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Forecasting the Impact of Legislation on Courts

Keith O. Boyum *and*
Sam Krislov, *Editors*

PANEL ON LEGISLATIVE
IMPACT ON COURTS

Committee on Law Enforcement and
the Administration of Justice

Assembly of Behavioral and Social Sciences
National Research Council

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Preface

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. The Panel's charge was to evaluate the feasibility of estimating the changes in workloads that courts would experience with the adoption of new legislation—that is, the possibilities of forecasting the impact of new legislation on courts. The work of the Panel was supported by a grant to the National Academy of Sciences from the National Science Foundation.

In carrying out its work, the Panel met regularly over a period of 18 months. Individual Panel members undertook analyses of various topics for panel consideration, and the Panel staff produced a series of working papers on other issues. The Panel also had two other formal sources of input. One was 10 papers commissioned by the Panel, authored by experts in particular areas of interest, and presented at a 3-day Conference on Legislative Impacts on Courts held in August 1978. The second was the views and insights offered by members of a liaison group, with whom the Panel met formally twice in 1978, and on whose expertise the Panel and staff drew on many other occasions. (Lists of conference and of liaison group participants are included in Appendix D.)

The dimensions of our effort can be seen in the content of this report, but some comments about our work may be useful here. First, the Panel took on the task of making judgments about feasibility and therefore did

not seek to develop specific forecasting methodologies (although we hope that our review will be useful to those who do). Second, the Panel made an early decision to restrict its consideration primarily to legislation per se, excluding for the most part executive orders, administrative directives, appellate court decisions, and the like, and to courts as ordinarily understood, excluding for the most part administrative law processes, arbitration schemes, diversion schemes, and the like. Our review may be generalizable to certain of these other kinds of "legislation" and to other dispute resolution forums, but only within limits. Third, the Panel concentrated particularly on federal courts rather than state courts: the issue of the impact that legislation may have on courts has been raised largely (although not exclusively) as a federal concern; the Panel thought that data would be more easily available at the federal level; and the Academy's location in Washington, D.C., offered the possibility of fruitful liaison with agencies and organizations that have primarily a federal focus (such as the Federal Judicial Center, the Office for Improvements in the Administration of Justice of the U.S. Department of Justice, the Administrative Office of the United States Courts, the Administrative Conference of the United States, the Supreme Court, and the members of Congress and their staffs). But the Panel was determined not to neglect state-level concerns. We are pleased that a former state court administrator is a member of the Panel; our relationships with organizations such as the National Center for State Courts and various state court administrative offices were cordial and fruitful; certain of our commissioned papers focused on state-level issues; and staff member Susan O. Burke's report of a survey of state court administrative offices is included as an appendix in this volume.

Our primary intended audience for this report is those who are consumers (or potential consumers) of impact forecasts and of methodologies for generating them. This includes lawmakers and their staffs, of course, but consumers of impact forecasts may be found more frequently in the judicial branch. Judges, judicial councils, administrative offices of courts, and others with a research mission in support of courts are naturally specially concerned with the operation of court systems. Indeed, a search for improvements within the judicial branch has been in considerable measure responsible for present interest in forecasting legislative impact on courts. With this audience in mind we have taken some special care to explain certain theoretical and methodological details that are familiar to some analysts already working in the general area. But we hope that this assessment will also be useful to a research community.

In producing this report, the efforts of the Panel members were many

and inestimable. The special skills of some of our members were most valuable, and the dedication of all impressed me throughout our work. Major portions of the text reflect background papers by both Panel members and staff.

Since the Panel was associated with the Committee on Research on Law Enforcement and Criminal Justice of the National Research Council's Assembly of Behavioral and Social Sciences, the membership of the Panel was formed in consultation with that Committee; the Committee was kept informed of the work of the Panel; and members of the Committee were given the opportunity to comment on the draft of the Panel's report. The report, however, is solely the responsibility of the Panel.

The Panel is grateful for the dedication and hard work of its staff. Keith O. Boyum, study director, had overall responsibility for the design and execution of the project as well as general responsibility for drafting the text of the report. Susan E. Martin, research associate, worked closely with the chairman and the study director in planning various phases of the project, and she was primarily responsible for developing information on the workloads of the federal courts over time as well as for evaluating the reported experiences of other attempts at assessing impact. Susan O. Burke, research assistant, contributed generally to the work of the staff at the time of its peak effort and carried out the survey of state court administrative offices found in this volume. Susan O. White, former study director of the Committee on Research on Law Enforcement and Criminal Justice, served as a consultant to the Panel; she played a major role in the earliest stages of the Panel's work and contributed her counsel as needed throughout. Completion of the Panel's work would not have been possible without the hard work and dedication of Dorothy E. Jackson and Juanita L. Maclin, each of whom served as administrative secretary to the Panel during important phases of our work.

We are grateful to the staff of the Assembly of Behavioral and Social Sciences of the National Research Council. The executive director, David A. Goslin, and associate executive directors, Lester P. Silverman and Robert Shelton, were helpful mentors as well as administrators who eased the way for the work of the Panel. Eugenia Grohman, associate director for reports, provided exceptional assistance with problems of structure and format ranging well beyond wielding an expert blue pencil, which she also did especially well. Even those of us who have become accustomed to and dependent upon her editing found her work on this report outstandingly deft and helpful.

Summary and Recommendations

BACKGROUND

This report is concerned with the feasibility of estimating the number of new court cases and the extent of other burdens that might result from proposed legislation. The central question that the Panel on Legislative Impact on Courts considered was whether "judicial impact statements" were feasible. The Panel sought (1) to examine the potential and limitations of techniques that might be used for estimation; (2) to chart the kinds of knowledge about litigative behaviors and about courts that would be needed for estimation and to assess the extent to which such knowledge is presently available; (3) to assess at least some of the advantages and disadvantages of making such estimates at different junctures in the policy process (such as during a legislative process or shortly after the legislation is adopted); and (4) to consider evaluations of the experience with other impact statements, although the Panel undertook no evaluation of its own on this subject.

There are many possible meanings of "judicial impact statements." Virtually any new legislation involves some effect in the sense that there is a change in the litigation that results: more cases or fewer cases are brought or different issues are raised, according to different procedures, involving different parties. There are also various sources of change. A recent report of the National Center for State Courts (Adamany 1978) points to executive and administrative actions as sources of stress on the judicial system, and it has been pointed out that

court rules and decisions of various kinds have significant impact as well. The concern is with either those changes that significantly affect the burden of the courts, i.e., changes in the numbers or the mix of cases, or those changes that affect the dispositional difficulty or the nature of court proceedings.

Impact analysis can be made at various junctures and for various purposes. When proposed for implementation prior to legislative enactment, judicial impact statements are intended to measure the probable pressures created for courts—that is, to provide an estimate of one particular cost of new legislation. They may also be used, at this and later points, as a measure of judicial needs and resources. Finally, impact analysis can be a tool for understanding how courts work, to appraise the actual use of the courts (as compared to intended or desired use).

Conceptually, anticipating a future burden from proposed legislation involves predicting the behavioral responses of people who have a variety of relationships to courts. New legislation varies as to its novelty. Some measures involve minute changes in procedure among existing classes of known cases. At the other extreme, bold new social programs may create broad new classes of litigants. Whether entitlement will result in substantial litigation is a complex product of the behavior of administrators, parties, judges, and lawyers. Knowledge of these behaviors is not far advanced. Thorough studies are limited to specific locales or specific types of litigation; the variation in research techniques employed in these studies and the nonsystematic selection of groups studied do not permit specification of users of courts and their motivations except in very general terms.

Another obstacle to predicting court impact is the lack of knowledge about the range and ability of the legal system to adjust to, adapt to, and absorb change. In all areas of public policy, there is a history of careful plans for change that produced results very different from those intended, but the "justice system" may be at the extreme of even the class of loosely articulated systems. By and large, judges, prosecutors, counsel, and other participants in court cases have little control over each other, and their purposes range considerably. We know the system has creative ways of adapting to changes, but we know far too little to predict what forms those adaptations will take.

CONCLUSIONS AND POLICY RECOMMENDATION

The issue of whether reliable predictions about the impact of legislation on courts can be made on the basis of presently available theory and

methods was the Panel's primary concern, but we also considered the prospects for making reliable predictions after some further developmental work has been done. As will be seen, our view on the latter is more optimistic than our judgment on the former.

We conclude that the basic theoretical and empirical knowledge necessary to develop good estimates of the impact of legislation on courts for broad classes of legislation is not yet available. The task of estimating impact is fundamentally one of predicting behaviors: the number and nature of transactions in the society that may eventually lead to litigation, the choices made by potential litigants to go to court or not, the behaviors of lawyers and others who broker entry to the legal system. Estimating the impacts of new legislation on courts involves predicting the effects of the legislation on all those behaviors and probably more, and they are all extremely difficult to predict.

There may be some limited exceptions to the general conclusion—for example, legislation that specifies jurisdictional responsibility for courts and especially laws that would exclude some cases from courts that are currently being heard in those courts—but, in general, the present prospects for achieving good estimates are dim.

Recommendation. We recommend against the imposition of a requirement that a formal impact statement accompany all legislation that could have an impact on courts.

If a more modest view is taken, however, a different picture emerges. Estimates in selected instances of legislative proposals, which might establish approximate costs, seem feasible. More importantly, downstream studies of programs already in place appear to be more manageable tasks, and such studies would contribute to knowledge about court functions on the part of the legislative branch. For most programs, it is sufficient for the legislature to be confident that even a conservative estimate of the cost is not prohibitive. Some of this has been done. Modest estimates based on very simple extrapolations where there is a marginal change in an existing program (or by analogy when a new program seems to be reasonably similar to an existing one) have been used to inform legislators about expected developments with new legislation. Unfortunately, there have not been studies of the results of those estimates, and the methods used have not been validated (or in most instances even put to a rudimentary test). For proposed procedural reforms in the courts, more precision may be possible. In these cases, data from similar situations may well be available, and experiments can be undertaken to provide some guidance as to the reasonable range of responses expected.

In a sense these conclusions amount to a modest lowering of expec-

tations as to the precision that may be reasonably expected given current methods. Another form of lowered expectations is in defining when an analysis may usefully take place. As a tool for legislative oversight, retrospective impact evaluation may be more promising than impact analysis as a "costing" mechanism. If, through an impact evaluation, it is possible to describe the current state of affairs within the judicial system with respect to some program or innovation, retrospective impact evaluation may amount to a means of evaluating the status quo in the light of what was intended.

An automatic requirement for impact analyses to be made with respect to legislative proposals or enactments will in many instances result in tedious and inconclusive work that will not, in fact, prove useful. Across-the-board requirements are more likely than not to become *pro forma* exercises (as has occurred for other required impact statements, on inflation, paperwork, and the like). Instead, impact analyses should be undertaken selectively, where there is good promise that the resulting estimates will be reasonable and useful. This implies that no one governmental department or agency should be designated for making such analyses: the task should be undertaken by the involved agency for those relatively few pieces of legislation whose impact is sufficiently predictable to warrant such analysis. Impact analyses of the numbers of cases to be expected, and of the burdens of those cases, would be particularly useful at two stages of the process of planning for judicial needs: (1) prior to the adoption of a new law, to estimate approximate costs or a kind of rough pricing of proposed legislation; and (2) immediately following the adoption of new legislation, for preplanning for judicial system needs.

If empty exercises are to be avoided, a credible and valid message must result from an impact analysis, and the message must be delivered to an audience that wants to hear it. Analyses that are part of longer-term planning are usually addressed to the court executives who are faced with planning for growth or change. In that circumstance, audience problems are minimal. But that may not be true when legislators are the intended audience; administrative planning is not ordinarily their central concern. It may be hard to win attention to an analysis that predicts a certain cost in judge time if a bill were to be enacted, particularly if the proposed legislation addresses major current problems. It is harder still to win the attention of policy makers if an analysis predicts only within wide ranges and is based on problematic assumptions.

There are also several institutionalized features of legislative processes that impede meaningful impact analysis of pending legislation. These include unexpected amendments and compromises, and appro-

priations processes apart from the deliberations as to substantive legislation. Moreover, the provisions of the proposed statute may be ambiguous, perhaps by design. We conclude therefore that even if theory and data posed no hindrances, anticipating caseloads still would be largely a matter of interest to court system administrators and managers rather than legislators.

RECOMMENDATIONS FOR RESEARCH AND DEVELOPMENT

The prospects for estimation of the impact of new legislation on courts rest on the further development of theory and better data. Although we are skeptical that a capability for relatively routine and reliable estimates of the impacts of legislation will be achieved in the near- or even medium-term future, a useful theoretical basis for a general understanding of how cases are generated can be developed.

With respect to the number of new cases to be expected to result from some event, both estimates making use of structural models and estimates derived in other ways are necessarily based on some understanding of the reasons why people litigate. We need to know more about objective needs to litigate, about how propensities to litigate modify objective need, and about how available opportunities influence choices of forum and procedure. Moreover, while we need to know more detail, we need at the same time to know the theoretically integrated, general ways.

DIRECTIONS FOR THEORY CONSTRUCTION

All modes of forecasting are ultimately founded on some understanding of why individuals behave as they do in ways that are consequential for the business of courts. It is a recurrent theme of this report that there does not presently exist an integrated theoretical understanding on which to draw for a variety of research purposes, including estimating the impacts of new legislation on courts. We are unable to say that research pursued from one theoretical standpoint will prove to be more useful than that pursued from some other. Our conclusion therefore is to warn against undue closure, and our recommendation is that multiple strategies be pursued. Research that focuses on cultural patternings, on the psychological states of potential litigants, on the negotiating processes of attorneys, on the mobilization of political interests, and on other circumstances may together and severally shed light on predicting

the behaviors relevant to knowing why cases come to courts. We specifically mention two areas, however, that seem of particular theoretical interest: research into adaptive processes within court systems, and conceptual work with respect to the different groups or types of litigants who bring cases to courts.

Adaptive Processes

Impact estimation is made particularly difficult by the adaptive character of the litigation process. The choice to initiate a legal action, the move into the court system, the willingness to settle a case, and the form of settlement are all influenced by other parties, other litigants, and, in particular, by the capacity of the courts to handle an action and by the delay until a case is heard. The criminal courts handle this issue by diverting enough cases to expeditious handling through guilty pleas so that increases in caseload do not result in comparable growth in backlog.

One approach to learning about the nature of these adaptive processes would involve careful empirical analysis of the feedback response of courts to changes in workloads. Such studies could be undertaken cross-sectionally, relating the litigation rate to available court resources in different jurisdictions. And longitudinal analysis within a sample of jurisdictions would provide a basis for exploring changes in processing within jurisdictions as demand changes.

Another approach to examining adaptive processes would recognize that caseload following passage of a particular piece of legislation is likely to follow one of a small number of basic patterns. These typically involve some delay in any increase in court actions, followed by an increasing growth rate as awareness of the legislation spreads and as familiarity with the appropriate litigative strategy is communicated through the legal community. The growth period is then followed by either a decline, as the basic behavior in the society causing the litigation becomes extinguished, or a stable level, reflecting the normal level of conflict on the issue.

These patterns can be represented by the class of models that have been extensively developed to describe epidemics—the spread of infection through a community. Epidemics also typically involve a period of increasing growth, followed by either extinction or a stable infection rate (as the number of susceptibles is diminished by immunity). One could classify the different kinds of legislation whose growth pattern has been observed to match them to the appropriate kinds of epidemic model. One could then estimate the parameters of such models for prior

legislation. An attempt to relate those parameters to various aspects of the social and legal environments current at the time could follow. These analyses might result in estimation of values of the parameters in the epidemic models as a function of exogenous variables influencing the growth and development of litigation. Such a research approach might have greater promise of indicating the influence of such exogenous factors on the courts than would an approach involving straight statistical estimation.

Types of Litigants

Traditional legal categories on types of litigants are not founded on distinctions related to the kinds and levels of demands for judicial services brought by different types of litigants. Different types of people confronting the same problem may behave differently, may pose different kinds or different levels of demands for judicial services. Such distinctions are not totally new: the rate at which poor people in society use the legal system has received some study, for example, and, as described above, a recent reconceptualization of types of litigants distinguishes between "one shot players" and "repeat players" (Galanter 1975). Further work along such lines is needed.

THE DEVELOPMENT AND USE OF STRUCTURAL MODELS

With respect to the development of structural (causal) models, we suggest vigorous work on their development and caution in their use. Theory is needed to inform empirical research, but, as noted, there is no well-developed theory related to court caseloads. Empirical research, however, should take advantage of the perspectives that do exist (together with the information that may be available in previous studies done in view of those perspectives). The fundamental reason for using previous work is to ensure that appropriate account is taken of the variables that have been posed as causally relevant for the behavior patterns of actors in judicial processes at the outset, when equations to be tested are being formulated. In turn, the use of such equations in attempts at estimation can shed light on the relative importance of such variables. In that way, modeling procedures can be particularly helpful for theory development: improved models informed by improved theory should eventually allow better estimation than is currently possible.

We urge caution, however, in the use of structural models. Although it is possible in principle to construct models based on equations that represent the behavior patterns of groups of actors ("components") in

judicial systems, the actual use of these models involves substantial difficulties. There are also major data problems: data needed by researchers are frequently absent or insufficiently disaggregated, and the use of surrogate data involves major problems. Moreover, idiosyncratic factors in particular courts may make errors probable when predictions for those courts are based on general relationships identified in studies of entire systems of courts. Hence extreme caution should be exercised when making particular predictions on the basis of a general model.

These difficulties also apply to other modes of prediction: experts who provide opinions or projections on the basis of intuition or of past experience are equally liable to having a prediction go awry because of a lack of theory understanding, poor information, or unknown idiosyncratic factors. In comparison with those using other modes of prediction, however, analysts who use structural models must at least be explicit about what factors they consider, how the factors interrelate and combine, and what data are being employed and in what ways. And what is explicit in the procedure must also be made plain in the report of the analysis. Policy makers who may be presumed quite able to take judgment-based predictions for what they are may not be sophisticated about the limits of modeling tools. There is a need to alert the prospective users of predictions based on sophisticated methodologies that the chances of divergences from such predictions are substantial, particularly at the level of particular courts.

RESEARCH ON THE QUALITY OF JUDICIAL SERVICES

Whenever a process is measured by simple quantitative standards, there is a well-observed tendency for those standards to dominate and overshadow more subtle aspects or dimensions of a problem. (So, for example, if teachers are judged on the performance of their students on standardized tests, "education" will tend toward preparation for those tests and other concerns will be given less attention.) Emphasis on the caseload burdens of courts focuses attention on cases processed. There are currently no comparable measures for other aspects of court processes, such as strains on the participants, or on the costs involved in speeding up trials, or, for that matter, on the benefits involved in speeding up trials. Unless other measures are developed, simple measures of demand for judicial services, such as numbers of cases processed, will probably receive policy significance beyond their worth.

Thus in a move toward quantity measurement and resource estimation, equal attention to quality estimation, to aspects of the system that

are vital to concepts of justice, is required. Such studies as have been undertaken (as in moves to evaluate the performance of judges, for example) have been concerned almost exclusively with state courts, and the efforts are not currently far advanced, conceptually or methodologically.

THE SYSTEMATIC REPORTING OF FORECASTING AND RELATED RESEARCH

In the course of its study, the Panel found remarkably few explicit attempts to forecast the effects on caseloads of new legislation or indeed of any other event. Yet we were apprised of situations in which the caseload consequences of new legislation had been of interest to policy makers and others and in which some best guess as to consequences was included as a part of the overall considerations with respect to the policy. In our work, we would have been well served by some systematic reporting of those forecasts. Particularly if a new research program is undertaken, perhaps especially with respect to research on statistical estimation techniques and on patterns of caseload growth and decline, there will be a need for some kind of feedback process that allows the assessment of projections, predictions, and forecasts. Predictions need not be restricted to estimates of the caseload consequences for courts of new legislation; they could also include other kinds of law-making and rule-making activities and other environmental changes that are thought consequential for the demand for judicial services.

Successes along with failures—and there may be more of the latter than of the former, at least in the early stages—ought to be used to enrich further development of predictive models and by extension to enrich further development of theory. Explicit statements should be put on the record, covering not only what the predicted outcomes are, but also whatever contingencies are assumed (or alternative outcomes for alternative contingencies). We recommend a clearinghouse project at a natural location, such as the Federal Judicial Center, the National Center for State Courts, the National Judicial College, or the American Judicature Society.

We envision a process focused on methodology rather than one intended to produce particular predictions that might be suitable for consideration in policy making. If a literature is built in this way, it will be a stimulus to further work, a resource for improvement in capabilities, and it could become a basis for another assessment of the feasibility of prediction at some future time.

THE CONTEXT FOR RESEARCH ON PREDICTING COURT CASELOADS

To ask only about the demand for judicial services to be expected from new legislation is to ask only part of a broader set of questions. Indeed, some would say that demand is the least provocative and perhaps the least important question. As was noted above, one should also consider the quality of services rendered.

Questions of access are a key part of the context for judging what is the right level of demand. What kinds of cases should be allowed to come to court? What costs or other obstacles should it be necessary to surmount in order to bring cases? Ultimately, who should be allowed to sue? Perhaps not all possible cases should be brought to court, even all cases that are justifiable: the dollar costs of providing the necessary number of judges and courts might be too high or some other aspect of the system might suffer if a large set of new cases are brought. There might not be constant returns to scale in court systems: if the size of the federal court system doubled, new organizational complexities might appear, different kinds of people might be recruited for judicial positions, or some kinds of undesirable rigidity might be injected into ordinary social transactions. Questions such as these should be studied, along with research on the estimation of new demands for judicial services. Such research should include descriptions of who currently has access to courts. Descriptions of particular systems might have as much policy relevance as estimates of new demand for judicial services. Comparative studies could have even more policy relevance in that the consequences of different access patterns could be assessed.

In a way this is a reminder that there are costs connected not only with new demands for judicial services—more judges, courtrooms, etc.—but also with a decision *not* to grant access to the courts to some particular group of people who have grievances. We must be sensitive to the benefits that may accrue from giving some group the chance to resort to courts, in addition to being sensitive to such costs as the number of new judges required. We must be sensitive to the costs of denying some group the chance to resort to the courts, in addition to being sensitive to the number of new judges that will not have to be put on the payroll. We do not suppose that these questions are simple. Nevertheless the importance of the answers to them clearly justifies their study in the context of research on court caseloads.

1 Introduction

Two key conditions, occurring contemporaneously, have spurred calls for judicial "impact statements" or similar analyses in order to anticipate the number of new cases and other workload changes for courts resulting from new legislation. The first is the apparently unprecedented growth in the numbers of cases filed in federal courts. The second is the appearance of planning methods and other new management techniques.

This introduction begins with a brief review of each of these conditions, followed by a brief consideration of the policy context in which these conditions exist. The final section of this chapter considers the apparent relationship of judicial impact analyses to impact analyses proposed or currently required in other substantive areas.

THE PRESENT SITUATION

INCREASES IN FEDERAL COURT CASE FILINGS

If there had been no increase in the number of cases filed in courts in recent years, the idea of prospectively assessing the number of new cases to be expected from new legislation would interest few except, perhaps, students of court management. But there has been a sharp and substantial increase, and it shows few signs of abating. The most dramatic increase has been in federal courts rather than state courts, and,

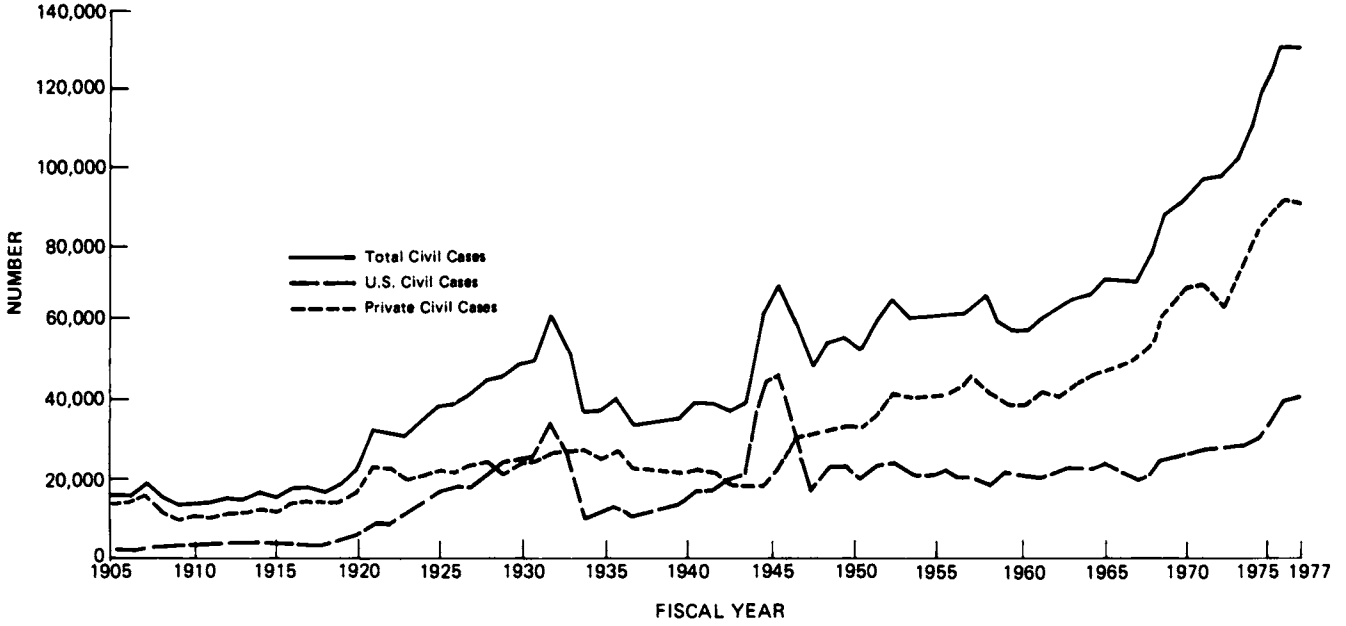

FIGURE 1 Private and total civil cases commenced in the United States: fiscal years 1905–1977.

within the federal courts, in civil rather than criminal case filings. The number of civil cases filed in U.S. district courts grew from less than 20,000 in 1905 to 54,622 in 1950; the total in 1960 was still fewer than 60,000, but by 1977 the number was 130,567.

As Figure 1 illustrates, there were two periods of substantial growth earlier in this century, with peaks in 1932 and again in 1946. Civil cases initiated by the United States as part of its enforcement of prohibition and price control statutes largely accounted for a large part of those increases, and that litigation declined abruptly with the repeal of prohibition and the end of World War II price controls, respectively. The present period of growth, becoming dramatic at the end of the 1960s, is attributable not to actions taken by the U.S. government, but to cases filed by individuals, the "private civil actions" shown in Figure 1. There is no easily identified particular cause for those filing increases (such as prohibition or price control), and, consequently, substantial decline is not anticipated. The current situation, then, is largely unprecedented.

Figure 2 shows that actions under statutes have clearly accounted for most of the increase in the current period: that is, an increased number of cases have been brought pursuant to the provisions of federal statutes, rather than being filed over tort, contract, or real property disputes. However, a further analysis of the data shows that the new cases have not resulted only from new laws. Table 1 shows a breakdown of actions under statutes; the data reveal that not all the increase in the number of civil cases filed in U.S. district courts has resulted from statutory provisions that were enacted immediately prior to the current period of substantial growth. "Prisoner petitions," for example, have been brought under provisions that have long been available, but that were given new currency through judicial interpretation. On the other hand, the huge increases in civil rights cases and social security cases have resulted, at least in part, from civil rights laws and social security laws enacted after 1961.

Clearly, the recent growth in the number of civil cases filed in the federal courts has been substantial, and it has undoubtedly been caused by factors other than just the availability of new statutory provisions. But the new cases have largely been actions under statutes, and at least some of those have been brought under the provisions of new laws.

NEW MANAGEMENT TECHNIQUES

In response to sharply increased case filings in federal courts, one can curb demand; one can increase the supply of decision resources; one

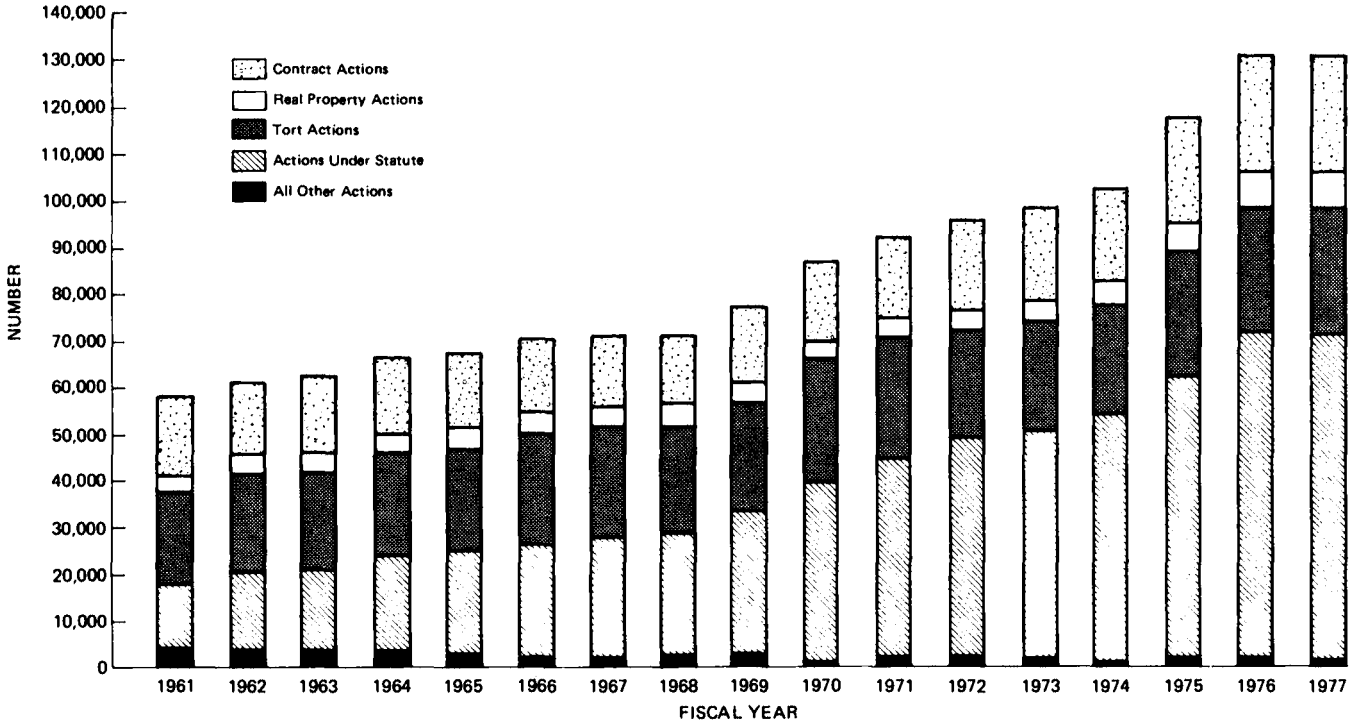

FIGURE 2 Civil cases commenced in U.S. district courts by nature of suit: fiscal years 1961–1971.

TABLE 1 Civil Cases Commenced in U.S. District Courts: 1961, 1971, and 1977 by Nature of Suit

Nature of Suit	Number of Cases			Percent Change
	Fiscal Year 1961	Fiscal Year 1971	Fiscal Year 1977	1977 Over 1961
TOTAL	58,293	93,396	130,597	124.0
Contract actions	16,340	18,575	23,907	46.3
Real property actions	3,326	3,608	8,387	152.2
Tort actions	21,205	25,405	26,029	22.7
Actions under statute	13,427	43,750	70,694	426.5
Antitrust	420	1,505	1,658	294.8
Civil rights	296	5,138	13,113	4,330.1
Commerce (ICC rates, etc.)	335	2,014	2,549	660.9
Prisoner petitions	2,609	16,266	19,537	648.8
Patent, copyright and trademark	1,585	2,042	3,051	92.5
Forfeiture and penalty suits	2,360	2,031	2,854	20.9
Labor law	2,484	4,663	7,530	203.1
Tax suits	1,507	1,464	1,981	31.5
Securities, commodities, and exchange	267	1,962	1,960	634.1
Social security laws	537	1,792	10,095	1,779.9
Other actions	3,995	2,058	1,550	−61.2

can do nothing, leaving the court to deal with the situation; or one can try to increase efficiency in resource use through the use of modern management techniques that were not known, say, 50 years ago. Today, there are many schools of business administration and of public administration, among others, that provide university-level instruction in efficient and effective management. At least two presidents and one senator are memorialized in schools meant to train public managers, and an Institute for Court Management and several other programs train court administrators. Particularly in the last 10 or 15 years, court administrators have been placed in key locations in judicial systems, in at least the larger trial courts, in state court administrative offices, and in appellate courts.[1]

Court administrators have been asked to apply resources to needs effectively. The management of budgets and personnel is a part of this, but finding new ways to achieve efficiency is also part of what court administrators are being asked to do. An interest in predicting future

caseloads stems in part from this search for efficiency. Knowing future needs would allow court administrators and others to request the resources necessary to meet those needs.

Those who are optimistic about being able to predict future caseloads have been prompted by such developments as models of the economy, which have allowed predictions of the consequences of changes in economic policies. Trend projections are also now made for world population, food supplies, energy reserves, and more. Much of this work depends on new techniques and on a more vigorous and certainly a more systematic enterprise than was possible earlier. In the particular instance of judicial systems, interesting efforts have been made at developing forecasts of the overall number of cases that will require judicial services in the near future. The analysis of the prospective impact of particular statutes differs from aggregate caseload prediction, but both are ways of trying to assess what the future will bring.

In sum, a desire to predict the future has been joined with apparent opportunities for doing so by the use of new techniques. Whether those apparent opportunities can be realized is a major concern of this report. However, the issues are, in our judgment, not only narrowly technical ones; thus before we present our assessment of the feasibility of prospectively assessing the impact of new legislation, we consider a broader context of issues.

THE CONTEXT

A number of important policy issues underlie the technical issues with which this report is primarily concerned. In this section we briefly consider three of them: first, the expanding role of the courts in our society; second, and related, the question of priorities as to what cases and issues should receive the inevitably limited attention of courts and judges: and third, the widespread opinion that public monies, including those spent procuring judicial services, could be used more efficiently, returning more services per dollar.

THE EXPANDING ROLE OF THE COURTS

Courts now hear and decide cases involving issues that, in earlier times, were not brought to judicial forums.[2] In considering the issues in these cases, judges may be asked to make decisions that turn, at least partly, on technical questions, questions for which a law school education may have equipped them poorly at best.[3]

Other new issues may require judges to make decisions that set prospective rules, that apply broadly to large numbers of people, and that seek to set policy for controversial matters. Judge-crafted public school desegregation plans involving pupil transfer schemes are a classic example. Many people believe that such issues might be better suited for legislative than judicial arenas (see Horowitz 1977).

In this context, legislators may be open to the criticisms that they serve courts poorly by not setting clear policy guidelines in statutes or by leaving policy making to the judges completely in some areas. Friendly (1973, p. 22), for example, decries "the slowness of our legislatures, due partly to the power of lobbies and partly to sheer inertia, to respond to demonstrated needs." Yet legislators are not the only group putting new and difficult policy determinations before judges: regulatory agencies create new work for courts simply by making many rules; pressure groups seek policy goals in court. Moreover, judges themselves can, and at least occasionally do, encourage the process, by standing ready to address problems that other policy makers and policy-interested groups are unable or unwilling to resolve without courts. As Friendly observes (1973, p. 22):

> De Tocqueville's time-worn statement, "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question," has come to have an application far wider than he could have foreseen.

The larger questions are not resolved simply. Caseloads might be reduced with some litigants or some issues frozen out of court—but what then of the needed policy determinations that are not being made elsewhere? Perhaps judges should be less involved in making social policy—but what is the social cost of doing nothing? Caseload questions cannot be considered only as technical matters in the face of questions of judicial activism versus judicial restraint or questions of whether the society is well served by deciding that some issues cannot be taken to the courts.

PRIORITIES

New cases are added to dockets that already have cases brought under the provisions of older statutes or causes of action. If the courts are fully occupied by the processing needs of those old cases, the new cases may not receive the kind of attention policy makers expected. On the other hand, attention may be diverted from some of the old cases in order for new cases to be heard promptly, or fully, or in some other way

given priority. This is a question of priorities, and the priorities are being determined by judges.

A major question is whether other policy makers intend to leave such choices in the hands of judges, indeed, whether other policy makers have even considered the question. While there are instances in which legislators have considered questions of priority in a coherent fashion, they are rare.[4] Rather, a surprising number of statutes are designated as priority so that judges have great leeway even among the priority statutes. Moreover, attempts by legislatures to set case-processing priorities have often had unanticipated consequences (see Chapter 2). The larger question is not whether judges will be overworked, but what other cases may be affected by new cases and in what ways. Some proponents of prospective analyses of impact believe that such analyses would pose these policy choices to legislators, where they belong.

EFFICIENCY

Few would dispute that achieving more output of goods or services per unit of resource input is a worthwhile goal. As was noted above, the perceived need for achieving new efficiencies in courts is especially strong at this time because of caseload increases and the availability of modern management techniques. A third spur to efficiency is the apparently widely held opinion that governments, including judiciaries, are wasteful. This view may be the cause of recent defeats of measures calling for new taxes and of a recent finding in a national survey that 57 percent of the people thought that "efficiency in the courts" was a serious national problem (Yankelovich, Skelly & White, Inc., 1978, Table III.6, p. 25).

But efficiency in judicial systems is not always easy to identify. What is efficiency in one view is second-class service in another view. Holding hearings before auditors, referees, or magistrates instead of before judges may be demonstrably cheaper: but what cost, in client satisfaction, for example, is involved? Proposals for neighborhood justice centers are now heard, but not too long ago the abolition of justice of the peace courts was urged, primarily on the grounds that second-class (or worse) justice was being dispensed there. The larger question is one of quality—of knowing when proposed efficiencies impinge on quality and, ultimately, what level of quality the society wants and is willing to pay for. Once again, technical questions about caseloads and court capacities can be understood only in a context of broader value-laden and political questions. But in that context, one sees that justice and its quality are defined differently by different individuals and groups in

society. The resort to "efficiency" as a goal is in part an effort to sidestep those differences.

IMPACT ANALYSIS

In general, analyses of "impact" seek to identify how some natural, physical, or social system is altered by the introduction of a program or activity, which is the object of the analysis. Analyses of impact can be prospective, current, or retrospective. Our primary focus in this report is prospective analyses, in which questions take the form: "What will be the effect of [the program or activity under consideration]?" We also consider some retrospective analyses, in which questions take the form: "What was the effect of [the program or activity]?" Although we do not consider current analyses, we note they can be done, in which case the questions take the form: "How would this system appear in the absence of [the program or activity]?"

Judicial impact analyses can focus on the experience to be expected in an entire judicial system or on the experience in a particular local jurisdiction. One might seek to know demands for judicial services in all U.S. district courts, or for just one. Demands may differ in different courts and may furthermore vary independently. Beyond the question of system-wide versus local foci, there is also the question of focusing on particular statutes or on total caseloads. In discussions about caseloads, some distinctions are usually made, such as between civil cases and criminal cases, among different kinds of civil actions, and so forth. At least elementary breakdowns are routinely used.[5]

IMPACT STATEMENTS

Impact statements are formal reports of impact analyses. A requirement that a formal statement be made has important implications, especially with respect to policy processes. Statements about impact are meant to be read by somebody who will presumably take an action or at least consider an action that would not otherwise have been taken or considered. Impact statements can be fairly straightforward, as, for example, those done to ensure that federal statutes are kept free of internal contradictions by setting out the provisions that would be altered by a new statute. A similarly straightforward use might be made of Congressional Budget Office impact statements on the costs associated with bills under consideration in Congress.

But some impact statements are meant to have influence beyond

what might be called housekeeping concerns, and beyond even the promotion of more comprehensive planning processes. This is the case with respect to environmental impact statements, for example, which are available to the public as well as to the relevant officials together with comments by interested parties. An environmental impact statement can raise issues or provide a focus for debate about a proposed project. In addition, the adequacy of an environmental impact statement itself can become a basis for objecting to a proposed activity.

One way in which impact statements are influential in the policy process is simply through detailing the projected costs of a proposal. Monetary cost estimates are the hallmark of impact statements; they are, of course, the explicit purpose of Congressional Budget Office statements. But to construe costs more broadly, one of the costs of damming a river is the alteration of the environment; a cost of selling weapons might be to set back arms control; new legislation might require additional paperwork, which is also a cost; and a cost of a statute might be the court cases that result from its provisions. The particular costs detailed in an impact statement are those directly related to the proposed activity. Thus judicial impact statements would explicitly consider the costs for courts that are implied in a proposed piece of legislation, but would presumably not include an analysis of costs for energy producers or for notaries public. The hope that is implicit in requiring impact statements that detail particular costs is that those costs will therefore be considered by policy makers and either provided for or reduced.

One reason for impact statements is implicit in the discussion of costs: to make decision making more rational. Another reason for particular, topical impact statements is to pay particular attention to special concerns or policy areas. Thus the proponents of paperwork impact statements believe that paperwork is an important problem. When in 1974 President Ford issued an Executive Order (No. 11921) requiring that executive agencies prepare inflation impact statements to accompany all proposals, he did it in a context of special concern for inflation. And U.S. Chief Justice Warren Burger (1972), who has a special concern for the condition of the federal courts, called for judicial impact statements to accompany new legislation. Similarly, there have been proposals for impact statements concerning arms control, families, privacy, law enforcement, and the urban environment. Those who call for statements of the impact of proposed activities in particular areas are usually those who are especially concerned with those areas.

A third reason for promoting impact statements is to allow interested parties or groups, who would not otherwise have an opportunity to do

so, to influence the nature and direction of an activity. Environmental impact statements are often justified on that basis.

Finally, some people call for new impact statements in order to try to prevent, minimize, or end some proposed activity. Thus if some dams were not constructed as a consequence of the impact statement required by the National Environmental Policy Act of 1969, at least some proponents of the act would have intended just that. And who admits to being in favor of more paperwork, the topic of paperwork impact statements? To formulate the purpose in those terms makes clear an intention to try to reduce paperwork: people might respond differently if the purpose were formulated as "documentation and reports necessary to ensure strict accountability on the part of those who spend the taxpayers' hard-earned dollars."

In sum, the reasons for calls for impact statements can range from what one might consider noncontroversial attempts to inject more rationality into governmental decision making to an expression of fairly clear policy preferences.

THE EXPERIENCE WITH IMPACT STATEMENTS

Impact statements have had their critics as well as their proponents, and some review of the debates about impact statements is useful. Critics have pointed to problems with across-the-board requirements for impact statements, charging that all too often the result is only a *pro forma* exercise. Critics also allege that impact statements too often are used as devices for delaying some project or activity. Proponents, on the other hand, have argued that the requirement for impact statements forces analysis and planning. They also argue that at least some requirements for impact statements provide a vehicle for interested groups and individuals to express their concerns, to have some effect on policy decisions from which they would otherwise be excluded.

Impact statements apparently run the greatest risk of becoming *pro forma* when it is in the interest of the analyst to provide only a *pro forma* statement, which may come about in at least two different situations. First, a detailed analysis might raise issues that the preparer of the impact statement does not want raised. Second, an impact statement may be desired by neither the provider nor the recipient, but rather be required by a general rule imposed by some third party.

Impact statements on arms control are thought by some to be, at least occasionally, examples of the first situation. The executive agency proposing an arms sale is asked to make a statement about the impact of the sale on arms control efforts. The agency is thus asked to be both

advocate for the sale and provider of an analysis regarding the advantages and disadvantages of the sale for arms control. In a recent General Accounting Office study (Comptroller General of the United States 1977), a Department of Defense official set out the dilemma very clearly: "Congress asks us to shoot ourselves in the foot. Now Congress is complaining because we aren't doing it."

A similar criticism with respect to environmental impact statements was raised by the Council on Environmental Quality (1976), which noted a tendency for impact statements to lack an adequate discussion of alternatives and secondary consequences of projects. A very long impact statement can be used, too, as a way of masking issues and topics that the preparer would rather not discuss. In its evaluation, the Council on Environmental Quality noted that environmental impact statements had too often been inordinately long.

The requirement first set by President Ford in 1974 for "inflation impact statements" and modified by President Carter in 1977 to require "economic impact statements" has drawn criticism on the grounds that the analyses are not wanted and not used in decisions (U.S. Department of Health, Education, and Welfare n.d.). In such situations, *pro forma* analyses may be implicitly encouraged. Other examples of impact statements that are required but not desired can be found in some of the analyses made by the congressional budget office pursuant to the broad requirement for budgetary analyses found in the Congressional Budget Act of 1974. Alice M. Rivlin, director of the Congressional Budget Office, wrote on May 3, 1977, to Congressman Peter Rodino reporting that "a bill to amend the corporate name of AMVETS (American Veterans of World War II), and for other purposes" would entail no additional cost to the government if the bill were enacted.

To the extent that most proposals for judicial impact statements envision providing information for the use of either administrative agencies or legislative bodies, the kinds of delays of major projects that are attributed to the impact statement requirements of the National Environmental Policy Act may not be pertinent as a lesson. On the other hand, a general requirement for judicial impact statements or analyses that was not met might be subject to a point of order in a legislative setting.

Do requirements for impact statements force analysis? The experience seems mixed. The Council on Environmental Quality argues that environmental impact statements, properly conceived and written, can be an extremely useful management tool; yet it found that many statements lacked the necessary analysis and synthesis of data (Council on Environmental Quality 1976). The staff analysis cited earlier raised

significant concerns about the analytic quality of economic impact statements (U.S. Department of Health, Education, and Welfare n.d., p. 6):

> Even if highly qualified staff are available, many analyses will be error ridden or controversial. Few will make a conclusive difference in the appraisal of proposals. Unless a mechanism is provided for review and feedback on the quality of individual studies, incentives for improving performance over time will be weak at best. Finally, the sheer volume of work, and general absence of mechanical rules for producing high quality analyses could result in a large volume of weak studies requiring a great deal of staff time and effort and of little utility in improving decision-making.

The Panel has no independent evaluation of these critiques to offer, in that no detailed study of the experience with impact statements in other substantive domains was attempted in the course of our work. Yet these criticisms, whether valid in their particulars or not, suggest at a minimum some warning flags, some points to be considered. First, an impact analysis must be pertinent and useful to the decisions being made. Second, the analysis must be wanted by its audiences. Third, some thought should be given to who should prepare an analysis, to avoid the difficult situation of asking advocates to take a neutral stance. In sum, the right people must provide useful information to an audience that wants the information: if any element in that formulation is missing, the exercise loses its purpose.

NOTES

1. Gallas and Lampasi (1978, pp. 311–317) note, for example, that in May 1976 the Bureau of Social Science Research's "National Manpower Survey—Criminal Justice System" identified 456 professional court administrators in state courts, up from only about 50 positions in 1965. And in addition to the approximately 500 formally designated court administrators in 1978, there may be 3,000 additional people working in the general field (see Gallas and Lampasi 1978, esp. p. 312).

2. Frank Grad (1978) lists five areas of "significant legislation-connected litigation" that are, in general, new areas for judicial concern:

> (1) the broad area of so-called public interest litigation; (2) the field of the statutory creation of new private rights; (3) statutory changes in procedural law that make it easier to bring lawsuits; (4) the area of the statutory establishment of new fields of regulatory law which, in turn gives rise to new opportunities for court challenges; and (5) new legislation in the areas of social insurance and social welfare.

3. See, for example, the discussion in Friendly (1973, pp. 22–27).

4. Part of the discussion of whether diversity of citizenship jurisdiction should be eliminated in federal courts turns on priority questions; see the discussion in Chapters 2 and 3.

5. The state of New Jersey used six case categories for their scheme for comparing the "weights" (fundamentally what we call burden) represented by different types of cases heard in the trial courts of general jurisdiction: combined civil, criminal, district court (i.e., appeals from courts of limited jurisdiction), juvenile delinquency and domestic relations, general equity, and matrimonial (see State of New Jersey 1977, p. xii). The state of Washington used eleven categories (see National Center for State Courts 1977).

2 The Dimensions of "Impact"

This chapter is concerned with the nature of "impact." That is, we seek to specify the ways in which the things that courts do may be altered by the introduction of some change, such as the adoption of a new statute. In particular, we focus on changes in workload, in the demand for judicial services. (Other lines of inquiry would be possible, focusing on other changes: if the level of trust in public governmental institutions were to change, for example, a very interesting inquiry might focus on how courts respond to that. But as we noted in Chapter 1, the setting for contemporary interest in judicial impact analyses is the workload of courts.) Before examining issues related to judicial workload in detail, we first consider some general aspects of judicial impact analysis.

KEY TERMS IN JUDICIAL IMPACT ANALYSIS

IMPACT

In considering the advisability of estimating the impact of new legislation on courts, we first need to understand "impact." The first and obvious impact that may result from new legislation is new cases. New cases imply impact in the sense that the processes or outcomes in courts will be different from what they would have been in the absence of those new cases. Some of the effects are simple: judges may work harder, parties to cases may have to wait longer before receiving atten-

tion from judges who are now busier with a larger workload, etc. Some possible effects are more complex and more worrisome: feeling the pressure of more or new cases, judges may give less attention to individual cases than they otherwise would have. Some element of quality in processing may be lost. Still other possible effects are only occasionally recognized and not much discussed: for example, there may be changes in the mix of judicial services actually delivered. With new cases and heavier workloads, one might expect that fewer complex cases would be decided within a given time span (say, a year), so that the mix of judicial services delivered would change. Although such a change might not have been intended and might not even be easily recognized, a social choice with possibly substantial consequences would have been made.

These kinds of changes can result not only from changes in the numbers of cases filed in courts, but also from changes in the kinds of cases filed. One can easily imagine a legislative change that does not stimulate any new cases, but that in some way affects some cases so that they are harder to decide, i.e., that increases the resources required per case to reach disposition: a law could impose a new procedural step in the processing of some class of cases; by legislation, attorneys could be given incentives to dispute rather than cooperate at early stages of, say, criminal prosecutions. These kinds of changes affect what is called the burden represented by a workload or a part of the workload.

In sum, changes in the demand for judicial services, whether through increases in the number of cases brought to courts or through some change in the dispositional difficulty of the cases heard, have impact.

LEGISLATION

"Legislation" can be understood broadly or narrowly. In a narrow sense, legislation refers to formal actions taken by legislatures. But more broadly, judges craft procedural rules for courts; regulatory agencies adopt administrative rules; and executives promulgate formal orders. And even more broadly, new interpretations of statutory or constitutional provisions handed down by appellate judges could have the effect of and might be considered legislation. In most of the discussion that follows, an act of Congress or of a state legislature is our focus, but in fact there are few points in our analysis that would not easily apply to "legislation" adopted by policy makers outside legislative bodies.

An attempt to classify legislation by types of impact that may be

expected for courts is more troublesome. For example, there are laws that bring new cases to courts and laws that remove some cases; there are laws that set up penalties for proscribed behaviors and laws that intend to have little to do with police, courts, lawyers, and judges. The possibility of making other useful distinctions is at once tantalizing and difficult.

COURTS

Places where decisions are made in response to the various sorts of legislation include more than just courts where judges sit. Administrative law judges decide cases, and settlements are reached by disputants and their lawyers in professional office suites quite apart from courthouses, to give only two examples. Moreover, settlements occur within courts, after cases are filed but before the authority of a judge is invoked, or as a result of actions by nonjudicial personnel. Although what constitutes a court can be variously understood, here we largely restrict our considerations to courts in the ordinary sense. Most of our analytical comments, however, would apply to a variety of forums other than courts.

In sum, "impact," "legislation," and "courts" have a variety of meanings. In our discussion, we detail some of the apparent dimensions of impact, but largely restrict our focus to legislative acts and the court cases that may result from those acts.

AUDIENCE AND TIMING

There are different audiences for judicial impact analysis, depending on the timing and the nature of the estimates. Most proposals for requiring judicial impact statements specify legislators as the intended audience. In 1975, for example, Congressman J. Kenneth Robinson introduced House Concurrent Resolution 163 (94th Congress, 1st Session), which would have made the following requirement:

> Section 2. The report accompanying each bill or joint resolution of a public character reported by any committee of either House to that House shall contain an estimate, made by such committee, of the number of cases in Federal courts which might result from the adoption of such bill or joint resolution, and of the number of additional court personnel which would be required to handle such increase.

On February 3, 1977, at a meeting of the Committee on the Judiciary of

the U.S. House of Representatives, Congressman Tom Railsback proposed a change in the rules, which was not adopted, that would have read:

> Prior to reporting any measure to the full Committee, a Subcommittee shall have considered the effect, if any, such measure may have on the day-to-day workload of the federal courts and after full Committee consideration a statement analyzing such effect shall be made part of any Committee report filed with the House. Measures not so considered shall be subject to a point of order, unless their consideration is agreed to by a two-thirds vote of the Committee.

But policy makers other than legislators are the intended audience of other impact statements, such as environmental impact statements and economic impact statements. And a recent call for impact statements with respect to state judiciaries envisioned their use in more than just legislative arenas (Adamany 1978, p. 19):

> The task force endorses the concept of "judicial impact statements" that would accompany proposed state policies. . . . The concept of impact statements should be broadened to include consequences beyond caseloads, and impact statements should accompany major policies promulgated by executive and administrative agencies as well as by the legislature.

Implicit in each of these proposals, and explicit in Congressman Robinson's references to number of cases and additional court personnel, is the idea that impact assessments involve, ultimately, resource requirements.

There are two potential uses for resource predictions. The first use is knowing a price before purchase, that is, knowing the resources that may be required if a proposal is adopted. Such knowledge is useful even if the simultaneous provision of new resources is not planned. Second, impact estimates may be useful in periodic assessments of the resource needs of the judiciary. The first potential use clearly implies impact assessments that are prospective: what will the cost be? The second potential use, periodic assessments, may be prospective, but they may also—and perhaps even more usefully—state current conditions: what needs have arisen since the last assessment? This latter question is as important as the question of what needs may be expected to arise in the future.

For prospective estimates of cost, the terms of an analysis are naturally specific to particular proposals or bills. However, a prospective assessment of needs for the judicial system may not be most useful on a statute-specific basis; forecasts of aggregate caseloads may instead be sought as an indicator of system needs. Consequently, although esti-

mating the resource prices of particular proposals is the central topic of this report, it clearly overlaps with aggregate forecasting efforts, and we also address that issue.

LEGISLATORS

For analyses of costs of specific proposals, those who will decide on the "purchase" are the natural audience: for bills proposed in legislative bodies, this means legislators. If legislators or other policy makers are to be influenced by assessments of impact, however, the assessments must be made at a time when changes in the proposed activity are still possible. But if a proposal were changed in response to an impact assessment, the usefulness of the estimate for later situations would be impaired, perhaps fatally.

An analyst might be asked to prepare estimates based not only on a proposal as originally introduced but also on probable proposed amendments; prices could be arrayed for a range of options. Such an analysis might be more costly in terms of time for the analyst, but it might allow reasonable choices in assessing alternatives, at least in some circumstances. The separate appropriations process that characterizes policy making in the United States at virtually all levels of government further complicates predictive analyses. Grand designs may be underfunded, and expected grand results not forthcoming. At the point of pricing a new program, an analyst might guess right about probable funding levels, but a wrong guess might make a price estimate wrong in turn.

To deal with the situation, the timing of analyses might be altered; the resource price of a new statute might be estimated not at the committee stage, as envisioned by both Congressmen Robinson and Railsback, but immediately after enactment. Of course that would mean that there would be no price input to the decision as to whether the proposed law should be enacted. But amendments are possible, and cost analyses may be helpful for them. One could also ask for analyses at more than one stage of the process. In any case, legislators might wish to know whether new resources should be supplied to the judiciary, given a new law. In short, there may be reasons why legislators would find post-enactment assessments useful.

JUDICIAL ADMINISTRATORS

A more likely audience for postenactment assessments, however, would be those charged with administering the judicial system. How will available resources, at either present or higher levels, be used to

meet any anticipated new demand? The question is one administrators would find familiar. To the extent that legislators are used to having the needs of the judicial system detailed to them by those in that system, moreover, it would seem likely that a needs estimate made after passage of a new statute would be appropriate for judicial administrators to report to legislators. Judges and administrators might also usefully report estimates of new needs for impact estimates at two other times: after some reasonably short period of experience with a new statute (say, 6 months to 2 years) and at periodic assessments of judicial system needs (say, every 4 years, as is current federal practice). In the first situation, impact estimates after some months had passed would have the benefit of at least some experience and might be more accurate as a consequence. If the volume of new cases began to increase, appropriate actions either by legislatures in supplying new resources or by administrators in rechannelling present resources to handle them might be possible. At longer intervals, account might be taken of significant shifts in demands for services or in general societal patterns that may affect demands.

Overall, then, there are four general options with respect to the timing of impact analyses: during the deliberations as to whether to adopt a new law or policy; immediately after enactment of a new law; after some fairly short period of experience with a new act; and at the time of a periodic review of the system in the longer term. Choices among these might be made on the basis of which audiences wanted the information concerning prospective impact, on the basis of which presented the most tractable methodological challenges, or for various other reasons. But a key item of background for proposals to systematically assess the possible impact of new statutes is the increases in both rates and amounts of litigation. With more suits in the courts, one might argue, legislators might be wise to be wary of actions that would bring about still more suits. In addition, with courts near, at, or in some sense beyond capacity at the present time, the consequences of still further demand might be thought more dramatic than were earlier increases in demand.

DECISIONS AS JUDICIAL SERVICES

Our focus on the effects of changes in the demand for judicial services leads us to consider the nature of those services. Complex organizations, including courts, fulfill many functions, and courts serve in many ways.[1] Nevertheless, courts serve fundamentally by making decisions.

Associated with decisions we find three judicial services in particular, defined by the identity of those who are served. First, courts serve the disputants at hand in a case. Judges, and others in courts including juries, magistrates, referees, and more, define winners and losers in particular disputes.

Second, courts serve others who are or will be similarly situated to the disputants, through decisions about the rules on which decisions are founded. The common law tradition is understood in this way, as judges are expected to deliver written opinions that explain and justify particular decisions according to those rules. In addition, the simple fact of consistency in the outcomes of disputes may allow rules to be identified even though they are not formally announced in written opinions. Lawyers in personal injury litigation may know in this way the "worth" of some type of injury. Would-be criminal offenders may know in this way what they may expect to receive by way of sentence in the event that they are caught and convicted.

Third, the general public is served by judicial decisions in what may be called a demonstration of justice effect. People see and welcome evidence that justice is being served. A sense of public morals can be vindicated; a sense may be fostered that within the community there is substantial adherence to important publicly defined rules, to the satisfaction of at least a substantial part of the general public.

If courts serve through decisions—demonstrating justice, announcing rules, and defining winners and losers—then we should view impact questions in terms of what the consequences of some change might be for those decisions. In this context, the simple fact of an increase in the numbers of cases filed in a court is not of interest by itself. To be of interest, the increase (or other change) would have to be associated with some change or changes in decisions.

Courts make decisions in a certain number and mix, of a certain quality, using a certain amount of resources. These factors are mutually interdependent: a change in one factor implies a change in one or more of the other factors. If, for example, courts increase the total number of decisions supplied with no change in quality and with no change in mix, the resources used would be affected. Court personnel might be called upon for longer hours of work; extra judges or other personnel might be added; hours of work might be more efficiently used; or some other change in resource use might occur. Or, since some cases are more complicated and difficult to terminate than others, a change in the mix of decisions supplied between burdensome and easy cases would affect the total number of cases decided, the quality of decision, or resource utilization. If the number of decisions in difficult cases in-

creased, for example, the total number of decisions supplied might decrease, quality might suffer, more resources might be used, or some combination of these effects might occur.

Demands and constraints on courts can be viewed in terms of the aspects of decisions. The number and mix of cases seeking judicial services are a part of demand. The resources available are an important constraint: the number of judges and the number of courtrooms, etc., may in some circumstances be more than the system uses, but the system can never use more resources than are available. Decisions supplied by court systems—their number, mix, and quality—together with the resources used in providing the supply will be some function of the demand for judicial services—the number and mix of cases—and the resource constraints. Social variables might also affect the supply of decisions; a rash of muggings, for example, might influence the kinds of decisions supplied. And formal court rules or some kinds of legislation might also be consequential for the supply of decisions; to take only one example, legislation might specify timing requirements (as the Speedy Trial Act does for the federal system).

The above framework of supply and demand specifies in the most general terms the kinds of impact that may be experienced and their causes.[2] With this general framework for our discussion, we turn to that task of detailing. We first consider each of these factors and then consider the relationships between demand (or constraint) factors and supply factors as they have been set out in the literature on courts.

SUPPLY OF DECISIONS: NUMBER

Counting the number of decisions supplied to the disputants in a case is not as easy a task as a naive observer might suppose. Trials are a part of the total, but most cases are not disposed of by trial.[3] Settlements are the norm in civil actions, and pleas of guilty and dismissals of charges account for most criminal case terminations. One question, then, is whether settlements in civil cases that occur after filing but before any other formal action by the court should be counted as decisions supplied. Or, when judges in effect ratify bargained pleas of guilty reached in negotiations between prosecutors and defense counsel, has a decision been supplied? We do not answer these questions here, but we note that different options are available even in counting the number of decisions supplied to immediate disputants.

Since these decisions serve others besides the immediate disputants, as was noted above, we might ask what proportion of the immediate decisions serve other groups of people. Counting here is obviously difficult. In some written opinions, the rules for decisions may be

made clear, but "unnecessary" opinions are occasionally criticized essentially on the ground that they said nothing new or needed, that the rules were not made clearer, or that a demonstration of justice effect was not achieved. Some settlements or bargained pleas may contribute to a pattern, making rules clear; others presumably do not.

SUPPLY OF DECISIONS: MIX

All decisions are not of a single kind or type: some are easy and some are difficult; some are in civil cases and others in criminal cases; the issues decided may be novel or routine. Given these and other differences, the mix of decisions supplied must be considered in an impact analysis. It is usually possible to supply more decisions of one kind, but at the expense of supplying fewer decisions of another kind. In trying to understand the effect of mix, knowing the best distinctions to make is a difficult analytic problem. Yet understanding the mix can be important from policy perspectives—are too many criminal cases crowding out civil cases in some jurisdictions? Moreover, different mixes can imply different resource requirements.

SUPPLY OF DECISIONS: QUALITY

The concepts of number and mix of decisions turn out to be subtler and perhaps richer than we thought at first glance. When we consider the concept of quality, however, it is clear even at first glance that it involves subtle, rich, and difficult ideas. But the concept of quality is critical, because impact on the quality of judicial services is at the heart of workload concerns.

Aspects of quality in judicial services are fragile and difficult to conceptualize, much less to measure. They may be, in fact, not merely fragile, but ineluctably subjective. Furthermore, attempts to measure quality in decisions can be threatening, even to excellent judges, inasmuch as the difficulties of conceptualization and measurement create a distinct possibility of the wrong conclusions being drawn from any analysis. Consequently, a search for definition and analysis has not been much pursued by court administrators or by researchers, with one notable exception: the timeliness of dispositions. Hence our discussion of quality begins with the issue of timeliness.

Timeliness

That which is properly due a civil plaintiff is usually thought to be properly provided quickly; a person innocent of a criminal accusation

is well served by winning early vindication; a civil defendant who is not in fact liable is advantaged by an early decision to that effect; and even a criminal defendant guilty as charged may prefer a timely decision, most especially of course if he or she is waiting in custody. And it is usually thought that the public is well served when wrongdoers are found guilty sooner rather than later. A first part of the timeliness criterion is thus simply the avoidance of waiting for processing attention when the waiting does not represent time being spent to accomplish some other purpose (such as developing evidence or arguments).

Some analyses of timeliness measure time. (Other analyses of timeliness measure backlogs, the number of cases awaiting dispositional attention; see discussion below.) Such things as median number of months taken to disposition for particular classes of cases are reported in the annual reports of administrative offices of judicial branches in most states and for the federal judiciary. The federal Speedy Trial Act sets out standards for timely disposition of criminal cases expressed in numbers of days. Year-to-year comparisons are made in the annual reports of judicial councils and administrative offices of court systems, and a relative standard for timeliness emerges. Changes in median times taken are usually noted and commented on, and if the median time required for cases to reach disposition is longer (perhaps for certain classes of cases), the conclusion is drawn that an aspect of quality has suffered.

At least a part of the idea of quality is bound up with adherence to criteria or to standards.[4] It is worth emphasizing here that apart from a few obvious examples, such as the Speedy Trial Act (which also mandates planning to meet the standards (see Mann 1978)), exact definitions of a standard of timeliness are hard to find. Furthermore, implicit standards have been found to vary considerably from court to court; see National Center for State Courts (1978) and Boyum (1979). There is a standard for defining when an airplane is late in that there are scheduled departure times. But in courts, especially with regard to civil cases, there are usually only general references to past practice. The result is that for time, for which measurements are easily possible—one can, after all, count the number of days a case takes from filing to disposition—conceptual difficulty remains.

Correct Decisions

The problem of conceptualizing correctness of decisions is apparent at first glance. By what standard or criterion can we assess correctness? In criminal cases, judges might be asked to let the punishment "fit

the crime," or they might be asked to let the punishment "fit" the criminal. Not only are these criteria ill defined, they also compete. A correct decision by one standard may be an incorrect decision by another standard. In civil cases it is difficult even to locate a standard for assessing the quality of settlements. Flanders (1977, p. 69), for example, remarks:

> Evaluating the quality of settlements is an especially difficult problem. In one sense, every settlement must be the best possible result since all participants agreed to it. In another sense, it is trivial to regard settlements that way: rather, one must evaluate the litigants' alternatives. We do not expect ever to be able to conduct a precise inquiry that would include that evaluation.

In the face of these difficulties, scholars have adopted surrogate measures in approaches to correctness, one of which is adequate processing. If we assume, that is, that the probability of incorrect decisions increases when judges or other judicial personnel fail to give due consideration to decisions, we might assess whether sufficient consideration was given to decisions. But there are no clearly defined standards of due consideration, either. Instead, reference is usually made to past practice or to practice in other courts used as comparison, and differences are taken to mean differences in quality of process, and, by extension, quality of decisions.

Other Measures

There is another sense in which one may call processes good, fair, marked by quality—or the opposite—independently of whether the correct outcome was reached: namely, the opinion of the recipient of the decision. In an interesting recent study, Casper (1978) obtained a sample of 812 men who had been formally charged with felonies in three cities, Phoenix, Detroit, and Baltimore. His interest was in the defendants' evaluations of the fairness of the treatment they received. He found a strong relationship between lack of severity of treatment and a defendant's saying that fair treatment had been received: 70 percent of the defendants who had received no sentence (were acquitted, had had their cases dismissed, etc.) thought the treatment had been fair, and 73 percent of those who had been put on probation reported fair treatment, but only 39 percent of those who were sentenced to some incarceration thought their treatment had been fair (Casper 1978, p. 47). Clearly, any use of defendants' responses must be tempered by the fact that their perceptions are affected by their self-interests. Yet some 30 percent of those who received no sentence at all

believed they had not been fairly treated, and 39 percent of those who were incarcerated thought they had been treated fairly.

For those who reported unfairness, Casper sought to associate types of alleged unfairness with mode of disposition. As is shown in Table 2, Casper did not find any simple relationship between disposition by trial or pleas and perceived fairness. He did find that more of those who were tried complained that they were not given an opportunity to talk or present a case than did those who entered a plea. The feeling that there was coercion in making an unfavorable choice was somewhat more common for those who entered a guilty plea than for those who were tried. Casper's data indicate that to those directly involved, good or fair—or quality—processing is more than just a matter of outcome; the fact and the appearance of fair process, of due process, are also important.

What is needed, and has apparently only infrequently been sought, are independent criteria for case processing, ideally differentiated by particular needs for particular kinds of cases and a measurement of the extent to which processing performance meets the criteria. Some aspects of that have long been familiar. The denial of procedural due process is a familiar ground on which an appellate court may set aside a conviction. The rule of the clear mistake, used at least occasionally by appellate courts in justifying a decision to set aside an outcome reached by a trial court, can be an assessment of outcome. But procedurally correct processing can be low-quality processing if we give weight to such complaints as being pressured (presumably subtly, perhaps not on the record) and not being allowed to have one's say in a dispute.

Wildhorn *et al.* (1976) have sought to associate goals of the criminal justice system with performance measures. But the subtleties of process are not well represented by the performance measures chosen, such as reported crime rate, gross conviction rate, pretrial custody rates, gross dismissal rate, and the like (see Wildhorn 1976). Polls of attorneys that seek ratings of judicial performance try to tap different and significant dimensions of conduct, but they achieve this by ignoring definitional problems, relying instead on implicit internalized and shared professional standards. A recent review of such polls (Flanders 1978) suggests that, in comparison with the state of the art in survey research, most of those efforts have been poorly done. Flanders argues, indeed, that a simple, global approval or nonapproval rating would be preferable to what is frequently attempted at present.[5] However, a review published by the American Bar Foundation (Maddi 1977) finds some efforts extremely promising.[6] The polls reviewed have for the

TABLE 2 Relationship of Mode of Disposition to Defendant Reports of Types of Unfair Treatment

Type of Unfairness	Mode of Disposition (percent)		
	Dismissal or Acquittal	Trial	Plea
Defendant should never have been arrested or charged at all	50	18	7
Defendant not given opportunity to talk, present his side of case	5	14	4
Judge and/or prosecutor biased against defendant	7	19	11
Defendant's lawyer acted in uncaring, dishonest, or incompetent manner	11	12	19
Sentence imposed too harsh	—	11	14
Defendant coerced into making unfavorable choices (e.g., to plead guilty, waive rights)	2	5	10
Other	25	21	35
TOTAL	100	100	100
	(N = 56)	(N = 74)	(N = 112)

SOURCE: Casper (1978), p. 51.

most part been conducted by bar associations, and the very different evaluative approaches found, reflecting a wide variety of aspects of quality, might also reflect the different perspectives of the evaluator. Some polls (for example, the poll undertaken in Alaska) are conducted by state judicial councils and thus have even more of an official aspect about them than do the polls conducted by bar associations. The Supreme Court of New Jersey has decided to inaugurate evaluation of individual judicial performance and presumably will attempt to go beyond polling.

Decision Rules: Consistency

As was noted above, one aspect of judicial services is the provision of decision rules, which serve a general class of potential litigants. Simple consistency is a part of this service, and might be an aspect relatively open to investigation. With respect to written opinions, a simple frequency measure would be only the barest beginning of an analysis.

Flanders and his project team, who studied a sample of U.S. district courts (Flanders 1977), noted an interesting fact:

> We can observe, however, that lawyers in districts where written opinions are rare were almost always puzzled when we inquired whether they felt the court prepared too few opinions. While they generally agreed that written opinions are rare in their districts, they did not feel deprived in any way.

Of course, this does not dispose of the topic; other lawyers might feel differently, judges might benefit from more written opinions through a higher degree of consistency across courts, and potential litigants and their lawyers might be able to keep their court appearances infrequent through study of available written opinions.

Summary: Understanding Quality

Even with this short review of the issue of quality, we are able to reach some conclusions. First and unsurprisingly, there is unresolved conceptual difficulty with the concept of quality; work is needed for ascertaining dimensions of quality. Second, if quality is to be assessed, standards or criteria must be articulated. Without them, for example, we might be able to assess the consequences of new demands for judicial services for case disposition processes but unable to decide whether the impact should concern us. New demands may occasion changes in processing, but we may not know whether the changes represent more efficiency or whether they represent less quality.

SUPPLY OF DECISIONS: RESOURCE UTILIZATION

The key resource available to judiciaries is the number of judges, and, more particularly, the amount of judge time available to supply decisions. But judges are not the only decision makers in courts: there are various quasi-judicial positions, such as magistrates, referees, and the like, and clerical personnel can be influential in scheduling decisions and other procedural matters.

In addition, the prosecutors and counsel to particular disputants can make decisions of consequence, even including dispositional decisions. Thus once again we note that conceptualizing another aspect of supply, the resources available to courts, is not simple. Most analyses concentrate on judges, as we do, but with the important caveat that judge time does not account for the whole picture.

What level of utilization of judge time is possible? What level is

reasonable to expect? One might talk in terms of number of hours per day or per week, but it may in fact be difficult even to know when a judge is working. What can we make of time spent contemplating a decision, or of time spent in training seminars learning how to make better decisions, or even of time spent reading periodicals in order to stay abreast of issues and decisions that may be pertinent to some future case? Nevertheless, reaching decisions is central in analyses of the use of judges' time. Consequently, one might be able to say that spare capacity exists in some courts, at least as a logical matter: a judge or a court may sit idle for lack of demand for decisions. However, there are few accounts of jurisdictions in which that condition exists (and such situations are of little analytical interest here). More interesting are courts or jurisdictions in which greater resource utilization is sought through the application of straightforward efficiency-seeking techniques. Indicators of a kind of hidden spare capacity may include such things as the following:

- underworked judges or other personnel at one location (in a different community, or on different assignment within the same community) while other judges face backlogs[7];
- "calendar breaks," that is, situations in which a judge and a courtroom (or chambers) are available but there is no case to consider because of a breakdown in scheduling[8];
- support tasks being done by decisional personnel, draining time and attention away from decision tasks[9];
- poor grouping of cases: a string of tax cases, for example, would be more quickly terminated by one judge than by several judges, because one person would know the law, the arguments, and the tax bar, and thus reduce the time needed for researching and considering issues.

Courts in which such conditions were present might reasonably be thought to have unused resources that might be available if appropriate court management techniques were applied.

Other approaches to the question of using judge time and effort pose other difficulties. Standards for case terminations per judge per year, for example, have been set, by general reference to past practice, yet it is recognized that the number of terminations is a partial function of the mix of terminations (see discussion below). Overall, we see that resource utilization is as rich and subtle a concept, and poses similar analytical difficulties, as the concepts of quality, mix, and number.

THE CONSEQUENCES OF CHANGE

We have said that the behavior of court systems (that is, the number, mix, and quality of decisions supplied, using certain resources) is some function of the number and mix of decisions sought, of resources supplied to courts, of other factors in society, and of formal rules or legislation. With a change in one of those causal factors, a change will occur in the behavior of courts. But we have said nothing about what the nature of the change would be, or its direction, or on which of the four factors the effect would be felt. In the next few pages we discuss some associations that have been argued in previous literature. They are primarily arguments about the consequences of increases in the number of cases seeking judicial services. Many of those arguments recognize implicitly what we wish to make explicit at the outset: that changes in the behavior of courts in response to some change in the causal factors involve, almost inevitably, rich and subtle changes in behavior. Moreover, those changes are extremely difficult to chart and to predict. They are difficult to chart because of the conceptual difficulties in understanding each of the four causal factors. They are difficult to predict because we know little about how complex organizations, including courts, adapt to changes. We know that they adapt: courts do not compare well to physical structures, which may be crushed under increased burdens; courts do not come tumbling down. But given, say, an increase in the number of cases seeking judicial services, one cannot easily predict in what ways the number and mix and quality of the services supplied will change or in what ways the resource use will change. This central point can be clarified in a review of some arguments about the effects of caseload increase.

ASSESSING INCREASES IN DEMAND FOR JUDICIAL SERVICES

One way to assess the nature of increases, of course, is simply to look at numbers of cases seeking judicial services. But if one counts the number of cases filed in a court or in a system of courts, two problems arise. First, some cases that are filed in fact seek no judicial services, at least not in the form of decisions. Civil actions, for example, may be filed even when an out-of-court settlement of the dispute is likely: the filing may be a part of the bargaining over the settlement, a way of showing seriousness, or a necessary step to stop the clock in a statute of limitations. In response to this kind of case, some courts in their internal procedures count a case as a part of the workload only when it reaches some processing point subsequent to filing (such as the point

at which a Certificate of Readiness is filed). Second, the provision of the services can be cheap or costly depending on the kind of case involved: some cases may require many hours of judge time; others may be decided very easily, quickly, or even routinely. Thus the number of cases by mix becomes an important topic in assessing demand; weighted caseload analyses have become a standard tool for understanding the workload meaning of different kinds of cases.

Weighted caseload analysis is a way of approximating the extent of judicial attention required for reaching disposition in various types of cases. In most weighted caseload analyses, judge or bench time is measured for a type of case and then the time is divided by the number of cases of that type; the result is a period average. Weighted caseload measures or factors are then expressed in time units. Thus if in some baseline period 2,000 minutes were required to dispose of 100 probate cases, the weight factor would be 20.[10]

The workload implications of cases of a given type change over time, however. The Federal Judicial Center found it necessary, some years after its 1969–1970 study, first to advise against undue reliance on its case weights and then to undertake a new weighted caseload analysis (which is now being completed). Factors that influence such changes include, among many others, changes in tactics by lawyers, the emergence of new social complications, and doctrinal evolution. Most of these changes result in more time per case; however, some people have argued that learning by all parties and decision makers involved in a dispute may operate to reduce judge time spent per case.

The assertion is occasionally made that case category weights are related to complexity, the argument being that complex cases take more time than simple cases. That assertion is not necessarily true in that weighted caseload analyses alone encompass only time, which might, for example, involve a large number of noncomplex activities. More important is the observation that the standards that emerge from weighted caseload analyses emerge from current practices in courts and not from some inherent or invariant characteristic of the case types per se. Categories of cases are related to each other, on the basis of the experience in the recent past within court systems. From that procedure we would not be able to tell, for example, whether some class of cases is taking longer than it should or could be taking (or whether some class of cases is being hurried through to its detriment), judged on the basis of an externally derived standard.

We note that these analyses are general approximations of the workload meaning of numbers of cases, based on gross classifications rather than on some more finely tuned analysis. Cases are categorized very

generally in the state court weighted caseload analyses that have come to our attention. Moreover, components of decisional processes are not separately used in workload measurements that are founded on weighted caseload factors, but rather the sum of time taken to disposition by classes of cases is used. Components may be available: mean minutes per activity by case category type were figured in the Washington study cited above, including, for example, such things as minutes spent for arraignments, warrants, evidentiary motions, and the like for felony cases and also including, for all case types, such activities as legal research, preparation for trial and other proceedings, opinion writing, and the like. The California study noted above did much the same. But only the sums by case category are ultimately put to use.

The practice is standard across jurisdictions. The *1969–70 Federal District Court Time Study* reports case-related judicial time by activity (U.S. Department of Agriculture 1971, p. 65), but any uses made of it in places such as hearings on the question of needs for new judgeships are not apparent. A report by the California Administrative Office of the Courts (1977) notes that Kentucky court time analyses resulting in case weights were done in a simplified, summary way. New Jersey assesses only hours on the bench and in settlement conferences by case categories and uses the resulting figure as a weight factor (see State of New Jersey 1977, p. xii). Virginia in 1977 was moving to a scheme for recording judge bench minutes for each type of case, which would then be a basis for developing case weights. Again, minutes spent by differentiated activity were not studied (see "The Judicial and Clerical Workload Analysis Studies of the District Court System of Virginia" (n.d.) and "The Virginia Circuit Court Caseload Reporting Study" (n.d.)).

INCREASED DEMAND AND CHANGES IN NUMBER AND MIX OF DECISIONS SUPPLIED

Even with no change in the input mix of demand, one can easily imagine a change in the output mix of decisions supplied. For example, if judges pay attention to gross number of cases waiting in the backlog and strive to keep that number low, they can decide more "easy" cases as a proportion of the total number of decisions.

But increases in all categories may be less likely than a situation in which some categories grow faster than others: that is, the input mix is likely to change. Without any change by judges, a new mix of cases will lead to a change in the output mix. If the new input mix includes a larger number of cases that are difficult to decide, the number of total cases

decided might decline. A point made earlier is worth reiterating here: these things are likely to happen in combination, and frequently in subtle combination. Details of the adaptive process are hard to chart, much less to predict.

INCREASED DEMAND AND CHANGES IN QUALITY

Given no change in the amount of resources available, a change in the number or in the mix of judicial decisions might occur in the face of increased demand; such a change might be thought by some to indicate lower overall quality of judicial services rendered. But the reasons one mix of decided cases might be preferable to another mix can be subtle. It is probably easier to win a sympathetic hearing for one's point (often made in the context of requests for new resources, new judgeships) by invoking the probability that the quality of decisions rendered or outcomes reached in particular cases might suffer in the face of new demands. The point is frequently made in the context of backlogs.[11]

Thus backlogs may be associated with delay, which is one way an increase in the demand for judicial services can affect quality of the services delivered. But some people believe that backlogs can affect the substance of dispositions as well. First, decisions not supplied in a timely fashion may bring about case outcomes different from those that would otherwise have occurred. People may settle cases in ways that might be judged unfair.[12] Second, decisions may be different because of the pressure that judges and other dispositional personnel feel, stemming from the sheer fact of the backlog. The notion is that the time and consideration that a judge or other decision maker gives to a particular case are reduced when the fact of many others waiting for dispositional attention looms large. Indeed, it is plausibly argued that the felt pressure to reduce the time and consideration allocated per case is heightened by analyses that study the topic of quality by studying only backlog analysis.

This is the "heavy caseload/cursory disposition hypothesis" that Feeley in particular has set out well. The major claims of the heavy caseload/cursory disposition argument, Feeley says (1975, pp. 2–4), are as follows[13]:

- The lack of adversarial practices in lower criminal courts is a result of the heavy volume of business before the courts, a work load that allows virtually no one adequate time to fully prepare for cases. . . . Hence the adversarial relationship is compromised because no one has the time to engage in it. The clearest indication of this is found in the lack of trials in the lower criminal courts.

- The pressure caused by heavy caseloads not only affects the rate of trials, but also affects the *quality* of the proceedings at all other stages of the process. Other forms of short-circuiting the process include the reluctance to file formal motions, the defense waiver of other pretrial rights, and the casual yet rapid treatment of the defendant before the bench.
- The pressure for ways to circumvent the complication of an elaborate adversarial process goes still farther and leads to the adoption of "work crimes," shortcuts designed to save time and effort. These devices are usually implemented at the expense of the interests of the defendant. . . . This shortcut is most often and most visibly institutionalized in the form of pleas bargaining, the exchange of a plea of guilty for a consideration of leniency by the prosecutor. This practice, while constitutional, is of dubious legitimacy since it may facilitate improper or inappropriate convictions and is governed by few standards.
- The caseload pressure leads not only to the "abandonment" of certain types of proceedings, but has a dramatic effect on the substantive outcome of cases as well. Defendants who find themselves in a system pressed with a crushing workload are treated arbitrarily and harshly. The effects of heavy caseloads are not confined only to the final determination of guilt or innocence or even to the sentence, but they have an impact on the earlier stages of the process as well, most particularly the conditions for pretrial release. The court's inability to make careful assessments of defendants' backgrounds results in harsher release conditions being set.
- The high volume of cases requires a high speed mass production of justice. Defendants in high volume courts are shuffled through them as quickly as possible, without ever comprehending what is happening to them and without anyone caring about their confusion. Thus not only is justice denied, the appearance of justice is also denied.

Feeley goes on to say (1975, p. 4):

One important feature of these arguments is that they all cut two ways. That is, each of them implies an opposite; in the absence of heavy caseloads, there will be more trials, less reliance on plea bargaining, an increase in motions, and different types of outcomes.

By comparing a high-volume workload court with a low-volume workload court, Feeley finds one remarkable difference in the direction specified in the heavy caseload/cursory disposition argument: charges were much more frequently reduced in the court with heavy caseloads. Especially when considering felony charges that eventually led to misdemeanor convictions (Feeley 1975, p. 13), "the heavier caseload court appear[ed] much more willing to reduce charges than [did] the court with the lighter workload." But when considering other aspects of the processing, Feeley found virtually no differences between the courts. Distribution of sentences, pretrial release status, initial bond amounts,

and time spent in pretrial custody did not vary significantly between the two courts (Feeley 1975, pp. 14–18).

Flanders (1977) compared U.S. district courts that were at the extremes on measures of speed (that is, of case terminations) and productivity (that is, terminations per judge per year). Although his central purpose was to develop recommendations for improvement in case management in the U.S. district courts, he also approached the case pressure/quality argument. Most particularly in that regard, Flanders' project team sought definitions, in interviews with six U.S. district court judges, of what breakdowns in processes would characterize courts that had yielded to undue pressure to "perform statistically": "Nearly all were instances of essentially the same issue: failure to grant a trial continuance for a good cause" (Flanders 1977, pp. 68–69). Flanders also said (p. 68):

> Armed with these responses [from his judge respondents], we examined our notes, detailed observations of the five courts visited in the project's first phase, to consider whether the abuses described . . . are more characteristic of the fast or the efficient courts than of the others. The answer, simply, is that they are not.

In a third example drawn from the scholarly literature, we briefly cite Heumann's analysis of data from Connecticut trial courts of general jurisdiction spanning the period of 1880–1954 (Heumann 1975). Heumann associated the numbers of criminal cases awaiting disposition on a per-judge basis with trials taken as a proportion of total dispositions. Heumann sought to test whether nontrial dispositions (bargained pleas of guilty, dismissed charges, etc.) increased with increases in the numbers of cases awaiting dispositional attention. In short, did Connecticut judges in this period, feeling the pressure of large numbers of cases waiting in the backlogs, seek shortcuts in the process? Heumann found no patterns in his aggregate historical data to support such a hypothesis.[14]

In Feeley's analyses, the outcome measures were frequency of charge reductions, severity of sentences, pretrial custody versus release, initial bond amounts, and time spent in pretrial custody. Heumann concentrated on type of disposition, trial versus nontrial. The notion in each study was that if substantial differences in these measures were found between pressured and nonpressured caseload situations, at least a tentative attribution to caseload pressure could be made as the cause of the observed differences. At a minimum, a null hypothesis of no difference might have been rejected; but as we have noted, in general, differences were not found.

It may be that at least within the ranges of caseload pressure investigated, outcomes did not change. We do not know that as a certainty: it is at least equally plausible that relationships between caseload pressure and outcomes are subtler than could be captured in these approaches to the topic. It may be, for example, that although nontrial dispositions as a proportion of the gross numbers of trial dispositions did not vary between the pressured and the nonpressured situations, in some way the wrong cases were being given nontrial dispositions. Some aspect of individual cases that would have marked them for a particular disposition may have been overlooked in the pressured situation. The only way we might approach such questions is by independently identifying those cases that are best suited to, say, nontrial disposition, and then matching them in the particular with the kind of disposition actually received. In fact, Feeley did supplement his statistical analyses with observation—and found nothing to support such a hypothesis. Flanders and his project associates also observed directly and included their judgments in their findings.

INCREASED DEMAND AND RESOURCE NEEDS

The status of the caseload pressure/cursory disposition hypothesis in the scholarly literature notwithstanding, the common sense association between work to be done and resources available to do the work can still be found in discussions concerning the resource factor. The assumption that underlies the colloquy at hearings on bills to supply more resources to courts is that increases in demand should be dealt with through changes in resources, not through changes in quality, in particular, or number and mix (presumably for the worse) in the face of changed demands for judicial services. But the question of what resources are actually required remains.

The question of using currently supplied resources is involved. Legislators, before providing new resources, think it quite proper to ask whether best use is being made of the resources that are already available[15] (or, if not best use, then whether there are fairly obvious improvements to be made in resource utilization). Questions occur, too, about how many cases judges should be expected to handle in a given time span (usually per year). The number depends on the input mix, and also on the meaning of "handle"—the quality of judicial services sought. The elusive nature of these ideas, as already discussed here, leaves standards defined only subjectively or through some reading of past performance. That is, the only option may be to ask the opinions of judges or other well-placed observers of courts and take their responses in terms of the workload experience of the recent past.

In practice, that is frequently done. The arguments and analyses put forth in legislative hearings as justification for the authorization of new judicial positions are usually presented in relative terms.[16]

In summary, the resource needs of courts are elusive because the extent to which judge time and other resources are currently being utilized is very difficult to ascertain. In the end, the consequences of increased demands for the number and mix of decisions supplied are hard to know in advance because number and mix may be difficult to identify in and of themselves. And quality is surely hard to identify. Finally, we note again that it is nearly inevitable that increases in demands will be felt in all of the factors in some way or other, by some way of reckoning or other. This is also true for changes in input factors other than changes in demand.

SOCIETAL AND LEGISLATIVE VARIABLES AND RESOURCE CONSTRAINTS

With the term "societal variables" we mean to cover a very large territory, and we explicitly concede at the outset that analyses of any detail at all would be required to deal in the particular with the demographic, cultural, environmental, moral, political, and other variables that we are including in a single term. Yet for our limited purpose a brief comment will suffice.

Societal variables may affect courts either directly or indirectly. That is, a change in cultural attitudes about disputing at law, for example, might affect the number and mix of cases that make up the input demand for judicial services and in that way affect the output of decisions made. But such a variable might also directly affect the behavior of court systems. Judges' inclinations to achieve early terminations in particular cases might be affected, for example, by a change in cultural attitudes about the relative importance of legal disputes. Similarly, judges might change their work habits; they might change the mix of cases they decide in any given time period or the total number of cases decided. In addition, the particular way in which a change in a societal variable will be felt will very probably be subtle, hard to chart, and probably have an impact on all of the factors rather than just one.

By legislation or by formal court rule, matters such as the jurisdiction of courts are decided, and these legislative variables would have to be considered in any analysis of factors that are thought to cause the behavior of court systems. A change in jurisdiction rules is likely to change what courts do. Again, these factors can affect courts directly, or indirectly, by affecting the level of demand. And again, effects are complex rather than simple.

The points to be made with reference to resource constraints are

identical. Resource constraints obviously affect courts directly[17]; but courts with backlogs may find demand reduced because of the backlogs (which may be caused by resource constraints), which is an indirect link. Once more, effects are complex rather than simple.

RESPONSES TO CHANGES IN COURT CASELOADS

Courts as public agencies are provided with resources by legislatures. But the needs of judiciaries are reviewed only periodically (every 4 years in the federal system), and in the interim new demands may arise. Busy courts, when faced with new demands, cope or adapt, at times by decision and at other times by what one might call nondecision. Longer queues may develop, as one example of nondecision. Perhaps even more threatening to the integrity of the system, some of the effects predicted in the caseload pressure/cursory disposition argument (discussed above) may occur. The key point is that judges make choices in case-pressured situations: they choose between allowing queues to grow and giving more cursory attention to particular cases, or they select which cases to hear from among many that are ready for dispositional attention. Case selection might be done on an *ad hoc* basis, or judges might make a clear policy decision to hear some classes of cases to the (at least temporary) exclusion of other classes of cases. For example, a memorandum from the general counsel of the Administrative Office of the U.S. Courts (Imlay 1976) notes:

> The Sixth Circuit has established by decision a priority for Social Security Review cases, second to criminal cases. *Webb* v. *Richardson*, 472 F. 2d 529, 538 (6th Cir., 1972). The Supreme Court has . . . noted that the District Court for the Eastern District of Kentucky, adopted these priorities, added a third, i.e., actions in which the United States is a party, and placed as the lowest priority, private civil actions. *Thermtron Products, Inc.* v. *Hermansdorfer, U.S. District Judge*, 423 U.S. 336, 340, fn. 3 (decided Jan. 20, 1976).

And whether or not acknowledged as such, even a decision (or nondecision) to let the queues lengthen amounts to a policy choice. Legislatures, by tolerating, and occasionally by exacerbating high workload demands on courts, are ceding at least some policy choices to judges.

Calls for impact assessment to be done in legislatures, in this view, are proposals that the policy decisions involved in workload demands be at least addressed by legislators. When courts are at capacity—when courts are making choices—legislators may be urged to consider these

policy choices in the light of proposals that carry with them increases in demands for judicial services, usually new laws. Thus it may be argued that legislators need to know what kinds of new demands will be forthcoming from the laws they may enact.

Substantive laws—those that regulate behavior, establish rights cognizable in civil matters between private parties, allow change in legal status to persons or property, or provide material benefits to some class of the population—can be expected to result in some court cases. If other cases might be displaced, slowed, or given more cursory attention as a consequence of new cases, one might seek to have the legislators consider that consequence as a part of their deliberations and to make a choice for the court system rather than leave the choice to judges, administrators, and other judicial branch personnel. Legislators might choose slower processing, by making no further resources available to the judiciary after considering the question. Legislators might choose displacement, providing for the removal of some set of cases from courts. Legislators might provide for new resources to handle the expected new cases, trying in that way to leave the quality and mix of judicial decisions unchanged. Legislators might make priority judgments as to which cases should be heard when more are ready for dispositional attention than can be handled in a given period.

There are examples of legislators making such choices. For example, the Speedy Trial Act of 1974 (P.L. 93-619, 88 Stat. 2076, 18 U.S.C. 3161 *et seq.*) set time limits for the prosecution of criminal cases in federal courts, and a recent study (Fort *et al.* 1978) found 217 speedy trial statutes in a review of the 52 jurisdictions (the United States, the District of Columbia, and the 50 states). These instances of legislators setting policy have not, however, been related to a substantive act, with an eye toward dealing with its effects. A more interesting example of legislative policy making with respect to the order in which cases will be heard in courts can be found in the provisions for priority in acts of Congress, provisions that have been adopted as a part of the substantive statute. In the memorandum cited above (Imlay 1976), 29 such provisions were listed, ranging from relatively broad categories (e.g., the Federal Rules of Criminal Procedure 50(a), at 18 U.S.C.), and acts that one may presume were deemed to be of particular importance (e.g., 26 U.S.C., section 9011(b), relating to presidential election campaign funds) to enactments that are not easy to characterize (e.g., 12 U.S.C., section 1464(d)(6)(A), relating to savings and loan associations). There may be some irony in the number of statutes with priority provisions: if too many such statutes carry priority provisions, judges are once again required to choose which priority case to give priority

to over other priority cases, when more than one is ready for dispositional attention at the same time.

Displacement is another policy that has been adopted, although not usually at the same time that new cases are anticipated. Various proposals to eliminate part or all of the diversity of citizenship jurisdiction cases from the U.S. district courts have been justified in part on displacement grounds. In state court systems, no-fault automobile insurance statutes have been partly justified by the fact that court caseloads would presumably be reduced. Other diversion schemes that seek to keep disputes out of courts—a kind of displacement—include a variety designed for civil cases. In a recent review, Johnson, Kantor, and Schwartz (Johnson *et al.* 1977) identify three major categories of civil diversion schemes: measures obviating the need to resolve a dispute in order to afford relief (such as no-fault auto insurance); measures obviating the need to decide certain issues to afford relief (e.g., no-fault divorce, in which "a moment's testimony about irreconcilable differences justifies the court's granting a divorce" (Johnson *et al.* 1977, p. 8); and measures that move disputes to other forums (such as arbitration or informal tribunals).

Perhaps the most interesting attempt to provide new resources at the same time that new demand for judicial services was expected was the addition of 31 judges to the trial court of general jurisdiction for New York City (the supreme court, in New York's unusual nomenclature) concurrently with the passage of the "Rockefeller Drug Law" in 1973 (Chapters 276, 277, 278, 676, and 1051 of the 1973 Laws of New York State). That law prescribed new and severe "mandatory penalties for narcotic drug offenses at all levels and for the most serious offenses involving many other drugs" (Schell and Webster 1977, p. 3). The results, detailed in an extensive study of the effects of the law, were disappointing to those who had hoped that delays in drug cases could be avoided by adding the new judgeships. "[D]emand for trials in drug cases rose sharply, and the productivity of the new courts created under the 1973 law failed to match that of the established courts" (Schell and Webster 1977, p. 104). They went on to say: "Contributing to the low productivity was the fact that even cases that did not result in a trial took longer to dispose of because incentives for delay were increased" (Schell and Webster 1977, p. 104).

As this brief review indicates, legislators are at least occasionally very much aware of the policy choices that inhere in questions of case processing. At least occasionally, legislators have sought to make those choices.

NOTES

1. Courts enhance urban landscapes with imposing public buildings, worthy community leaders are recognized in judicial selection procedures, and a list of secondary services performed by courts could easily be extended.

2. A formalization of this general scheme will be found in Appendix A.

3. This point is generally recognized in the literature; see, for example, Heumann (1975). In his analysis of 75 years of data from the superior courts of Connecticut (criminal cases, 1880–1954), Heumann found a mean percentage of trials to all dispositions of 8.7 percent.

4. In fact, our discussion thus far has involved using the words "standard" and "criterion." Carlson (1976, p. 306) makes the same point: "quality can provisionally be defined as adherence to a standard."

5. Flanders (1978, p. 310) offers an example of a journalistic evaluation of a Philadelphia judge, which is worth quoting in that what we have called subtleties of process are well represented in it:

> Judge C. Temperament: Wow. Ability: Moves too fast to be sure. Judge Roy Bean, the law west of the Pecos, never came to decisions faster than [Judge] C. . . . Runs a wild courtroom; try it sometime. You'll see one case being tried at the bar; lawyers on another case meeting with C at side-bar; meanwhile, he's on the phone to lawyers on still another case, and may be reading a book he's reviewing at the same time. Positive danger were it not for the fact that he seems quite capable of handling all this.

6. The Maddi (1977) study has appendices describing each poll and reproducing some of the instruments used.

7. It is generally believed that this situation can be avoided through unification of court systems, whereby temporary assignments of judges to courts where they are needed is facilitated; on the general point, see Berkson (1978).

8. On this and related problems, see Lagging Justice (1960), a topical issue of the *Annals* of the American Academy of Political and Social Science.

9. Setting the right tasks before the right people is of course a key to effective management, including court management; for a general reference to court management, see Friesen *et al.* (1971).

10. In fact, the National Center for State Courts weighted caseload project for the Washington Superior Court found a weight of 19.9 for probate cases; see National Center for State Courts (1977, p. 5). In California, the weight for probate cases was 20 both for statewide excluding Los Angeles and for Los Angeles; see Arthur Young & Company (1974, p. 7).

11. This is exemplified quite well by experiences in New Jersey (State of New Jersey 1977, p. 12) and California (Judicial Council of California 1978, p. 93), respectively:

> This increase in backlog was caused by a 27% increase in filings and resulted despite the fact that the total disposition of cases increased by 26%. The unacceptable increase in backlog would have been even higher had the number of dispositions per judge not also increased. . . . Unless the backlog is de-

> creased, the citizenry of New Jersey will be substantially denied its constitutional and common law right to the timely disposition of criminal and civil cases.
>
> [I]f the [elapsed time] interval to trial is larger than present medians in other courts, or in the past, then it can be inferred that ready cases are probably being delayed by court congestion.

12. A familiar argument along those lines is made by Judge Cancio (U.S. Congress 1973, pp. 833–834):

> . . . the unknown number of settlements which are due to the parties or their attorneys becoming discouraged when they face the reality that their case will not be set for trial in a reasonably foreseeable future, is certainly not something to be proud of. . . . especially if we consider that normally the party who gives up and settles because of the economic pressure exerted over it is the weakest party. We do not know and the statistics cannot show how many cases of needy people have been settled for amounts much lower than the one they deserve just because they are not able to wait until it can be set for trial due to the reality of an overburdened court. Similar inequities must be found in criminal cases for the same reason.

13. See also Feeley (1979).

14. Peter F. Nardulli (1978) has an analysis that is similar in its conclusions to Heumann's and to Feeley's.

15. Typical is the concern for efficiency raised by the chief counsel to the Subcommittee on Improvements in Judicial Machinery of the U.S. Senate Committee on the Judiciary. When a bill to add new judgeships was under consideration in 1973, William P. Westphal said (U.S. Congress 1973, p. 278):

> I notice that in 1971 there were about 34 trial days in Newnan [Georgia]. It gets to be a question of whether you are gaining any efficiency by transferring those cases to Atlanta where you can work them in with your regular calendar.

16. Consider this extract from a brief by Judge MacBride in support of a recommendation that two additional judgeships be created for the Eastern District of California in 1973 (U.S. Congress 1973, p. 724):

> If we had had five full time judges in the Eastern District in fiscal 1972, our individual weighted case load would have been 265 per judge, but if we continue the 10% annual increase in case load that I anticipate, then by the time our two new judges would become active in 1974 we will have a weighted case load per judge of 315, and by 1975, their first full year of service, their case load would be back up to 342, which is seven cases per judge more than the 335 cases per judge which the United States Judicial Conference has found to be too high.

"Too high" in Judge MacBride's argument was found by reference to past practice and by reference to a standard arising from past practice. A similar example can be offered from a question put to Judge George Young of the U.S. District Court for the Middle District of Florida from Senator Burdick, chairman of the subcommittee. The senator uses arithmetic and relative comparison

in making his point about an average caseload per judge (U.S. Congress 1973, p. 213):

> Also, your 2558 terminations, if divided by eight, would yield only 310 per judge. That is well below the average of 358. Do you care to comment on those comparisons?

The Senate Subcommittee on Improvements in Judicial Machinery in 1973 was considering the quadrennial report of the Judicial Conference of the United States on the needs (for new judgeships) of the federal courts; 51 new judgeships were recommended for the U.S. district courts, to be assigned to districts in which case filings per judge exceeded or were expected to exceed 400 (a figure different from that imputed to the judicial conference by Judge MacBride).

17. A particularly interesting attempt to provide new resources at the same time that new demand was anticipated was the "Rockefeller Drug Law" adopted in New York in 1973; see discussion in Chapter 3.

3 Estimating Numbers of New Cases: General Considerations and Examples

The previous chapter considered the meaning and consequences of caseloads for courts; this chapter considers another difficult topic with which any analysis of impact must wrestle: the prediction of the number of cases that would eventually come to courts under the provisions of new statutes. As a first step in the analysis, we turn to a scheme for understanding statutes and other events according to where impact may result. In some instances, new cases may ultimately come to courts as a consequence of occurrences that affect activities that take place far removed from courts. An example would be a general increase in commercial activity, perhaps of some new type or form. On the other hand, new cases could be brought or existing cases dropped as a result of some change that affects disputants who are, metaphorically, at the courthouse door. In the former instance we may need different and perhaps more information concerning the behaviors of individuals than we need to know in the latter instances.

IMPACT ASSESSMENT MATRIX

A general scheme for identifying at what point impact may occur is offered in Table 3, the impact assessment matrix. The matrix is a way of generally identifying the behaviors one needs to know in order to predict the number of cases that would be brought as a result of new legislation or some other significant event. The first part of this chapter

TABLE 3 Impact Assessment Matrix

	A	B	C	D	E	F
1. Statutes that explicitly seek to regulate behavior	Number of persons apparently engaged in a regulated activity	Proportion of (A) who are apparently not in compliance with regulations	Proportion of (B) who are accused of being in noncompliance	Proportion of (C) who dispute the accusation	Proportion of (D) who fail to resolve dispute without recourse to court processes	Proportion of (E) who resort to court processes
2. Civil wrongs	Number at risk of a particular type of civil wrong	Proportion of (A) who are apparently wronged who claim compensation	Proportion of (B) whose claim is denied	Proportion of (C) who dispute the denial	Proportion of (D) who fail to resolve dispute without recourse to court processes	Proportion of (E) who resort to court processes
3. Status changes and titles to property	Number who apparently are eligible to seek a particular status change or title transfer	Proportion of (A) who apply for a status change or title transfer	Proportion of (B) whose application is denied	Proportion of (C) who dispute the denial	Proportion of (D) who fail to resolve dispute without recourse to court processes	Proportion of (E) who resort to court processes
4. Statutes conferring direct material benefits on some group of the population	Potential beneficiaries: number of persons apparently in the defined category	Proportion of (A) who apply for benefits	Proportion of (B) whose application is denied	Proportion of (C) who dispute the denial	Proportion of (D) who fail to resolve dispute without recourse to court processes	Proportion of (E) who resort to court processes

NOTE: The Panel wishes to thank Keith O. Boyum for developing the matrix.

presents the logic and rationale for the matrix; the second part of this chapter reviews some statutes in terms of the matrix.

As shown in the left-hand column of Table 3, four general categories of laws are recognized at the outset:

- Laws that explicitly seek to regulate some behavior by making it civilly or criminally wrongful;
- Laws that provide redress for civil wrongs;
- Laws that cause status changes and changes in titles to property; and
- Laws that confer direct material benefits on some group of the population.

In addition to these four categories, we recognize one other general kind of statute, namely, laws that directly define the size and scope of court organizations and procedures. Laws in this fifth category, including those that establish or increase the size of judiciaries, that set up quasi-judicial positions (e.g., U.S. magistrates), that require judges to set criminal sentences within guidelines, that define the jurisdictions of courts, or that may increase or decrease nonjudicial litigation resources (such as legal service lawyers or public defenders), etc., are considered in the discussion of the matrix.

We note that there is overlap among some of the categories. Some regulatory statutes, for example, while having as a main goal the explicit regulation of some behavior, by setting up some agency with a surveillance function, also create grounds for private civil actions. And some private suits for damages, at least implicitly, have a regulatory function (personal injury suits may be an example). The logic of the matrix may be essentially unimpaired by this fact of overlap, but if it were to be directly used as an analytical tool, such overlap could pose problems.

Laws typically make distinctions about what kinds of behaviors are prescribed, proscribed, or permitted. Laws rarely if ever apply to literally everybody in a population. Boundaries are defined as to whom the law does and does not apply; within those boundaries, laws specify people who can elect to act, perhaps to dispute, perhaps ultimately to litigate pursuant to the provisions of a statute. This structure of laws leads to the logic and makeup of the cells in the matrix.

ROW 1: STATUTES THAT EXPLICITLY SEEK TO REGULATE BEHAVIOR BY MAKING IT CIVILLY OR CRIMINALLY WRONGFUL

The first set defined in Table 3, cell 1-A, is the number of persons who are engaged in a regulated activity. Behaviors may be prescribed (e.g., the Commodity Futures Trading Act requires the registration of persons involved in futures trading) or behaviors may be proscribed (e.g., robbery). If the number of persons involved in futures trading or the number of persons involved in robbery fell to zero, no court cases would ever occur. Cell 1-B includes the proportion of those persons engaged in a regulated activity who are apparently not in compliance with the regulations. We say "apparently" because there may be some doubt about boundary locations (a point discussed further below). Here, too, if there were no members in this set, no court cases would occur.

In cell 1-C a sense of surveillance emerges, in that ordinarily an accusation that somebody is not in compliance with a regulation is brought by a second party. (Consciences may, however, be stricken.) "Accused" may be a little strong in some instances, such as when a commodity futures trader who may be blissfully unaware of a registration requirement is informed of it. That trader might immediately register and so not be included in cell 1-D, which represents the proportion of those accused of being out of compliance who choose to dispute the accusation. Alternatively, however, the trader might argue that the registration rule does not apply to him, and similarly, the robber might argue that the merchandise in question really belongs to him, or that the merchandise was voluntarily given to him, or that somebody else committed the robbery. Cell 1-E includes all those traders, robbers, or others who fail to persuade their accusers of the nonapplicability of the regulation to their behavior. Members of the set illustrated in cell 1-E are good candidates for court processes, for bringing a case or being named defendant in a case brought by another. But not all those in cell 1-E become court cases; some unresolved disputes are simply left with no positive resolution. Hence cell 1-F includes a still smaller subset, those disputes that actually go to court.

ROW 2: LAWS THAT PROVIDE REDRESS FOR CIVIL WRONGS

The first set defined, in cell 2-A, is the number of persons who are at risk of a particular civil wrong. In some sense, those who ride in automobiles, for example, risk being injured through the negligence of another; that is, they risk incurring a civil wrong; and if the number of

automobile riders somehow fell to zero, no court cases could occur with respect to that particular civil wrong. Cell 2-B includes the number of people who apparently have been wronged and who seek compensation. Once more, we say "apparently" because one might, for example, be injured by another yet not be wronged in the eyes of the law.

Those who claim compensation might be compensated promptly, and further proceedings might be thus obviated. If that were true for all claimants, cell 2-C would be empty, and no court cases would ever occur. Again, if all of those whose claims were denied failed to dispute the denial, cell 2-D would be empty and no court cases would occur. In turn, if everybody in cell 2-E resolved the dispute without recourse to court processes or if nobody resorted to courts after failing noncourt resolution, no cases would come to courts.

ROW 3: LAWS THAT CAUSE STATUS CHANGES AND TITLES TO PROPERTIES

First represented, in cell 3-A, is the number of people who are apparently eligible to seek a particular status change or title transfer. Some subset of those, shown in cell 3-B, may actually apply to be married, to have their name changed, to be declared bankrupt, to have a will probated, etc. As before, if none were eligible or if none who were eligible actually applied, no court cases would later occur. The point also holds for cells 3-C through 3-F, as it does for civil wrongs.

ROW 4: LAWS THAT CONFER DIRECT MATERIAL BENEFITS ON SOME CATEGORY OF THE POPULATION

Once again, the first cell, 4-A, includes all those apparently eligible, cell 4-B the proportion of those who apply, and so on as for the other categories of laws. Type 4 statutes include such laws as those that define who may receive old age insurance payments through the Social Security Administration, that confer benefits on veterans, etc. It is interesting to note that there are circumstances under which cell 4-A would eventually be empty: there are no Civil War veterans remaining, for example; no benefit claims on behalf of those veterans will ever be made again.

This review of the rows in Table 3 shows that a key regulator of interest is the cell within each row that defines the smallest number of persons. If any cell represents an empty set, the set of court cases is empty. It follows that the crucial determinant of the number of court

cases that will result from a particular statute is the set or cell containing the smallest number of persons. When Congress acted to take title to the presidential papers of Richard M. Nixon, cell 3-A in our matrix contained one person (who brought suit over the matter). With the repeal of the price control laws that were in effect during World War II, the number of persons in the set represented by cell 1-A in the matrix became zero. But these examples from column A notwithstanding, the sets that are more likely to be the smallest are those in column F. Hence we now turn to a consideration of the columns in the matrix.

COLUMN A

Activities that are fundamentally nonlegal in nature underlie the sets of persons defined in each A cell in Table 3. To use previous examples, people would probably trade commodity futures, ride in automobiles, marry, and would doubtless grow old even in the absence of laws about some aspect of those activities. And a variety of nonlegal events can and do significantly affect the size of each set represented by an A cell, both directly and indirectly. A general increase in prosperity, for example, might directly result in enough extra income to cause a larger number of people to seek investments such as commodity futures or to stimulate auto trips. Indirectly, such an increase in prosperity might, by financing improved medical care, result in a decline in child mortality and thus in an increase in the number of people who reach marriage age or in a decline in overall mortality and thus in an increase in the number of people eligible for old age pensions. A war, an economic depression, a general change in societal mores, and surely many other events could have similar effects. Laws, too, may stimulate prosperity or economic depression (war is declared by Congress), and many people believe that laws can reinforce societal mores or contribute to their change.

But more directly, a law defines the age at which one is eligible for social security payments (cell 4-A); laws define minimum ages at which one may legally marry; a law defines auto negligence; and regulations must exist before there can be regulated activity. In each instance, moreover, laws may expand or reduce the size of each set by a change in the definitions.

All of these column A events have effects in what we referred to as nonlegal contexts. That is, these events cause a change in the potential number of persons who may behave in ways contemplated by a statute in one or more of the four rows in the matrix. Some events affect all four

cells of column A, while others are quite specific to cell 1-A, or to cell 2-A, etc. (see discussion below).

COLUMN B

Each B cell in the matrix is a subset of its counterpart A cell. Persons in the sets represented by each B cell have undertaken some behavior that brings them within the purview of a law. The fact that one may be eligible for old age benefits or veterans' benefits and the like is not important in terms of ultimately generating court cases until application for such benefits is made. A column B event could be specific to a particular cell: for example, a program might be initiated to publicize to poor people that food stamps are available by application, with the result that more poor people apply. Other events might affect all the cells in column B: the bonds of long-term associations among neighbors may weaken in a society grown increasingly transient, with the result that apparent wrongs are neither suffered silently nor settled amicably, but instead are made a basis for a claim for compensation; the legitimacy of a government may diminish, bringing about more frequent instances of noncompliance with regulations.

Laws can make it easy or difficult to comply with regulations; laws can also make it easy or difficult to make a claim for compensation, to apply for a status change, or to apply for benefits. If food stamps were sold as postage stamps are in every hamlet in the country, the number of people who applied for them would very probably increase. Laws can make noncompliance with regulations costly by providing for stiff penalties for noncompliance; laws can make compensation levels attractive or trivial; laws can condition some benefits on whether couples are legally married or can make such other benefits available without a precondition of marriage; and laws can raise or lower the level of benefits.

A Special Class of Column B: Challenges to Laws Per Se

Instead of choosing noncompliance with a law that makes some behavior civilly or criminally wrongful, of bringing a claim under current law that provides for redress for civil wrongs, or of applying for some status change, title determination, or for the receipt of benefits, a would-be litigant may opt to challenge a law as such. One might claim that a law is unconstitutional or that a rule conflicts with a statute that must take precedence; one might seek to have a judge modify a present provision in the common law in order to keep pace with changing social mores.[1]

Although the number of such suits would probably be small in nearly all instances, such suits might be very time-consuming: out-of-court settlement would be improbable; full trials would be likely; and at least one appeal would also be likely. With one interested party pursuing a challenge to the law, other interested parties have the attractive option of merely waiting to see the outcome. In that situation, one might suppose that events in this class would not in themselves have much effect on the numbers of cases that reach the courts. But at least one possible secondary effect might be very significant for the demand for court services: some laws might in effect be delayed in their operation while a challenge is being heard. Such delay could happen with an injunction, or it might happen informally, with litigants deciding to delay the filing of their suits until the outcome of a challenge is known.

COLUMN C

The essential similarity of the C cells in the matrix is that the boundaries defined by a law are actually invoked and some unwanted event occurs. Denial of a claim or application gives the claimant/applicant a "no" when a "yes" was sought. Individuals seeking to evade compliance with a regulation are unlikely to welcome any notice of their noncompliance.

Although factors other than statutes could affect the sizes of the sets represented in column C, the impact of sweeping changes (wars, prosperity or depression, shifts in public morals) is more likely to affect the cells in column A or, perhaps, those in column B.

One can more readily imagine impacts in column C that are the consequences of changes in laws or administration: stricter (or more lenient) scrutiny might be imposed in judging applications for such things as welfare assistance or adoptions; agents whose task is to enforce regulations may give special scrutiny to some kinds of behaviors; claims for compensation for civil wrongs could be made more doubtful or more obviously valid.

COLUMN D

The similarity among the cells in column D in the matrix is apparent. The sets defined are the people who choose to dispute the unwanted event that has occurred. All the D cells would be affected by such things as increases in litigiousness, a psychological need to dispute, in the population and by a general belief among people that those who dispute, win. The converse of these conditions would have equally

significant effects, of course. In addition, heightened competition among lawyers might result in increases in the per capita supply of attorneys and lead to lower fees, which in turn could result in larger numbers of people who choose to dispute. Laws can also affect such phenomena, for example, by providing for lowered costs for legal services. Changes would probably be felt more particularly in some categories than in others. If lawyers were newly within the reach of poor people and if poor people had been previously unlikely to dispute many criminal charges or most benefit denials, the sets represented in cells 1-D and 4-D might grow more than those in 2-D and 3-D. Poor people with newly affordable legal services might also tolerate fewer civil wrongs or seek more changes in status or regularization of titles to property.

COLUMN E

Disputes can be settled or forgotten or resolved by third parties who are not court employees. A change in the effectiveness of such other adjudicators can have an important impact on all of the sets represented in column E. Skilled arbitrators and mediators may resolve disputes that would otherwise find their way to courts, and an increase in the number of such personnel might reduce the sizes of the sets in column E. In fact, there have been proposals for such things as neighborhood dispute resolution centers as a means of reducing those sets. Such proposals also reflect a hope of just getting neighbors together to talk things over and thereby settling disputes outside the courts.

COLUMN F

Courts can be costly, forbidding, backlogged places, to which one turns only as a last resort. Courts can be places where one risks especially unwelcome judgments in the event that a dispute is lost. Or courts can have the opposite characteristics: one can fail to resolve a dispute because of the expectation that a more advantageous outcome may occur in court; judges or jurors may be considered likelier to agree with one party to a dispute or to grant a more generous settlement. The sizes of the sets in the F cells, the number of people who actually go to court, depend in part on such factors. There are nonstatutory events that can have such effects—public outcry about a rash of muggings may cause judges or juries to deal harshly with those accused of mugging, causing those who might have been tempted to dispute such an accusation to

seek instead a bargained resolution of the matter rather than a full-dress trial—but one can more easily imagine such effects from statutes, especially those that we earlier referred to as a possible category 5, statutes that directly define the size and scope of court organizations and procedures. Such laws are not shown horizontally, in the matrix, with the substantive categories 1 through 4, but are rather thought to be "vertical" effects, important for the caseloads of courts insofar as they stimulate or deter the bringing of substantive disputes.

UNDERSTANDING IMPACT IN TERMS OF THE MATRIX: SOME EXAMPLES

In terms of the matrix, one can categorize statutes and other events according to whose behaviors are (or will be) affected. As noted above, some events could affect an entire column; others could cover an entire row. In addition, some phenomena could cover two columns, or three cells within a column but not the fourth, or three cells within a row but not the other three, and so forth. Still, it should be possible to use the matrix to at least generally identify the behaviors one needs to know in order to predict the caseload volumes that will result from a given event.

In an initial test of that use, this section reviews some statutes for which we have information concerning the caseloads that resulted from them. Two questions are of interest: First, can statutes and other phenomena of interest be reasonably unambiguously understood with respect to the terms supplied by the matrix? Second, does the scheme draw attention to the important characteristics of interest for further analysis?

ROW 1: CRIMINAL STATUTES

Criminal statutes clearly are among those that explicitly seek to regulate behavior (although there are also some statutes that have civil sanctions in this category). Professor Paul Froyd accepted the Panel's invitation to review the impact on the courts of a Massachusetts act that required sentences of no less than one year upon conviction of unlawfully carrying a firearm.[2] The Bartley-Fox Act (Massachusetts General Laws, Chapter 269: 10(a)), was meant to be " 'preventive', that is to be such an effective deterrent that eventually, hardly anyone would be required to suffer the inflexible punishment" (Froyd 1978, p. 1). Others

argued that unfair penalties would result and that the courts would suffer undue burdens. Froyd (p. 2) reports further:

> It was also argued that judges and prosecutors, more sympathetic with the defendant than with the new law, will give defendants the benefit of every doubt.

Froyd reports that he and his colleagues found "no evidence that the Massachusetts Gun Law aggravated the Massachusetts court system's case load problems" (Froyd 1978, p. 85). Rather, they found a steady decline in the number of cases involving guns, a finding to which no easy explanation could be attached. Citizen compliance with the law might have played a part, the use of discretion in systematic ways by actors within the criminal justice system may have been important—or the finding may be an artifact of other, perhaps random, processes.

In terms of our immediate task to assess the feasibility of predicting the numbers of cases and other effects of new legislation, we learn at least three things from the Bartley-Fox experience. First, in terms of the matrix, some estimate of the numbers of people who are apparently not in compliance with some regulation (cell 1-B) is both an important datum and one not easy to obtain. Second and perhaps more interesting, there were changes in system processing, which Froyd characterized as adaptation. Processing statistics and supporting interviews (especially in the Springfield District Court) indicated that facts that could have supported a "carrying" charge (i.e., the subject of the new statute) often resulted in a "possession" charge instead (Froyd 1978, p. 29). Processing, and especially sentencing, flexibility was thereby preserved. Third, in view of Froyd's observation that "public pressure may have heightened the court's sensitivity to the need for all deliberate speed" (Froyd 1978, p. 29), the Bartley-Fox experience includes a simultaneous nonstatutory event that altered the nature and magnitude of the impact that some observers may have expected. In sum, Froyd's study suggests the difficulties of predicting impact.

That suggestion is supported by a retrospective study on the decisions to criminalize the sale and possession of marijuana, done for the Panel by William McDonald (1978). McDonald asked whether at the time, about 50 years ago, legislators could have anticipated the number of prosecutions that would result from statutes that made marijuana sale and possession illegal. McDonald argues that, while one might have been able to gather some sketchy information on the number of people who used marijuana before the statutes were enacted, only gross estimates would have been available on the proportion of users who would fail to stop their use. Moreover, the key determinant as to the

number of cases that would eventually come to courts in this kind of criminal law violation, in which ordinarily there is no complaining party, is the amount of effort by the police in seeking violators. McDonald demonstrates that that effort has proved to be particularly sensitive to outside events, such as levels of public attention to marijuana use—"vertical" effects at cell 1-C—which are virtually iinpossible to predict. McDonald reminds us, too, that the social changes decades later, which resulted in substantial growth in the number of marijuana users, could not have been foreseen at the time of enactment of the antimarijuana laws. One might have predicted further growth in marijuana prosecutions at the time when such prosecutions were in fact rising, but without a much better understanding of the processes involved, rates of growth (and the point at which growth would slow) could not have been predicted.

ROW 1: CIVIL STATUTES

The Panel considered reviews of two civil statutes that sought to regulate behavior but that were very different as to the numbers of cases that were brought pursuant to them: the World War II effort to control prices and rents and the early 1970s effort to regulate the environment. In fiscal years 1945 and 1946 the Office of Price Administration (OPA) cases accounted for more than half of the civil cases filed in United States district courts, or almost 60,000 cases. In contrast, for the six fiscal years of 1970–1975, a total of 654 cases involving the National Environmental Policy Act (NEPA) were filed (Liroff 1978, p. 9). A basic reason for the difference is the size of the sets represented by cell 1-A in the matrix. NEPA requires that federal agencies must prepare an impact statement on all major federal actions significantly affecting the quality of the human environment; the target of price controls was a far larger number of people engaged in a far larger number of transactions. Since NEPA took effect on January 1, 1970, about 9,000 environmental impact statements have been prepared (Liroff 1978, p. 2). In comparison, OPA activity covered more than 600 price and rent regulations, the prices of some 8 million different articles and 20 categories of rationed goods, several million rental dwellings, and some 3 million business establishments.

In considering the 1-B cells in the matrix, i.e., the proportion of those persons who are apparently engaged in a regulated activity who are apparently not in compliance with the regulations, many of those who were the objects of regulation in both the OPA and the NEPA instances changed their behavior after a learning period had taken place. Liroff

(1978, p. 6) reports that with NEPA there was substantial uncertainty as to the real import of the act, and as to the scrutiny that courts would give to the environmental impact statements, until the landmark Calvert Cliffs decision in 1971.[3] Agencies learned what they had to do in order to comply. So, too, did those to whom World War II price regulations had applied (Clinard 1952, pp. 107–115).

But a dynamic situation prevailed in both instances at cell 1-C, i.e., the number of those apparently not complying who are accused of not complying. As agencies learned about NEPA, so too did those who might use the act's provisions to challenge agency decisions. Liroff points to the growth, both in size and in sophistication, of groups seeking to defend the environment (in their view); industry and trade association groups, too, learned to use NEPA in defending their interests (Liroff 1978, pp. 5 and 18–19). With respect to OPA, the size of the enforcement staff grew every year between 1941 and 1946. Thus even though there is some evidence to suggest that fewer violations were occurring, it is probable that a larger proportion of those violations were being pursued. The net result in each instance was that the numbers of cases for courts did not decline as the apparent number of violations declined. Dynamic forces—feedback, learning—were at work. And significant court decisions affected, at later dates, the numbers of cases that were brought to court. Options and possibilities were opened or closed by judicial decisions; in terms of the matrix, we might think of them as simultaneous (in practical terms) nonstatutory events: "vertical" effects at column C or column F.

Could the effects have been predicted before the enactment of these statutes? One might have grossly predicted that more cases would be brought pursuant to the OPA regulations than would be brought under the NEPA. But very importantly, this brief review shows that the processes that lead to court cases are dynamic, subject to learning and feedback, and affected by nonstatutory events, including judicial decisions. In order to estimate the number of court cases that will result from the enactment of new statutes, we must understand those processes.

A STATUTE WITH EFFECTS AT ROW 1 AND AT ROW 2

The fair employment provision (Title VII) of the Civil Rights Act of 1964, which prohibited discrimination in employment based on race, color, religion, sex, or national origin, is an example of a statute with effects at rows 1 and 2. It established the Equal Employment Opportunities Commission (EEOC), but with negotiation and conciliation author-

ity, not direct enforcement powers. The attorney general of the United States was authorized to sue in federal court to redress a "pattern or practice" of employment discrimination. Aggrieved individuals were allowed to sue after first having had recourse to the EEOC. Courts were authorized to provide a full range of equitable and civil relief, including awards of back pay and reasonable attorney's fees, to prevailing non-governmental parties.

The behavior of the attorney general might have been the easiest to predict at the time of enactment of the statute. One might have predicted the filing of a relatively small number of relatively long-duration cases. "Pattern and practice" suits were meant to be the difficult ones; by taking these on, the attorney general might hope to set a tone for other negotiations by the EEOC or by private parties or indeed to make negotiations unnecessary as employers ended their discriminatory practices in the light of actions brought by the attorney general. Such a prediction, from a basis of a general understanding of the role and functions of attorneys general, would have been correct.[4] There is no evidence that observers feared that suits brought by the attorney general would be so numerous or so burdensome as to severely and negatively affect the operations of federal courts.

Suits brought by private parties under Title VII presented a totally different picture. In the terms of the matrix, the sizes of all but one of the sets in row 2 would have had to be estimated. The set represented at cell 2-A was known: some 29 million employees were covered after the act had been fully phased in. Taylor *et al.* (1978) report no evidence of attempts at predicting what proportion of those 29 million would seek redress from an employer and be denied it and would ultimately come to the EEOC. Interestingly, they do report on some casual assessment of experience with state Fair Employment Practice Commissions: the fact that only 0.1 percent of cases brought before these forums resulted in state court cases was thought significant (Taylor *et al.* 1978). But such state experience was in various and significant ways different from what was contemplated for the EEOC. The laws were different as to scope, and the powers and duties of various state Fair Employment Practice Commissions varied. More significantly, at least from the vantage of hindsight, the difference in what historians might call the spirit of the times—between the pre-1962 state-level experience and what might have been predicted with respect to the Civil Rights Act of 1964—was not taken into account in debates that at least in small part considered predictions of court impact.

A political commitment to secure civil rights in the early to mid-1960s probably stimulated more aggrieved individuals to seek redress than

would have been the case had the political mood been different. Yet insofar as the behavior norms meant to be changed were deeply rooted, most claims for redress might have been expected to be denied. The political mood once again probably made some difference as to the proportion of claimants who would dispute a denial of redress. But at cell 2-D of the matrix, the impact of the EEOC would be significant; complaints could be made cheaply and easily with little formality and insignificant expense (compared to hiring a lawyer, for example).

The EEOC, in turn, reinforced by the political mood and bringing with it a sense of government intervention and occasionally perhaps a certain fear of action by the attorney general, had considerable effect, according to Taylor *et al.* (1978). They report that "hundreds of thousands" of complaints were filed with the EEOC in the 14 years following enactment, and there were approximately 20,000 lawsuits in the same time period. Thus the effect at cell 2-E, with respect to the number of disputes resolved without resort to courts, was considerable.

The advantages of hindsight might suggest that some of this might have been predictable. While we recognize that in 1964 no one could have forecast later important events that affected American society, the elements we have identified here might have been a better basis for estimating the number of cases than that provided by reference to state Fair Employment Practices Commissions. The political role of the attorney general was as well known in 1964 as it is now. The political mood would have been somewhat more difficult to predict, but it was known that the behavior norms meant to be changed were deeply rooted. However, only rough perspectives based on intuition as to the numbers of cases that might be brought would have been possible, and these would inevitably have been given little weight, might well have been ignored, or might well have been challenged by other intuitions. Simple analogies to apparently similar experience can be seriously misleading; account must be taken not only of statutory differences but also of factors such as "political mood." Yet even to say "political mood" is to signify the need for better conceptualization of the factors involved, in short, the need for theory development.

ROW 2: LAWS THAT PROVIDE REDRESS FOR CIVIL WRONGS

As defined above, cases in row 2 include private claims for damages usually inflicted unintentionally—e.g., damage to one's person or property or failure to live up to a contractual obligation. Wholly new kinds of civil wrongs are rarely created by legislation that does not mean to regulate behavior explicitly (which would be classified in row 1). Legis-

lation can modify the need to sue, however, or the opportunities to take cases to court, through alternative schemes for compensating damaged parties or through jurisdiction rules. This section briefly reviews two such statutes: (1) the adoption of no-fault automobile insurance and (2) proposals for changes in diversity of citizenship cases, cases in which a citizen of one state is involved in a controversy with a citizen of another state or a foreign country, which may be brought in either federal or state court.

Claims for damages arising out of motor vehicle accidents have traditionally been evaluated on the basis of who was at fault in the incident. But in recent years some states have adopted no-fault legislation, specifying that those incurring damages would be compensated (up to some limits) by their own insurance carriers, instead of seeking compensation from another party (or from another party's insurance carrier). The effect in terms of the matrix would be at cell 2-C, reducing the proportion of those who were wronged whose claims for compensation were denied. With the size of the set represented at cell 2-C made substantially smaller, it should follow that the numbers whose claims were eventually brought to courts would be substantially smaller.

Proposals for changes in (or the elimination of) diversity of citizenship jurisdiction in the federal district courts are similar in that they would affect a particular set, represented at cell 2-F in the matrix. Currently, citizens of one state who are wronged by citizens of another state have an option of having their cases heard in the federal courts, even though their causes of action arise under the laws of a state, in the belief that federal courts would protect out-of-state parties to a suit from favoritism (or the possibility of favoritism) on behalf of the local defendant. A bill to virtually abolish diversity of citizenship jurisdiction in the federal courts passed the U.S. House of Representatives in 1978, and similar proposals have been heard in recent years, usually in the context of concern over increases in the number of filings in the U.S. district courts.

In the instance of no-fault insurance statutes, insurance company statistics and records of the numbers of motor vehicle accidents provide fairly exact data on the size of the sets in the matrix for an impact analysis. In the instance of proposals for eliminating diversity of citizenship jurisdiction, records of court filings provide an exact count of the number of cases that would apparently be affected. That knowledge in each instance improves the prospects for estimating the decline in the number of cases to be anticipated. Moreover, there is little ambiguity in the statutes (unlike, for example, the National Environmental Policy Act).

But even in these instances, the analyses suggest a need for understanding more than just the provisions of a statute, a need for understanding the behaviors of the parties involved in the disputes that may eventually lead to court cases. In Massachusetts, the first state to adopt a no-fault automobile insurance law, not only did the number of personal injury cases decline, but suits alleging property damage also declined. Bovbjerg (1977) believes that claim for property damage was often brought as a rider to a basic bodily injury lawsuit. Thus, even though legally independent, the property damage claims were not brought after the adoption of the no-fault legislation that covered personal injury because the primary claim, the bodily injury claim, was not brought. More difficult to explain is the substantial difference in rates of decline of bodily injury suits in three states that adopted similar no-fault statutes, Massachusetts, Michigan, and New Jersey. The rate of decline in Michigan may, in effect, have been delayed in that state until the Michigan Supreme Court rejected a challenge to the statute's constitutionality 2 years after enactment. In effect, an outside event intervened. But there was nothing similar, apparently, to account for the very large difference between the Massachusetts and the New Jersey trial courts of limited jurisdiction rates of decline in numbers of cases in the third and fourth years following the adoption of similar laws. And in Delaware, where mandatory no-fault coverage was required and expected to have some effect even though an unchanged fault-based system was also left in place, no effect at all could be found (Clark and Waterson 1977).

To explain these differences, one must consider factors other than the no-fault statutes themselves, and such considerations must also apply to an analysis of proposals to eliminate diversity of citizenship jurisdiction from federal trial courts. The question arises of how many who now bring cases on this jurisdictional basis would find another jurisdictional basis for bringing their cases to the federal courts. In her presentation of material from an earlier Judicial Council report, Susan Martin (in this volume) notes that rises in the minimum amount in controversy have had no discernible dampening effect on the numbers of cases filed in U.S. district courts. The amounts for which recovery was asked were apparently simply inflated to meet the new minimums. Of course, discovering a federal question in a case where diversity of citizenship jurisdiction would have applied might be more challenging than inflating a damage estimate, but the more general point is nevertheless illustrated that key factors in estimating impact are the desires and motivations and opportunities of the parties for potential lawsuits. And diversity of citizenship proposals may be easier to analyze for

court impact than most other proposed or enacted legislation. The size of only one set in the matrix needs to be estimated; there is considerable information in hand. At least those proposals that leave few alternatives for plaintiffs in diversity of citizenship cases to find other jurisdictional grounds for filing in federal court may result in nearly all such cases being diverted to state courts as intended.

ROW 3: STATUS CHANGES AND TITLES TO PROPERTY

Some status changes can be the subject of real disputes, such as *habeas corpus* hearings, child custody or adoption cases, and contested divorces. And of course some titles to property may be disputed. In such instances, a process substantially similar to that we described for row 2 laws would prevail.

But many or most status changes (at least of certain kinds, such as marriages and, increasingly, divorces) are not the subject of real disputes. They are, however, the subject of court actions. In terms of the matrix, cell 3-B is the equivalent of cell 3-F: those who apply for a status change or a title transfer apply to the court. Of course the workload meaning of "cases" in which no real dispute exists may be very different from that of disputed cases. We have, then, another reminder of one of the key points made in Chapter 2: the workload meaning of cases varies, and some account of it must be taken even though there are considerable difficulties in doing so.

ROW 4: STATUTES CONFERRING DIRECT MATERIAL BENEFITS

Governments give things, usually money, to people deemed needful or worthy. Welfare laws have this aim, as do laws providing for old-age pensions, for benefits to veterans of the armed services, and for compensation to victims of crime. Among other things these statutes have in common is the fact that those who seek to take advantage of them must apply and have their applications considered in an administrative structure.

In 1977 there were 1,236,700 claims to the Social Security Administration and the state agencies with which it contracts for disability insurance payments (Schwartz 1978). From this very large number at cell 4-B in the matrix, only a very small proportion eventually go to court: benefits are much more frequently granted than denied; of those whose applications are denied, not all dispute the denial; of those who appeal through the Social Security Administration's elaborate hearing and appeal system, only a small number eventually resort to court

processes. In 1977 the number of cases filed seeking judicial review of the denial of claims totaled 6,658. Schwartz (1978, p. 5) says:

> There is a basic puzzle about the claimants' decision to appeal. If the success rate of those cases which are appealed is applied to the value of a grant of benefits and compared to the monetary costs of an appeal, the number of appeals seems surprisingly low.

Schwartz suggests some reasons for the small number of court cases: first, those cases not appealed may be systematically less meritorious, with weaker claims being weeded out, perhaps on the advice of counsel; second, those who fail to appeal may simply find litigation unpleasant; and third, some claimants may simply fail to understand their right to appeal. Perhaps more intriguingly, Schwartz suggests (1978, p. 7):

> It is also suspected that over time, the Social Security Administration may have gradually grown more liberal in its grant of benefits. If this is so, it would appear also to lead to a reduced incidence of appeal—at least in the short term. As a more liberal policy is adopted, the pool of cases which emerges as denials should be weaker and yield a lower possibility of reversal by the courts. This in turn should lead to a lower appeal rate.
>
> The long term effect of liberalization may, however, be ambiguous. A more liberal practice may lead to an increase at the margin in the number of cases filed—many of them presumably of doubtful validity. This increase, particularly if there is no proportional addition to decisional resources, will require a new trade-off of outlay and expected error by the agency. The way in which this is done will have a complex effect on the pool of cases available for review.

In short, dynamic systems cannot be well understood through static analyses. An analysis of impact that failed to take learning and feedback into account would at best be of limited, short-term use.

A review of plans that provide compensation to victims of crime revealed that they have been too recently adopted to be useful with specific regard to cases that eventually come to courts. But some information is available with respect to earlier points in the administrative process, especially about factors that affect the proportion of those apparently eligible for benefits who in fact apply, cell 4-B in the matrix. In states in which police notify victims of their rights to apply for compensation, rates of growth in filings applications for benefits have been considerable: California, for example, experienced a growth of 194 percent in filings from fiscal 1974 to fiscal 1975. But in most states the public is unaware of the programs, and people who could apply for money simply do not. In addition to elements in different statutes that may make applications for benefits unattractive (such as residence

requirements and limitations on amounts permitted to be awarded), the restrictiveness of the boards that make awards determinations apparently makes a difference. A board in one state that diligently investigates claims apparently deters claims by people who believe they run the risk of a finding that they have been in some sort of illicit complicity with the guilty person or have had a questionable relationship with him or her. Among the factors an analyst of judicial impact would have to estimate, apparently, would be the restrictiveness or liberality of board policies.

An interesting example of an attempt to prospectively assess the impact on courts of proposed new legislation occurred in 1977. The U.S. Department of Justice submitted a "justice impact statement" to the Senate Committee on Veterans' Affairs on S. 364, a bill that would have for the first time subjected final administrative determinations of the Veterans Administration to review in the federal courts. The impact analysis was presented by Deputy Assistant Attorney General Paul Nejelski at a Senate committee hearing (on August 31), and some details of the analysis appeared in a subsequent article (Davis and Nejelski 1978). In the terms of the matrix, the task was to estimate the size of the set represented at cell 4-F. The number of veterans (cell 4-A), the proportion who apply for benefits (4-B), the proportion whose applications are denied (4-C), the proportion who dispute the denial (4-D), and the proportion who fail to resolve the dispute without recourse to court processes (4-E), in this case through administrative appeals, were all known. The size of the set at cell 4-E was 22,900 in fiscal 1977; an estimate was needed of what proportion of those cases would become court cases. The staff at the Office for Improvements in the Administration of Justice at the U.S. Department of Justice applied the experience with the Social Security Act and on that basis estimated that 20 percent of the denials, or 4,600 cases, would be appealed to the U.S. district courts.

Such an analysis is based on the assumption that the phenomenon to be estimated is critically similar to the phenomenon about which one has data. In this instance there were several similarities: the Veterans Administration and the Social Security Administration are both in the business of conferring direct material benefits on certain categories of people; their denials were administratively appealable; and the benefits programs in the agencies are very large. It would appear that the choice of the Social Security Administration was rather a good one, and there may well have been no better choice available. Yet one could point to potentially important differences between the two populations of recipients or potential recipients of benefits. Veterans can join organizations

that represent their interests, such as the American Legion, the Veterans of Foreign Wars, etc., while that option is not easily available to persons of retirement age. One might plausibly propose that retired or disabled persons eligible for social security benefits are a class of people who might be especially disposed not to dispute or to sue, whereas a middle-aged male population of veterans might be expected to dispute or to sue more frequently than the population as a whole.[5]

LAWS DESIGNED TO MINIMIZE BURDEN OR RESTRICT ACCESS

Measures designed to alleviate burden are in fact an easier form of impact analysis, but one not often encountered. In general, an impact analyst would be dealing with legislation where known behavior patterns (in terms of the matrix) were involved. That is, repeal of or amendments to laws that are designed to restrict access will come in terms of categories where behaviors, propensities to sue, and the like may be demonstrable from past experience.

OTHER EVENTS: SOME SPECULATIONS IN TERMS OF THE MATRIX

Phenomena other than the adoption of new legislation can bring about changes in the numbers of cases that are brought to courts. Some events may be sudden and pervasive: war or revolution would presumably affect the sets represented at each of the 24 cells in the matrix. Other phenomena may be pervasive but gradual: changes in societal mores, for example, or a gradual increase or decrease in a nation's standard of living. Other events may be discrete, perhaps brought about in part by legislation that can be categorized in one of the four rows offered in the matrix but that has consequences that are vertical in the terms of the matrix. Two examples may make this point clearer.

National health insurance would be a statute that conferred direct material benefits. Undoubtedly, some cases would arise over which benefits were included and which were not, which beneficiaries were eligible and which were not, etc. But if the existence of such insurance made people healthier, perhaps by helping to bring about longer life spans, the numbers of persons represented in all the cells in column A might grow, at least eventually. An even clearer example, inasmuch as it is more proximate to courts, would be the widespread adoption of legal insurance plans (whether fostered by legislation or not). If legal care plans were provided as a government benefit, some cases would again undoubtedly arise as to eligibility, etc. But another real consequence of such plans might be found at all the cells of columns D, E,

and F: an overall increase in the numbers of those who dispute and go to court.

Revolution, economic change, health insurance, natural disasters, and new legislation have in common a potential for changing behaviors in ways that may affect the numbers of conflicts, disputes, and court cases experienced in a society. A matrix such as the one in Table 3 can help identify the behaviors that may be affected. But what such a matrix cannot do, of course, is supply the prediction of behavior. We turn to that subject following a summary of our analysis of case studies in terms of the matrix and what that may suggest for the prospects for estimating impact.

SUMMARY AND CONCLUSIONS

Although we found no instance of legislation for which the analytical task of estimating impact was simple, the difficulties posed were more numerous in some instances. It may be easier, for example, to estimate the impact of an event that has its effect in column F of the matrix, involving decisions to go to court, than to estimate the impact of an event that has its effect in column A, involving activity perhaps without regard to legal definitions. In the latter instance we would have to estimate the changes, if any, in the sizes of the sets represented in columns B, C, D, E, and F before being able to make a prediction. If the proportions in each column did not change, the matter would reduce to simple arithmetic, of course. But to assume that would be to make at least five different assumptions, and any incorrect assumption would result in an error at the key point, column F, the number of cases that will go to court. The alternative, estimating the size of each set that intervenes between column A and column F, is only a little more attractive. As with any assumption, any estimate in error would mean that the final estimate of cases that go to court would be wrong. The general point is that the more estimates or assumptions to be made, the greater is the chance of an erroneous final estimate.

Another way of making that point is to observe that the smaller the number of behaviors it is necessary to predict, the better the prospect for accurate prediction. Estimations specific to single sets (or cells, in the matrix) are likelier to be accurate than are impact assessments that require estimates of the sizes of more than one set. Events that have effects in column F require an estimate of the size of only one set. Events that have effects in other columns frequently require several estimates.

The prospects for statute-specific impact prediction, then, are best

when that which is to be predicted is narrow, when that which is to be predicted is specific to a group of people about whose probable behaviors something is known, and when the impact occurs at or close to the actual point of the decision to go to court (rather than earlier in a dispute). Consequently, the effects of what would generally be regarded to be the most significant pieces of legislation are the most difficult to predict. Statutes such as the Civil Rights Act of 1964 and the National Environmental Policy Act (NEPA) were pieces of legislation without substantial precedent, so that little was known about probable behaviors. Both were phenomena that affected whole rows, in terms of the matrix, meaning that fairly precise estimates of the numbers of cases that would be brought to court would have been very difficult. And indeed in both instances, but perhaps especially in the instance of NEPA, the boundaries of the sets, defining who was covered when engaging in what behaviors and under what circumstances, were not well specified. If the fundamental task is to estimate the sizes of sets of people, then when the boundaries of the sets are not well marked, the estimation is doubly difficult. Not only must one predict who will join a set, by predicting the behaviors of people, but one must also predict where the set of boundaries will be. The NEPA underwent considerable appellate litigation before the limits of the statute were known to any reasonable extent. In such a circumstance, the cautious choice for one who would forecast court impact would be to wait—until the appellate courts have in effect finished writing the law. Short of that, if a forecasting need were more pressing, contingent forecasts might be made, on the order of "if x then 1, if y then 2." Yet while that might solve the forecaster's problem, it would not meet a need to know the number of cases that one might expect following an enactment.

Thus we have identified another troubling factor with respect to statute-specific estimations of impact: vagueness in the set boundaries defined (or ill-defined) in statutes. Estimating the behaviors of people as they enter sets or do not enter sets is difficult enough, but when several such sets must be estimated and when the problem of vague boundaries is added, the problem grows substantially.

There are still further difficulties. In the legislative process, bills usually go through many versions: amendments, compromises, rewrites, conference modifications, etc., may have the consequence of seriously changing the scope, the coverage, and indeed the very nature of a bill. Were impact analyses to be performed at an early stage in the legislative process, all of these later modifications might make any forecasts obsolete well before passage. This is even before any court interpretations, which as we have suggested may be very consequen-

tial. In this vein, we may also mention the need to take into account the separate appropriations process within most legislative bodies, which significantly affects many laws. Without funds, apparently significant legislative determinations may be only symbolic.

A further set of complications has to do with simultaneous events, either legislative or nonlegislative. (The separate appropriations process may fall into this category, being essentially simultaneous.) New criminal penalties could be accompanied by a freeze in hiring on police forces. Laws proscribing interference with union organizing may be accompanied by a general rise in productivity, making union demands easier for employers to grant and making unions less threatening. Or competition (perhaps stimulated by advertising) among lawyers, or the spread of legal insurance plans, may occur simultaneously with the enactment of some substantive piece of legislation, resulting in lowered costs for disputation. These examples share the characteristic that they have vertical effects in the terms of the matrix.

PREDICTING BEHAVIORS

The discussion to this point has been concerned with defining whose behaviors it would be necessary to predict in order to estimate the numbers of cases that may result from a new statute or the number of cases that may be stimulated by some nonstatute event. Yet the problems of the would-be predictor do not end with those estimates, but rather extend critically to the need to make the actual prediction. Therefore, one must bring to the problem of prediction some careful understanding of the ways in which the behaviors of particular groups or individuals will change in response to a particular event. In other words, theoretical understanding is required.

In the estimations of impact with which we are familiar, assumptions about the ways in which people will behave have been typically simple, one-way relationships that usually do not take into account the ways in which the behaviors of other actors may affect the behaviors of that set of people who would presumably be most centrally affected by the change. In a report to the Judicial Council of California, for example, Ralph Andersen and Associates developed a checklist procedure for determining the impact of legislation on the courts that failed to indicate how an analyst might make a judgment about the behaviors of parties to cases (Ralph Andersen and Associates 1974; see also Ralph Andersen and Associates 1975). But in two of the examples of impact analyses appended to their report, such judgments were crucial and were made.

In analyzing a bill that proposed an increase in the per diem payment to trial jurors, civil litigants were thought responsive to costs of litigating (Ralph Andersen and Associates 1974, p. A-4):

> An increase in juror fees will make access to the courts more difficult for some civil litigants. This is because the party requesting the jury trial in a civil matter must be responsible for paying in advance the daily juror fees. . . . Therefore, the impact on caseload may be in the nature of a reduction in civil cases going to jury trial to the extent that the increased fees act as a deterrent.

And in reviewing a proposal that sought to eliminate plea bargaining, the project team (Ralph Andersen and Associates 1974, p. D-4) thought that a consequence would be:

> . . . a significant increase in the number of cases going to trial. Presumably, if a defendant has nothing to gain in pleading guilty, he will proceed to trial on the basis that there is no better alternative.

We are not surprised at the notion that defendants in criminal cases would seek ways to avoid penalties or to mitigate their severity. Yet at least three possibilities occur that would cast serious doubt on the Andersen team's conclusion that all of the cases that would otherwise end in bargained pleas would be tried if the proposal were to be adopted. First, defendants might still win lighter sentences with pleas of guilty, if judges were to engage in a kind of silent bargaining. Second, prosecutors' behavior might change: some defendants might have their cases dismissed, saving the prosecutor the effort of developing evidence in the face of the uncertain rewards in marginal cases that previously were terminated in bargained pleas of guilty. Third, if the very processing of a case is part of the cost to the defendants, a plea of guilty would allow escape from that cost even when no sentence reduction was won in exchange for the plea.

The general point, that understandings of the behaviors to be predicted have been elemental rather than complex, can also be illustrated with reference to impact estimates made for proposals to modify diversity of citizenship jurisdiction in U.S. courts, noted above. Neither the study authored by Senator Q. N. Burdick (1971) nor that authored by Flango and Blair (1978) made any substantial attempt to judge whether parties to a civil action now heard in the federal courts would do anything other than meekly repair to state trial courts following the adoption of the proposed limitations. Yet attorneys might under some circumstances bring the action as a federal question or take some other

actions that might bring their cases within the purview of the federal courts. Indeed, when the amount-in-controversy requirements were raised in 1877 and again in 1911, there was no discernible reduction in the numbers of actions brought, the implication being that damages sought were simply inflated by at least some attorneys.

Since we recognize that good theory to explain these behaviors is for the most part lacking, we offer these examples by way of illustration rather than to criticize the analyses. Indeed, at least two prospective estimates of impact were made in explicit awareness of the limitations imposed by the lack of elaborated theory. In analyzing provisions of bills that would reduce or eliminate diversity of citizenship jurisdiction, R. F. Keller, the Deputy Comptroller General of the United States, noted in a letter to Peter W. Rodino, Jr., Chairman of the Committee on the Judiciary of the House of Representatives (published in U.S. Congress 1977, pp. 283–292):

> Thus, barring plaintiffs from bringing actions in the Federal courts in their own States could reduce the Federal caseload. However, we cannot realistically determine the impact. It would be pure speculation to estimate how many plaintiffs, if barred from filing complaints in the Federal courts of their own States, would invoke the jurisdiction of other Federal courts. . . .
>
> Further, it would be speculation to estimate how many defendants would exercise the right to remove a case to the Federal court where the plaintiff resides if the plaintiff had brought the action in his own State court.

And Davis and Nejelski (1978, p. 22) are explicit in facing the difficulty of predicting in the absence of a reliable basis on which to predict:

> A general lack of data or experience with comparable legislation or statutes made it difficult to assess the impact of section 3 (rule-making) and 4 (attorney fees). For example, section 3 might encourage an undetermined number of challenges to V.A. actions which do not involve a denial of individual claims. By removing the current $10 limitation on attorneys fees, section 4 would provide attorneys a greater incentive to represent V.A. claimants. Cases in which claimants are represented by counsel probably would raise more issues, thus taking more time to resolve, and attorneys representing claimants who received adverse determinations from the V.A. probably would be more likely to challenge V.A. rulings in the district courts. These factors generally would increase the number and complexity of V.A. cases that would be filed in the district courts under S. 364.

The need for theory is central, and previous impact assessments have been substantially hampered by an absence of available theory.

NOTES

1. Some legislation may provoke challengers: a law that embodied rules that were thought very disadvantageous by some group with the resources and the motivation to sue would be particularly open to being challenged.

2. Professor Froyd's work was carried out as part of a major project supported by the National Institute of Law Enforcement and Criminal Justice.

3. *Calvert Cliffs' Coordinating Committee* v. *Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

4. From 1967 through 1972 (when significant amendments to the law were passed), the number of U.S. plaintiff civil rights suits filed varied from 67 in 1968 to 154 in 1971. In 1972 the 132 cases represented only 2.2 percent of the total civil rights actions filed. These were, however, more burdensome cases than those brought by private plaintiffs. The median number of months taken to terminate U.S. plaintiff civil rights cases in 1972 was 8.5, whereas the comparable figure for federal question jurisdiction cases was 6.76. (U.S. plaintiff cases are those brought by the attorney general; cases brought by private parties are brought under federal question jurisdiction.)

5. The proposed law making veterans' claims appealable was not adopted, so one cannot evaluate the analysis that was done.

4 Estimating Caseloads: Techniques and Theories

In the preceding chapter we considered the kinds of behaviors one would have to understand in order to predict the impact of a particular new statute or other event; in Chapter 2 we considered the kinds of changes that might be consequential for courts, including changes in the numbers of cases seeking judicial services, changes in the mix of those cases, changes in the resources supplied to courts, and changes in societal variables. The projection techniques and the theories reviewed in this chapter consider not particular changes in demand but rather patterns of aggregate demand. Of course, changes in number can be forecast for particular case category types, and in that way some sense of the input mix might be gained. It is reasonable, however, to seek to forecast numbers of cases even if mix or resources supplied or societal variables cannot be forecast.

Knowing something about the levels of demand for judicial services is useful to those who are concerned with the operation of courts. There is an (often assumed) axiom that increases in demand should not be allowed to affect the quality of services rendered, that courts in which demands are increasing should be given more resources lest quality, or output mix, or output number of decisions changes in unacceptable ways. Hence there is concern about future caseloads.

TECHNIQUES FOR ESTIMATING CASELOADS

TECHNIQUES BASED ON PAST CASE FILINGS

The simplest scheme for estimating the future number of case filings is to count the numbers of cases filed in the recent past, identify a trend, and extend the trend. If, for example, case filings in a particular court numbered 500 three years ago, 550 two years ago, 605 last year, and 666 in the current year, there has clearly been an increase of 10 percent each year, and simple extrapolation for the next year would lead to a prediction of a 10-percent increase, or 733 case filings.

But increases are not usually that uniform, and so a projection line that does not intersect each data point must be drawn. A standard technique to determine such a line is least-squares or simple regression, which produces a line closer to all of the data points than any other straight line would be. Having chosen the technique of least-squares regression, however, one must still choose the data points to be used. In a study by the Administrative Office of the U.S. Courts in 1973, four different sets of data points, and consequently four different projections, were made for each federal judicial district. The study's explanation of those projections illustrates the range of possible choices in selecting data points (U.S. Congress 1973, pp. 970–971):

> For each of the districts in the survey we plotted the last ten years (1962–1971) of total filings. From portions of these data points we generated four separate projection lines.
>
> The first projection forecasts a district's 1976 caseload on the basis of the last six years of filings. We felt that this six year analysis was the soundest and most realistic projection because both the growth rate of the court's activity prior to the sharp increases of recent years and the current rate of growth receive equal consideration.
>
> The second projection was based on the last three years of data. For most courts this projection is the most liberal of the four. It is influenced only by recent years' filings and could yield forecasts of little value, especially if we are now going through a period of abnormally sharp and unlasting change.
>
> The last two projections use known "simple moving averages." With this method we average the values of each three point grouping of filing data. The resulting averages are used as a set of new points from which projection trends are generated. The moving average system is generally used with data subject to cyclical fluctuations and results in a set of points which are less erratic than the actual data.
>
> One of the projections using this method was based on the last ten years of filing. This projection is generally the most conservative because of the influence exerted by distant past years. In some cases these years have such an

influence that the projected total for 1976 is below the actual filings total for 1971.

The other projection using moving averages was based on the last six years of data. This projection, like the first, gives equal influence to historic slower rates of increase and the more recent rapid patterns.

Differences in the anticipated value of case filings among the four different projections were often substantial (even though a least-squares line was drawn in each projection). For example, the district of Arizona showed 2,326 total filings in 1972. The projections for 1976 were 3,980, based on the previous 3 years; 3,080, based on 6 years; 3,130, based on a 3-year moving average using 6 years of filing data; and 1,970, based on a 3-year moving average using the previous 10 years of filing data. The difference between the highest and the lowest projections was 2,010, which at a standard of 400 filings per judge would make a difference of five judges in a court for which the current complement of judges was five (U.S. Congress 1973, p. 662).[1]

These projections were presented first to the Judicial Conference, the policy-making arm of the federal judiciary, and on the basis of both accumulated need in the previous years and projections, and the Judicial Conference made recommendations as to which judicial districts should receive an additional judgeship(s). But they had to choose from among the projections. Judge John D. Butzner, Jr., chairman of the Subcommittee on Judicial Statistics of the Judicial Conference, explained their choices (U.S. Congress 1973, p. 9):

> . . . I think that they [the projections] are helpful guides. This is the first quadrennial survey, I understand, in which recommendations were based on predictions. Heretofore the recommendations were based on the fact that the district was already behind and by the time 4 years went by, it got even further behind. . . .
>
> We studied those projections and selected the one that seemed to be the most appropriate. Ordinarily I would say that was the linear projections based on the 6-year data, but sometimes we found that a 3-year base was more appropriate and sometimes a moving average base gave better projections.

A moving-average base did not give "better projections" in the sense that it was more accurately calculated. Rather the judge was saying that from the vantage of intimate acquaintance with patterns of litigation in the federal district courts, the members of his subcommittee believed that they could perceive something about the strength and direction of trends in demand for court services. On that basis they selected one of the four projections.

They might, however, be wrong. And outside observers, in this case

senators in the context of hearings, had no good way of independently judging the quality of the subcommittee decision. Furthermore, neither the senators nor their staff would have had any independent basis for evaluating projections developed through other techniques but based solely on the past values of case filings.[2] That situation, moreover, would be found in hearings or other considerations taking place on the state level as well. In her survey of 23 state court administrative offices, Susan O. Burke (in this volume) found that 21 states made projections of case filings; of them, 13 made their projections solely or largely on the basis of the numbers of filings in previous years.

Those who develop and use projections have some sensitivity to their limitations: they do not simply assert that whatever process is resulting in cases currently will by a kind of momentum carry forward into the indefinite future. Instead, projections are often only the beginning of a subtle consideration by knowledgeable judges and court system executives. Judge Butzner noted, for example, that his subcommittee studied projections and selected from among alternatives. In Kentucky, formal bounds were placed on what would be accepted as reasonable projections (Administrative Office of the Courts n.d., p. 114):

> First, no 1978 projected caseload was accepted which was less than the 1975 volume. . . . Second, increases between 1975 and 1978 were limited to a maximum of approximately 30%.

And in California, staff of the judicial council explicitly review projections to see whether linear or curvilinear (or neither) projections are reasonable (Burke, in this volume).

But even if the judges and court system personnel who use projections are sophisticated with respect to factors that may influence the number of case filings, the simple projection techniques based on previous caseloads are not. The techniques used do in fact assume that whatever process is resulting in current cases will continue in the future, but the nature of such process or processes is wholly unspecified.

In the short run it may well be that the processes will not change. The "short run" in this sense would mean some period of time in the future that is largely determined by the recent past. There is a sense in which events that have already taken place, processes that have already been set in motion, will importantly determine (or contribute substantially to the determination of) the status of the phenomenon of interest—in this case, the numbers of cases brought to courts—in the near term. In this sense, Leavitt (1978, p. 2) remarks that the short range for the purpose

of forecasting the filings of cases in the federal courts taken as an entire system is 2–4 years. This sense of "short run" may to some extent make explicit part of the usually implicit rationale underlying projection attempts, but it plainly does not provide any guidance for the choices that must be made with respect to the number of prior years on which a projection should be based nor any guidance as to whether a straight-line projection technique is to be preferred to some curvilinear technique. With no well-developed understanding of the factors affecting caseloads, users of projections are reduced to intuitive judgment, however well or ill informed, as the basis on which projections of future case filings are founded.

TECHNIQUES BASED ON INDEPENDENT VARIABLES OTHER THAN PAST CASE FILINGS

To distinguish techniques that generate expected future numbers of case filings strictly on the basis of previous numbers of cases filed from those that use other independent variables as a basis, we refer to "forecasts" rather than "projections." In common parlance the terms are frequently used interchangeably, but our distinction is generally in accord with technical usage.

Forecasts imply an explanation of the causes of case filings. In order to forecast the number of cases that will be filed, say 4 years hence, one must first know the values of the factors thought to be causally related to the number of case filings in 4 years. One would predict the population size, the unemployment rate, or whatever factors are indicated by theory in order to know the case filings for that future time. The first requirement is some theory.

Theory with respect to the generation of case filings is not well developed. When Frankfurter and Landis wrote more than 50 years ago, they saw changes in the amount of business brought to federal courts as a function of general social and economic factors (Frankfurter and Landis 1928, pp. 59–63):

> The factors in our national life which came in with reconstruction are the same factors which increased the business of the federal courts. . . .
>
> This swelling of the dockets was due to the growth of the country's business, the assumption of authority over cases heretofore left to state courts, the extension of the field of federal activity.
>
> The great commercial development brings its share of litigation to the courts; booms and panics alike furnish grist for the courts.
>
> Finally, the political issues of the [Civil] War begot legislation that for a time flooded the lower courts. . . .

Echoes of that view may be found in the factors selected as bases for explaining and predicting case filings in Kentucky (Administrative Office of the Courts n.d., pp. 127–128):

> The method of projection will be elaborated to include factors other than caseload. Such factors as population, net migration, miles of highway, number of police officers, crime rate, number of practicing lawyers, "wet"-vs.-"dry" status, number of campgrounds, college enrollment, per-capita income and other economic information, the presence or absence of state or national parks, correctional institutions, or military installations, and other contingencies external to the court will be evaluated as to their effect on caseloads.

In a recent study, Goldman *et al.* (1976) chose 158 "indicator variables" that they sought to associate with numbers of cases filed in U.S. district courts. A few examples of those variables are as follows:

1. American Bar Association Membership
2. Average Months Served by Prisoners in Federal Prisons
13. Insured Unemployment Rates by States
30. Annual Volume of Trading on Each Contract Market—Wheat in Bushels
37. Annual Average Seafaring Jobs
81. Food and Drug Administration Budget
122. Arrests for Liquor Law Violations
131. Male Population Age 15–24
157. Wine Gallons or Other Liquors Seized
158. United States Wage Rate for Agricultural Workers

And among those states that Burke (in this volume) found to be using factors other than previous years' filings in their efforts to anticipate future filings, all were substantially similar (although some states surveyed used several such factors and others very few).

Efforts seeking to associate such factors with numbers of cases filed are founded on a proposition that has considerable face validity: that "the business of courts—whether trial or appellate—flows from processes in our social, economic and political life" (Goldman *et al.* 1976, p. 202). But without a theory, we cannot explain why Goldman *et al.* were able to write an equation that predicted assault, libel, and slander cases brought to U.S. district courts between 1957 and 1970 by private individuals on the basis of Moody's common stock averages and median months to trial in civil cases (Goldman *et al.* 1976, p. 235). With no theoretical explanation, we are unable to assess whether such rela-

tionships would be found in the future, for forecasting the number of such cases that would be filed.

In general terms, however, associating explanatory variables of at least potential theoretical interest is more useful than simple projections and provides information for the process of theory development. One might test even weak propositions, hunches, and educated guesses and thereby challenge, and ultimately advance, the development of theory. Moreover, the ultimate outcome of such a process would, when successful, allow at least contingent forecasting. If, for example, we knew quite specifically how changes in unemployment rates affected the numbers of particular kinds of cases that were filed, we would know that something meaningful might be said about the numbers of those cases to be expected, say 4 years hence, if the unemployment rate at that future time were in hand. The unemployment rate itself might be forecast, but an interesting alternative might be to make contingent forecasts. That is, one could make alternative forecasts of the number of case filings on the basis of, say a 4-, 6-, or 8-percent unemployment rate at some future time. In contrast, projections offer little more than a forecast that says: "If things keep going up the way they have, we will have more cases filed in years to come."

OTHER TECHNIQUES

Before turning to theoretical approaches for estimating caseloads, we should mention other, generally informal, techniques for analyzing the possible court impact of new legislation. One might have the experience of other jurisdictions with similar legislation and base estimates on that. Or in a situation of a widening of some boundaries defined by statute, perhaps one could draw on the experience of previous changes in the boundaries. The proportion of the newly eligible who at an earlier time actually applied for benefits might provide a basis for estimating the numbers of those who would apply in the future. A straightforward experiment might provide the basis for an estimate, or one might have data from a demonstration project. The U.S. Department of Health, Education, and Welfare (HEW), for example, has funded a number of legal service demonstration projects, and one could draw on that experience to estimate the probable increase in demands for legal services that would accompany new provisions of legal services at low cost.[3] However, these methods may not be appropriate because of differences. Perhaps the people in another jurisdiction are different in some significant way from those in the jurisdiction for which the estimate is

to be made. A new widening of boundaries could for the first time include people whose behaviors might be expected to differ significantly from the behaviors of people who had earlier been defined in the set. Or perhaps the findings from previous years would not apply at a time when society had critically changed in some way.

Another method of predicting impact is the opinions of experts. An apparent difficulty with this, however, is that experts would presumably base their estimates on information from other jurisdictions, from past experience, etc. Moreover, experience with expert prediction is not encouraging. As one example, Goldman *et al.* (1976) asked an advisory group to a large study that sought to develop caseload forecasting models for federal district courts to estimate, first, the probability that particular "surprise events" might occur, and, second, the meaning that those surprise events would have for caseloads. The surprise events included such things as regulation of firearms, nonjudicial handling of prisoner complaints, legal assistance to the poor, procedural changes such as an end to three-judge district court requirements, and wars, economic depressions, and other pervasive events that would influence most aspects of society. Although the experts did provide estimates of the probabilities that particular surprise events would occur within 5 or 10 years, when it came to understanding the effects of those events on caseloads, the authors reported: "Impact estimation proved to be most difficult. The members of the committee varied widely in their opinions, not just in degree, but often in direction" (Goldman *et al.* 1976, p. 226). This lack of agreement on effects can be understood in terms of the argument being made here. The experts had no comprehensive theory as a basis on which detailed predictions might be confidently made.[4]

THEORETICAL APPROACHES TO ESTIMATING CASELOADS

In Chapter 3 we identified the behaviors that would have to be predicted in any analysis of impact. Once these are identified, by means of an impact assessment matrix or some other suitable analytical tool, two further requirements are central for the predictive task: empirical or observational information about actual behaviors and a theoretical scheme for organizing the information into an integrated understanding. The latter, a theoretical scheme, is actually the prior need, for at least implicitly a theory carries with it some specifications of the information required.

In the most general terms, the need is to conceptually specify those things that induce people to enter or to fail to enter a particular set as outlined in the impact assessment matrix. A variety of theoretical approaches are available: one might say, for example, that people respond to psychological needs in choosing to engage in activities, including choosing to dispute. Alternatively, one could seek to predict behaviors on the basis of attitudes; in the terms of such a theory, it might be crucial to know such things as whether choosing to make claims or to dispute denials of claims, to seek status changes or to dispute denials of such changes, etc., were positively or negatively valued by people, and how strongly. Or again, one might seek to know about social organization and the roles adopted by individuals occupying particular positions in social systems: changes in the expectations that define roles would be critical data. Cultural traditions might be basic to still other theoretical schemes, with group norms very consequential for decisions to behave in certain ways. Finally, there are theoretical approaches that are generally in the tradition of economics, founded mostly on the hypothesis of utility maximization. And, structural characteristics, such as the rules that specify what causes may be brought to courts under what circumstances, must take a part in any analysis.

GENERAL THEORETICAL CONSIDERATIONS

Elaborated theory that might explain who litigates and why does not yet exist, but some information, in effect notes toward a theory, is available in at least three general categories: work that identifies who uses courts according to needs for court services that arise for occupants of particular social positions; work that seeks to understand how social and psychological processes modify propensities to litigate; and work that focuses on how the structure of opportunities and alternatives modifies propensities to go to court. This section reviews current theoretical perspectives on the generation of litigation and considers further theoretical development in light of those perspectives.[5]

Need to Litigate

The logic of going to court includes having some problem that may be dealt with by some service that courts provide. A number of descriptive studies have reported that civil litigants are disproportionately Caucasian, male, well educated, and holders of some wealth or property and that these qualities of the litigants are found even in forums such as small claims courts—which were originally intended to serve the

"tradesman, victualler and labouring man" (Yngvesson and Hennessey 1975, p. 243). The conclusion usually drawn from such studies is that the litigants are those in society who have problems that fall within the purview of courts, i.e., problems about the regulation of the ownership, use, and transfer of goods and services. Moreover, courts award compensation for civil wrongs, which includes the goods that may have been damaged or the services that were not performed.[6]

In addition to laws that create needs to litigate for certain classes of the population, factors other than legislation per se can result in changes in the status of groups of people that have the effect of bringing them within the purview of the need situation defined by a statute. As an example, before the institution of the social security system, no need to dispute, perhaps to litigate, over a denial of benefits could have existed. Law created a need to dispute, perhaps to litigate, among that class of old age pension claimants who might be inappropriately denied pensions. And for this example, because the U.S. population is growing older, the size of that class of claimants will probably grow.

Propensity to Litigate

Defining a need to dispute or to litigate can be difficult conceptually, but even more difficult is finding explanations for differing propensities to litigate in the face of an apparent need. Not all who are involved in substantial transactions involving goods and services, not all whose copyright may have been infringed, etc., are equally likely to bring problems arising out of those situations to courts. Attitudes with respect to disputation, perhaps reflective of group norms, affect people's propensities to litigate. Inclinations to dispute at law may vary systematically by social class, by ethnic group, by generational cohort. There is evidence of generational differences in the propensity to litigate (Silberman 1978), which one might seek to explain by reference to changes in cultural norms between some previous time, when an older generation learned the cultural rules about proper behavior with respect to disputes, and the present. There is some evidence of Oriental disapproval (relative to Occidental norms) of resort to courts.[7] A third example of differing propensities to litigate is suggested by Zeisel *et al.* (1959), who believed that they validated the existence of "claims consciousness" in their finding of a stable rank order to cities with respect to rates of cases brought over a domain of legal types of suits—automobile accidents, department store torts, etc.

Of more general interest are studies such as Felstiner's (1974), which poses two "ideal societies," a technologically simple, poor society and

a technologically complex, rich society, and associates forms of dispute processing with each. Mediation is thought effective in simple societies because its success is predicated on shared beliefs and norms and the involvement of an empathetic mediator with intimate knowledge of the parties involved. Compromise through mediation allows the maintenance of the psychological integrity of both disputants. Adjudication—because it concentrates more on the behavior of the parties than on the merits of the rules and because there is a risk of psychological damage to the losing party (or to both parties)—is in Felstiner's view characteristic of complex societies. In his analysis, avoidance of conflict is similarly characteristic of complex societies. Avoidance requires the ability of an aggrieved party to survive economically, socially, and spiritually apart from the other party and the other party's social matrix, which is more easily done in complex than in simple societies.

On both individual and group levels, a psychological need to dispute—"litigiousness" and the "litigious" personality—has been hypothesized as another factor that affects the propensity to go to court. The idea was recognized at least 100 years ago (by von Ihering (1877)), but the notion remains an hypothesis awaiting systematic investigation.

Another factor that may affect the propensity to litigate of both individuals and groups is called by Galanter (1975) party capability. Certain kinds of parties to suits, including a set Galanter labels "repeat players," are advantaged *vis à vis* those he terms "one-shot players." Advantages accruing to parties engaged in a large number of similar litigations over time include (Galanter 1975, pp. 347–348):

> . . . ability to structure the transaction; expertises, economies of scale, low start-up costs; informal relations with institutional incumbents; bargaining credibility; ability to adopt optimal strategies; ability to play for rules in both political forums and in litigation itself by litigation strategy and settlement policy; and ability to invest to secure penetration of favorable rules.

The individual who finds that he or she must sue for the first and perhaps the only time in a lifetime enjoys no such benefits.

Legislation can intentionally modify incentives, and some interesting examples of statutory incentives to litigate are offered by Grad (1978, p. 8):

> In a number of fields, legislatures, both federal and state, have chosen to protect the public interest by granting new rights to individuals, in part to protect themselves, and in part to protect broader public interests. The legislation that authorizes such private actions often provides a special incentive to litigation by authorizing recoveries of multiple damages that are punitive in

intention. One of the oldest examples of this category of legislation is the treble damage litigation. Under the federal antitrust laws, while the Federal Trade Commission has clear authority and has a statutory obligation to prosecute for antitrust violations, any person who has suffered injury or damages in consequence of unfair competition or restraint of trade can sue to recover not only the damage he has suffered, but three times the amount of such damage. [15 U.S.C. § 15.] The only justification for such treble damages is the notion that the antitrust laws will be more effectively enforced if a potential plaintiff has a greater incentive to enforce them. Similar provisions are made for multiple damages in a number of other situations. These include violations of wage and hour laws where the public interest in compliance with the law is emphasized by providing the plaintiff with an extra punitive recovery. The advancement of federal—and later state—policy was the purpose in rent control legislation when a tenant who was overcharged was authorized to recover three times the amount of the overcharge.

Opportunities to Litigate

In addition to some estimate of an objective need to go to court and psychological, social, and cultural factors that affect propensities to litigate, there are structural factors that importantly affect who litigates. Such structural factors include standing and similar rules that directly specify who may sue and who may not. *Congressional Quarterly* (1977) offered a sample of 12 decisions by the U.S. Supreme Court between February 1971 and June 1977 that have the effect of curtailing the number of cases that may be brought to court. Those decisions concerned the award of attorney fees in suits against private defendants,[8] conditions under which class action suits may be brought,[9] circumstances in which federal judges should abstain from intervening in state criminal proceedings,[10] rules for *habeas corpus* actions,[11] and standing rules governing the question of who has a sufficient stake in the outcome of a dispute to be allowed to file suit.[12] Structural factors also include the availability and attractiveness of alternative forums for resolving disputes (see, generally, Johnson *et al.* 1977), as well as the availability and attractiveness of courts, their monetary costs, the time required before receiving dispositional attention, the perceived favorable or unfavorable predispositions on the part of official decision makers within the legal system, and more.

Grossman and Sarat (1975) note, for example, that the basic structuring of courts amounts to an invitation to certain kinds of litigation and a discouragement to other kinds. Courts are classically passive, dealing with issues brought to them by others. In addition (Grossman and Sarat 1975, p. 321):

> Partially due to their passive natures the controversies which they [courts] receive may reflect only salient private concerns, not necessarily social problems.

Yet Bernstein and Hagan (1978) argue that courts can be "entrepreneurial," can be "pro-active"; in particular, in the federal courts of the United States, the U.S. attorneys (who are the prosecutors) can very substantially affect the makeup of the criminal caseload heard—or can choose not to take such a pro-active role. Furthermore, this effect is plausibly argued to be substantially independent of need (defined as variation in the population of potential criminal cases available for prosecutorial attention). Courts described as pro-active operated in contexts of potential criminal cases that showed no apparent differences in comparison with courts described as reactive.

Grossman and Sarat (1975) note that the structure of opportunities can extend beyond courts and forums that are specifically constructed as alternatives to courts. Some forms of political participation can serve as alternatives to courts, and vice versa. Political cultures characterized as "traditional"—in which governance is proprietary and paternalistic, in that those who govern are a relatively closed group who have (or whose progenitors have) always governed—may discourage political participation and so drive would-be participators to courts (Grossman and Sarat 1975, pp. 325–326). And Grad (1978, pp. 5–6) notes that legislatures can intentionally set up inviting structures for the very purpose of stimulating litigation thought to be a means of achieving larger policy goals.[13]

Beyond simple associations and categories, some work has been done on the ways in which elements in the three categories are related. At a macro level, Grossman and Sarat (1975) suggest a curvilinear relationship between social development and litigation. Complex social interactions bring with them a need for resolving a larger number and a new variety of disputes, but, at least eventually, direct monetary costs of litigating together with a need for speedy dispute resolution make litigating unattractive. Changing needs change the attractiveness of an existing structure of opportunities. One consequence, in Grossman and Sarat's analysis, is an increase in the demand for legal services associated with increasing social development, but without a directly corresponding increase in the demand for court services, i.e., litigation.

McIntosh's (1978) detailing of changes in the composition of the civil dockets in the trial court of general jurisdiction for St. Louis, Missouri, between 1820 and 1970 is similarly unsurprising in its most general

conclusion: docket composition changed in apparent response to the social and economic change during that century and a half in which St. Louis grew from a fur trading outpost to a major metropolitan area. More interesting may be his finding that docket composition may be related not only to need but also to the structure of opportunities as represented by judicial attitudes. McIntosh (1978, p. 19) quotes L. M. Friedman in *A History of American Law:* "'Enterprise was favored over workers, slightly less so over passengers and members of the public.'" McIntosh goes on to say:

> Missouri judges were no exception. For example, the 'fellow servant rule' was adopted by the state supreme court in 1860, and although subsequent decisions tended to water down the strength of the rule somewhat, legislation was required to finally abolish the doctrine in 1919. In 1897 the doctrine had been abolished by legislation with respect to the railroads only, but as late as 1907 a majority of the justices on the state's highest bench made it clear that they did not like the intention of the law. Hence, the evidence seems quite clear that the case law written by the Missouri Supreme Court created barriers which effectively kept all but a determined few of an entire class of potential litigants out of the trial courts.

The categories we have found useful in this review—need to litigate, propensity to litigate, and the structure of opportunities to litigate—may not be those that will ultimately be found to be the most theoretically useful or provocative, of course. But even on the basis of this simple review we may be able to extract some lessons or tentative conclusions.

Conclusions

Good analyses of even what may appear to be at first glance the easier categories, need and opportunities, are not simple. Even with detailed information available, as with proposals to alter or abolish diversity of citizenship jurisdiction in the federal courts, analyses are difficult because factors interact. Factors such as attractiveness of different forums affect patterns of litigation through effects on the decision making of potential litigants, but decisions rarely hinge on any one factor. Given cleverness and determination, sufficient incentive, and strong enough feelings, for example, litigants may find ways to invoke the jurisdiction of a court even in the face of rules meant to bar their way.[14] It is essentially on this ground that one could criticize the impact analysis by Ralph Andersen and Associates to the Judicial Council of California, which said that all of the cases that would otherwise end in

bargained pleas of guilty would go to trial if plea bargaining per se were eliminated (Ralph Andersen and Associates 1975). And it is, of course, a ground on which one would criticize other impact analyses that failed to take many factors into account.

No particular theory, or even theoretical approach, has a firmly established claim, based either on the observed power of previous explanatory tries or on prospects for powerful explanations, that is notably brighter than that of any other theory, including even the intriguing possibility of prediction from structural models (discussed below). We believe that an eclectic stance is warranted at this very early stage of theory building with respect to judicial processes.

Much of the theoretical work done to date has been in the nature of bivariate associations: the effects of x on y (although many of the proposed independent variables have been rich, even complex formulations). Yet a major challenge to any theory will necessarily be to account for what we may term adaptation within social systems. A theory will have to account for the actions, reactions, and further reactions, on the part of a potentially very large number of different actors, that may accompany a given event, such as new legislation. Consequences stemming from particular events may extend well beyond the sets of people expected to be immediately affected by a given change. This is a major limiting factor in any effort to predict the impact of a particular statute (or other single event). The situation may be somewhat better if a prediction is expressly meant for the short range. "Short range" would depend in part on the nature of the phenomenon of interest. Thus we are unable to define precisely what the short range would be; we note, however, that 2–3 years has been suggested as the limit for short-run forecasts of the overall workload of the federal courts.

STRUCTURAL MODELING

Recent work that has its roots in economic theory has been undertaken with the goal of understanding, and ultimately predicting, the circumstances under which individuals choose to dispute, eventually to litigate, or not.[15] Basically, the theoretical approach is to understand courts as a social system. Hence there is a need to identify the different sets of actors in courts and to identify what makes the different sets of actors behave as they do.

A structural model could be created to represent the court system. Components of the system would be sets of actors, such as judges, prosecutors, plaintiffs, etc. Variables would include such things as the

resources available to the plaintiff, or to the prosecutor, etc., or such things as decisions to emphasize the prosecution of a particular kind of crime; variables could also include such things as economic conditions or even the weather. The equations in the model would set out the ways in which the variables combine (add, subtract, multiply, etc.) to determine the behavior of a component of the system. Thus it can be said that an equation (or a set of equations) for a component defines the behavior of that component. The behaviors of all of the components in the total system make up the structural model.[16]

Structural models do some things well, but forecasts from structural models are sometimes very poor in real situations.[17] In fact, with the first structural models of the American economy about 2 decades ago, if one wanted a simple forecast of, say, the gross national product for the following year, many economists believe that more accurate results could be obtained from a simple projection of recent trends than from a structural model.

Part of the problem in forecasting lies in limitations to the structural modeling tool per se and limitations in the theory underlying it. In a paper prepared for the Panel, William Rhodes (1978) observed two important limits of structural modeling: a lack of well-grounded theory explaining the phenomena of the judicial system (not necessarily the lack of a theory of structural models), and the problem of supplying suitable levels of detail in a model. In the absence of well-developed theory for determining the algebraic form of structural equations for the judicial system, researchers have attempted to discern relationships from empirical data. Results from these efforts have provoked new theoretical effort, but the results do not suggest that theory, much less models based on theory, is at hand. Furthermore, levels of detail required of a model increase with the complexity of the analysis that is required. And at least some of the analyses that might be thought most useful could well overtax the capabilities of current or foreseeable models to provide the needed detail.

Beyond the limitations inherent in structural models and those related to the complexity of the judicial system, idiosyncratic features of particular courts could further reduce the usefulness of analyses made on the basis of models developed from general understandings of many courts[18]; levels of data aggregation may be unsuited to some important analytical tasks; and questionable outcomes are inescapable when, as some work reviewed by Rhodes has done, simple production functions describing, e.g., police behavior, fail to consider such things as the different mixes of police services and varieties of police behavior noted in work done by sociologists.

But what a structural model offers (that a simple projection does not) is a way of accounting for the consequences of change. Saying that this year's gross national product will be equal to last year's gross national product plus a certain percentage offers no way to tell how a change in taxes, for example, would affect the economy. Similarly, one might get weather forecasts that are quite accurate by simply saying that tomorrow's weather will be very similar to today's weather. The mean error of such a forecast could be quite low. But the prediction of the consequences of structural change, which is ultimately of more interest and of more use to one who must plan on the basis of a forecast, is missed in simple projections when such change occurs. Forecasting tomorrow's weather by extrapolations from yesterday and today, for example, would miss the consequences of a cold front.

Because structural models can give poor forecasts, predictions about something such as the impact of new legislation on courts ought to be done from several standpoints. "Naive" forecasting (such as simple projections, but including also more sophisticated time-series approaches) are very cheap to do. When several forecasts differ, one may ask why: it might be that some of the compromises that one must make in building a structural model have pushed the model's forecast in the wrong direction; on the other hand, one might conclude that because of an anticipated structural change, a simple projection is going to be incorrect.

Our conclusions with respect to structural modeling suggest caution, not as much from a developmental perspective—for which indeed these comments point to the need for further work, drawing on all of the relevant disciplines—as from a policy perspective. Elaborated models based on good theory by means of which one may analyze good data await model elaboration, theory development, and improved data. There is promise here, but realization of the promise will not come easily or quickly.

NEEDS AND PROSPECTS FOR THEORY DEVELOPMENT

The development of theory—to explain in causally meaningful ways why individuals choose behaviors that may make them subject to court processes—is the most pressing need for making reasonably accurate predictions of the numbers of cases that will result from a new statute or some nonstatutory event. We find promise that such development will take place. In the absence of good theory, would-be forecasters are reduced to employing less satisfactory tools, are occasionally in fact reduced to informed speculation.

Even armed with theory, however (or with early formulations being tested in a theory development process), there are substantial limitations to forecasting impact. First, one must determine the behaviors that will likely be affected by a given statute or other phenomenon. Careful legal analysis is a first requisite, but language that is ambiguous in determining boundaries of sets of individuals who take certain actions may foil even the best legal analysis.

Second, simultaneous events may substantially alter a forecast of some future state of a court system. Adaptations—or the appearance of wholly new conditions—are increasingly probable over time, so the reliability of a forecast decreases over time. Alternative forecasts conditioned on new conditions may be an option when some event is thought probable or possible. But alternative forecasts would limit the usefulness of forecasts for those trying to plan for new demands for judicial services by supplying new resources.

Third, if predictions of impact are done early in the legislative process, such as prior to enactment, later changes in a bill (or later short shrift given to a law in a separate appropriations process) may mean a very different impact from what had been forecast. This limitation applies even to changes that occur at or close to the point at which decisions to go to court are finally made, at the doorstep of the courthouse. (Jurisdiction-setting statutes, which grant or deny access to courts to particular disputants, are the clearest example of these changes.) And for changes that occur elsewhere (in the context of decisions that are not literally whether to enter the courthouse but that in fact may ultimately have the consequence that more parties to suits will in fact file cases in court), the number of behaviors that must be predicted increases. This would be true, for example, for a major new policy granting new rights to groups of people for the first time, such as the Civil Rights Act of 1964. Hence the probability increases that the estimate of the number of cases that will go to court will be wrong. The unhappy consequence of this limitation is to make the outlook for producing precise estimates of the caseload consequences of particular statutes most dim for at least some of those statutes expected to be especially consequential. The outlook is better for small changes, at the point where a decision to go to court is finally made—exactly when the need for statute-specific impact analyses may be least needed (in that informed observers may be able to estimate impact quite well).

Fourth, the precision and accuracy of impact estimates will be limited fundamentally by the precision and accuracy of available data. Data have not so far been gathered for sophisticated analyses, but have rather served more general administrative and accounting purposes.

That is unsurprising and is not open to criticism as such. But until what are essentially research purposes forthrightly enter systems for data collection, work on estimating the impacts of new legislation on courts will be hampered.

The pursuit of reliable theory is worth the effort. Increases in our understanding of court processes will inform a variety of policy needs, including estimates of impact, and also scholarly needs, and serendipitous uses of new knowledge are probable. The Panel recommends, first, that theory development include straightforward trial and error, in terms of testing predictions made on the basis of theory. Impact predictions with which we are familiar have been imprecise and thus not amenable to careful tests or have been made for bills that were not (or have not yet been) enacted. The tractability of the problems that we have identified will not ultimately be known until such efforts are made. Hence the Panel recommends, second, that efforts be made to systematically follow up predictions of impact. Third, another worthwhile approach is "predicting the past," approaching previously unanalyzed data armed with predictions from theory. Retrospective studies provide some sense of problems and prospects, and the Panel has made use of some in its work. While useful to understanding, however, such past predictions cannot substitute for true predictions ultimately tested against future experience. Fourth, empirically oriented studies of decisions made to dispute, to litigate, should also go forward on the micro level, i.e., at the level of the individual or small group.

Research work can and should go forward, but substantial reliance in the policy-making process on predictions from theory that is still in a process of development is not warranted. Legislators may wish to consider the question of the consequences of new legislation for courts and may even wish to consider providing new resources to the courts concurrently with laws that may cause increased caseloads. The goal of maintaining quality in the courts, which would presumably motivate such considerations, is one to which the Panel finds it easy to subscribe. But available theory and available method are not sufficient to warrant a recommendation that analyses of the impact of new legislation for courts be routinely required in legislative processes.

NOTES

1. For the record, the total number of filings in the district of Arizona in 1976 was 2,471 (Administrative Office of the United States Courts 1976).

2. These would include nonlinear techniques; the projection techniques

used in California, for example, use both linear and curvilinear regression techniques as a means of projecting previous case filing values into the future. See Arthur Young & Co. (1974, p. 21) and Burke (in this volume).

3. The HEW projects and other programs for providing legal services for particular groups are discussed in Curran (1971).

4. This conclusion would apply equally to "Delphi" techniques, in which a panel is given feedback by means of which to evaluate members' own responses in light of the response tendencies of the whole group. For a critique of such methods that raises considerable doubts about any conclusions that are drawn by using them, see Sackman (1975).

5. The discussion of theory outside the economics-based structural modeling approach that follows draws substantially on work undertaken by Keith O. Boyum and Samuel Krislov in the course of a project supported by the National Institute of Justice. The research assistance of Karen Adams is gratefully acknowledged.

6. More particularized explanations of who litigates can also be understood within this framework: holders of copyrights bring suit over alleged copyright infringement, racial minorities sue with respect to discrimination, etc.

7. See Haley (1978), although he minimizes the apparent difference.

8. *Alyeska Pipeline Service Company* v. *The Wilderness Society*, 421 U.S. 240 (1975).

9. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

10. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

11. *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Stone* v. *Powell*, *Wolff* v. *Rice*, 428 U.S. 465 (1976).

12. *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *U.S.* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

13. See also the research done on Michigan's environmental protection act, which gave standing to ordinary citizens to sue over environmental matters (DiMento 1977).

14. For example, with respect to plans for compensating the victims of crime, the order of the home secretary in Britain provides that decisions of a compensation board are not reviewable in court. However, in at least two instances courts have found that the "nonreviewable and final" decision of the administrator was reviewable, and in at least one instance a court has reversed the decision.

15. See, among others, Gould (1973), Landes (1971, 1974), Landes and Posner (1976), Rhodes (1976), and, generally, Posner (1977).

16. See Appendix A for a detailed description of structural models in general and an example of the formulation of such a model for the court system.

17. For a recent review of errors in forecasting, see Ascher (1978).

18. A human forecaster on the other hand, could allow for such idiosyncratic features when using the results from a model.

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APPENDICES

A Structural Models: A Primer for the Courts and an Illustration

BUILDING A STRUCTURAL MODEL

A structural model as we use the term is a model consisting of more than one relation, all of which are causally meaningful. It typically consists of more than one equation, each of which defines relations among variables.[1]

Each equation represents the behavior of a separable part of the model of the system, called a component. By separable, one means it is possible for that part of the model to change without any other part changing. That is, when one writes equations (which define relationships among variables) to represent the behavior patterns of different components, those equations can change independently of each other. Note that this is different from merely saying that some variable can change independently of another. As an example, a variable of interest in a stereo system might be its loudness or the purity of its sound, but the components would be the speakers, the amplifier, etc. A speaker, of course, might change without the amplifier changing. Defining components amounts to idealization in many instances: we conceptualize independent components even knowing that in practice it may be difficult to find complete independence.

In economics the components of structural models are typically groups of similar people. Thus farmers would be one component in a structural model of an agricultural market. Another component in such a model might be the consumers of agricultural products. The equations

that represent the behavior pattern of the farmers might change in response to, say, the introduction of a program for taking farm land out of production, without there being any change in the behavior of consumers. Or, with respect to a judicial system, civil plaintiffs could make up one component and judges another. The equations that represent the behavior pattern of the civil plaintiffs might change in response to a change in the amount charged as a filing fee without there being any change in the behavior of the judges. On some occasions, of course, a particular change might affect several components. But the key is that the components are capable of reacting to change independently.

Each component, then, is characterized by a relationship among variables, an equation or a set of equations: an equation involving two numerical variables can be set out graphically, as a curve.[2] In the example of an agricultural market, a supply curve representing the farmers' behavior could change without a change in the demand curve representing consumers' behavior. The point at which the supply curve intersects the demand curve would probably change, of course, and the implication is that the actual behavior or actions of consumers would in fact change. But this would come about due to a change in the behavior *pattern* of only one of the two components—the farmers—in this example.

If one were to build a structural model of courts (or of a single court), one would need first to specify the components. A natural first step in such specification would be to consider the different types of persons in courts. If *a priori* one can specify a group of people whose behavior pattern is the same and separable from that of people in other groups, one would treat all of the members of that group as one component. One might, for example, define a lawyer component and a judge component; this specification presupposes that one could imagine doing something that would affect the behavior pattern of judges but not of lawyers and vice versa.[3]

The model builder faces the problem of selecting those variables that will enter—or be excluded from—the equations representing the behavior pattern of a component on grounds other than availability (observability).[4] Structural modeling seeks to be causally meaningful, and the variables that enter equations must therefore have that character: the variables must be more than merely associated with the behavior pattern of a component. The problem of selecting the variables, thus, is both crucial and difficult. In building a structural model, one will want to write down, algebraically, the equations that describe the behaviors of the components of the system. Any particular variable might not enter (i.e., would have a coefficient of zero for) an equation

that describes the behavior pattern of a particular component even though it could enter the equation for another component. A model builder might, for example, exclude weather from an equation describing the behavior pattern of consumers in a structural model of an agricultural market, but include weather in an equation for farmers.

An equation is said to be *identifiable* within a specified model if, given a sufficient number of observations on the variables, it is possible—by using suitable statistical procedures—to obtain consistent estimates of the parameters of that equation. (Estimates are said to be "consistent" if they tend, in probability terms, to the true values of the parameters as the sample size goes to infinity.) Typically, an equation's identifiability is accomplished by specifying variables that are absent from that equation but do enter other equations of the model. That is, identification of that equation is accomplished by specifying (as a part of the model formulation process, prior to performing statistical operations on the given set of observations) those variables that (1) do not affect the behavior of the given component and (2) are expected to affect the behavior of other components. If a sufficient number of variables can be specified *a priori* (and if certain technical conditions are satisfied), then the given equation will be identifiable—*provided* that the expectation in (2) is confirmed by the given set of observations.

The latter proviso is important. Suppose a model specifies that a variable x (1) does not enter the equation for component A, but (2) may conceivably enter the equation for component B. Suppose further that, in fact, variable x is totally irrelevant to the behavior of B as well as A. In that case, x will not actually enter the equation describing the behavior pattern of B and hence will be of no help in identifying the equation for A.

In constructing the behavioral relations—the equations—the model builder must label the variables as endogenous or exogenous. Exogenous variables are those that are not subject to feedback.[5] Labeling a variable z as exogenous is essentially equivalent to making identifiability assumptions: that is, it assumes that no variable affected by z enters the behavior equation determining the variable z.[6] For mathematical reasons, the number of equations required to make a model "complete" will be the same as the number of endogenous variables. (Otherwise the model would be inadequate to explain or predict the endogenous phenomena.)

In pursuing identifiability, there are algebraic techniques available to supplement expert judgment in determining which variables ought to enter the equations for components, and there are also some techniques that enable one to use pieces of information that one can bring to the

problem *a priori*. For example, one may be able to state *a priori* that two variables—say, x_1, x_2—affect the behavior only through their difference, i.e., $x_3 = x_1 - x_2$, and not separately.[7]

One typically begins the task of identification by implicitly (sometimes explicitly) eliminating those factors that obviously do not enter an equation. One would not ordinarily use precipitation in Brazil in a structural equation describing the behavior pattern of criminals in the United States. Yet such decisions concerning the exclusion of variables do involve judgment: perhaps someone could think of extreme circumstances in which precipitation in Brazil would be relevant. But to get identifiability one has to go further than a simple process of including and excluding variables. One begins to use some more detailed knowledge or theory about what goes on in the component, and why.

Frequently, model builders adopt the hypothesis of utility maximization, i.e., the hypothesis that individuals are motivated by a desire to maximize their expected utility. Of course, this is a narrow view of behavior phenomena, and for some circumstances it may be too narrow.[8] But adopting a narrow hypothesis is useful because of its very narrowness: it can frequently tell more about which coefficients are in the equation, and in what way (positive or negative coefficient, for example), than can other hypotheses. It thus significantly improves the model builder's chances of obtaining identifiability. When the assumption of utility maximization is correct, its adoption also has the advantage of increasing the "efficiency" of the estimates; i.e., the approach will lower the error of estimation. But if the assumption of utility maximization is false, *biased* estimates will be obtained. (Biased estimates are those that will be systematically different from the true values of parameters, i.e., not "consistent.")

Clearly, there is an element of art in the process of model building. But a reasonable way to go about it is to begin with a looser first approach, as we outlined above, and to follow with the more restrictive approach in the utility maximization hypothesis (or with an alternative behavioral hypothesis, such as "satisficing" (Simon 1957)). The quest for identifiability ends only when the substantive experts (in this case those in the fields related to court processes) are satisfied that an equation, and the corresponding assumptions about the rest of the system, represents a reasonable statement of causality for the behavior of a component and the whole system.

After a structural system has been identified, the next stage is estimation. A simultaneous equation estimation process is used, as distinct

from such other processes as multiple regression, which estimates each equation separately. When such single-equation methods of estimation are used, a particular set of identifiability assumptions are implicit: namely, that all but one of the variables in each equation are exogenous.[9] We note, however, that in special cases the multiple-equation approach reduces to the separate estimation of each equation through multiple regression techniques.[10]

When one is trying to forecast the impacts of new legislation on courts, structural models are not a magic tool. A model builder would have to ask the expert in the substantive field first to judge which components would be affected by a change and second to specify something further about the nature of the change. Let us suppose that a change would occur only in a civil plaintiffs component. The expert would specify that and might also be able to say that the proposed change would mean a different (say, higher) coefficient for one of the variables already present in the equation that describes the behavior relation of the civil plaintiffs. In other words, the expert would point to the way in which the new legislation might move the coefficient representing the impact of a variable that is already in the equation for the behavior of civil plaintiffs. The use of a structural model in this instance would be (hypothetically) to predict the consequences of the change in the context of the other variables that the model builder has already identified for the equation defining the behavior of the component. If, for example, there was a change in the dollar amount of the filing fees for civil actions, one presumably could predict the change in the behavior of civil plaintiffs from the civil plaintiffs behavior equation in which the variable of "amount of filing fees" was already present.

But there is a second kind of change, involving a new variable, i.e., a factor that was not present before (or that was not relevant before). One can say that previously the model builder was unable to represent this factor by an observable variable in the estimation process.[11] But now it must be entered, and one would proceed to do that, on the basis of other information available. An expert might use intuition, or results from experiments or from survey analyses, or the experiences in other jurisdictions. Here what the structural approach can offer is a facilitation of this process (which one would have to go through in any case, using any approach). The structural approach usefully requires us to pinpoint the component through which the new variable will enter the system. And the structural approach provides us with the context of the other variables and the equation in which the new variable will have its impact.

AN ILLUSTRATION: A STRUCTURAL MODEL OF THE COURTS

THE MODEL

One may use a structural modeling approach to provide a schema, or logical structure, for the analysis of impact, and in doing this one may illustrate a structural modeling approach per se. This example is a heuristic, which may be of some use in considering the dimensions of "impact." Being a heuristic, however, it is of course not as fully developed as a model would have to be in order to be seriously used for estimation purposes.

The variables are set out first. In this heuristic, the variables are offered only in general terms, in an undifferentiated (aggregative) form. But each variable of the model might very well have a micro-structure consisting of different micro-variables. Thus, "legislative action being contemplated," for example, might be broken down into laws that command, laws that define, laws that secure rights, and so forth—and of course the gradations could easily be different, or finer. In this model: let x = the legislative action being contemplated; z = societal variables, treated here as exogenous[12]; n = the level (quantity) of judicial system services demanded; and m = the mix of judicial system services demanded. For example, n might be measured by an index of total caseload and m by the proportions of different types of cases within the total. More specifically, one might measure n by total filings and m by standard legal-administrative classifications (two parties/multiple parties; criminal cases; civil actions under statute/civil diversity of citizenship jurisdiction actions/torts and contracts/other civil cases; and so on). We mention these indices to illustrate what we mean by n and by m, not to recommend these measures in particular. Classifying is both crucial and extremely problematic, as is discussed in Chapter 2.

The (total demand) behavior of the users of the court, in *reduced form*,[13] is written as

$$n = \nu(x, z) \tag{1a}$$

where n, the number of cases, is shown as a function of x, the legislative action being contemplated, and z, the societal variables. Both x and z are assumed exogenous. The demanded mix of cases (denoted by m) is assumed to be a different function of the same two factors:

$$m = \mu(x, z). \tag{1b}$$

Let R = resources used by the system (which might be multidimensional, including such things as money, judge time, the time of clerks who work in courts, and many more). Let $\bar{R}$ = resources available to the system. Resource limitation implies a constraint, although in some cases R may be less than $\bar{R}$. (For example, the system may in fact spend all of the money available to it, but some amounts of personnel time may go unused.) Let N = a quantity index of court services *supplied* by the system (an actually observed quantity); similarly, M = the mix of court services supplied; and L = the quality of court services supplied. For all of these, but perhaps most obviously for L, the abstract symbol represents a rich multidimensional idea, which in actual use might be treated in a differentiated form.

Resource requirements may be written as

$$R = \rho(N, M, L; x). \tag{2a}$$

This formula states that the system are a function of the quantity of cases to be processed, the mix of those cases (because some cases require more resources to process than others—a lengthy antitrust suit is very different from a minor personal injury suit), and the quality[14] to be achieved; they are also a function of legislative action. Resource availability constraint is written as[15]

$$R \leqq \bar{R}. \tag{2b}$$

"Court system's behavior," describing the determinants of the quantity and nature of services supplied, is written as

$$(N, M, L, R) = \sigma(n, m; x, z; \bar{R}). \tag{3}$$

This simple-looking relation actually represents a system of equations. If N is unidimensional, there would be one equation for it, and similarly for M, L, R. But if any of these symbols represents a multidimensional phenomenon, there would be one equation for each dimension.

The endogenous variables of this equation system will be determined by the behavioral rule of the court system as a function of certain data that the system regards as parameters. Those parameters would include the pressure on the system (especially user demand or n, m, and legislation that specified such things as timing requirements); societal varia-

bles (z) (a rash of muggings, for example, might influence what kinds of outputs the system supplied); and the available resources ($\bar{R}$). Now, if this were written out completely, it would have as many equations as there are unknowns, provided that societal variables are treated as exogenous. (Recall that the variables x and z, which appear in most of these equations, are both treated as exogenous.)

Solving the system for the endogenous variables in terms of the exogenous variables, we obtain the reduced form of the system:

$$(N, M, L, R) = \phi(x, z; \bar{R}) \tag{4}$$

where the function ϕ can be expressed in terms of the previous relations as

$$\phi(x, z; \bar{R}) = \delta[\nu(x, z), \mu(x, z); x, z; \bar{R}]. \tag{5}$$

Equation (4) expresses the fact that the outputs of the system (N, M, L, R) depend on legislation (x), societal variables (z), and available resources ($\bar{R}$).

With the help of the function ϕ in (4), we are in a position to state precisely what is meant by "legislative impact." The form of the statement, however, will depend on the nature of the exogenous variable x that represents legislation. Suppose first that x is a discrete variable (of the "on" or "off" type): denote by x' the absence of legislation in question and by x'' its presence. The impact of this legislation is then measured by the difference

$$D = \phi(x'', z; \bar{R}) - \phi(x', z; \bar{R}). \tag{4'}$$

Note that, in this formula, the difference D is not a single number, but a function of the variables z (societal factors) and $\bar{R}$ (available resources).

On the other hand, suppose that x represents a continuously varying quantity (e.g., the level of filing fees). Then the legislative impact may be measured by the partial derivative of the function ϕ with respect to the variable x, represented by $\partial\phi/\partial x$. This derivative gives us the effect of small changes in the level of the legislative variable x on the various outputs of the judicial system, as measured by the variables N, M, L, R. Again, note that the derivative $\partial\phi/\partial x$ is not a single number but rather a function of z, R, and also of the initial level of x.

A crucial aspect of the above interpretation of impact analysis is that it is carried out in terms of the function ϕ representing the reduced form

relationship given by (4). But, because (by hypothesis) there is no past "track record" of x, this relationship cannot be obtained by simply regressing the variables in the left-hand side of (4) on those in the right-hand side. What must be done instead is, first, to construct and estimate a structural system (of which (4) is a reduced form), introducing into it the hypothetical role of x in certain behavioral equations, and then solve this estimated structural system for the endogenous variables N, M, L, R. This will yield expressions for these variables in terms of the exogenous variables x and z, thus producing the reduced form (4). Once the reduced form is available, it has in it the information to answer the question of legislative impact along the lines indicated above, and always conditionally for given levels of the exogenous variables.

With reference to (4), an example will illustrate the logic underlying the relations. Suppose that an act were adopted that brought a set of new cases to the courts,[16] while N, the number of cases decided by courts (among other things included in this index of services supplied), remained the same. In the face of the new demand occasioned by the change in x, something else would have to change. It might be L, quality. But if we were to say that L must not be allowed to change, then R would have to change, and the implication is that $\bar{R}$ would have to be increased. Alternatively, one might specify that resources ($\bar{R}$) must be constant. Equation (4) requires that some other factor would have to change in order to compensate for the increased demand.

Thus (4) provides us with the trade-off relations. The analyst is not confined in advance to asking the question in a particular way; e.g., one is free either to assume constant resources or to assume increased resources. Also, (4) is designed to raise not only the question of what the situation would be like under the new law, but also the question of what the system would look like in the absence of the new law. In both cases, the answers would depend, *inter alia*, on assumptions concerning the behavior of the societal variable(s) z.

Finally, we may illustrate what might be done from a social optimization point of view, i.e., with optimal legislative changes as an unknown rather than as given. Let W = a social welfare index and u a function relating the level of social welfare to various judicial, legislative, and societal variables. Then the problem is to maximize the social welfare level given by

$$W = u(N, M, L, R; n, m; z) \tag{6}$$

subject to the limitations implied by (1) through (4). The maximization is carried out with respect to whatever parameters or variables in (6) are

regarded as controllable.[17] The "controllables" would, of course, include legislation and resources made available to the system, but they might also involve rules determining the behavior of the system, i.e., the functional relation δ, since there may be ways of affecting the behavior patterns themselves. The solution to such a problem would point toward optimal legislative changes, as well as toward the most desirable levels of other controllable factors, taking into account both the goals and the constraints of the system.

FACTORS FOR CONSIDERATION IN A MODEL

Equations (1a) and (1b) are simple in their form, yet they represent many complicated factors. The equations say that with respect to some new legislative proposal the number of cases brought to courts and the mix of cases brought to courts will be (respectively) some functions of the legislative action being contemplated and of the societal variables: $n = \nu(x, z)$ and $m = \mu(x, z)$. As they stand, (1a) and (1b) express a logic, but are not, of course, in a form with which an analyst could work directly in making estimates.

This section presents some of the factors an analyst would have to consider in a structural model of the courts. Set out in a spare, "propositional" form are some assertions about how different kinds of legislation and how different kinds of societal variables might be expected to affect the behavior patterns of the users of courts. They are offered to provide a sense of the very considerable range of factors and ideas that must be taken into account in developing models useful for estimation purposes. There is no suggestion that what follows is a comprehensive listing: attention is largely directed to the number of cases brought to courts, although the possibility of variation in the mix of cases is implied. Many of the factors may be pertinent to only a subset of the cases brought to courts, and if numbers grow selectively the mix of cases in the aggregate caseload will change.

Nature of Proposed Legislative Action

1.0 The number and mix of cases brought to courts will vary according to the nature of the population affected by the legislative action.
  1.1 The number of cases brought to court varies directly with the number of persons affected by the provisions of the legislation.
  1.2 The number of cases brought to court varies directly with the number of potential claims per capita in the affected population.

Thus, for example, legislation may extend protection against discrimination to particular groups in society, but if there are discriminatory acts, few cases would result.

1.3 The number of cases brought to court varies directly with the "disputing capability" of the persons affected.

"Capable" parties or potential parties to litigation would be those who possess sufficient resources to make disputing at law a better option in the face of conflict than doing nothing. Capable parties would have relatively high levels of education, income, knowledge, organization, and other resources (see Galanter 1974).

2.0 The number of cases brought to courts will vary according to the effect of legislative provisions on potential parties' expected utilities from litigation.

2.1 The number of cases brought to courts varies directly with the presence of incentives to litigate in the legislation.

Thus, for example, treble damage provisions are intended to stimulate lawsuits (Grad 1978). As another example, legislation that contains provisions for priority handling of cases arising under its provisions can lower delay costs and thus increase expected utilities (Imlay 1976). But one's incentive to dispute can also be increased by legislative provisions that seek to impose large negative returns: legislative attempts to halt profitable enterprises are likely to be fought; provisions for mandatory harsh sentences stimulate strong efforts to avoid such penalties.

3.0 The number of cases brought to courts will vary according to the presence of structural requirements as to the conditions under which case may be brought.

3.1 The number of cases brought to courts varies inversely with the presence of provisions for administrative appeals from adverse decisions.

3.2 The number and mix of cases brought to courts varies with the presence of jurisdictional limits.

Dollar amount in controversy limits, for example, may serve to keep some cases out of federal courts.

4.0 The number and mix of cases brought to courts will vary according to the clarity of legislative provisions.

4.1 The volume of appellate litigation varies inversely with the clarity of legislative provisions.

4.2 The proportion that large and substantial litigants bear to the total number of litigants varies inversely with the clarity of legislative provisions.

When policy is unclear in legislation, there will be groups and individuals interested in making policy through litigation—groups and individuals who are "repeat players," who anticipate having future transactions governed by the rule in question (Galanter 1974, Olson 1968).

4.3 The number of cases brought to courts varies directly with increasing clarity of the legislative provisions.

4.4 The proportion that cases having a predominantly factual dispute bear to the total number of cases varies directly with the clarity of the legislative provisions.

That is, when the rules are settled, the number of cases will largely be a function of the occurrence of factual disputes, which, when determined, will allow a disposition of the case according to the accepted rules.

4.5 Clarity of rules is a partial function of the degree of innovativeness of a legislative provision.

That is, incremental changes are easy to understand, but legislation in a new substantive area can mean that legislative provisions and intent are unclear.

4.6 Clarity of rules is a partial function of the extent to which the rules are technical and thus difficult to understand.

5.0 The number of cases brought to courts will vary according to the ripeness or maturity of the issue that the legislation addresses.

Legislative determinations that are expected and accepted by the groups to which they are relevant will be greeted by few transgressions of the rules.

5.1 Fewer potential claims per capita in the affected population will be found with respect to legislative determinations on mature issues (but see proposition 1.2).

General Societal Factors

6.0 The number and mix of cases brought to courts will vary according to the frequency with which the need to dispute arises out of social transactions (see proposition 1.2).

6.1 The number of cases brought to courts varies directly with the presence of social stratification and the extent of interclass interaction.

Rigidly stratified societies may have little intercaste interaction and few disputes, and single-class societies may share world views and thereby avoid misunderstandings and disputes. But some class division with interclass interaction may result in misunderstandings and disputes.

6.2 The number of cases brought to courts varies directly with the frequency of interactions on a universalistic basis.

Universalistic (i.e., achievement-based) criteria imply heightened competition and increased frequency of disputes.

6.3 The number of cases brought to courts varies directly with the proportion of societal resources reallocated by government.

Governments are rule-bound in their procedures, and behaviors or decisions are thus open to challenge on the rules.

6.4 The number of cases brought to courts varies inversely with the level of political consensus in a society.

Consensual politics should occasion fewer disputes.

6.5 The number of cases brought to courts varies directly with the extent to which the economy is modern (postindustrial).

Complex interactions are less frequently governed by traditional norms, requiring more governance through legal means.

6.6 The number of cases brought to courts varies directly with the proportion of the population that is in the adult midyears.

People between, say, 21 and 65 are probably seeking wealth or position more aggressively than are persons who are either older or younger.

6.7 The number of cases brought to courts varies directly with the crowding of the population.

Crowding implies more transactions. Furthermore, some people believe that crowded populations are also more prone to dispute because of psychological factors (see proposition 7.0).

7.0 The number and mix of cases brought to courts will vary according to the extent to which the population is prone to dispute.

7.1 The number of cases brought to courts varies directly with the extent to which recent obvious success in litigation is observed.

7.2 The number of cases brought to courts varies directly with levels of acquisitiveness in the population (see proposition 6.6).

7.3 The number of cases brought to courts varies directly with levels of need for achievement in the population.

7.4 The number of cases brought to courts varies directly with the extent to which traditional or cultural attitudes toward lawsuits approve of such behavior.

8.0 The number and mix of cases brought to courts will vary according to the institutions and resources that are available to identify and process disputes.

8.1 The number of cases brought to courts varies directly with

levels of disputing capability in the population (see proposition 1.3).

8.2 The number of cases brought to courts varies directly with levels of disputing capability on the part of official dispute-bringers (government enforcement agents, etc.).

8.3 The number of cases brought to courts varies directly with the availability and attractiveness of legal services.

8.4 The number of cases brought to courts varies directly with the availability and attractiveness of courts as dispute-processing agencies.

Courts are not the only agencies that may be available for processing disputes; other forums may provide more expert, more sympathetic, or otherwise more attractive arbiters. There may be greater delays in courts than in some other forums. Some cases may be very well suited to courts owing to the nature of the role of the institution (e.g., free speech claims). Many other such comparisons are possible.

NOTES

1. To simplify exposition, we ignore certain other kinds of relations, e.g., inequalities. More generally, the reader should be warned that what follows is a highly informal presentation, rather than a rigorous formulation, of the main issues and concepts involved in structural modeling; see Hurwicz (1950, 1962) for a more rigorous discussion.

2. Such a curve is a geometric expression of a relationship (equation) connecting the variables involved in a component. There are also "hybrid relations" that cut across the equations that describe the behavior of certain components. Hybrid relations depend on the internal conditions of different components simultaneously. The parameters or coefficients of those relations might depend, for example, not only on the psychology of the lawyers but also on the psychology of the plaintiffs. The specification and use of these hybrid relations is a later step in model construction and use, and we mention it only in passing here for the value of distinguishing such relations from structural ones. Hybrid relations in their so-called reduced form (see note 13, below) are frequently used in forecasting.

3. This does not rule out situations in which a common cause (not expressed by one of the observed variables of the system) might affect both components.

4. We omit at this point the discussion of other aspects of identifiability (but see discussion below).

5. Feedback is a response to the consequences or effects of an earlier behavior. Suppose judges change their behavior in such a way as to put more first-time criminal offenders back in society rather than sentence them to prison. If good consequences resulted—less taxpayer cost, more offenders being rehabilitated, etc.—the good consequences could in turn affect the be-

havior of judges. (So, too, could bad consequences—more muggings, for example—affect the future behavior pattern of judges.)

6. One may also use a somewhat more inclusive concept of predetermined *variables*, to include both exogenous variables and any lagged (earlier) values of variables used. Lagged values of variables (even endogenous ones) cannot be affected by feedback from later events.

7. For example, we might say that profit is important in determining business decisions: x_1 = revenue, x_2 = cost, and x_3 = profit. In this case the identifying *a priori* information used is that the coefficient of x_2 is the negative of the coefficient of x_1.

8. Thus, in certain cases, mechanical following of customs and traditions (or "satisficing") may be a more realistic hypothesis. The structural approach does not require the use of the utility maximization hypothesis. But although, in principle, alternative hypotheses (such as tradition-motivated behavior) can be incorporated in the structural approach, the utility maximization hypothesis is by far the most common.

9. In fact, some of these assumptions—which are founded in the mathematics of the techniques and thus may escape notice—when made explicit are often found unacceptable by the substantive experts.

10. This occurs when all variables determining the behavior of a component are exogenous or lagged (i.e., predetermined).

11. Typically this would occur because the variable had a coefficient value of zero during the period of observation, but would in the hypothetical instance have a different value, say equal to one.

12. By *exogenous* we mean that there is no feedback.

Consider, for instance, the relationship between a societal variable z (say, the crime rate) and a variable describing the operation of the judicial system such as N (a quantity index of court services supplied by the system). It is plausible to assume that there is a structural relationship expressing the effect of z on N (through the variable n, which measures the demand for services). Feedback in this case would mean that there is also a reverse relationship, with the supply of services (N) influencing z: that is, a lower supply of judicial services raising the crime rate. If such a feedback is recognized in the model, the crime rate, z, is *not* exogenous. If the model assumes (whether correctly or not) that feedback is absent, the crime rate is being treated as an exogneous variable in the model.

13. An equation system is said to be in reduced form when each of its equations expresses the dependence of one endogenous variable on one or more exogenous variables. As a rule, reduced-form equations are not structural; they are obtained by solving the system of structural equations for the endogenous variables.

14. One might differentiate between a required standard of quality, say L_0, and that quality that emerges from the process as a function of demands and resources available to meet demands, say L. One can either specify the inputs to determine the outputs (the "output" here being quality) or specify the outputs required first and then determine what the inputs would have to be. The

relation as written says only that one cannot choose all of those things arbitrarily; if some are specified, others will emerge from the relation.

15. Equation (2b) represents a *set* of inequalities, one for each type (or even each aspect) of resource. For instance, suppose there are two types of resources (say, judges and money), indicated by the subscripts 1 and 2, respectively. Then (2b) would stand for two inequalities: $R_1 \leqq \bar{R}_1$ and $R_2 \leqq \bar{R}_2$. Thus R represents a vector: $R = (R_1, R_2)$.

16. An example is the bill to allow for the first-time appeals in veterans compensation cases: see Davis and Nejelski (1978).

17. A reduced form of (6) may be written as

$$W = u\,[\delta(\nu(x, z), \mu(x, z); x, z; \bar{R}), \nu(x, z), \mu(x, z); z] = \nu(x, z, \bar{R}).$$

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B Impact Analysis and Caseload Projection at the State Level

SUSAN OLSON BURKE

INTRODUCTION AND METHODOLOGY

Much of the interest and concern about increasing volumes of case filings and the associated impact on courts has been concentrated at the federal level. Chief Justice Warren Burger has been an exponent of the development of judicial impact statements, and much of the discussion stimulated by the chief justice and by others has focused on the federal courts. The Panel on Legislative Impact on Courts also gave more prominence to considering the feasibility of predicting court impact for the federal courts. However, the Panel also needed to know something about the responses of state court systems to the impact of legislation. The states, after all, hear many more cases annually than are heard in the federal courts.[1] Perhaps even more important, the federal system of government in the United States offers a rich variety of experiences that the Panel believed should not be neglected in its work.

With or without the advance warning provided by an analysis of the impact of new legislation on the state courts, every state court administrator and other personnel in the judicial branch must regularly administer the results from every legislative session. To get a picture of the work currently being done to estimate future workload and changes in conditions of operation, I conducted an informal telephone survey of the offices of 23 state court administrators between July 20 and August 1, 1978. I sought information on two topics: efforts to project total

caseload burdens in future years and efforts to estimate the impact on the courts of specific bills pending in their state legislatures. With the guidance of the Panel, the 23 states surveyed were selected on the basis of the general reputation of the court administrator's office. The states, which represent different regions of the country and have a wide range of population size, are Alabama, Alaska, California, Colorado, Florida, Hawaii, Idaho, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and Wisconsin.

A letter was sent in advance to the chief administrator of the courts in the 23 states, explaining the nature of the inquiry and alerting him to the telephone call. In 5 states I spoke only to the chief administrator; in the other states I spoke to one or more staff members from the administrator's office or to the administrator and another staff member. Although I had a prepared interview schedule, the interviews were largely informal conversations. Consequently, the nature of the information acquired varies somewhat from state to state, depending in part on what and how much information each court administrator volunteered. (A more detailed description of the methodology of the study is found in "A Note on Method," at the end of this paper.)

FACTORS INFLUENCING COURT ADMINISTRATION ACTIVITIES

Overall, the findings of the survey reflect the reality of federalism: there is tremendous variation in the quantity and sophistication of caseload projections and of impact analyses being done in state court administrators' offices. In my discussions, several factors emerged as important general influences on both activities: the organizational structure of each state's court system; the use of automatic data processing equipment; the population and geographical size of the state; the frequency and duration of the legislative session; the scope and distribution of rule-making authority for the courts; and the length of time a court administrative office or a particular administrator has existed in the state. Table B-1 presents comparative data on some of these factors.

One factor apparently affecting the scope of the work of a court administrator's office is whether the state has a unified (or vertically integrated) court system, in which the state government finances and administers all courts in the state, or a decentralized system, in which some courts are state-run and others are locally run. In states in which

the court administrator works primarily with the state supreme court alone, as in Ohio, there has been no perception of a need for analysis of the impact of new legislation on that court. But perception of need is only the first step: one administrator of a state with a unified court system attributed the lack of time available for doing research on the impact of pending legislation to the system's large payroll and accounting responsibilities. (Although not universally accepted as the best model of judicial organization, "court reform," which tends to mean court unification, has been occurring in a number of states in the past few years; see, for example, Gallas (1976) and Saari (1976).)

Another general factor, which is not necessarily associated with the simplification or unification of the court system, is the use of automatic data processing equipment. At least 2 states of the 23, Utah and North Carolina, indicated that they do not yet have fully computerized record keeping and data processing. Although both of these states do some caseload projecting, not surprisingly they use straight-line projections rather than more complex regression methods. But some other states that do have computerized systems also do only straight line projections.

The size of the state, both in population and in geographical area, also apparently affects its court administration practices. Administrators in some large states felt that this is an important substantive factor in their workload projections because of the distance some judges must travel. Population, which is generally reflected in the size of the state legislature, is associated with the formality or informality of court administrators' responses to pending legislation. Administrators and their staff in states with small populations, such as Idaho, North Dakota, and Rhode Island, tend to emphasize face-to-face contact with legislators and informal negotiations over aspects of legislation of concern to the court administrator's office. In contrast, two of the most populous states, California and New York, have more specialized staff and procedures for responding to legislation, although this could also be a function of the amount of resources put into court administration or of governmental complexity.

The frequency and duration of the legislative sessions form another important factor, though the nature of its effect is not always the same. Some state legislatures meet for 60 days or less annually or even biennially. In those states, court administrators have very little time during the session to analyze and respond to bills. They may, however, be involved in the developmental stages of legislative proposals between sessions. Furthermore, although no respondent specifically mentioned this connection, longer legislative sessions may well produce more

TABLE B-1 General Factors Affecting Caseload Projections and Impact Analyses in 23 States

State	Population[1]	Land Area[2] (square miles)	Frequency of Legislative Session[3]	Limitation on Length of Regular Session[3]	Date of AOC Establishment[4]	Number of AOC Staff[5]	Ratio of Unification[6]
Ala.	3,444,165	51,609	Annual	36 L[a]	1971	3	.55[b]
Alas.	302,173	586,412	Annual	None	1959	30	.80
Calif.	19,953,134	158,693	Annual	None	1960	44	.38[c]
Colo.	2,207,259	104,247	Annual	None[d]	1959	54	.81
Fla.	6,789,443	58,560	Annual	60 C[e]	1972	27	.66
Hi.	769,913	6,450	Annual	60 L[f]	1959	20[g]	.91
Idaho	713,008	83,557	Annual	60 C[h]	1967	14	.75
Ky.	3,219,311	40,395	Biennial	60 L	1954[i]	8	.55[b]
Md.	3,922,399	10,577	Annual	90 C[e]	1955	29	.69
Mich.	8,875,083	58,216	Annual	None	1952	92	.48[c]
Mo.	4,677,399	69,686	Annual	January–May 15 or June 30[j]	1970	26	.36
N.H.	737,681	9,304	Biennial	[d]	No information available	No information available	.58
N.J.	7,168,164	7,836	Annual	None	1948	273[k]	.61[b,c]
N.Y.	18,241,266	49,576	Annual	None	1955[l]	237[m]	.36[b,c]
N.C.	5,082,059	52,586	Biennial	None	1965[n]	62	.72
N.Dak.	617,761	70,665	Biennial	60 L[o]	1971	6	.61
Ohio	10,652,017	41,222	Biennial[p]	None	1955	8	.52
Oreg.	2,091,385	96,981	Biennial	None	1971[q]	27[r]	.38
Pa.	11,793,909	45,333	Annual	None	1968	34	.59
R.I.	949,723	1,214	Annual	60 L[s]	1969	7	.75
Utah	1,059,273	84,916	Annual[t]	60 C	1973	5	.61[b]
Wash.	3,409,169	68,192	Biennial	60 C[u]	1957	18	.63[b]
Wis.	4,417,933	56,154	Annual	None	1962	22	.58[b]

SOURCES:

[1] United States Census, 1970.

[2] *World Almanac and Book of Facts, 1977* (New York and Cleveland: Newspaper Enterprise Association, 1976), p. 456.

[3] *The Book of the States, 1972–73,* Vol. 19 (Lexington, Ky.: Council of State Governments, 1972), pp. 60–61.

[4] *State Court Systems, Revised 1976* (Lexington, Ky.: Council of State Governments, 1972), pp. 34–35.

[5] *Ibid.*, pp. 36–37, unless otherwise noted.

[6] Larry Berkson, "Unified Court Systems: A Ranking of the States," *Justice System Journal* 3:264–280 (Spring 1978). These figures represent each state's mean score on a series of indicators measuring five components of court unification: consolidation and simplification of court structure, centralized rule making, centralized management, centralized budgeting, and state financing. The closer the score to 1.00, the greater the unification of the court system.

NOTES:

[a] Abbreviations: L, legislative days; C, calendar days.

[b] These states have taken steps in the direction of greater unification since these data were compiled.

[c] This state's score has a standard deviation higher than .33. Those states with relatively high standard deviations in relation to their means scored very high on one or more dimensions and very low on others. This means a state may have adopted some features of court unification, but, for reasons peculiar to that state, has not adopted other features.

[d] Indirect restriction since legislators' pay per diem or daily allowance stops but session may continue: Colorado—statutory limit of 160 days pay in biennium for those senators elected prior to 1970; New Hampshire—constitutional limit on expenses of 90 legislative days or July 1, whichever occurs first, 15 days salary and expenses for special session; Rhode Island—constitutional limit of 60 days.

[e] Session may be extended for an indefinite period of time by vote of members in both houses: Florida—three-fifths vote; Maryland—three-fifths vote for 30 additional days.

[f] Extension of 15 days granted by presiding officers of both houses at the written request of two thirds of the membership or granted by the governor.

[g] The administrative director of the courts for Hawaii stated that the number of employees on his payroll is 900, but he was undoubtedly including judicial and clerical positions in all courts in the state rather than only his administrative staff.

[h] The session length reported by the Idaho respondent was 3 months.

[i] Position of administrative director of the courts was established in 1954. With the implementation of a new judicial article in 1975, the Office of Judicial Planning was established.

[j] Different adjournment dates in alternate years. If the governor returns any bill with his objections after adjournment of the legislature in even-numbered years, the legislature shall automatically reconvene on the first Wednesday following the first Monday in September for a period not to exceed 10 days for the sole purpose of considering bills vetoed by the governor.

TABLE B-1 (*continued*)

[k] As of September 1978 the New Jersey respondent reported the number of employees in the Administrative Office of the Courts as 217 permanent and 56 federally funded positions, the latter continued on a year-to-year basis.
[l] 1955, Judicial Conference and Office of State Administrator; 1962, Administrative Board; 1974, Office of State Administrative Judge and Office of Court Administration.
[m] The New York respondent estimated that of the 237 employees, 15 professionals are significantly involved with the legislative branch.
[n] Previous position of administrative assistant to the chief justice was created in 1951.
[o] The North Dakota respondent reported the sessions as lasting for 4 months. Apparently, the official limit has either been changed since the data were compiled or is ignored.
[p] Legislature may divide session to meet in even years also. Ohio is required by law to hold second session.
[q] Previous position of administrative assistant to the chief justice was created in 1953.
[r] The Oregon state court administrator described his "personal staff" as nine persons.
[s] See note *d*. Nevertheless, the Rhode Island respondent said the session lasts from January to May. This is apparently an example of a state where the sessions have increased in length since these data were compiled.
[t] Even-year session is basically limited to budget and fiscal matters and, according to court administrator, lasts for only 2 days.
[u] According to the Washington respondent, the sessions always last at least 120 days, despite the official limit, and there is usually a special session in off-years.

legislation, including laws that create new cases or change the operation of the court system.

A number of states are moving in the direction of longer and longer sessions, as constitutional or statutory limitations on the length of sessions are removed or modified by special sessions. One indirect effect of this, noted by respondents in North Carolina and Michigan, is a decreasing proportion of lawyers in the legislature and an increasing proportion of legislators with less initial familiarity with and sensitivity to problems of courts. This connection between length of session and number of lawyers serving in the legislature is not universal, however. The proportion of lawyers in the New York legislature, which meets virtually full-time, is approximately 80 percent.

A factor that may affect the amount of court-related legislation introduced is the scope of the rule-making authority of the supreme court or some other judicial body in the state. Four respondents noted that changes in court procedures accomplished by court rule-making can decrease the amount of legislation that court administrators need to monitor. On the other hand, in states where the court and the legislature exercise concurrent rule-making authority, the court administrators may need to be alert to the emergence of inconsistent rules.

Finally, the length of time a court administrator's office has been in existence or the length of tenure of a particular court administrator seems to affect relations between the court administrator's office and the legislature. These factors, too, have various effects. While one administrator attributes his influence in the legislature to his long tenure and personal credibility with legislators, another finds his office is listened to because it is a "new resource" for the legislative process. All of these factors and others appear to help explain some of the variation found in the caseload projection and impact analysis activities of the different states, which are summarized in the rest of this paper.[2]

CASELOAD PROJECTION

Of the 23 states surveyed, 17 indicated that they do some kind of projection of future caseload burden on a regular basis, and 4 others indicated that they had done so at least once or that they do so when requested for a specific purpose; only 2 states, Ohio and Missouri, have not done projections, but Missouri is planning to do so in the near future.

Most states are fairly conservative in how far into the future they attempt to project the caseload: 2 states do so for only 1 year at a time,

6 do so for 1 or 2 years, and 5 states regularly forecast for 3–5 years into the future. Of the other states, 3 use 6- to 9-year time frames, and 3 regularly forecast 10 or more years into the future. Those that do the longer forecasts, of course, also do short-term projections for some purposes. Three professional statisticians and one general administrator who were interviewed expressed a preference for projecting no farther ahead than required, indicating an awareness of the possible inaccuracies of projecting too far into the future. (Three of these four comments were from states that project for only 1 or 2 years.)

Weighted caseload analyses, enthusiastically promoted in recent years by the National Center for State Courts and others, are regularly undertaken in 6 of the 23 states, and 5 more are planning such efforts. There are 2 other states that have an informal method of treating some cases differently from others though they are not numerically weighted, and 8 states do not use weighted projections. The methods of determining the weights vary from having judges weight cases through a Delphi technique, to asking judges to keep records of their time spent on the bench, to electronically recording bench activities. California's system, developed in the mid-1960s, seems to be the model among the states, but respondents in 2 states, one with an informal system and one in the process of developing its own weighted system, mentioned that they had tried a California-type weighting system and had rejected it.

The amount of detail I obtained about the exact method of projecting varied a great deal, depending on the length of the interview, on the detail offered by the respondent, and, in the case of general administrators rather than statisticians, on the respondent's own understanding of the process. Roughly, it appears that 7 states use straight-line projections, 8 use some form of simple regression formula, and 2 use multiple regression formulas. (One other state indicated that it is developing a multiple regression formula.) The description from 4 states could not be categorized in any of these three ways. Descriptions of the methods are given in Table B-2, along with information on other aspects of states' projection activities, including problems.

The uses made of the caseload projections are much as would be expected—planning annual budgets and requesting funding for new judgeships and facilities from the legislatures. A few states indicated that they also use the projections for assigning court personnel to overburdened areas and estimating the impact of new legislation. A few others, more cautious about the reliability of the projections, use them at present only for internal planning within the court system rather than for presentations to the legislature in justifying new judgeships. As one assistant court administrator said: "We don't want to 'sell' a new judgeship to the legislature with data that don't come to pass."

Many of the states surveyed are pleased with the accuracy of their forecasts; 9 states claimed error rates of 3 percent or less or generally expressed satisfaction with their results. On the other hand, 8 states, including some with reasonably accurate projections for short periods, expressed concern about the accuracy of data available to them from the subregions of the state. States are beginning to collect more data about their judicial systems with the help of automatic data processing, but there is still a danger of untrained local clerks not categorizing information consistently or accurately.

After surveying the states' activities in caseload forecasting, I wondered whether it would be possible to predict from them which states do the most extensive impact analysis of legislation. A likely connection might be that those states with sophisticated forecasting procedures for planning might also produce the most sophisticated statistics for impact analysis. Although there are a few polar examples of involvement and noninvolvement in both areas, there is no consistent pattern of states having the most sophisticated statistical analyses also being the most involved in responding to legislative proposals. Moreover, the actual content of the impact analysis done (in the sense of the combination of quantitative and qualitative analysis) was one of the hardest things to determine from the telephone conversations (see further discussion below).

The relationship between the two activities depends in part on the court administrator's policy on taking stands on proposed legislation and the frequently occurring mixture of taking stands on and analyzing the impact of a bill. Although some respondents made a point of differentiating their involvement in what I call substantive and operational issues (see discussion below), the logically preceding distinction between doing a neutral analysis of impact and taking a position on the legislation was often blurred in the conversations. This ambiguity, complicated further with the subtleties of informal negotiations between court administrators and the sponsors of legislation, produces a great variety in the nature of the involvement of court administrative offices in responding to legislation.

IMPACT ANALYSIS

Of the 23 state administrative court offices surveyed, 12 reported that their offices review all bills or summaries of all bills introduced into the legislatures; 7 reported that their offices review all court-related bills; and only 2 states, Ohio and Missouri, do not regularly attempt to analyze in some way pending legislation with potential impact on the

TABLE B-2 Caseload Projections in 23 States

State	Use of Projections	Years Ahead	Use of Weighted Caseload	Projection Method	Uses	Problems	Comments
Ala.	As requested		Informal	Consider past trends, population density, geographical area, local peculiarities	In responding to bills creating or eliminating judgeships	Weak data base—recently changed to monthly data from 6-month data with only three categories	Tried total caseload projection once and "blew it"—caseload and cost too high
Alas.	As requested	Depends on request; 2 years for judgeships	Yearly bench-time study using electronic recording system	Straight-line for judgeships; new PERT model for appellate caseload	Jail beds in Anchorage in 1990; superior court workload in 1983		Planning to use Delphi to improve estimates
Calif.	Yes	2 years	Yes, system developed 12–14 years ago; successful in computing judge-year value	Modified regression method over 5-year data base; not committed to any method, see what makes sense from linear and parabolic lines	Requesting judgeships and assigning court personnel	No, projections "quite accurate"	Acceptance of forecasts by decision makers varies from one administration to another; legislature usually receptive
Colo.	Yes, once	5–10 years: grant for special study	No, experimental study underway for trial courts and probation department	Multiple regression with 20–30 variables	Will be used in planning annual budget		Had a special grant from LEAA; now developing for ongoing use

Fla.	Yes	12 months	No—planning "caseload difficulty index" with Delphi technique	Multiple regression for four types of cases at circuit level and five types at trial level; use unobtrusive measures—sales tax, number of attorneys, etc.	Advising chief justice on need for judgeships; testing validity before taking data to legislature	Transient population complicates—case number correlates best with sales tax and gas sales	Caseload weighting study done by consultant in 1973–1974, but not used because judges found it inaccurate; 3 percent error rate for 1977 projections; developing similar system for county courts
Hi.	Yes	6 years, as required by law	No	Straight-line; discussing use of computer modeling	In making budget and judgeship requests to legislature	Always underestimating	
Idaho	Yes	1 year	No, not found to be useful; some cases (e.g., domestic relations) given special treatment but not numerically weighted	District and statewide projections; four factors considered—population, number of attorneys, geographical area, past caseload	In making annual budget and requesting judgeships	No—no judgeships refused in past 4 years	Legislature respects figures; try to keep statistics simple to be meaningful to legislature
Ky.	Yes, once—Arthur Young contract	2 and 3 years	Yes	Simple linear regression; presumed negative slope would level off and that slope increase limited to 30 precent	Determining need for new judgeships and clerks	Variation in district courts greater than in general jurisdiction courts, but average error only 1 percent	Instituting own regular system; will be reweighting cases using Delphi method and nonparametric scale
Md.	Yes	1, 2, and 3 years	No—system should be developed next year	Experimented with three methods, settled on linear regression	For budget requests to legislature; determining need for judgeships, impact of proposed legislation; general planning	Lack of weighted caseload system	5-percent error rate with regression

TABLE B-2 *(continued)*

State	Use of Projections	Years Ahead	Use of Weighted Caseload	Projection Method	Uses	Problems	Comments
Mich.	Yes	3 and 5 years	No	Courts divided into categories according to number of judges in number of counties	In requesting judgeships only	Need to reduce number of categories—too bulky; skepticism of data from supreme court and legislature; need to avoid comparing urban and rural courts	Legislature and judges organization rejected California-type case-weights; commissioned bar association study of court congestion
Mo.	No						Planning to make projections; now collecting data for them
N.H.	Yes	10–12 years; predicted year when backlog equals entering cases	No	Take number of cases entered, disposed of, and pending, and do regression on six functions; fits exponential regression curve; redo regression yearly	Requesting judges—especially number needed to keep backlog constant	No—correlation coefficient in excess of .9—good fit to line for 10–12 years	"Projection, not forecasts"—picture of system without large changes; working on systems dynamic model to predict need for support personnel and facilities; believes lower court statistics in most states very inaccurate

N.J.	Yes	7 years regularly, some planning estimates to 1990	Yes—average hours of judge time per disposition; six types of cases vary by factor of 50	Regression based on population and historical factors; total caseload and breakdown by court	Requesting judgeships and new court buildings; assigning court personnel; planning future workload	Hard to get good data for subregions; legislature considers factors other than workload projections	Short-run projections good, accurate within 1–2 percent; long-run projections sufficiently accurate for planning purposes
N.Y.	Yes	Depends on need, no more than 2 years	Developing weights through Delphi technique—ready in 2 months	Straight-line projections from 5–6 years of data; found linear regression models do not fit	In requesting judgeships	Criminal case filings vary with D.A.'s policy; need more than one model for predicting across courts or counties	Projections done for each court in each county; beginning to work on nonjudicial staff
N.C.	Yes	2, 5, 10, and 25 years	No	Straight-line projection from past data, correlated with population	In making budget and requesting facilities from legislature	None—have not made many mistakes on 2-year forecasts	Planning to get automated information system
N.Dak.	Yes	2 years—longer not reliable; tried to year 2000	No	Simple regression, based on population found to correlate best with filings of 30 variables tried	General planning, making budget, advising judges of growing backlogs	Population projections not good enough to carry weight of more breakdown in small state	Data not yet used with legislature, do not want to "sell" new judgeships with data that do not come to pass
Ohio	No						Collecting monthly statistics since 1972 (general jurisdiction) and 1975 (limited jurisdiction)—have not felt need to project; not a vertically integrated court system

TABLE B-2 *(continued)*

State	Use of Projections	Years Ahead	Use of Weighted Caseload	Projection Method	Uses	Problems	Comments
Oreg.	Yes	1 year for administrative purposes; 2 years for budget	No	Time series analysis on prior filings—weights recent time more than earlier time; no regression	Making budget, requesting judges and staff, assigning personnel	Limited by quarterly data; only 25 quarters collected; categorized by only civil and criminal	Projections not too accurate beyond one or two observations into future
Pa.	Yes	5 years	Yes, judges have weighted dispositions through Delphi method for 3 years	Regression analysis on data since 1972	Only to show counties what to expect for 1–5 years	Validity of county data from 1970–1974 suspect	Data reevaluated at end of year to check for accuracy
R.I.	Yes	1 or 2 years	No	Straight-line, subjective judgments of varying factors	Planning budget, facilities, and legislature requests		Fairly accurate, but simple; "statistician probably wouldn't think much of it"

Utah	Yes	1, 2, and 5 years	No	Straight-line projections from 5 years of filings and dispositions	Requesting judgeships and assigning court personnel	Need weighted caseload system, but too little staff to do it	Projections successful in getting judgeships; soon shifting from manual to computerized information system
Wash.	Yes	1, 3, 5, and 10 years; for fun to year 2000	Yes, time study of activities in use for 2 years	Simple regression over base period; developing a multiple regression model	Making annual budget and requesting funds; sometimes to assess impact	Concerned with uniformity and validity of data at collection point; legislature skeptical of data	"We use whatever works and project no farther ahead than we have to." Working on econometric model; would like to use simulation model
Wis.	Very limited		No, but study starting January 1979	Use population projections to make rough estimate of caseload	Responding to bills to create or phase out judgeships	Existing statistics not accurate enough for making staff decision	Weighted system tends to put too much emphasis on caseload and not enough on extrinsic factors

courts. In some cases, a legislative referral service makes the determination of court-relatedness; in other cases, the source of determination was ambiguous. One state's legislative liaison learns of legislation by sitting in on committee sessions, and another relies on the legislative summary published in the state bar magazine. The means by which those offices that directly review bills receive the bills vary: some legislatures automatically forward bills to the court administrator's office; some administrator's office staffs pick up the bills themselves; and two or three use services that publish summaries of pending legislation. Tables B-3 and B-4 summarize information about impact analysis from the 23 states surveyed.

I attempted to determine whether the states that analyze legislation distinguish between "operational" bills, which would directly alter the way courts do business or are financed, and "substantive" bills, which would change the substantive law by adding, eliminating, or changing civil causes of action or criminal penalties and thus affect the courts primarily by altering the quantity or composition of their caseloads. The responses indicated that 10 states do make some distinction in the way such different types are handled, and 10 apparently do not. Among those that make some distinction, 6 expressed some reservation about taking positions on substantive issues. This was stated in various ways: for example, no stand on questions of "fundamental state policy," no stand on issues that might later have to be judged by the supreme court, etc. Only one respondent, from Wisconsin, declared that the administrative office of the courts takes no position on any legislation and testifies before the legislature "for information only."

The question about who responds to legislation must be divided into consideration of who does the work of analyzing the potential impact of the bills on the courts and who decides on the position to be taken on a bill. In general, staff members of the administrative office of the courts do the work, and members of the supreme court, the judicial council, or some equivalent body decide what stand should be taken, if any. Of course, the common practice of staff recommendations to the decision makers on the basis of the analysis blurs this distinction.

In 11 states there are one or more staff members whose primary responsibility (at least during the time of the legislative session) is to analyze and respond to legislation. In 5 other states the work is divided among the general staff of the court administrator. In 4 small states the administrator personally does the majority of whatever impact analysis is done. In one state, New Hampshire, it is the executive secretary to the judicial council rather than the administrative assistant to the supreme court who is the primary legislative analyst and lobbyist.

Judicial councils were mentioned most often (5 times) as being the

body that speaks for the judiciary on an issue. In 4 states the chief justice or the supreme court does this; in 2 the chief justice or the administrator speaks for the judiciary; and in 2 other states the judicial conference has that role. Finally, 7 states have judges' associations that take stands on legislation, though this may be in addition to one of the other voices above.

As was mentioned before, one of the hardest things to assess from the interviews was the actual content of the analyses prepared by the administrators' offices. I attempted to classify the information along two dimensions: the format in which the analysis is presented and the amount of statistical analysis included. In 6 states, oral testimony by the administrator, staff members, or representatives of the judiciary is the primary means of communication with the legislature. One state, New York, prefers written memoranda to oral testimony for its formal responses, desiring, I was told, to avoid being asked for inappropriate substantive opinions during committee hearings. The majority of states use memoranda, oral testimony, and individual contacts in varying proportions and degrees of formality. The greatest informality appears to be in North Dakota, where staff of the administrator's office occasionally write brief memoranda or testify, but most communication with legislators is by telephone and face-to-face meetings.

The estimation of the statistical sophistication of the impact analyses is very rough. Most administrators, when asked if they include statistical analyses in their analyses of the potential impact of bills, qualified their answers with comments about the availability of data or staff time. My interpretation of their responses would classify 6 states as making an effort to do a statistical analysis of impact with most of the bills they analyze, 7 states as including some statistical material in certain analyses, and 5 states as doing minimal or no statistical analysis of impact.

After the first few interviews, it became clear that preparing and presenting impact analyses of pending bills was an insufficient description of the involvement of many administrators in the legislative process. Many administrators or the judicial councils they staff are moderately or heavily involved in initiating court-related legislation. Their role may vary from directy drafting and introducing legislation, to participating on a joint planning committee for major legislative revisions, to working with a friendly legislator to get their concerns considered. In trying to classify the degree and types of involvement in initiating legislation, it was also necessary to combine the roles played by the administrators' offices, the judicial councils, and the judicial conferences into the role of the judiciary generally.

The 4 states in which the judiciary is reported to be very heavily

TABLE B-3 Impact Analysis: Role of Administrative Offices of the Courts

State	Receipt of Bills by AOC[a]	Types of Legislation Analyzed	Personnel Who Respond to Bills	Nature of Responses Prepared	AOC Role in Initiating Legislation	AOC's Degree of Influence with Legislature	Comments[b]
Ala.	Staff attorney in chief justice's office monitors	Both operational and substantive[c]	Assistant director for legal services prepares analysis for chief justice	Mostly a legal analysis; hope to do more statistical; mostly oral—administrator[d] testifies at legislative hearings	Judiciary sometimes works through legislator to initiate legislation	Influential—e.g., was able to modify jury selection procedures	
Alas.	Staff counsel reviews all bills	Both operational and substantive	AOC or Judicial Conference, with staff assistance	Usually oral testimony rather than written reports; three staffers spent 40 percent of time in Juneau during session	AOC initates or participates in early stages of most court-related legislation (i.e., on a special committee such as criminal code revision)	So far influential—"we do better budget estimates than executive branch"; administrator since 1973 personally trusted by legislature	AOC trying to eliminate administrative duties from courts (e.g., land recording, traffic)
Calif.	Staff reads every bill (over 6,000) and amended versions	All operational; examine substantive bills, but usually take no position on legislative policy—"courts here to handle work given them by legislature"	Three staff (two attorneys, one analyst) in Sacramento contact various courts to ask assessment; take positions authorized by Judicial Council	Try to compute cost and caseload burden for written report to Judicial Council, executive and legislative budget offices, legislative sponsor; testify "continuously" during sessions	Judicial Council initiates "a few" bills each year—more in past, but trend now is to accomplish by rule, not legislation; encourages legislature to give more authority to council	Staff recommendations usually accepted by Judicial Council; AOC "reasonably influential, quite successful" with legislature	600–800 of 6,000 bills per session have some court impact; often work with legislative sponsor and smooth out problems before hearings; request for more Sacramento staff vetoed by governor

Colo.	Staff picks up relevant bills from legislature	"All court-related bills" (broadly defined)	Two or three staff at legislature constantly during sessions; have own budget staff; chief justice or AOC speaks for judiciary	No uniform procedure—varies from verbal to one paragraph to 10–12 pages, "some" statistical analysis; testify as invited, do not request to	No legislation initiated last year; usually make suggestions to legislators	Not so good relations between legislative and judicial branches—"arm's length"; legislative less interested in impact analysis than "broader picture"	Recent cuts in AOC budget; work through friendly legislators to accomplish ends
Fla.	Legislature committee staffs send us bills related to courts; some we may feel have no impact	All operational bills, but supreme court careful not to take positions on issues they may later rule on, and AOC follows their lead	Legislative liaison position now vacant; no one staff to analyze; bills sent to different divisions, depending on content; supreme court determines position on bill, if any	Some legislative committees have standard format for information requests; varies from paragraph to treatise; statistical analysis if data available; AOC testifies, especially on budget	Supreme court and Conference of Circuit Court Judges occasionally initiate bills; AOC works with legislators on new legislation	No information, but some legislation changed or dropped after AOC opposition	New judicial resources usually added only year or more after cause of burden; supreme court must verify need
Hi.	All bills received, legal staff screens for impact on courts	Operational bills analyzed; hesitate to take position on substantive law—would analyze for impact if we could (too little staff) but not take position	Staff does bills with administrative impact, judges do substantive bills; deputy court administrator is full-time legislative lobbyist; another staffer watches legislative calendar and arranges testimony if necessary	(Most expert) judge or staff drafts study, AOC edits and sends to legislature; administrator or his counsel testifies during session	Active—AOC introduced 25 bills last session (e.g., uniform probate code, new penal code, adoption of federal rules of evidence)	Often can not say if impact information or social grounds more influential; statistics worthless without credibility of AOC—"ours pretty good"	"We lobby more than in most states—have a full-time lobbyist"

TABLE B-3 *(continued)*

State	Receipt of Bills by AOC[a]	Types of Legislation Analyzed	Personnel Who Respond to Bills	Nature of Responses Prepared	AOC Role in Initiating Legislation	AOC's Degree of Influence with Legislature	Comments[b]
Idaho	Administrator personally reviews every bill	[Not clear if operational and substantive legislation treated differently]	Administrator does most himself; spends 60 percent of time on legislation during session and other work in preparation	Writes weekly legislative bulletin for judges; negotiates with bill sponsors; letters to governor or lawyers; testifies often; almost always uses statistics	Initiates 10 or fewer bills per session—recently fewer but more important ones	"We're a catalyst—get support of trial judges and bar for measures"; had several examples of successful intervention; stressed informal face-to-face contacts in small state	Administrator advises judges not to discuss pay with legislators "because it's not effective"; AOC holds training for judges on new laws at end of session
Ky.	Does not receive bills; staff sits in on committee sessions, watches legislative index	AOC responds to operational changes to courts, but not too many operational or substantive measures have been introduced	Special assistant to administrator and legal counsel watch and analyze legislation; administrator or chief judge speaks for judiciary	Varies—often sits in on committees or testifies; statistical analysis rare	No information	Can not ever tell who had influence, but AOC is "respected absolutely"	
Md.	Administrator screens all bills	AOC stays out of "fundamental state policy"; most work on bills they especially support or oppose; may write fiscal note but take no stand	Different staffers analyze different types of bills; Judicial Conference makes policy, administrator testifies daily during sessions	Written reports and oral testimony, statistical analysis occasionally; Fiscal Service has own forms, asks only dollars and cents	Drafts and gets introduced technical court administration bills and others in cooperation with chief judge and Judicial Conference; often advises others on court bills	13 of 50 proposals conceived or supported by AOC or Judicial Conference in 1978 were enacted—better than average success rate	

Mich.	Reads private legislative summary service to cull court-related bills; legislature's status report monitored for average 200 bills	Budget bills, substantive law revisions with whopping impact, changes in court fees, etc. Very low profile on judicial retirement and pay	Associate administrator for information and research is legislative and executive branch liaison	"No canned analysis format like executive branch"; sends copies of important bills to judges and administrators' associations; sends letter to sponsor with statistics or information from outside source; testifies once a week	Introduces only 4–5 per session within AOC direct authority ("usually ho-hum, sexless bills"); seek to get legislators interested in our problems; active in negotiating compromises	Impact "almost scary—information in such short supply that any is very influential even when we doubt quality of data from outside sources or local courts"; get asked for more information than we can supply—data not available	Deputy administrator drafts some court-related legislation for short-handed committees; "Giving legislators good service is good business." Dropping percentage of lawyers in legislature means fewer know of and are sensitive to court problems
Mo.	Receives court-related bills	No information	Policy of supreme court not to lobby for or against any legislation	Passive role—AOC gets requests from legislators for information—e.g., statistics on need for new judgeships; no routine procedure	No information	No information	Supreme court clerk's office "may do more" on legislation; Planning Department provides technical assistance to courts
N.H.	Bills not referred but are picked up from legislature	Both operational and substantive legislation	Executive secretary of judicial counsel is self-appointed lobbyist; administrative assistant of supreme court less involved with legislation	Informal response through testimony of executive secretary on 50 bills per session after consulting with affected groups; 10–15 bills per session formally referred to Judicial Council for recommendation before next session; more	Initiates some, intends to get more involved; Judicial Council takes initiative on some of their formal recommendations if original sponsor loses interest	Judiciary very influential unless strong local feelings; less influential on budget matters than others; courts sometimes suffer in fiscal trade-off	AOC planning "Court Day" to discuss problems with legislators and legislators-elect; referral to Judicial Council sometimes used to shelve hot topic

TABLE B-3 *(continued)*

State	Receipt of Bills by AOC[a]	Types of Legislation Analyzed	Personnel Who Respond to Bills	Nature of Responses Prepared	AOC Role in Initiating Legislation	AOC's Degree of Influence with Legislature	Comments[b]
				legal than statistical analysis			
N.J.	AOC screens all legislation introduced for court-related impact	Both operational and substantive law	Referred through administrative director and supreme court to appropriate staff units or committees for comment on contents and impact; when requested, AOC director testifies and written responses prepared	Written and oral responses to Governor's Counsel and Legislative Committees presenting the judiciary's view on the advisability and impact as well as cost of proposed legislation; where possible, statistics summarizing impact of legislation are included	Limited number of bills initiated concerning court operations and judicial resources. Response by legislature to bills recently introduced has been very favorable	Significant influence with legislative judiciary committees in court-related matters; bills concerning increases in judicial resources enacted in past year	Many changes in court programs and administration have been accomplished through supreme court's power to make and enforce court rules as well as directives issued by the administrative director
N.Y.	AOC monitors daily legislative index service, noting bills with potential court impact	Operational issues always, substantive issues only if impact great and then only to estimate number of cases—legislature's role to make law and courts' to carry out	AOC has Office of Legislative Counsel in Albany; last year filed memo on 492 bills and responded to governor's request on 194, monitored about 2,000 bills	Responses primarily written, prefer not to testify because asked for inappropriate substantive comments; more legal than statistical analysis, cost and caseload of some issues too hard to estimate	Prepared 53 bills, 32 passed; advisory committees assist in developing legislation and response	Very influential; recommendations of AOC prevail 95 percent of time; administrator was legislator (assembly whip); governor usually follows recommendation, too	Memos usually distinguish administrative position from substantive issue; "Pure managers lack sufficient experience with courts; N.Y. legislature very lawyer-oriented, so attorneys on staff have more clout"

N.C.	Administrator screens legislative bulletin with bill titles and summaries for court relevance	"Have some input on everything that happens about courts"; more time on operational than substantive bills	Administrator does much himself; routinely notified of legislative meetings, standing invitation to testify	Informal analysis for use in testimony; contracts with state bar for studies (e.g., merit selection, appellate code, sentencing); tries to estimate costs	Informal—"worked to get mandatory judicial retirement"; marshalls court clerks to contact local legislators	"Win some, lose some," but pretty influential	AOC opposes local measures that detract from uniformity of courts
N.Dak.	Legislative counsel sends court-related bills; also get index with all bills listed	Very involved with operational bills, but try to stay out of substantive law even if it impacts courts	Administrator and other two professional staff work on legislation during session; asks chief justice and Judicial Council if they want to take position	Very informal—phone calls, 2- to 4-page memos; statistics only occasionally; administrator testifies on occasion	Initiates all major legislation on courts— seven or eight bills per session	Squelched only operational bill not earlier involved in (mandatory sentencing); not so successful at getting more money—"they think we ask for more all the time"	AOC does post-session review of all bills with impact before effective date
Ohio	Legislative summary in weekly state bar magazine read	None regularly		"We do not try to influence the legislature"; examination of bills only occasional and informal	Supreme court has constitutional rule-making authority, so not much done through legislature		Chief justice uses superintendent powers to respond to backlog—issue of court impact analysis has not arisen
Oreg.	Legislature sends all bills; administrator personally reads summaries on all bills	Bills with potential impact culled and sorted into support, oppose, information only; analyze both operational and substantive, 100 followed closely	Administrator and two assistants spend 50 percent of time on legislature during session—"voice of judiciary"	Send out memos to those interested; appear before committees; statistical analysis of impact; give opinions to legislative fiscal office	No information—committees of Judicial Conference can draft legislation	No information	"Not too many people are interested in courts," so AOC organized citizens' council last September to stir interest and input

TABLE B-3 *(continued)*

State	Receipt of Bills by AOC[a]	Types of Legislation Analyzed	Personnel Who Respond to Bills	Nature of Responses Prepared	AOC Role in Initiating Legislation	AOC's Degree of Influence with Legislature	Comments[b]
Pa.	Receives copies of all	Both operational and substantive	Special assistant to court administrator works full-time on legislative	Weekly newsletter with abstracts and comparisons of legislature sent to AOC; some statistical analysis, drawing on existing data; occasionally testifies at hearings	No information	Quite influential because AOC's perspective more statewide than local judges' or legislators'; former court administrator was legislator for many years	AOC's staff attorney is former legislator, provides informal interpretation of what goes on in legislature
R.I.	Court-related bills sent to AOC	All operational bills, substantive bills only if potential impact is major	One or two staffers work full-time during sessions; Judicial Council takes positions on legislation, is official voice of judiciary	Asked for fiscal note on all court-related bills; statistical analysis "relatively unsophisticated"; respond to governor's requests for information; testify at request of legislature four or five times per session	Initiate some through governor's program of Judicial Council	Most influential on technical issues; "do better on procedural than political issues, but still pretty good"	Courts have no constant constituency—people interested only if personally involved; high number of lawyers in legislature yields some special interest bills that look innocent but can give us problems—must follow closely
Utah	Legislative staff asks for budget impact, sometimes judicial impact; also do some of own screening	All operational bills and some substantive bills	One assistant court administrator works on legislation part-time, sends bills with potential impact to Judicial	Chief judge of Judicial Council writes to chair of legislature committee; administrator testifies frequently,	Judicial Council initiates some legislation, AOC drafts and gets friendly legislator to carry it through	"We're a new resource for the legislature; they tend to listen to us." Some specific successes	

			Council; they decide whether to support, oppose, or be passive	chief justice only rarely; statistical analysis "not that sophisticated"		in legislation	
Wash.	Receives all bills; staff reads and summarizes those with court impact	Administrator sorts bills into court-related, impact, and major impact; 10–15 percent get detailed study—both operational and substantive	Two staff members of AOC prepare memos; administrator testifies "almost daily"	On "major impact" bills, AOC goes to Judicial Council and trial judges' associations for opinions, tries to determine caseload burden and cost; most input through testimony	No information on AOC; Judicial Council initiates 10–15 bills per session—mostly minor statutory changes	No comment directly, but 14 new judges added recently in response to AOC studies	Less direct contact between judges and legislators than in past because percentage of lawyers in legislature decreasing
Wis.	All bills picked up daily from legislature	All court-related bills sent to 10 constituent groups (boards of judges, specialized judges' groups, administrative judges, court reporters, court commissioners, municipal judges' group, etc.)	Each group responds directly to legislature with letters or testimony if concerned; AOC gets directly involved on major bills; AOC prepares fiscal notes—250 last year	Fiscal notes ask detailed information—may have to say "don't know"; AOC does not take positions on bills—may testify for information purposes; arranged for legislative sponsor of court reform to meet with Administrative Committee (Judicial Council)	Initiates legislation of technical nature through Administrative Committee; may be appointed to sit on special study committees	"We're advocates, but try not to tell legislature what to do." Legislature requires state agencies that contact legislators to register, "Hard to say if our sending bills to court groups has influence"; no direct line to chairs of legislative judicial committees	Can not really predict impact—maybe weighted caseload system would help; court decisions also have impact—too often ignored; "good legislation can be destroyed because of too much emphasis on workload; we try to weigh that."

[a] AOC is a generic term for the equivalent of the Administrative Office of the Courts, regardless of its actual title in the given state.

[b] "Comments" are those of the respondent, not the interviewer.

[c] "Operational" legislation is that which directly alters the way courts do business or are financed (e.g., altering the terms of conditions of employment of judicial personnel, changing jurisdictional divisions, reallocating state and local costs, jury changes, etc.). Substantive legislation is that which changes the substantive law by adding, eliminating, or changing civil causes of action or criminal penalties; it affects the courts primarily by altering the quantity or composition of their caseloads.

[d] Administrator is a generic term for the top state court administrator, regardless of the actual title in the given state.

TABLE B-4 Impact Analysis: Role of Participants and Users Other Than Administrative Offices of the Courts

State	Concern with Impact: By Local Government	By Legislature	By Governor and Other Executive Staff	Involvement of Judges	Involvement of Lobby Groups
Ala.	No information[a]	No information	Attorney general gives opinion on content—e.g., salaries; Office of Prosecution Services monitors D.A.-related bills	Chief justice speaks for judiciary through informal liaison with legislative sponsors—"almost a lobby"; individual judges seem to have a lot of contact with legislators, but AOC "not aware of" their testifying	Bar association has "feet in the door," interested in jury management
Alas.	No information	Asks AOC for impact information	Irregular—if bill impacts attorney general or public defenders	Judicial Conference has study committees—takes stands but does not lobby; administrator assumes local judge-legislative contacts, but does not know; no judges testify in 4 years	No information
Calif.	Many superior courts now have administrators who follow bills, give reaction to pre-	AOC works with court-related committees, tries to "educate" them; staff reports	Not much concern with courts; D.A.'s worry about themselves; governor's office calls 2–3	Judges have own professional association—monitor compensation bills, some involve-	Temporary interest from time to time, not very effective in getting legislation

	siding judge, who passes it on to AOC; L.A. Superior Court office does some impact analysis	often reflect AOC concern	times per month to ask for information or opinion	ment in other issues; individual judges occasionally testify on own or AOC request, but "we feel they shouldn't be too involved"	passed; L.A. bar unsuccessful in getting more superior court judges
Colo.	AOC represents all trial courts except a few independent courts in Denver, which may follow the legislature and represent own interests	Legislative budget office determines court (and all others') budgets	Governor's Planning and Budgeting Commission does fiscal notes and sends to legislative budget office; asks AOC to prepare those related to courts	Chief justice represents official view, but no objection to individual judges testifying on own opinions; encourage more contact between judges and legislators	Time to time—citizen committee existed for merit selection, bar lobbies on judicial salaries; most bills get no attention
Fla.	No information	Some committees ask for AOC response	No information	Supreme court speaks for judiciary; no information on involvement of individual judges	Bar has active legislative program, but concerned with impact on lawyers, not courts
Hi.	No information—court system is unified	"They refer everything to us"	No information	Judicial Council only advisory, initiatives go through AOC to legislature; policy for judges not to testify but they occasionally appear as individuals	Bar association "comes out of the woodwork" for pocketbook interests; Commission on Children and Youth works on family court legislation

TABLE B-4 (*continued*)

State	Concern with Impact: By Local Government	By Legislature	By Governor and Other Executive Staff	Involvement of Judges	Involvement of Lobby Groups
Idaho	Trial court administrators do some impact analysis and try to bring things to attention of AOC	No—legislative committees not staffed; fiscal office analyzes judicial appropriation	No	Judges' Legislature Liaison Committee meets with judicial committees of legislature; informal contact between judges and local legislators helpful; testify by invitation with approval of supreme court if representing judiciary—if not, own opinion	Good relations with bar association—special committees lobby on court issues, administrator presents resolutions to bar for support; League of Women Voters involved occasionally
Ky.	No information	Legislative Research Commission only staff for all committees; each house has Judicial Courts Committee and Judicial Statute Committee	Not specific, but governor is most powerful in state—controls purse and appointments	District and circuit judges have own associations; individual judges in touch with AOC, do not lobby much, but encouraged to speak to local legislators	Bar association and League of Women Voters active in judicial reform
Md.	"Have more autonomy," may analyze if pushing or opposing particular project;	Do not have staff or resources to study more than fiscal impact; Department of	No information	Chief judge and Judicial Conference Committee chairs get weekly status report	League of Women Voters supports bills in principle, but no impact analysis;

	Baltimore City staff does fiscal analysis if bill would add cost for local general jurisdiction courts	Fiscal Services asks AOC to do fiscal note for court-related bills		on bills from AOC; judges lobby "too much" on pay, especially if a former legislator; not supposed to testify without invitation from committee or AOC, but some get friend to ask them	bar association did report on district court reorganization, but usually just lawyer pocketbook issues
Mich.	Some involvement by Cities' League, Counties' League	Some requests to AOC from Judiciary and Appropriations Committees	Executive agencies often ask AOC to do fiscal notes for court-related bills	Two out of three judges' associations have paid lobbyists to work on salaries—chief justice unhappy about this; officers of associations respond to AOC memos on bills, testify if expert on subject; AOC encourages judges to pass substantive information to legislators	Some involvement by Sheriffs' Association
Mo.	No information	Judiciary and Appropriations Committees concerned, may request information and statistics from AOC	No information	Local judges and magistrates' association lobby on variety of court-related legislation	[See Involvement of Judges]
N.H.	No information	Judiciary Committees do some analysis	Attorney general represented on Judicial Council and Judicial Planning Committee	Institutionalized—supreme court gives advisory opinions on bills, Judicial Council makes	Bar association represented on Judicial Council and has own subcommittees that

TABLE B-4 (*continued*)

State	Concern with Impact: By Local Government	Concern with Impact: By Legislature	Concern with Impact: By Governor and Other Executive Staff	Involvement of Judges	Involvement of Lobby Groups
			(Law Enforcement Assistance Administration group); council and committee learning to work together	formal reports between sessions; many judges feel informal contact inappropriate but testify often	make some recommendations
N.J.	No information	Committees request impact statements from AOC concerning court-related legislation; may also be interested in changes in court procedure accomplished through court rules or administrative directives	Governor's Counsel may request information concerning pending legislation	Judges generally stay out of legislative business; annual state of judiciary address by chief justice to legislature started last year	Primarily the Bar Association; changes in rules and recent case opinions published in *New Jersey Law Journal*; other groups may lobby on specific issues
N.Y.	No information	"Always rely on us—no instance in 4 years when they made independent assessment; they provide fiscal impact and ask us for information"	Court-related bills go to Governor's Counsel with staff of seven or eight to recommend veto or approval—often ask opinion of AOC Legislative Counsel	Judges at different levels have own associations—social and political like labor union, limited influence; AOC solicits judicial expertise; individual judges speak informally often to legislators and occasionally testify	AOC Legislative Counsel coordinates position on court reform with bar association and League of Women Voters

N.C.	No information	Fiscal Research Division gets into other areas somewhat and works with AOC	Budget Office asks AOC for data	Judges do not get involved except with pay and chief judge warned other judges not to oppose her pay package; AOC asks judges with good credibility to testify on complex issues	Criminal Code Commission (attorneys and professors) make recommendation without regard for court impact; League of Women Voters lobbies on our issues but no impact statements; bar influence limited [but see Table B-3, Nature of Responses Prepared] because fewer lawyers in legislature
N. Dak.	No information	Only Legislative Council to staff all committees; does some advance analysis	No information	Judicial Council may take position and testify; others may testify with or without invitation; 60 percent get involved on retirement, 15 percent on substantive bills (e.g., juvenile law)	No information
Ohio	No information	No information	No information	No information	No information
Oreg.	Oregon Association of Counties has paid lobbyist, often introduces legislation on	Fiscal office assigns analyst to judiciary, asks AOC for information—"more than we	No information	Legislative Committee of Judicial Conference coordinates judges' appearances before leg-	State bar sometimes initiates legislation

TABLE B-4 (*continued*)

State	Concern with Impact			Involvement of Judges	Involvement of Lobby Groups
	By Local Government	By Legislature	By Governor and Other Executive Staff		
	local court costs, which they finance	have,"—on dozens and dozens of bills		islature; committees can draft bills; judges encouraged to alert AOC if they hear of upcoming bills from local legislature	
Pa.	Philadelphia and Allegheny County have representatives in Harrisburg, concerned with local court costs; smaller counties deal with local legislator	Several committees do some analysis and work with AOC—judiciary, appropriations, consumer affairs, local government, law and order	Governor's Justice Commission (Law Enforcement Assistance Administration planning) and deputy attorney general for criminal justice do some court impact analysis	Frequent informal contact with local legislators and administrator; rural judges more involved; judges testify on new judgeships and pensions	Maybe bar association; county commissioners' association on financial issues
R.I.	No information	Standing legislative commission on judicial process (legislative, judicial, and public members) sponsors legislation on courts	Governor puts some court-related bills in his legislative program	[See Table B-3, Personnel Who Respond to Bills]; only 45 judges in state—high degree of contact with legislature and AOC; many judges were legislators; judges	League of Women Voters not very effective; some interest from juvenile and minority lobbies, but "no group I can mobilize when I need

				almost never testify, presiding justice occasionally on complex issue	it"; bar association minimal because so many lawyers in legislature look after interests; we try to involve bar's legislative committee
Utah	No	Budgetary only	"Sometimes attorney general presumes to speak for courts, but he doesn't, really."	[See Table B-3: Personnel Who Respond to Bills; Nature of Responses Prepared; AOC Role]; try not to have judges too involved; encourage local meetings with legislators, but not in legislature; judges testify by invitation, monitored by AOC or Judicial Council	League of Women Voters active in court reform and adding judgeships; state bar also active
Wash.	"Not to my knowledge; they turn to us."	Judiciary or Ways and Means Committees do what they call impact statements—not very good, no expertise in court operations	No	Trial judges association has lobby committee; public disclosure act prohibits public employees from contacting legislators unless asked; some judges arrange blanket invitation; AOC occasionally asks judges to testify	Bar associations occasionally involved (e.g., no-fault); League of Women Voters involved more on broad, system-wide issues

TABLE B-4 (*continued*)

State	Concern with Impact			Involvement of Judges	Involvement of Lobby Groups
	By Local Government	By Legislature	By Governor and Other Executive Staff		
Wis.	No information	Asks AOC for fiscal and other information	Sometimes consults AOC before signing	[See Table B-3: Types of Legislation Analyzed; Personnel Who Respond to Bills]; supreme court may take position on major legislation; Judicial Conference may initiate legislation—usually reactionary, political; supreme court and legislature have concurrent jurisdiction over procedure—Judicial Council advises supreme court on rules	Bar association has lobbyist, active standing committees occasionally testify

[a] "No information" includes both instances when the related question was not asked and instances when the respondent had no comment on the subject.

involved in initiating legislation are Alaska, North Carolina, Hawaii, and New York. The Alaska office initiates or participates in the early stages of most court-related legislation. The North Carolina administrator's role is informal, but he "has some input on everything that happens about courts." The Hawaii court administrator's office introduced 25 bills during the last legislative session, including major code revisions and procedural rule changes. New York's Office of Legislative Counsel (of the administrator's office) prepared 53 bills last session, 32 of which became law. Of the other states, 13 reported moderate or occasional involvement in initiating legislation. The Idaho office, for example, initiates no more than 10 bills per session: "fewer in recent years, but they have been more important legislation." Two states claimed only a minor role in initiating legislation or were responsible for only very small, technical proposals; 4 states were either not asked or gave answers too ambiguous to classify.

Asked for an assessment of their offices' degree of influence with their respective legislatures, 12 of the respondents reported excellent or generally good relations with and satisfactory responsiveness from the legislatures. Three respondents made neutral comments about not being able to determine what actually influences a decision, but 2 of these added that the administrator's office was definitely respected. Three other respondents who did not evaluate their offices' influence did cite some instances of success in achieving their legislative goals. Only one state office, Colorado, reported that its influence is weak and its relations not too good with the legislature, and 3 others acknowledged that they have less influence on financial or "political" issues than technical or procedural ones.

Another area that is extremely difficult to generalize about is the involvement of judges in responding to legislation. I asked about individual judges' informal contacts with legislators and their testifying before legislative committes, but the answers were too diverse and vague to categorize—except for the possibly surprising finding that 6 respondents indicated the administrator's office encourages judges' informal contacts with legislators, although in some cases with the suggestion that they be made in the home communities and not in the halls of the legislature. Of the 23 states, 13 indicated that some kind of control is exercised over judicial involvement in legislation, ranging from an expressed opinion or formal policy that "judges shouldn't be too involved," to the coordination of all testimony by judges through the administrator's or chief judge's office, to a public disclosure law that prohibits all public employees from contacting legislators unless asked. Eight respondents made comments that were either explicitly or

implicitly critical of some judges' activity on legislation. There was some but not complete overlap between these 8 respondents and the 8 who mentioned that the legislation that most interests the judges is judicial compensation and retirement bills.

In their official capacities, judges also have roles in the analysis of and response to legislation. In 15 states the judicial council or the judicial conference takes stands or makes substantive contributions through study committees or proposals for new legislation, and in 5 states the chief justice or the supreme court engages in such activities. Seven states also have lobby or professional organizations of judges that respond to legislation, and in only 2 of them did respondents indicate that their emphasis is primarily on judicial compensation.

The survey originally asked about the capacity and involvement of local courts in analyzing the court impact of legislation, but as the interviews progressed, I also got responses from some states concerning the interest of local units of government that finance local courts in issues affecting court costs. Although the majority of respondents offered no information about any local involvement in impact analysis, 4 mentioned involvement by city or county governments or their lobby organizations in cost issues. California, Colorado, Idaho, and Maryland have local court administrators who make some effort to analyze proposed legislation.

Responses about the concern of state legislators and executives about court impact tended to be very vague. Only 2 states gave no information on this issue, but 8 said that the concern of legislators is confined to asking the court administrator's office for information rather than doing any independent assessment and 6 said the concern is only about the fiscal aspects of court impact. Four respondents specifically mentioned that legislative committees in their states have either no staff or only one central staff serving all committees. Seven respondents indicated that legislative staff do some kind of analysis of court-related bills, but no one spoke with any admiration or even much knowledge of such work done in the legislatures. A respondent from the state of Washington put it most forcefully: "The judiciary or ways and means committees do what they call impact statements, but they are not very good and demonstrate no expertise in court operations."

Evidence of executive branch efforts to do court impact analysis was even more scarce. In 4 states, executive agencies (usually governors' offices) ask the administrative office of the court for information or opinions on legislation related to courts. Respondents for 4 states indicated only fiscal interest on the part of the executive branch, and 3 others suggested the executive is concerned only with those aspects of

the judicial system that fall into its domain—prosecution and corrections. In 2 states, the attorney general sometimes issues opinions on court-related legislation, but the interviewee in one of these states said that the attorney general was inappropriately presuming to speak for the courts. Ten states did not give any information about executive-level involvement. Only in Pennsylvania was an executive branch agency reported to be doing any real impact analyses. The New Hampshire office mentioned participation by the executive branch in the joint planning body for the judicial system required by the Law Enforcement Assistance Administration; probably more states have this kind of cooperation, but the respondents did not consider it relevant.

Responses to a question about the concern of lobby groups with problems of court impact were influenced by my suggestion of the bar association or League of Women Voters as groups that might play such a role. Consequently, these two groups were mentioned much more often than any others—perhaps disproportionately to their true involvement. Eight respondents acknowledged the League as having an interest or playing some role in court-related legislation, but nobody credited it with doing substantive impact analysis.

State bar associations were mentioned 17 times—far more than any other group—with 11 neutral comments, 4 negative comments, and 2 positive comments. Of the neutral comments, 4 characterized the bar as active, and 3 as largely inactive or not very influential. Most of the negative comments pertained to the bar's emphasis on pocketbook issues for lawyers. However, the administrator's office in Idaho seems to have a particularly close, productive relationship with the state bar, and the North Carolina office actually contracts with the bar association to do substantive studies of court-related issues that it does not have the time or staff to do itself.

Other kinds of groups that were mentioned once or twice as getting involved in court-related issues are a citizens' committee on merit selection of judges, commissions on children and youth, a sheriffs' association, minority group organizations, and a criminal code commission. The latter, made up of attorneys and professors, would appear to be more of a study committee than a lobby group, but the administrator felt the group created problems for him because it made its recommendations with little regard for their court impact. Three persons specifically commented that lobby groups tend to be generally ineffective, temporary, or nonexistent: "Nobody I can mobilize when I need them," as one person put it. The Oregon administrator's office has attempted to address this problem by organizing a citizens' council on

the courts; the group has met a few times since its formation in 1978, and so far the administrator is pleased with it.

A CLOSER LOOK AT 9 STATES

To augment the general findings from the survey, a few more detailed examples of the range of statistical and legislative activity in selected state court administrators' offices will emphasize the variety around the country. The California Administrative Office of the Courts was mentioned several times by other states as a model in the field. It has had a weighted caseload system of projecting future workloads for more than 12 years, and it attempts to include quantitative cost and caseload estimates in its analyses of pending legislation. Its legislative staff in Sacramento takes the initiative in smoothing out problems with legislative sponsors before the hearing stage and in educating legislative committee staffs to the problems of the judiciary although its policy is to take no stand on matters of substantive policy. In addition to the work of the administrative office, many of the California superior courts now have administrators who follow bills with potential court impact and report their views to the state court administrator's office through the judges on the judicial council. The Los Angeles Superior Court's administrative office does some court impact analysis of its own.

Alaska is another state with an administrative director's office that is active in both statistical analysis and legislative influence. In the course of my work, I received a copy of a formal, quantitative court impact statement prepared in Alaska. The Alaska study fits the ideal model of a judicial impact analysis better than any other state example we have received except that it was prepared after, rather than before, the passage of the legislation.

In Michigan the court administrator's office is highly involved in court-related legislation, but in a more informal and perhaps more comprehensive way. It makes an effort to compile statistical data pertinent to pending bills, partly by borrowing them from outside sources, such as *Judicature* and the National Center for State Courts. The state itself generates somewhat less sophisticated statistics than some other active court administrative offices—due in part to the skepticism of the supreme court and legislature of a California-type case weighting system and long-range forecasts. Michigan's associate administrator for information and research has a liaison function between the legislative and executive branches, playing a brokerage role in negotiating compromises on court-related legislation. He also drafts court-related

legislation for short-handed legislative staffs and takes pride in doing it fast: "Giving legislators good service is good business."

New York State represents an equally active but a much more formal approach to legislative involvement. The Administrative Judge's Office of Legislative Counsel in Albany last year filed legislative memoranda on 492 bills and responded to gubernatorial inquiries on 194 bills. Its memos often distinguish the administrative aspects of the bills from the substantive issues involved, declining to take a stand on the latter. The staff says it prefers to respond by memoranda rather than by presenting oral testimony to avoid being asked for inappropriate substantive comments. Assisted by its own advisory committees, the office also introduced 53 bills. Although the New York court administrator's office does moderately sophisticated caseload projections, the legislative memoranda are discursive legal analyses with little or no quantitative discussion of the administrative impact.

Within my sample of 23 states, Ohio and Missouri represent the extremes of noninvolvement in both statistical and legislative analysis. Neither of them does any caseload projections, although Missouri is planning to begin doing so. The Ohio office of the administrative director of the courts has been collecting monthly statistics from the general jurisdiction courts only since 1972 and from the limited jurisdiction courts only since 1975. Ohio is not a vertically integrated court system, so that the administrative director's office relates primarily to the supreme court.

In the area of analysis of legislative impact, the Missouri state courts administrator receives court-related bills, but the Ohio office merely reviews a legislative summary published in the weekly state bar magazine. Both states have flat policies of not attempting to influence the legislature. The Ohio respondent reported that the rule-making authority of the supreme court results in little court-related legislation being introduced. Missouri has local judges' and magistrates' associations that lobby on court-related legislation, but the administrator's office confines itself to responding to legislative requests for information.

In New Jersey the judges, both individually and collectively, traditionally keep out of the legislative process, but the administrative office of the courts is large and active. The staff collects detailed data on many aspects of court operations and is engaged in several large research projects on court unification, sentencing, pretrial intervention, probation, and so forth. Many innovations have been accomplished through the supreme court's power to make and enforce court rules as well as through directives issued by the administrative director. In relation to substantive legislation, the administrative office produced in 1976 a

retrospective study of the impact on case filings of a 1973 no-fault automobile insurance law. The study is notable for acknowledging that a variety of factors in addition to the new law may have contributed to the decreasing number of auto negligence filings. The office's prospective work includes a calculation of additional judicial positions needed to meet "speedy trial" standards, a regular 6-year projection of total caseload increase revised annually, an estimate of judge strength in one county for the years 1980, 1985, and 1990 based on weighted workload and population projections computed by the State Department of Labor and Industry, and regular responses to executive or legislative requests for its views on the advisability of proposed legislation.

The Wisconsin administrative director of the courts refuses to take a position on any bill, instead preparing fiscal notes and testifying "for information purposes only," but the office is highly involved in generating responses to pending legislation. All bills are picked up daily from the legislature and sorted for those with court impact. All court-related bills are sent directly, without analysis, to 10 constituent groups, such as boards of judges, specialized judge groups, court reporters, court commissioners, a municipal judges' group, etc. Each of these groups responds directly to the legislature with letters or testimony if it wishes. The administrative director's office has also arranged for the sponsor of a legislative proposal to meet with the administrative committee (Wisconsin's judicial council) to discuss the bill.

Wisconsin's assistant administrative director of the courts was the only person interviewed who made two important points about court impact analysis. Although regretting their lack of statistical capability for better predicting the impact of legislation, he noted that "good legislation can be destroyed because of too much emphasis on its effects on workload." Perhaps it is that consideration that keeps the Wisconsin office from supporting or opposing legislation. His other point was the important impact of court decisions—common law legislation—on court operations and workload. He believes there is a need for more emphasis on this source of impact.

One final state must be described for its uniquely institutionalized avenues for judicial response to pending legislation. The judiciary of New Hampshire responds to bills in three different ways, although none includes much quantitative analysis of administrative impact. In a fairly typical approach, the executive secretary of the judicial council is a "self-appointed lobbyist," responding through legislative testimony to approximately 50 bills per session after consulting with affected groups. He hopes to become even more involved in initiating legislation, finding sponsors, monitoring passage, and arranging testimony. In addition, the New Hampshire Supreme Court is one of the

few high courts in the United States that issues official advisory opinions at the request of the legislature. Finally, between the biennial legislative sessions, an average of 10–15 bills are formally referred to the judicial council by either house of the legislature for further study and a recommendation. Before the next session, the council issues a report that recommends for each bill referred that it be adopted, dropped, or adopted with changes. They do not attempt to estimate costs or caseload impact. Reportedly, referral to the judicial council is sometimes used to delay action on controversial topics, and the recommendations are not always acted on at the next session. If the judicial council itself thinks a proposal is worthy, however, it may take the initiative in pursuing it if the original sponsor has lost interest.

CONCLUSIONS

Despite the diversity of state practices, a few generalizations and conclusions about the analysis of legislative impact on state courts can be made. First, although it is not universally true, it is evident that many state court administrators not only are involved in analyzing the impact of pending legislation, but also are heavily involved in initiating legislation and negotiating agreements. Four respondents used the term "lobby" to describe some parts of their activities, and others spoke of "marshalling" or "mobilizing" support for or opposition to bills. Though some offices differentiate the type or amount of attention they give to measures that are primarily operational from the attention they give to measures that are primarily substantive, analyzing the impact of a bill and taking a stand for or against it are often merged. In short, state court administrators are not merely carrying out policies, but are also playing a role in what the policies will be.

On the whole, the interviews did not uncover widespread concern about severely overburdened state courts. It appears that court administrators are relatively satisfied with the manner in which the courts are dealing with the demands made upon them. Not one person in the 23 states surveyed expressed a desire for a mandatory system of formal, quantitative judicial impact statements for all court-related legislation receiving serious consideration, such as Chief Justice Burger has proposed for federal legislation. State court administrators almost certainly feel that such a task would be impossible for their present staffs to accomplish, and they also seem to have little faith in the competence of other agencies of state government to do it.[3] Furthermore, there is little perceived need for such analyses.

This is not to say that court administrators do not need more informa-

tion about the judicial system than they presently have. At least 7 respondents mentioned that they would like to have more and better data for planning purposes or that they are asked by legislators and executives for more information than they can provide. On the latter point, the Hawaii court administrator articulated most explicitly a reluctance for his office to display too much research and analysis competence, even for issues it supports, for fear of being deluged with requests for information he and his staff could not possibly fill. On the former point, the collection of more detailed data on the justice system is a large, expensive process; progress is being made in some states with the help of the National Center for State Court's State Judicial Information System project.

The lack of felt need for impact statements of the sort proposed by Chief Justice Burger in comparison to the perceived need for more data about how the system is presently functioning suggests that the state judicial systems may be operating under more stable conditions than are the federal courts. The very reason for writing impact statements is the anticipation of changes in the nature or quantity of the demands on the courts.

At least one respondent in the survey articulated this distinction in the context of estimating total future caseloads. Although in most of the interviews we used the terms "projections" and "forecasts" interchangeably, the statistician from New Hampshire insisted that what he does are projections and not forecasts because they are based entirely on past caseload history. Even though his regression functions are more sophisticated than the straight-line projections done in some states, he described the projections as "pictures of the system in the future if there are no large changes."

Using this distinction, "projections" best characterizes the estimation of future caseloads that is done in most states. The respondents in close to half of the states that do caseload projections expressed satisfaction with their results. A few states are beginning to develop multiple regression formulas that incorporate in their projections factors external to the judicial system that affect the caseload of the courts, such as the number of attorneys in the area, population growth and population density projections, and so forth. Others are experimenting with unobtrusive measures that correlate with case filings, such as sales tax and gasoline sales (which is being done in Florida). Even these more sophisticated methods, however, do not necessarily anticipate significant changes in the system, and the simpler projections may sometimes be equally or more accurate than the sophisticated ones.

The explanation that may tie together the lack of interest in formal

judicial impact statements and the satisfaction with rather simple projection methods is that most state legislatures are not enacting or even considering the type of legislation that has created the greatest caseload problems for the federal courts. Two types of litigation that have contributed heavily to growing federal caseloads, for example, have involved civil rights and the Social Security system. The latter is exclusively a federal concern, and the former is an area of law that has been dominated by federal legislation. Those states that have passed notable legislation in such areas, such as New York and California, tend to be large states with judicial systems already carrying such massive numbers of cases that increases in these categories have relatively little proportional impact on the systems as a whole. The study done by the state of Alaska, which is a formal, quantitative analysis of the impact of a piece of new legislation, illustrates the difference between federal and state concerns. The legislation in question in the Alaska study is a bill increasing the size of the Anchorage police force. This creates only an incremental change in the number of familiar cases instead of creating an entirely new type of proceeding with no previous basis from which to estimate the likely number of cases. Such operational, as opposed to substantive, measures were cited much more frequently by the court administrators as the kind of legislation analyzed most regularly and most carefully by their offices.

In conclusion, state court administrators are generally satisfied with their present, largely seat-of-the-pants approaches to analysis of the impact of legislation on their courts. The present methods apparently work for two major reasons: the court administrators have a great deal of influence in determining what the policies will be (especially in the operational areas that most concern them), and the state legislatures are not generally enacting substantive legislation that introduces large numbers of new kinds of cases into the court systems.

A NOTE ON METHOD

The purpose of the survey was not so much to characterize the norm of the American states as to seek interesting examples of procedures and analyses currently being used in particular states. We were more interested in finding outliers, as it were, that would exemplify a novel approach to caseload projection or to impact analysis than in representing all of the states. This purpose shaped the procedure for selecting the states to be surveyed.

One does not randomly sample states. Samples of states are, instead,

purposive; thus size and geographic area, to name just two factors, are frequently considered when seeking to represent a picture of "the states." Here, Panel members and a variety of other knowledgeable observers were queried as to where interesting things were likely to be happening. The 23-state sample is partly a function of a sense of where some innovative court administrators might be located, partly a function of where larger staffs would make some interesting studies possible, and partly a function of idiosyncratic judgments.

We decided to do a telephone survey rather than a mail questionnaire because of the limited time for doing the survey and the likelihood of getting a higher number of responses by telephone than by mail. Although we undoubtedly sacrificed some precision in the information gathered (see discussion below), we succeeded in speaking to at least one person and often more than one in all 23 states selected for the survey.

A letter was sent to the top court administrator in each of the 23 states, explaining our project and describing the issues that we would be pursuing in the interviews. Sending out the letters in advance proved to be helpful because the recipients could prepare some responses to the questions before I called. In a few instances my call was ultimately referred to an assistant who had not seen a copy of the letter, and in general those interviews were somewhat less productive because the respondent had not had time to consider the questions beforehand.

Another reason for the good response is that my letter to the administrators was accompanied by a letter from Ralph Kleps, a member of our Panel, urging their cooperation. Mr. Kleps is the retired director of the California Administrative Office of the Courts and is well known and respected among his colleagues around the country. One court administrator who responded to the letter by mail said he would be pleased to comply "since your request is seconded by Ralph Kleps."

With the assistance of Panel staff members, Susan Martin and Keith Boyum, I developed a questionnaire for use over the telephone (Figure B-1). I thought that I would be able to read it practically verbatim during the interviews and that it would minimize my need for taking notes. It quickly became evident, however, that asking people such specific information was not feasible, and, in some cases, less productive than letting them respond in their own ways. In question II. 10, for example, if the court administrator's office did any legislative analysis at all, it would inevitably examine in some fashion the types of bills in parts (a), (b), and (c), so that it was superfluous to ask for frequencies in each case. The difference between those kinds of bills and the ones in parts (d) and (e) became the basis for the distinction between opera-

tional and substantive legislation used in the report of the survey and the tables.

Instead of asking frequencies for the various analysis activities in questions II. 12 and 13, it was easier to ask what the typical procedure was (if there was any) for responding to legislation. I did use the original categories for prompting people and for clarifying my meaning if there were questions. Because I would not have the time to contact people in other types of agencies that were doing impact analysis, as asked in questions II. 5–9, I began to ask only if the adminstrators knew of any such people instead of asking for their names and phone numbers.

As was noted above, the respondents varied a great deal in how much time they were willing to give me and how much information they volunteered instead of waiting for me to ask questions. As a result, the number of states tallied in most of the issues discussed in the report is not 23. The states that are not counted in some category either gave no information on that subject, gave information too ambiguous to classify, or were not asked that question. In short, most of the interviews were, indeed, informal conversations. Because of that, however, some of them yielded much more information than I would have obtained by asking only my own questions.

A major shortcoming of the questionnaire, which reflected our perception of the whole issue, was that it presumed a model of judicial impact analysis in which the court administrator or someone else prepared a response to a bill that had been submitted by someone else without the administrator's previous involvement. As the report notes, one of the major findings of the survey is that some state court administrators and their staffs are heavily involved in initiating legislation or at least participating in the early stages of legislative proposals. Once this became clear, I made a point to ask each respondent whether the administrative office played any role in initiating legislation.

In general, the columns in Table B-2 correspond closely to the questions asked in Part I of the survey questionnaire. Only the information about the amount of staff time spent on caseload projections was omitted because the responses were so vague. In general, projections involve only a very small amount of the time of one or more statisticians, who spend much more time collecting on-going data about the functioning of the court systems.

Tables B-3 and B-4 deviate more from the questions in Part II because the discussions of impact analysis were more wide-ranging than those of caseload projections. "Receipt of Bills by AOC" and "Personnel Who Respond to Bills" correspond primarily to questions II. 1, 2, and 13. As was noted above, this column combines the conceptually

distinct categories of those who do the work of analyzing the bills and those who decide what stand should be taken, if any. These two columns and "Nature of Responses Prepared" cover the responses to the general query about typical procedures for responding to legislation. (Because most court administrative offices do not see themselves as preparing judicial impact statements per se, I asked about activities undertaken in "analyzing," "examining," or "responding to" pending legislation.)

"Types of Legislation Analyzed" summarizes the responses to the variations I developed on question II. 10, illuminated in some cases by specific examples given for II. 11. Further review of the specific examples given of bills analyzed could reinforce the general conclusion of this paper that one reason for the lack of interest in formal impact statements is that the kind of legislation emerging from state legislatures differs from the highly litigation-producing legislation that is burdening the federal courts.

As described above, the column "AOC Role in Initiating Legislation" resulted from information I gained during the interviews; "AOC's Degree of Influence with Legislature" and "Involvement of Judges" are self-explanatory. With these latter two, it should be emphasized that the comments reflect the administrators' perceptions rather than an objective assessment of the situation.

"Concern with Impact by Local Government" combines the responses to question II. 6 and the unanticipated interest by other units of local government in issues involving court financing in those states in which local governments pay some of these costs. In this column and the following two, "Concern with Impact" is a shorthand that includes everything from the rare instances in which someone other than the staff of the court administrative office is doing a formal impact analysis to any small or sporadic interest expressed in general problems of the court system. The high proportion of "No Information" in these columns reflects both the low degree of involvement of those offices or groups in court issues and also the usual placement of these questions at the end of the interviews, when some persons had run out of time or energy for responding.

After forcing the wide-ranging conversations with 36 people into categories for the tables, I attempted to codify the information further to be able to generalize about the findings. The sense that this process resulted in eliminating much interesting information about the activities in various states led me to include the section of more detailed information on 9 states.

To get an even better impression of the actual content of the analyses

being done by court administrators' offices, I asked a few people if they had copies of analyses produced by their offices they would be willing to send. The states that were asked and responded positively tended to be those with the most formal procedures for analyzing the impact of legislation on the courts; in many states, responses to legislation primarily take the form of oral testimony to legislative committees.

By using all these formats, I have attempted to communicate to readers the essence of the information gained from the interviews. Despite the very informal methodology, I believe that the survey has accurately captured the activities and attitudes of the 23 state court administrative offices, and it has produced a hypothesis about the relationship between the type of legislation being passed by state legislatures and the legislation's impact on state courts that could perhaps be tested in a more methodologically rigorous study in the future.

NOTES

1. In the year ending June 30, 1977, the number of cases (39,786 criminal and 130,567 civil) filed in all the U.S. district courts combined totaled 170,353. During the same period in California superior courts alone (the general jurisdiction trial courts), case filings totaled 713,917 (54,682 criminal and 659,235 civil). This is in addition to the 6,206,936 nonparking cases filed in the limited jurisdiction municipal courts of the state.

2. Because answers were not obtained on all questions for all states, the tally of states in the discussions below is not always 23; see "A Note on Method" at the end of this paper.

3. One peripheral recommendation of this study would be to investigate further what is being done in the way of court impact analysis by state legislative and executive agencies and local courts. Little of this was noted, and what was noted was largely dismissed as insignificant, but one might discover more information being produced than the court administrators realize, at least in a few states. It would also be interesting to learn the scope of the information included in "fiscal notes," which are being prepared in at least 8 states: some of these were reported to be quite extensive, so that they may constitute what could be considered judicial impact statements for court-related measures.

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FIGURE B-1 Telephone questionnaire.

State _____

Name of Court Administrator _____

Name and title of person interviewed (if different from above) _____

_____

I. CASELOAD PROJECTIONS

1. Does your staff attempt to make caseload projections or forecasts for future years?

   ☐ yes ☐ no

2. How many staff members do this kind of work? _____

   What percentage of their time do they spend on the caseload projections? _____%

   Do caseload projections occupy them full time or is this only part of some other responsibilities? such as?

3. How many years ahead do you forecast caseloads? _____years

4. Do you use weighting factors in calculating the caseloads? ☐ yes ☐ no

   If yes, what kinds of factors go into the weighting?

5. Generally, how is the forecasting done?

   How long have you been making projections this way?

6. How are the projection studies used?

   ☐ In making the annual court budget

   ☐ In assigning court personnel

   ☐ In making financial requests to the legislature

   ☐ In requesting judgeships

   ☐ In advising about changes in court operations proposed by:
   - ☐ the Court Administrator's office
   - ☐ by the judicial rule-making authority
   - ☐ by the legislature

   ☐ Other *(specify)*

FIGURE B-1 (*continued*)

7. Do you have any particular problems with your forecasting system?

8. Who is the appropriate person to talk to to get more detailed information about the forecasting procedures? Please provide name, title, and phone number.

II. LEGISLATIVE IMPACT ANALYSIS

A. **Who does analyses of potential impacts of new legislation on the courts?**

1. Does your office routinely receive copies of bills pending in the legislature?

☐ No ☐ All ☐ Some

Which bills?

2. Regarding the procedure in your office for examining potential impact on courts of pending legislation: do you have any staff from the Court Administrator's Office (or Judicial Council) specifically assigned to this task, either regularly or occasionally as needed?

☐ Yes, regularly How many? _____

☐ Yes, occasionally How many? _____

☐ No

3. If yes, at what stage in the legislative process do you do an analysis? Is it done with bills still pending or with legislation newly passed?

4. Is this a full-time job for these staff members? ☐ yes ☐ no
Approximately what percentage of their work time do these staff members

spend on this task? _____ %

those who work occasionally? _____ %

5. Please give me the names, job titles, and phone numbers of those people primarily responsible for doing this kind of work.

6. Do you know of staff members of local courts within your state who examine the potential impacts of new legislation on the courts? Please give their name, job title, and phone number.

FIGURE B-1 (*continued*)

7. Are any staff members of the state legislature from the judiciary committee or any other specifically assigned to examine the potential impact of legislation on the courts?

☐ yes, regularly ☐ no

☐ yes, occasionally ☐ don't know

If yes, please give me their names, what office they are with, and how to contact them.

8. Are any staff members of the state attorney general's office or other executive branch departments assigned to examine the potential impact of legislation on courts? ☐ Yes ☐ No ☐ Don't know

If yes, please give information for contacting them.

9. If there anybody else (e.g., a paid lobbyist, someone from a bar association, or a League of Women Voters representative) who does this?

☐ Yes ☐ No ☐ Don't know

If so, please give me information for contacting them.

Please indicate the frequency of the activities described in questions 10-16: always (A), usually (U), rarely (R), never (N), no information (O).

B. **Legislation most likely to be examined by your office**

10. For the following types of legislation, how likely is it for a member of your analysis staff to examine these bills for their impact on courts?

☐ a. Bills altering the terms or conditions of employment of judicial branch personnel, e.g., adding extra clerical staff or changing retirement ages for judges

☐ b. Bills that directly alter the way courts do business (e.g., changing jury size, limiting plea bargaining, or affecting the time limits for processing cases)

☐ c. Other bills adding to financial costs of operating the court system (e.g., revising fee collections or changing the amount of state revenue available to the courts)

☐ d. Bills creating new civil causes of action or new criminal penalties (e.g., gun registration laws, environmental legislation, civil rights laws)

☐ e. Bills eliminating civil causes of action or criminal penalties (e.g., no-fault insurance or divorce, public drunkenness)

☐ f. Other bills

11. Please name some specific bills that were analyzed by your staff for their impact on courts.

FIGURE B-1 (*continued*)

C. **Types of activities in examining or responding to legislation**

12. How often does a court staff analyst perform the following types of activities with respect to a piece of legislation with possible court impact?

- ☐ a. Reads bill and makes informal estimates
- ☐ b. Writes reports or memoranda
- ☐ c. Provides data at request of others doing an impact study
- ☐ d. Sits in on legislative committee sessions
- ☐ e. Performs statistical analyses of possible impacts
- ☐ f. Researches impact of similar legislation in other jurisdictions

13. How often are the data or memoranda reported to the following offices?

- ☐ a. To you, the chief Administrator of Courts
- ☐ b. To individual judges
- ☐ c. To legislative members or staff through written reports or oral testimony
- ☐ d. Others *(specify)*

D. **Involvement of judges**

14. How often do individual judges alert your office to pending legislation which has important implications for state courts?

15. How often do individual judges speak informally to key legislators or staff members about such bills?

16. How often do individual judges ever testify before a legislative committee?

17. What percentage of judges involve themselves with legislation in these ways?___%

E. **Legislative response to impact analysis**

18. Please describe some instances in which legislative measures were adopted, modified, or rejected after legislators were told of the potential impacts of a piece of legislation.

19. What do you think were the most influential sources of information in getting the legislators to change their proposals in these instances?

20. Please list or describe some instances in which new judicial resources were added when impacts on the courts from a pending bill were forecast.

Forecasting Court Caseload: A Case History of Proposals to Change Diversity of Citizenship Jurisdiction in U.S. District Courts

SUSAN E. MARTIN

INTRODUCTION

Changes in federal jurisdiction over diversity of citizenship cases imply direct impact on the U.S. district courts; indeed, such changes have been proposed and adopted specifically in order to alter the volume and types of cases heard by those courts in recent years. Debates regarding such legislative proposals have included estimates of the impact of the change. For that reason an examination of legislation (and legislative proposals) altering diversity of citizenship jurisdiction provides an instructive case history for understanding the process of developing impact statements and the significance of such statements on the debate itself.

Federal jurisdiction over diversity of citizenship cases arises from Article III of the Constitution, which permits federal jurisdiction based on "controversies between citizens of different States" and "between a State, or the citizens thereof, and foreign States, citizens or subjects." The Judiciary Act of 1789 first provided for diversity of citizenship cases, and they have been part of the caseload of the federal courts ever since. Initially, there were few diversity cases. But in recent years their numbers have mushroomed: in 1941 there were 7,286 such cases; in 1956 there were 20,524; and in 1977 there were 31,678 cases filed, despite recent changes in the law eliminating certain bases for diversity cases. The growth in interstate travel and interstate commerce, the preference of some litigants for federal rather than state courts, to-

gether with certain interpretations of the law, have apparently been the principal reasons for the increasing number of diversity of citizenship cases.

In 1978 a bill to totally abolish diversity of citizenship jurisdiction from the federal courts (with the minor exceptions of interpleader and alienage cases) was passed by the House and considered in the Senate.[1] While such a sweeping approach to dealing with diversity cases is new, other attempts (both successful and unsuccessful) to alter the conditions under which a diversity of citizenship case could be brought in U.S. district courts have established a legislative history (including extensive public testimony) that can be examined for its forecasting methodology and accuracy. In 1958, Congress raised the amount in controversy minimum (i.e., the minimum dollar amount of damages sought in a case for that case to be heard in the U.S. district court) from $3,000 to $10,000. In 1971 a proposed bill would have prevented the invocation of diversity jurisdiction in a federal court by an individual in his or her home state merely because the defendant lived in another state. And in 1978, several bills were initially introduced in Congress that would have altered the amount in controversy and the in-state plaintiff provisions of the law. (After several days of hearings, the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee decided not to mark up any of the proposed bills but instead substituted its own.) The remainder of this paper will examine the debates and materials that predicted the effects for court caseloads of the 1958, 1971, and 1978 bills that proposed changes in diversity of citizenship jurisdiction.

THE ACT OF 1958

In 1958, legislation was enacted specifically to decrease the number of diversity of citizenship cases brought in federal courts. The legislative history of this act (*United States Code Congressional and Administrative News* 1958; hereafter cited as *Legislative History* 1958) noted the growth in the federal caseload and particularly the increase in diversity case filings. The act sought to reduce the number of cases in two ways: by increasing the minimum amount in controversy requirement in diversity of citizenship jurisdiction cases from $3,000 to $10,000 and by changing the definition of citizenship for the purposes of the law so that a corporation that formerly was deemed a citizen of the state in which it was incorporated would additionally be regarded as legally a citizen of the state in which it had its principal place of business.

The 1957 House hearings considered two bills: one (H.R. 4497) that provided for the jurisdictional amount and the definition of citizenship changes that were finally adopted and one (H.R. 2516) that would have completely eliminated corporations as parties to diversity of citizenship suits by declaring them citizens of every state in which they do business. In considering these bills, the Judiciary Committee appears to have relied primarily on two documents: the statement presented in 1957 by Joseph Spaniol of the Division of Procedural Studies and Statistics of the Administrative Office of the U.S. Courts (AO) and the 1951 report of the Committee on Jurisdiction and Venue of the Judicial Conference of the United States. Each of these included a number of tables, based on AO data, indicating the potential reduction in cases resulting from the adoption of the various legislative proposals.

The 1951 report of the Judicial Conference noted the large variety of legislative proposals seeking to alter the law with respect to diversity of citizenship jurisdiction. It concluded that diversity jurisdiction should be retained in the federal courts despite the growth in the number of such cases (which it noted in a table appended to the report). In addressing the matter of the invocation of diversity jurisdiction by corporations, it noted that a statute that made corporations citizens of every state in which they do business would deny federal jurisdiction to a large proportion of diversity cases. On the basis of AO statistics, the report noted that in 1950, 54.3 percent of the 13,124 diversity cases filed would have been eliminated by such a legal change and that 658 more cases might have been eliminated depending on where the corporate parties were doing business. The report added that this change would eliminate one third of all private civil cases and 17 percent (one sixth) of all civil cases in the district courts, but that "the reduction in the caseload . . . would, however, probably be not actually as great, for in some suits the parties or their domiciles or places of doing business might be changed to give jurisdiction, or some basis of jurisdiction other than diversity might be found" (*Legislative History* 1958, p. 3120). The House Judiciary Committee, however, recommended making a corporation a citizen of a state in which it receives more than half its gross income. The AO could provide no statistical information on the effect of this latter proposal on case filings.

The Judicial Conference report recommended raising the jurisdictional amount from $3,000 to $7,500 in 1952 and thereafter to $10,000. Its report noted (*Legislative History* 1958, p. 3122):

> studies of amounts claimed in cases already filed yield the percentages of all civil cases claiming more than the several amounts and these proportions can be applied to the numbers of cases commenced to estimate the effect of raising the jurisdictional amount in reducing the business of the Federal courts.

and presented the tables seen here as Table C-1 and C-2 (*Legislative History* 1958, pp. 3127–3130).

The report noted that the reduction in judges' workload would be highly variable among the districts, but that, overall, private cases

TABLE C-1 Effect of Changes in Jurisdiction[1]

	Civil cases commenced in 86 district courts in fiscal year 1950	Number that could have been filed if—			
		Jurisdictional amount raised to—			Nonresident corporation doing business in State treated as citizen of State for jurisdictional purposes
		$7,500	$10,000	$15,000	
Total cases	44,454	41,764	41,273	39,046	36,934
United States cases	21,854	21,854	21,854	21,854	21,854
Private cases	22,600	19,910	19,419	17,192	15,080
Jones Act	1,716	1,687	1,671	1,538	1,716
Diversity of citizenship	13,124	10,463	9,988	7,904	5,604
Contracts	4,862	3,244	2,983	1,987	(2)
Real property	743	563	531	402	(2)
Personal injury	6,499	5,813	5,666	4,857	(2)
Other diversity	1,020	843	808	658	(2)

	Reduction in number and percentage of cases filed if—							
	Jurisdictional amount raised to—						Nonresident corporation doing business in State treated as citizen of State for jurisdictional purposes	
	$7,500		$10,000		$15,000			
	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Total civil cases	2,690	6	3,181	7	5,408	12	7,520	17
Private cases	2,690	12	3,181	14	5,408	24	7,520	33
Jones Act	29	2	45	3	178	10	------	------
Diversity of citizenship	2,661	20	3,136	24	5,220	40	7,520	57
Contracts	1,618	33	1,879	39	2,875	59	(2)	(2)
Real property	180	24	212	29	341	46	(2)	(2)
Personal injury	686	11	833	13	1,642	25	(2)	(2)
Other	177	17	212	21	362	35	(2)	(2)

[1] This table gives the number and percentage of civil cases filed in 86 districts in 1950 which would have been within the jurisdiction of the Federal courts if the jurisdictional amount in secs. 1331 and 1332 of title 28, United States Code, had been $7,500, $10,000, or $15,000 instead of $3,000, or if foreign corporations had been regarded as citizens of any State in which they were sued if they were doing business in that State.

[2] Not available.

NOTE.—The statistics with reference to jurisdictional amount are based on the proportion of cases of different kinds filed in the 1st half of fiscal year 1951 which fell within the designated categories. For example, it was found that the following proportions of cases in these classes claimed $10,000 or more:

TABLE C-1 (*continued*)

Nature of action	Number of cases filed in the 1st half of 1951 for which amount claimed is known	Proportion claiming $10,000 or more
		Percent
Jones Act	814	97.4
Diversity cases	5,373	79.0
Contract	1,603	60.6
Tort	3,357	86.9

These percentages were applied to cases of the various types listed to determine how many would be eliminated by this change in jurisdiction.

The statistics with reference to nonresident corporations doing business in the State are based on a sampling of cases terminated in 1949.

Source: *Legislative History* (1958, pp. 3127–8).

(including diversity cases) average 3 times as much judge time as government cases, and therefore the percentages indicated by the tables could be increased as much as one half to represent the proportion by which the time judges spent on civil cases would actually be reduced by the proposed change. The Judicial Council's report concluded, however, with a warning about the use of its estimates (*Legislative History* 1958, pp. 3122–3123):

They are not entirely realistic because they represent the purely theoretical premise that the amount in controversy stated by the litigants in cases filed in 1950 would have remained the same if the jurisdictional amount had been raised. Litigants desiring to bring actions in the Federal courts would undoubtedly in many cases have raised the amounts for which recovery was asked, particularly in those cases sounding in tort. . . .

This warning is necessary because past increases in the jurisdictional amount appear to have had little effect on the business of the Federal courts. In 1877 the jurisdictional amount was raised from $500 to $2,000. Private civil cases commenced in the district courts from 1876–79 were as follows:

1876	11,366	1878	11,501
1877	10,258	1879	12,801

The Judicial Code in 1911 raised the jurisdictional amount from $2,000 to $3,000. Private civil cases commenced in the district courts from 1910–13 were as follows:

1910	10,618	1912	10,992
1911	10,191	1913	11,183

TABLE C-2 Effect of Raising Jurisdictional Amount on Civil Business of the District Courts[1]

District	Total civil cases filed, 1950	Number of Federal question [2] and diversity cases filed in 1950 claiming less than—			
		$7,500		$10,000 (number of cases)	$15,000 (number of cases)
		Number of cases	Percent of total		
86 districts	44,454	2,690	6.1	3,181	5,408
First circuit:					
Maine	232	6	2.6	5	9
Massachusetts	1,201	42	3.5	50	90
New Hampshire	83	5	6.0	6	11
Rhode Island	145	10	6.9	11	19
Puerto Rico	549	15	2.7	18	31
Second circuit:					
Connecticut	378	19	5.0	23	38
New York, northern	291	13	4.5	15	26
New York, eastern	1,196	45	3.8	54	94
New York, southern [3]	5,210	213	4.1	258	495
New York, western	414	16	3.9	19	33
Vermont	61	4	6.6	4	8
Third circuit:					
Delaware	109	7	6.4	8	13
New Jersey	1069	56	5.2	66	114
Pennsylvania, eastern	1,701	91	5.3	109	200
Pennsylvania, middle	310	15	4.8	17	29
Pennsylvania, western	1,085	49	4.5	58	104
Fourth circuit:					
Maryland	581	27	4.6	32	55
North Carolina, eastern	268	11	4.1	13	22
North Carolina, middle	150	9	6.0	10	17
North Carolina, western	166	11	6.6	13	21
South Carolina, eastern	282	29	10.3	35	58
South Carolina, western	84	8	9.5	9	14
Virginia, eastern	605	28	4.6	33	60
Virginia, western	168	8	4.8	9	16
West Virginia, northern	109	4	3.7	5	9
West Virginia, southern	240	19	7.9	23	40
Fifth circuit:					
Alabama, northern	363	31	8.5	36	60
Alabama, middle	117	9	7.7	10	17
Alabama, southern	101	4	4.0	5	8
Florida, northern	109	8	7.3	9	15
Florida, southern	883	75	8.5	89	149
Georgia, northern	443	23	5.2	27	47
Georgia, middle	232	11	4.7	13	22
Georgia, southern	170	10	5.9	11	20
Louisiana, eastern	621	50	8.1	60	103
Louisiana, western	350	31	8.9	36	65
Mississippi, northern	118	8	6.8	9	16
Mississippi, southern	318	30	9.4	36	62
Texas, northern	880	162	18.8	189	295
Texas, eastern	475	93	19.6	108	170
Texas, southern	1,067	193	17.8	225	350
Texas, western	553	84	15.2	98	155
Sixth circuit:					
Kentucky, eastern	316	22	7.0	26	45
Kentucky, western	342	16	4.7	19	32
Michigan, eastern	1,470	58	3.9	68	117
Michigan, western	281	10	3.6	12	20
Ohio, northern	1,125	64	5.7	76	133
Ohio, southern	875	25	2.9	30	51
Tennessee, eastern	433	32	7.4	38	69
Tennessee, middle	162	7	4.3	8	15
Tennessee, western	231	10	4.3	12	21
Seventh circuit:					
Illinois, northern	1,952	133	6.8	157	260
Illinois, eastern	319	13	4.1	16	28
Illinois, southern	267	17	6.4	20	34
Indiana, northern	308	20	6.5	23	39
Indiana, southern	554	22	4.0	26	45
Wisconsin, eastern	339	18	5.3	21	35
Wisconsin, western	97	8	8.2	10	18

TABLE C-2 (*continued*)

District	Total civil cases filed, 1950	Number of Federal question [1] and diversity cases filed in 1950 claiming less than—			
		$7,500		$10,000 (number of cases)	$15,000 (number of cases)
		Number of cases	Percent of total		
Eighth circuit:					
Arkansas, eastern	311	21	6.8	25	42
Arkansas, western	192	19	9.9	22	37
Iowa, northern	136	12	8.8	14	24
Iowa, southern	225	14	6.2	17	29
Minnesota	723	46	6.4	55	93
Missouri, eastern	808	39	4.8	46	79
Missouri, western	825	62	7.5	73	126
Nebraska	322	18	5.6	21	35
North Dakota	213	8	3.8	10	17
South Dakota	115	5	4.3	6	11
Ninth circuit:					
Arizona	261	16	6.1	19	31
California, northern	1,328	46	3.5	55	90
California, southern	2,191	65	3.0	76	121
Idaho	189	12	6.3	14	23
Montana	159	9	5.7	11	19
Nevada	93	7	7.5	8	13
Oregon	709	30	4.2	36	61
Washington, eastern	189	9	4.8	10	16
Washington, western	514	13	2.5	16	27
Hawaii	99	2	2.0	3	4
Tenth circuit:					
Colorado	458	37	8.1	44	70
Kansas	625	45	7.2	53	89
New Mexico	176	12	6.8	15	26
Oklahoma, northern	171	20	11.7	23	39
Oklahoma, eastern	191	19	9.9	22	36
Oklahoma, western	399	33	8.3	39	66
Utah	194	12	6.2	15	24
Wyoming	78	6	7.7	7	12

[1] Estimated figures, calculated as stated in the note to table 2. Applies to Federal question and diversity cases. 28 U. S. C. 1331, 1332. The number of cases listed for each district under $7,500, $10,000, and $15,000 does not exactly equal the totals for the 86 districts because of the dropping of fractions and the different method of computation in Jones Act cases in the southern district of New York as stated in the following note. The figures for each individual district are based on overall averages for all districts and not on the average for each individual district.

[2] Only those Federal question cases to which 28 U. S. C. 1331 is applicable are included. The only category involving a substantial number of cases is that of actions under the Jones Act for seamen's injuries.

[3] This district has a large number of Jones Act cases (seamen's injuries). The factors used in determining the numbers of cases listed in the southern district of New York are based in part on experience in Jones Act cases in this district. The Jones Act cases in this district below the amounts given are: $7,500, 4.1 percent; $10,000, 7.8 percent; and $15,000, 18.3 percent.

Source: *Legislative History* (1958, pp. 3129–30).

The report noted that raising the jurisdictional amount would eliminate many contract cases but would have a considerably smaller impact on tort cases (as shown in Table C-2).

The material prepared by the AO for the hearings updated and supplemented the report of the Judicial Conference. It noted that the aim of the proposed legislation was to reduce the crowded conditions in the district courts (which were documented by the AO) and then went on to examine the effects of the two legislative proposals on diversity cases

involving corporations. Mr. Spaniol concluded that H.R. 2516 would "very drastically reduce the volume of cases in the federal courts" since "of the 20,524 diversity cases filed in fiscal year 1956 a corporation was a party in 12,732 cases or 62%"—a proportion that had been relatively stable over the preceding 5 years (*Legislative History* 1958, p. 3111). He noted that the impact of H.R. 4497 was much harder to measure. Although the number and the percentage of diversity cases involving a nonresident corporation doing business in a state are known, there is no readily available information as to the principal place of business of the corporations involved in those cases. To make an estimate of the impact of the proposed legislation, the AO asked clerks in five district courts to tabulate (by hand) all pending diversity of citizenship cases in which a corporation was a party and indicate to the best of their knowledge how many of these cases involved corporations that were chartered in another state, but that had their principal place of business in their own state. The clerks produced the table seen here as Table C-3 for presentation to the Committee (*Legislative History* 1958, p. 3112). As the AO noted, the figures show considerable variation, but do indicate that a small but substantial number of cases would be affected.

With respect to the jurisdictional amount, the AO stated (*Legislative History* 1958, p. 3112):

> The reliability of any estimate of the effect on the workload . . . is lessened because of the flexibility readily apparent in the legal test of what constitutes the "amount in controversy" in personal injury cases, namely "the amount which is claimed in good faith."

In conclusion, the report detailed some information about the number of cases (Table C-4) and noted (*Legislative History* 1958, p. 3113):

> On the basis of the available information, it is, therefore, estimated that an increase in the jurisdictional amount requisite to invoke the jurisdiction of the United States district courts under diversity of citizenship or a federal question from $3,000 to $10,000 would have reduced the 1956 load of work in the 86 districts which have only federal jurisdiction by approximately 8 percent.

THE 1971 LEGISLATIVE PROPOSAL

In the 92nd and 93rd Congresses (1971–1972 and 1973–1974, respectively) the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee held hearings on the Federal

TABLE C-3 Diversity of Citizenship Cases Involving Corporations: Sample Data from Five District Courts

District	Total cases surveyed	Principal place of business			Percentage of cases involving corporations which have their principal place of business in the State
		In the State	Out of State	Unknown	
Connecticut	207	13	168	26	6.3
Michigan, western	51	12	33	6	23.5
Delaware	32	.....	32	.....	.....
Kentucky, eastern	58	.....	16	42	.....
Texas, southern	717	26	650	41	3.6

Source: *Legislative History* (1958, p. 3112).

TABLE C-4 Percentage of Jones Act Suits and Diversity of Citizenship Cases Filed in the United States District Courts During the First Half of the Fiscal Year 1951 and the Second Quarter of the Fiscal Year 1957 in Which the Amount of Damages Claimed Did Not Exceed the Sum of $10,000

Type of action	Cases filed during the 1st half of the fiscal year 1951			Cases filed during the 2d quarter of the fiscal year 1957		
	Total cases	$10,000 or less claimed		Total cases	$10,000 or less claimed	
		Cases	Percentage		Cases	Percentage
Federal question: Jones Act	814	21	2.6	607	16	2.6
Diversity of citizenship:						
Contract	1,603	631	39.4	1,193	456	38.2
Personal injury, motor vehicle	.....	.....	.....	668	37	5.5
Other tort	[1]3,764	[1]493	[1]13.1	1,260	126	10.0
Other diversity	6	5	[2]	65	26	40.0

[1] Includes the personal injury, motor vehicle cases.
[2] No percentage computed.

Source: *Legislative History* (1958, p. 3113).

Court Jurisdiction Act (S. 1876 in 1971). The act covered six broad areas of federal jurisdiction including diversity of citizenship. Although the bills were never reported out of the subcommittee (largely as a result of the intense opposition of the American Trial Lawyers' Association to the proposed changes in diversity jurisdiction), the materials presented in support of the bill are instructive about the ability to estimate the potential impact of a legislative change.

The bill was the result of a 10-year study of federal jurisdiction by the American Law Institute (ALI), done at the suggestion of Chief Justice Earl Warren. In introducing the bill at subcommittee hearings, its sponsor, Senator Q. N. Burdick, stated its rationale (U.S. Congress 1971, p. 2):

> . . .the function of this jurisdiction is to provide an even level of justice to the traveler or visitor from another state. However, when a person's involvement with a state is such as to eliminate any real risk of prejudice against him as a stranger and make it unreasonable to heed any objection he might make to the quality of its judicial system, the bill would not permit him to choose a Federal forum.
>
> In accordance with this principle, this bill bars a plaintiff from bringing suit in Federal court in his own State simply because his opponent is a citizen of another State.
>
> On a similar basis, a corporation or other business enterprise with a local establishment maintained for more than 2 years in a State would be prohibited from invoking, either originally or on removal, the diversity jurisdiction of a Federal court in that State in any action arising out of the activities of that establishment. Similarly, a natural person would be denied access to the Federal court in the State where he had his principal place of business or employment.
>
> . . . What this bill does is to treat plaintiffs the same way and deny them original diversity jurisdiction in Federal court in their own State.
>
> The policy with regard to commuters and corporations is the same as with natural persons. . . .
>
> Other provisions are designed to reinforce the prohibition against the artificial creation or destruction of diversity either by assignment or the appointment of a fiduciary.

Although there was no testimony by the Administrative Office of the U.S. Courts, an article by Senator Burdick published in the *North Dakota Law Review* (Burdick 1971), reproduced in the subcommittee report, used AO and other data to explain the rationale for the ALI-sponsored proposals incorporated in the bill and to assess the effect of the proposed changes on the state and federal courts.

The article notes that the heart of the bill lies in the elimination of the

TABLE C-5 Residences of Parties in Diversity of Citizenship Cases Commenced in the United States District Courts, Fiscal Year 1970

Class	Plaintiff	Defendant	Original	Removed	Total
1.	Resident	Non res. corp. doing business in state	5,901a	1,775a	7,676
2.	Resident	Non res. corp. not doing business in state	1,046a	283	1,329
3.	Resident	Other non resident	2,832a	831	3,663
4.	Non res. corp. doing business in state	Resident	1,867a	78b	1,945
5.	Non res. corp. not doing business in state	Resident	724	18b	742
6.	Other non resident	Resident	5,026	95b	5,121
7.	Non res. corp. doing business in state	Non res. corp. doing business in state	265a	54a	319
8.	Non res. corp. doing business in state	Non res. corp. not doing business in state	71a	14	85
9.	Non res. corp. doing business in state	Other non resident	99a	12	111

10. Non res. corp. not doing business in state	Non res. corp. doing business in state	88	10a	98
11. Other non resident	Non res. corp. doing business in state	883	70a	953
12. Non res. corp. not doing business in state	Non res. corp. not doing business in state	31	2	33
13. Non res. corp. not doing business in state	Other non resident	31	4	35
14. Other non resident	Non res. corp. not doing business in state	96	14	110
15. Other non resident	Other non resident	427	56	483
16. Resident	Resident	119a	24	143
17. Unknown		4	4	8
Total Cases		19,510	3,344	22,854

a Shifted by S.1876 to state courts. These cases total 14,109. See Table C-6 for further analysis.

b These cases are not counted as shifted because it is assumed there is a non resident defendant properly joined.

Source: Burdick (1971, pp. 8–9).

invocation of diversity in federal court in the home state by an individual (including a corporation) simply because his or her opponent is a resident of another state. In examining the impact of S. 1876 on the federal courts, the Burdick article notes that the ALI studied the effect of the proposal on these courts for 1964 and 1968. It reports that 11,543 of 20,174 diversity cases would have been shifted to state courts in 1964 and 12,367 of 21,009 cases would have been shifted in 1968. The article presents a table with a breakdown of diversity cases by residence of the plaintiff and defendant for 1970 (Table C-5). But Burdick notes that the table is based on two key assumptions: (1) in all cases involving nonresident corporations doing business in a state, "doing business" was made equivalent to "having a local establishment," and these cases arose from the local activities of that organization—although in a footnote, Burdick recognizes that these concepts may not be equivalent and that the actual number of local establishment cases transferred to state courts would be fewer than indicated in Table C-5; and (2) no account was taken of the commuter provision, the importance of which would vary depending on the location of urban centers within a state. Only a docket study, Burdick notes, could provide accurate data on this latter point.[2]

The diversity cases that would be shifted by the law were further examined in Table C-6, reproduced below. The article notes that the table shows a maximum of 14,109 diversity cases shifted to state courts, of which 11,673 are cases commenced by residents (both individuals and domestic corporations) and 2,356 are cases commenced by nonresident corporations doing business in a state. Burdick notes that fewer than the maximum number of cases are likely to be shifted because 4,048 cases are those brought by residents against nonresidents that are removable and will remain so. Thus the actual number of cases shifted will be between 10,000 and 14,000.

The article went on to examine the importance of the shift of cases on each district court, by state, as shown in Table C-7.

The Burdick article also examines the impact of the proposed legislation on state courts. It notes that the subcommittee had requested information from state authorities regarding civil caseloads in 1970 and had received information from 30 states. Table C-8 shows that the shift in all states but one varied between 0.27 and 1.5 percent of the total civil filings.

An additional calculation was made to evaluate the average number of cases shifted to each state in relation to the number of judges in the state's courts of general jurisdiction. Those data, presented in Table

TABLE C-6 Diversity Cases Excluded from Federal Jurisdiction Under the American Law Institute (ALI) Proposal (1970)

Class of Parties Affected By The ALI Proposal/a		Cases Shifted But Removable/b	Cases Excluded	Total
Resident Plaintiff Versus:				
(1)/c	Non res. corp. doing business in state		7,676	
(2)	Non res. corp. not doing business in state	1,046		
(3)	Other non resident	2,832		
(16)	Resident		119	
	Total	3,878	7,795	11,673
Non Resident Corporate Plaintiff Doing Business in State Versus:				
(4)	Resident		1,867	
(7)	Non res. corp. doing business in state		319	
(8)	Non res. corp. not doing business in state	71		
(9)	Other non resident	99		
	Total	170	2,186	2,356
Cases Removed by Non Resident Corporate Defendants Doing Business in State Sued By				
(10)	Non res. corp. not doing business in state		10	
(11)	Other non resident		70	
			80	
	Total			80
TOTAL ALL CASES		4,048	10,061	14,109

a/ This table, as all others in this paper, does not include the effect of the commuter provisions, S. 1876, 92d Cong. 1st Sess. § 1302(c) (1971)—which would increase the cases shifted. It also assumes that all cases involving a corporation doing business arise out of the activities of a local establishment which, by approximation, exceeds the actual number of cases affected.

b/ Removed cases in classes (4), (5), (6), and (16)—involving removal by resident defendants—are treated as not affected by the proposal. It can be assumed that removal was requested by a properly joined non-resident defendant 28 U.S.C. § 1441 (c) (1971). *See* Twentieth Century Fox Film Corp. v. Taylor, 239 F. Supp. 913 (S.D.N.Y. 1965). S. 1876, 92d Cong., 1st Sess. § 1304(6) (1971) would both expand and clarify removal in this situation.

c/ The numbers in parentheses refer to the party alignments shown in Table C-5.

Source: Burdick (1971, pp. 10–11).

TABLE C-7 Analysis of Federal Court Civil Caseload (1970) and Incidence by States of ALI Proposed Changes in Diversity Jurisdictions

States	Total Civil Cases Commenced	Total Diversity Cases	Total Diversity Cases Shifted By S. 1876
1st CIRCUIT			
Maine	198	60	34
Massachusetts	1,617	350	264
N. Hampshire	148	93	40
Rhode Island	219	78	26
Puerto Rico	978	385	295
2nd CIRCUIT			
Connecticut	720	193	83
New York	8,599	1,947	1,132
Vermont	333	261	107
3rd CIRCUIT			
Delaware	192	66	19
New Jersey	1,687	555	255
Pennsylvania	5,891	2,078	1,368
4th CIRCUIT			
Maryland	1,505	334	193
N. Carolina	1,188	337	193
S. Carolina	1,111	518	360
Virginia	2,639	718	442
W. Virginia	849	319	178
5th CIRCUIT			
Alabama	1,817	774	529
Florida	3,880	621	328
Georgia	2,035	649	350
Louisiana	4,988	925	645
Mississippi	949	462	274
Texas	5,524	1,506	1,105
6th CIRCUIT			
Kentucky	1,208	321	185
Michigan	2,537	756	496
Ohio	2,519	783	517
Tennessee	1,816	662	390
7th CIRCUIT			
Illinois	3,559	1,148	679
Indiana	1,618	940	523
Wisconsin	996	227	144
8th CIRCUIT			
Arkansas	841	427	354
Iowa	479	202	132
Minnesota	921	363	190
Missouri	1,990	522	316
Nebraska	426	147	75
N. Dakota	129	47	29
S. Dakota	177	87	29

TABLE C-7 (*continued*)

States	Total Civil Cases Commenced	Total Diversity Cases	Total Diversity Cases Shifted By S. 1876
9th CIRCUIT			
Alaska	247	60	45
Arizona	872	214	134
California	6,740	476	304
Hawaii	192	75	26
Idaho	225	70	36
Montana	275	102	52
Nevada	279	92	37
Oregon	799	285	202
Washington	1,090	194	170
10th CIRCUIT			
Colorado	865	272	118
Kansas	954	299	164
New Mexico	484	184	110
Oklahoma	1,293	499	337
Utah	394	124	68
Wyoming	115	47	26
TOTAL	81,107	22,854	14,109

Source: Burdick (1971, pp. 12–13).

C-9, indicate that the number of additional cases imposed would vary between 0.8 and 7.4 cases per judge in all states but Vermont and South Carolina.

A final table, reproduced as Table C-10, showed the number of diversity cases shifted to state courts in comparison with the annual increase in state civil litigation in those states for which both 1969 and 1970 filing data were available; however, the number of states in the table is quite limited.

Senator Burdick was not the only one to present quantitative data in support of his position. Opposition to the bill came from John Frank, speaking for a number of state courts and bar associations. He likened the bill to a shell game whereby cases merely would be shifted around—to the detriment of citizens who would have to wait longer to get their day in court as a result. He presented the figures given in Table C-11, based on information said to have been published by the Institute of Judicial Administration. The reliability and source of these figures were strenuously challenged by committee staff counsel, who noted that they represent time or delay only with regard to personal injury-tort cases, not all civil litigation, and that they represent only selected

TABLE C-8 Diversity Cases Shifted Compared to Total Number of State Civil Cases

States	Total No. of State Civil Cases	No. of Diversity Cases Shifted	Shifted Diversity Cases Compared To Total No. of State Civil Cases (%)
1st CIRCUIT			
Maine	—	34	—
Massachusetts	41,047	264	0.6
New Hampshire	12,741	40	0.3
Rhode Island	5,130	26	0.5
Puerto Rico	—	295	—
2nd CIRCUIT			
Connecticut	19,399	83	0.4
New York	75,809	1,132	1.5
Vermont	—	107	—
3rd CIRCUIT			
Delaware	4,203	19	0.5
New Jersey	35,777	255	0.71
Pennsylvania	25,707	1368 (780)*	3.0*
4th CIRCUIT			
Maryland	53,667	193	0.27
N. Carolina	13,589	193	1.4
S. Carolina	—	360	—
Virginia	49,276	442	0.9
W. Virginia	**	178	**
5th CIRCUIT			
Alabama	—	539	—
Florida	94,411	328	0.3
Georgia	—	350	—
Louisiana	108,749	645	0.6
Mississippi	—	274	—
Texas	200,992	1,105	0.6
6th CIRCUIT			
Kentucky	—	185	—
Michigan	86,893	496	0.8
Ohio	50,060	517	1.0
Tennessee	63,505	390	0.6
7th CIRCUIT			
Illinois	—	679	—
Indiana	—	523	—
Wisconsin	—	144	—
8th CIRCUIT			
Arkansas	29,531	354	1.2
Iowa	37,965	132	0.35
Minnesota	16,924	190	1.1
Missouri	71,166	316	0.45
Nebraska	—	75	—

TABLE C-8 (*continued*)

States	Total No. of State Civil Cases	No. of Diversity Cases Shifted	Shifted Diversity Cases Compared To Total No. of State Civil Cases (%)
N. Dakota	4,973	29	0.65
S. Dakota	5,938	29	0.5
9th CIRCUIT			
Alaska	—	45	—
Arizona	—	134	—
California	103,749	304	0.3
Hawaii	4,335	26	0.6
Idaho	—	36	—
Montana	**	52	**
Nevada	—	37	—
Oregon	29,853	202	0.7
Washington	35,212	170	—
10th CIRCUIT			
Colorado	17,717	118	0.6
Kansas	29,826	164	0.5
New Mexico	21,501	110	0.5
Oklahoma	—	337	—
Utah	—	68	—
Wyoming	**	26	**

* Pennsylvania reported only 25,707 civil cases as compared to a substantially larger volume for such States as Ohio and Michigan, for example. Apparently the Pennsylvania statistical system reports cases when they are filed at the time of commencement of the action. In order to offer some basis of comparison between Pennsylvania and Federal statistics, it must be noted that the Administrative Office of the U.S. Courts reports that in the nation as a whole 43% of all diversity cases are terminated without court action. If this same percentage is applied to the 1,368 cases shown in Table C-7 as being shifted to Pennsylvania, 588 of those cases would be terminated without court action. Thus, the remaining 780 cases would be an approximation of the number of Federal cases shifted which would reach the "ready for trial" stage which is the Pennsylvania criteria for inclusion in its statistical system.

** These states do not report cases filed.

Source: Burdick (1971, pp. 14–15).

urban courts rather than those of all large cities or of states. Mr. Frank, under questioning, conceded that the figures presented by Senator Burdick were "difficult" for him to understand—but probably accurate.

While the legislation never reached the floor of the Senate, the careful and thorough consideration given to the proposal indicates the potential value of such analysis and the political realities of the legislative process, in which careful analysis and strong arguments do not necessarily lead to passage of a proposal.

TABLE C-9 Number of Diversity Cases Shifted Per State Trial Judge

States	Number of State Trial Judges General Jurisdiction	Diversity Cases Shifted (1970 Data)	Diversity Cases Shifted Per State Trial Judge (Avg.)	Civil Terminations Per State Trial Judge (Avg.)
1st CIRCUIT				
Maine	11	34	3.1	—
Massachusetts	46	264	5.7	858
New Hampshire	10	40	4.0	1,268
Rhode Island	13	26	2.0	—
2nd CIRCUIT				
Puerto Rico	70	295	4.2	—
Connecticut	35	83	2.4	508
New York	225	1,132	5.0	336
Vermont	6	107	18.8/a	—
3rd CIRCUIT				
Delaware	12	19	2.1	403
New Jersey	78	255	3.3	427
Pennsylvania	254	1368 (780)*	5.9	—
4th CIRCUIT				
Maryland	79	193	2.5	635
N. Carolina	49	193	4.0	317
S. Carolina	16	360	22.5/a	—
Virginia	99	442	4.5	458
W. Virginia	32	178	5.5	/b
5th CIRCUIT				
Alabama	80	539	6.7	—
Florida	144	328	2.3	655
Georgia	52	350	6.7	—
Louisiana	94	645	6.9	858
Mississippi	49	274	5.6	—
Texas	211	1,105	5.3	927
6th CIRCUIT				
Kentucky	73	185	2.5	—
Michigan	116	496	3.9	730
Ohio	181	517	2.9	249
Tennessee	78	390	5.0	751
7th CIRCUIT				
Illinois	360	679	1.9	—
Indiana	186	523	3.9	—
Wisconsin	174	144	0.8	—
8th CIRCUIT				
Arkansas	48	354	7.4	593
Iowa	76	132	1.7	469
Minnesota	68	190	2.7	244
Missouri	102	316	3.1	628
Nebraska	38	75	2.0	—
N. Dakota	19	29	1.5	247
S. Dakota	21	29	1.4	193

TABLE C-9 (*continued*)

States	Number of State Trial Judges General Jurisdiction	Diversity Cases Shifted (1970 Data)	Diversity Cases Shifted Per State Trial Judge (Avg.)	Civil Terminations Per State Trial Judge (Avg.)
9th CIRCUIT				
Alaska	11	45	4.1	—
Arizona	51	134	3.8	—
California	416	304	0.7	180
Hawaii	14	26	1.5	217
Idaho	24	36	2.0	—
Montana	28	52	1.5	/b
Nevada	18	37	2.0	—
Oregon	59	202	3.4	467
Washington	88	170	1.9	—
10th CIRCUIT				
Colorado	74	118	1.6	266
Kansas	61	164	2.7	485
New Mexico	21	110	5.2	974
Oklahoma	138	337	2.5	—
Utah	22	68	3.1	—
Wyoming	11	26	2.4	/b

*See asterisked note, Table C-8.

a/ In Vermont there are 6 judges in the county courts, the courts of general jurisdiction. There are 10 judges in the district courts. Vt. Stat. Ann. § 444(a). (Supp. 1971). They have jurisdiction in civil cases for amounts up to $5,000.

Thus when the 107 shifted cases are compared with the total number of judges in the State courts of major jurisdiction, the average number of cases shifted per judge is 6.7, a figure comparable with many other states.

b/ These states do not record civil terminations.

Source: Burdick (1971, pp. 16–17).

POST-1971 LEGISLATIVE PROPOSALS

In the 95th Congress, the matter of diversity of citizenship jurisdiction was raised again. In late 1977 the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee held hearings on four different bills: H.R. 761, which would totally abolish diversity of citizenship jurisdiction including statutory interpleader cases; H.R. 5546, which again put forward the recommendations in the 1971 American Law Institute–sponsored bill and, in addition, recommended raising the amount in controversy requirement from $10,000 to $25,000; H.R. 7243, which proposed the elimination of in-state plaintiffs' suits from federal courts but was far less complex than H.R. 5546; and H.R. 9123, which was formulated by the U.S.

TABLE C-10 Comparison of Diversity Cases Shifted Under S.1876 to the Increase in Civil Cases Commenced: Selected States

	Civil Cases Filed '69	Civil Cases Filed '70	Increase	Diversity Cases Shifted	Change in Civil Case Filings Comp. to Div. Cases Shifted—%
California	97,997	103,749	5,752	304	5.3%
Connecticut	17,565	19,399	1,834	83	4.5%
Kansas	25,995/a	28,737/a	2,742	164	5.6%
Louisiana	99,139	105,439	6,300	645	10%
Maryland	50,384	53,667	3,283	193	6%
Massachussetts	41,736	41,047	—689	264	38.5%/b
Michigan	82,292	86,893	4,601	496	11%
Minnesota	15,533	16,924	1,391	190	13.5%
Missouri	59,037	71,166	12,129	316	2.6%
New Jersey	34,341	33,892	—449	255	57%/b
New York	69,783	75,809	6,026	1,132	19%
North Carolina	11,880	13,589	1,709	193	11.3%
North Dakota	4,344	4,973	629	29	4.6%
Oregon	17,401	19,682	2,281	202	9%
South Dakota	5,341	5,939	597	29	4.9%
Washington	57,423	60,569	3,146	170	5.4%

a/ The case filings for Kansas are from 1970 and 1971 respectively.
b/ In Massachusetts and New Jersey civil case filings were less in 1970 than 1969. However, the cases shifted are substantially fewer than the decrease in state cases so that a net reduction of the state caseload would still occur.

Source: Burdick (1971, p. 18).

Department of Justice, was submitted at the last minute, and was quite similar to H.R. 7243.

Among those testifying was Judge E. T. Gignoux, U.S. district court judge for the district of Maine and chairman of the Subcommittee on Federal Jurisdiction of the Judicial Conference of the United States. He stated that the Judicial Conference supported complete abolition of diversity except for interpleader cases and would support the other bills (U.S. Congress 1977). He submitted tabular data, shown in Table C-12, noting that H.R. 7243 would reduce the number of diversity cases by about 45 percent.

In supporting the Justice Department's bill, H.R. 9123, Assistant Attorney General Daniel Meador submitted a table (Table C-13), estimating the impact on state court systems: these data are not as thorough or convincing as Senator Burdick's earlier examination of the impact of proposed change on the states. They indicate that between 10 and 15 percent of the federal diversity cases in 1976 would be eliminated by H.R. 9123.

TABLE C-11 Waiting Time, State and Federal Courts

City	State, months	Federal, months
Chicago	61.7	14
Brooklyn	51.9	16
Manhattan	49.9	27
Philadelphia	46.8	37
Jersey City	35.6	26
Boston	35.0	15
Detroit	34.3	23
Los Angeles	24.3	12
Minneapolis	21.4	6
Cleveland (1970)	27.8	20
Memphis	9.9	11

Source: U.S. Congress (1971, p. 265).

Testifying once again against any change in diversity of citizenship jurisdiction, John Frank stated that "the current group of bills based on eliminating the in-state plaintiff would eliminate about 24,500 cases filed by individuals and 4,500 filed by corporations" (U.S. Congress 1977, p. 238). The statistical division between individuals and corporations is not consistent with other data presented because Frank treats all "residents" as individuals, although this category includes corporations as well. He went on, again, to argue that the change would lead to human suffering due to increased delay, saying (U.S. Congress 1977, p. 238):

> . . . if you take a jury case in Chicago, which is now on that Federal docket, it's going to take 11 months to come to trial and by those acts you're going to make it take 37 months. . . .
>
> In Brooklyn it's about 35 months and 18 months. In Philadelphia it's 47 on the State side, 27 on the Federal. . . .

Perhaps the most thorough analysis was that done by the Deputy Comptroller General of the United States. Chairman Peter Rodino of the House Judiciary Committee requested an analysis of each of the proposed bills from the General Accounting Office (GAO); that analysis is included at the end of this paper (with the historical discussion and explanation of general principles of jurisdiction deleted). Although the GAO routinely performs research and conducts investigations at the request of Congress, that organization had never previously prepared an analysis of diversity jurisdiction. Why Mr. Rodino turned to the GAO is unclear. Its statement, however, points to a different style of analysis from that found in the Burdick article. The GAO scrutinized H.R. 5546 line by line and explored the ramifications of various phrases without merely quantifying, pointed to the sections for which it was impossible

TABLE C-12 U.S. District Courts—Diversity Cases Filed Showing Residence of Plaintiff July 1, 1976–June 30, 1977

	All diversity cases		Diversity cases, less removals from State courts	
	Number of cases	Percentages	Number of cases	Percentages
Total	31,678	100.0	26,120	100.0
Resident of the State	19,339	61.0	14,482	55.4
Nonresident company doing business in the State	4,232	13.4	3,936	15.1
Nonresident company not doing business in the State	2,003	6.3	1,903	7.3
Other nonresident	6,104	19.3	5,799	22.2

DIVERSITY CASES FILED SHOWING RESIDENCE OF PARTIES

Total	31,678	100.0	26,120	100.0
Both parties State residents	229	.7	197	.8
Plaintiff a State resident and—				
Defendant corporation doing business	12,457	39.3	9,202	35.2
Defendant corporation not doing business	2,755	8.7	1,924	7.4
Defendant other nonresident	3,898	12.3	3,159	12.1
Plaintiff corporation doing business:				
Defendant resident	3,172	10.0	3,066	11.7
Defendant corporation doing business	551	1.7	454	1.7
Defendant corporation not doing business	227	.7	174	.7
Defendant other nonresident	282	.9	242	.9
Plaintiff corporation not doing business:				
Defendant resident	1,608	5.1	1,564	6.0
Defendant corporation doing business	260	.8	226	.9
Defendant corporation not doing business	51	.2	43	.2
Defendant other nonresident	84	.3	70	.3
Plaintiff other nonresident:				
Defendant resident	4,655	14.7	4,541	17.4
Defendant corporation doing business	903	2.9	781	3.0
Defendant corporation not doing business	172	.5	143	.5
Defendant other nonresident	374	1.2	334	1.3

DIVERSITY CASES FILED SHOWING AMOUNT IN CONTROVERSY

Total	31,678		26,120	
Amount not reported	7,431		5,772	
Total amount reported	24,247	100.0	20,348	100.0
Under $10,000	2,487	10.3	2,115	10.4
$10,000 to $14,000	2,816	11.6	2,381	11.7
$15,000 to $19,000	1,146	4.7	972	4.8
$20,000 to $24,000	1,061	4.4	876	4.3
$25,000 and over	16,737	69.0	14,004	68.8

Prepared by: Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, Washington, D.C.

Source: U.S. Congress (1977, p. 146).

TABLE C-13 Projected Impact on State Court Systems of H.R. 9123

Circuit and district	Total civil cases, fiscal year 1976	Diversity cases, January–September 1976	Resident plaintiff diversity cases, January–September 1976	Resident plaintiff diversity cases extrapolated, fiscal year 1976		Percent resident plaintiff diversity cases extrapolated, fiscal year 1976	
				District	State	District	State
Total, all districts	130,597	19,620	10,890	14,516		11.1	
District of Columbia	2,464	361	180	239		9.7	
1st Circuit	8,028	858	519	690		8.6	
Maine	273	44	24	32	32	11.7	11.7
Massachusetts	5,278	361	228	303	303	5.7	5.7
New Hampshire	423	144	71	94	94	22.3	22.3
Rhode Island	448	93	55	73	73	16.3	16.3
Puerto Rico	1,606	216	141	188	188	11.7	11.7
2d Circuit	11,587	2,093	1,244	1,655		14.3	
Connecticut	1,245	194	109	145	145	11.8	14.5
New York, northern	594	57	42	56		9.4	
New York, eastern	2,438	514	331	440		18.1	
New York, southern	6,440	1,160	667	887		13.8	14.3
New York, western	610	72	44	59	1,442	9.7	
Vermont	260	96	51	68	68	26.2	26.2
3d Circuit	12,325	2,293	1,264	1,681		13.6	
Delaware	460	65	30	40	40	8.7	8.7
New Jersey	2,451	530	309	411	411	16.8	16.8
Pennsylvania, eastern	3,978	1,190	671	892		22.4	
Pennsylvania, middle	1,706	205	110	146	1,230	8.6	16.2
Pennsylvania, western	1,899	303	144	192		10.1	
Virgin Islands	1,831						
4th Circuit	13,067	1,817	973	1,294		9.9	
Maryland	1,995	303	123	164	164	8.2	8.2
North Carolina, eastern	596	74	42	56		9.4	
North Carolina, middle	638	71	28	37	152	5.8	7.9
North Carolina, western	680	96	44	59		8.7	
South Carolina	2,466	547	299	398	398	16.1	16.1
Virginia, eastern	2,442	410	254	311		12.7	10.1
Virginia, western	1,793	138	88	117	428	6.5	
West Virginia, northern	544	45	28	37		6.8	6.2
West Virginia, southern	1,913	133	87	116	153	6.0	
5th Circuit	30,542	4,280	2,362	3,141		10.3	
Alabama, northern	1,818	294	123	164		9.0	
Alabama, middle	700	109	38	51	276	7.3	7.1
Alabama, southern	682	85	46	61		8.9	
Florida, northern	543	57	31	41		7.6	
Florica, middle	2,608	170	96	128	432	5.0	6.1
Florida, southern	3,909	412	198	263		6.7	
Georgia, northern	2,665	483	199	264		9.9	
Georgia, middle	599	132	51	68	440	11.3	10.9
Georgia, southern	784	169	81	108		13.7	
Louisiana, eastern	4,063	511	369	491		12.1	
Louisiana, middle	480	42	29	39	676	8.1	11.3
Louisiana, western	1,436	158	110	146		10.2	
Mississippi, northern	683	193	86	114	294	16.7	17.0
Mississippi, southern	1,039	236	135	180		17.3	
Texas, northern	2,585	521	285	379		14.7	
Texas, eastern	1,313	250	186	247	1,024	18.8	12.8
Texas, southern	2,880	281	182	242		8.4	
Texas, western	1,231	177	117	156		12.7	
Canal Zone	524						
6th Circuit	13,478	1,813	1,045	1,390		10.3	
Kentucky eastern	2,259	88	48	65	137	2.9	4.4
Kentucky, western	881	107	54	72		8.2	
Michigan, eastern	2,990	433	254	338	415	11.3	11.1
Michigan, western	751	100	58	77		10.2	
Ohio, northern	2,433	453	290	385	522	15.9	12.1

TABLE C-13 (*continued*)

Circuit and district	Total civil cases, fiscal year 1976	Diversity cases, January–September 1976	Resident plaintiff diversity cases, January–September 1976	Resident plaintiff diversity cases extrapolated, fiscal year 1976		Percent resident plaintiff diversity cases extrapolated, fiscal year 1976	
				District	State	District	State
Ohio, southern	1,894	180	103	137		7.2	
Tennessee, eastern	946	175	75	100		10.6	
Tennessee, middle	605	112	68	90	315	14.9	13.9
Tennessee, western	719	165	94	125		17.4	
7th Circuit	9,097	1,685	822	1,093		12.0	
Illinois, northern	4,508	914	396	327		7.3	
Illinois, eastern	595	74	37	49	427	8.2	7.7
Illinois, southern	462	66	38	51		11.0	
Indiana, northern	701	190	112	149	358	21.2	18.2
Indiana, southern	1,266	296	157	209		16.5	
Wisconsin, eastern	838	103	59	78		9.3	
Wisconsin, western	727	42	23	31	109	4.2	6.6
8th Circuit	7,810	1,319	766	1,019		13.0	
Arkansas, eastern	935	137	84	112	190	12.0	13.0
Arkansas, western	525	129	59	78		14.9	
Iowa, northern	243	42	27	36	83	14.8	9.9
Iowa, southern	592	65	35	47		7.9	
Minnesota	1,209	261	175	233	233	19.3	19.3
Missouri, eastern	1,399	273	157	209	309	14.9	9.9
Missouri, western	1,711	149	75	100		5.8	
Nebraska	712	154	101	134	134	18.8	18.8
North Dakota	205	27	13	17	70	8.3	14.5
South Dakota	279	82	40	54		19.1	
9th Circuit	15,670	1,741	987	1,313		8.4	
Alaska	324	25	13	17	17	5.3	5.3
Arizona	1,187	132	78	104	104	8.7	8.7
California, northern	2,886	251	144	192		6.7	
California, eastern	1,009	106	72	98		9.7	7.3
California, central	4,169	483	286	380	702	9.1	
California, southern	1,549	41	24	32		2.1	
Hawaii	442	119	42	56	56	12.7	12.7
Idaho	389	71	37	49	49	12.6	12.6
Montana	373	73	40	53	53	14.2	14.2
Nevada	534	82	38	51	51	9.6	9.6
Oregon	1,198	222	131	74	74	14.5	14.5
Washington, eastern	346	29	15	19	108	5.5	7.0
Washington, western	1,195	107	67	89		7.4	
Guam	69						
10th Circuit	6,529	1,360	728	968		14.8	
Colorado	1,425	249	104	138	138	9.7	9.7
Kansas	1,363	377	271	360	360	26.4	26.4
New Mexico	781	146	65	86	86	11.0	11.0
Oklahoma, northern	684	116	62	82		12.0	
Oklahoma, eastern	376	45	21	28	282	7.4	12.9
Oklahoma, western	1,124	265	129	172		15.3	
Utah	533	94	54	72	72	13.5	13.5
Wyoming	243	68	22	29	29	11.9	11.9

Source: U.S. Congress (1977, pp. 179–180).

to make a prediction because of a lack of data, and thus offered a different kind of "impact statement."

After considering all the testimony and data, the subcommittee, instead of selecting any of the bills before it, wrote a new bill, which it reported to the full Judiciary Committee and later to the House. This bill would effectively abolish diversity jurisdiction with the exception of statutory interpleader and alien cases, the number of which is unknown. The bill was approved by the House, but did not reach a vote in the Senate.

An analysis of the impact of the House-passed bill (H.R. 9622) to eliminate diversity of citizenship from federal jurisdiction was made by Victor Flango and Nora Blair of the National Center for State Courts (Flango and Blair 1978). They looked at the relative impact of the shift of diversity cases on state trial court caseloads and sought to determine whether the transfer of diversity cases would result in a proportionate increase in caseloads in all states and whether some states will get a disproportionate increase in workload. In addition, they estimated the number of additional state court judges (but not support personnel) required by the additional caseloads for the various states.

To make their estimates, they examined case filing data from courts of general jurisdiction from *State Court Caseload Statistics: Annual Report, 1975* published by the National Center for State Courts and the number of diversity cases filed in federal district courts during fiscal year 1976. Diversity cases heard in federal district court were aggregated by state and the number of diversity cases calculated: (1) per 1,000 state population, (2) per 1,000 total general jurisdiction filings, (3) per 1,000 general jurisdiction civil filings, and (4) per state general jurisdiction judge. The same four computations were also made for only those diversity cases filed by a plaintiff in his or her state of residence to examine the effect of partially reducing federal diversity jurisdiction (as proposed by H.R. 7243). The use of a per unit of population measure allowed an assessment of the impact of diversity cases across states by taking into account their variations in population.

Flango and Blair found that in fiscal 1976 federal diversity cases represented between 0.14 and 3.58 percent of the 1975 general jurisdiction civil filings in state courts. If cases were distributed evenly among states, each would get an average of 1.03 percent more civil filings, which would result in an average of 6.97 additional diversity cases per judge.

Diversity cases, however, will not affect all states equally. Table C-14 indicates the states where the impact of the proposed change would be disproportionately great. Looking at both the number of new cases and the caseload per judge, Flango and Blair found that populous

TABLE C-14 States in Which the Impact of Diversity Cases Will Be Disproportionately High

Impact as measured by:

State	Total diversity cases as a proportion of:				Diversity cases for which the plaintiff is a resident of the state as a proportion of:			
	State Population	General Jurisdiction Total Filings	General Jurisdiction Civil Filings	General Jurisdiction Judges	State Population	General Jurisdiction Total Filings	General Jurisdiction Civil Filings	General Jurisdiction Judges
Alabama	X				XY			
Alaska					Y			
District of Columbia	XY				XY			
Georgia		XY		XY				
Kansas		XY			XY	XY	Y	
Louisiana	XY				XY			
Maine			X				X	
Massachusetts			XY	XY			XY	XY
Minnesota		XY	XY			XY	XY	
Mississippi	XY	XY			XY	XY		
Nebraska		XY				X		
Nevada					X			
New Hampshire				XY				X
New York		XY	XY			XY	XY	
North Carolina			XY				XY	
Oklahoma	XY				XY			
Pennsylvania			Y					
Rhode Island		XY	XY			XY	XY	
South Carolina	XY	N/A	XY	XY	XY	N/A	XY	
Wyoming	Y	Y						

N/A Not available.

X States disproportionately high (over one standard deviation above the national mean) on this measure using diversity data for 1975-1976.

Y States disproportionately high (over one standard deviation above the national mean) on this measure using diversity data for 1976-1977.

Source: Flango and Blair (1978, p. 22).

states with high caseloads would require more new judges although they would not require proportionately more. For example, they estimated that (Flango and Blair 1978, p. 23):

> although the impact of the transfer of diversity cases would be disproportionately high in Rhode Island and Wyoming, the court systems in these states should be able to handle the extra filings without the additions of any new judges. Georgia and New York, on the other hand, may need to add four or more judges. Mississippi and South Carolina may need to add three; Kansas and Massachusetts may require two additional judges.

In making these estimates of the impact of shifting diversity cases from the federal to state caseloads, Flango and Blair note two limitations of their data. First, the data do not reflect increases in state judgeships since 1975 and thus possibly overstate the impact of the shift and, second, the analysis examines only the impact for each state while the distribution of new cases within each state may be uneven.

CONCLUSIONS

It is clear that judicial impact analysis related to diversity of citizenship cases was carried out as much as 20 years ago. The efforts varied widely in their complexity and sophistication, but were able, with a reasonable degree of accuracy based on data collected by the Administrative Office of the U.S. Courts, to forecast the impact of a variety of changes in the law governing diversity. At the same time, estimating the impact of certain other changes proved impossible given that data were not available. It is unclear whether this method of forecasting (if indeed "method" is even the appropriate term for these analyses) could be applied to examinations of proposals that only indirectly affect the courts (e.g., by creating new causes of action or new definitions of prohibited behavior and thus producing new types of cases). Such laws bring suits into the courts rather than remove a number of cases of an already known type.

It is also important to observe what these apparently rigorous and thorough analyses did not consider or attempt. Four possible avenues of analysis were not pursued:

1. None of the analyses paid attention to "secondary" impact effects, particularly effects on the U.S. courts of appeal. In view of the high percentage of diversity cases that are appealed and the rapid increase in the backlog of those courts, such analyses would have been valuable and not difficult to do.

2. Mention was made of the change in burden on the courts that would result from the various proposals for changing diversity jurisdiction, but little analysis was done. The focus, instead, was on the *number* of cases that would be removed, although the removal of diversity cases, in fact, means a reduction in burden more than proportionate to the number of cases eliminated. Similarly, there was no attempt to assess the impact of the proposed changes on court operations or on nonjudicial personnel, and no attempt was made to estimate the cost savings for the federal courts or cost increases for the state courts.

3. There was no projection of the impact of the changes to even the short-term future. The estimates of the impact of changes were based on the statistics of federal diversity cases filed in the preceding year and appear to have assumed that the next year would be like the previous one (although there was recognition of the growth pattern of the federal caseload). Thus these analyses typically offered very concrete estimates of how many cases would have been eliminated last year. In testimony before the Subcommittee on Improvements in Judicial Machinery, Assistant Attorney General Daniel Meador said (p. 4), for example, that in "abolishing the general diversity jurisdiction, approximately 31,678 cases will be eliminated from the civil caseload" (U.S. Congress 1978, p. 64). Only the Burdick article mentioned parameters; none projected how many cases would be eliminated in, say, 1980, if the proposal were adopted. Thus impact was regarded as an immediate phenomenon rather than as a continuing effect.

4. Although there was a warning in the committee report in 1958 and brief notice of the possibility in 1971, the 1977 discussion of changes in diversity did not take cognizance of the fact that some of the cases would return to the federal courts as federal question jurisdiction cases. There appears to have been the simple assumption that once the front door is closed, there is no (metaphorical) back door to the federal courts. Obviously, it is very much more difficult to estimate a number for back-door cases, and it might depend partly on whether federal judges permit these cases in their courts or not. Nevertheless, when the difficult question is ignored, even due to unavailability of data or lack of methodology to measure possible outcomes, some criticism seems warranted.

In summary, even in this optimal situation for estimating the effect of legislation on courts—optimal in that legislation being analyzed is specific, directly affects the operation of courts, and removes (rather than adds) cases—there were difficulties both in making the actual estimates and in the concept of impact.

GAO ANALYSIS OF DIVERSITY LEGISLATION

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., October 5, 1977.

B-189861.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: This is in response to your request of August 3, 1977, for our views on H.R. 761 and two related bills, H.R. 7243 and H.R. 5546. All the bills deal with reduction or elimination of jurisdiction of the U.S. district courts in actions between citizens of different States and are intended to help reduce the congestion in the Federal courts.

H.R. 761 would abolish diversity of citizenship jurisdiction by striking out section 1332 of title 28. Section 1335, which provides for the remedy of interpleader for adverse claimants who are citizens of different States and thus not subject to jurisdiction of a single State court or single district court, is also struck. The rest of the bill provides for the elimination of diversity jurisdiction in section 1342, involving rate orders of State agencies and the elimination of special venue and removal provisions regarding diversity jurisdiction contained in section 1391 and section 1441 respectively.

H.R. 7243 and H.R. 5546 both provide for the reduction of general diversity of citizenship jurisdiction. H.R. 7243 simply amends section 1332(a)(1) of title 28 so that no party in interest properly joined as a plaintiff can bring a diversity action in his own State. H.R. 5546 is much more detailed and likewise contains the general prohibition against a plaintiff bringing a diversity action in his own State.

An analysis of the general principles of present day jurisdiction, the historical basis for diversity jurisdiction, and a specific analysis of H.R. 5546 and H.R. 761 follow. Since the provisions of H.R. 7243 are the same as those contained in H.R. 5546, we are not providing a separate analysis of that bill. Moreover, H.R. 761 will be analyzed only with respect to the advantages of total abolishment as opposed to reduction of diversity jurisdiction. Finally, based on information readily available, we made an assessment whether the various provisions of the bills, if enacted, would reduce the caseload of the Federal district courts.

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IV. ANALYSIS OF H.R. 5546

A. Section 1301(a)—General Diversity of Citizenship Jurisdiction

This subsection is similar to the American Law Institute proposal with the important exception that the matter in controversy must exceed $25,000 rather than the present-day $10,000. The basic definition of diversity cases is similar to the current definition contained in section 1332 of title 28. However, H.R. 5546 contains a provision for dismissing an action for lack of jurisdiction when the sufficiency of the amount in controversy is put in issue, unless the court determines after a hearing that there is a reasonable probability of a recovery that exceeds the sum or value of $25,000. The burden, of course, would be on the plaintiff to show the reasonable probability of recovery in excess of $25,000. Neither the ALI proposal nor the present statute has a similar provision.

In addition, the term "citizen" is not defined to show the basis for determining an individual's citizenship. Presumably, "citizen" will continue to be defined by the traditional tests of nationality for the foreign citizen and domicile for the American.

Impact On The Federal Caseload

At least 4,895, or approximately 21 percent, of the 23,658 diversity jurisdiction cases filed during the 9-month period from January through September 1976 involved a demand of under $25,000. Consequently, raising the jurisdictional amount from $10,000 to $25,000 should reduce the Federal caseload, notwithstanding the possibility that some plaintiffs may artificially increase their de-

mands to secure access to the Federal court. However, the effects of continuing inflation may, over a period of time, minimize the impact. Although the caseload will probably be reduced, the actual burden of the court could conceivably be increased by the new requirement that the court hold a hearing when the amount in controversy is put in issue to assure that there is a reasonable probability of recovering an amount sufficient to satisfy the jurisdictional amount. Nevertheless, since most cases are settled before trial, this provision may have the effect of deterring plaintiffs from inflating their claims for relief in order to satisfy the $25,000 minimum. Information from the Administrative Office of the United States Courts indicates that about 42 percent of the diversity jurisdiction cases during fiscal year 1976 were terminated prior to trial.

B. Section 1301(b)(1)—The Corporation

Section 1332 presently provides that a corporation is a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. This proposed section would add after "State" the words, "and foreign state" so that an alien corporation with its principal place of business in a State cannot invoke diversity jurisdiction against a citizen of that State. Also, a corporaton would be a citizen of every State and foreign state by which it has been incorporated instead of any State in which it is incorporated. so that a corporation incorporated in more than one State is a citizen of each of those States.

Impact On Federal Caseload

We have no information as to the impact of this proposal, since data necessary to make an impact assessment on the operation of this proposed subsection is not now being collected by the Administrative Office of the United States Courts.

C. Section 1301(b)(2)—Partnership and Other Unincorporated Associations

Presently, the citizenship of an unincorporated association or partnership, for purposes of diversity, is determined by the citizenship of each member or partner. (*Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806).) Section 1301(b)(2) deems partnerships and other unincorporated associations to be citizens of the State of their principal place of business.

Impact On Federal Caseload

Data on which to estimate the impact on the Federal caseload is not readily available. However, the practical effect of this provision is that jurisdiction of the Federal courts may be increased when partnerships are involved. Since a partnership would be a citizen where it maintains its principal place of business, the fact that an out-of-State plaintiff and one or more of the partners are citizens of the same State does not necessarily bar the Federal forum. Consequently, this provision may increase the Federal caseload.

D. Sections 1301(b)(3) and (b)(4)

Section 1301(b)(3) retains the 1964 amendment to section 1332(c) that prevents in-State plaintiffs from gaining access to Federal court where the insured was also a citizen of the forum State but the insurer was an out-of-State citizen. This section is consistent with the original purpose of diversity jurisdiction by providing separate forums for out-of-State citizens to protect them from local prejudice because it prevents the artifical use of an out-of-State insurer merely to establish diversity.

Section 1301(b)(4) is also consistent with diversity jurisdiction's original purpose by requiring the citizenship of executors and guardians to be that of the decedent or party represented. Since the executor or administrator of the estate of the decedent has control over litigation involving that estate, it is the citizenship of that person that controls for purposes of jurisdiction and the citizenship of guardians is likewise often decisive with respect to jurisdiction. Thus, this section is designed to prevent either the creation or the defeat of diversity jurisdiction by the appointment of a representative or guardian having a different citizenship from the person he represents. At the same time, it is impossible to defeat diversity jurisdiction by appointing a representative of the same citizenship as the adversary if the decedent or person represented is of a different citizenship.

E. Section 1301(c)

This section defines "State" to include the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. This definition of "State" differs from the present definition in 28 U.S.C. 1332(d) by the addition of "possession." The ALI Study, at 119, says that the inclusion of any territory or possession of the United States in the definition of "State" seems desirable and is believed to be sustainable as a constitutional matter.

F. Section 1301(d)

This subsection would provide that a plaintiff who is adjudged to be entitled to recover less than the sum or value of $25,000 may be penalized by denying him costs and, in addition, may have costs imposed on him.

Impact On Federal Caseload

There is no change from existing law except that the amount is increased from $10,000 to $25,000. Information is not readily available to permit an assessment of the impact of this provision. However, the ALI Study, at 130, said it is doubtful that the costs sanction would ever become an effective deterrent to the choice of a Federal forum since the sanction has been invoked infrequently and the fear of it does not seem to have played any significant part in the choice of forum.

G. Section 1301(e)

This section is a codification of a concept already reflected in some case law that permits members of a family or household to join in a claim for damages of another family member so long as both claims arise from the same transaction, even though the joining family member's claim does not itself meet all the jurisdictional requirements for bringing suit in Federal court.

In terms of this provision's impact, the ALI Study commented at 121 that this standard "will be simple to apply, * * * will not substantially add to the burden of the Federal courts, and, of greatest importance, * * * will permit joinder in those cases where the need is particularly manifest."

The ALI Study, at 123 stated, however, that this provision was not intended to preclude courts from permitting joinder in cases which go beyond provisions such as those in H.R. 5546, but cautioned, however, that the courts could undermine the concept of jurisdictional requirements by stretching the family relationship beyond incidents arising from the same transaction.

H. Section 1301(f)

There is no change from existing legislation. However, to correct a typographical error, this provision should read "consuls *or* vice consuls" instead of "consuls *of* vice consuls."

I. Section 1302(a)—Limitations of General Diversity

This section provides a most important general provision: no one may invoke Federal diversity jurisdiction in any district of a State of which he is a citizen. This has long been the rule in removal cases where the resident defendant cannot remove an action from a State to a Federal court. The philosophy is that since diversity jurisdiction is to protect the outsider, it does not justify allowing the local party to sue in Federal court.

In this regard, Currie, *The Federal Courts and the American Law Institute*, 36 U. Chic. L. Rev. 1, 45, states the following complicated example of a suit by a Pennsylvania plaintiff against a Delaware defendant that could arise under a section such as proposed here:

"(Suit could be) filed in the federal court of Delaware, or in any available State court, but not in federal court in Pennsylvania. * * * (But) (i)f the suit is filed in a State court in Pennsylvana the defendant can remove (to the Pennsylvania federal court, particularly if he wishes to avoid any State court prejudice). If the suit is filed in the Delaware Federal court, the defendant may move to transfer it to the Pennsylvania federal court. * * * (I)f the motion is granted or if the suit is filed in Pennsylvania and removed, there has been a wasteful game of musical chairs."

Currie's position is that primary importance should be given to having a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction and that the rule as it presently stands makes a good deal of sense because it simplifies the task of judicial administration. However, Currie admits that "the present rule is assuredly impossible to justify if one looks only to the policy of providing a forum for the out-of-State litigant." Currie at 46.

Barring plaintiffs from invoking the jurisdiction of the Federal courts in their own districts could cause hardships or inconveniences for those plaintiffs who, for one reason or another, cannot get jurisdiction over the defendant in the plaintiff's State court and who then would be forced to bring the action in either the Federal or State courts where the defendant resides or where the harm was caused.

For example, if this provision were enacted, a plaintiff who was hurt in an automobile accident caused by an out-of-State defendant in the defendant's home State would most likely be forced to bring his action in the Federal or State court where the defendant resided. (Long-arm statutes giving the plaintiff jurisdiction in his home State do not normally apply to this type of situation.)

Impact On Federal Caseload

Information made available by the Administrative Office of the United States Courts indicates that about 60 percent of the diversity jurisdiction cases filed during the period January through September 1976 involved plaintiffs who brought complaints into the Federal court where they resided. Thus, barring plaintiffs from bringing actions in the Federal courts in their own States could reduce the Federal caseload. However, we cannot realistically determine the impact. It would be pure speculation to estimate how many plaintiffs, if barred from filing complaints in the Federal courts of their own States, would invoke the jurisdiction of other Federal courts. Of course, a plaintiff could only invoke Federal diversity jurisdiction in those districts where the defendant resides or where the cause of action occurred so long as the cause of action took place in a State other than the plaintiff's.

Further, it would be speculation to estimate how many defendants would exercise the right to remove a case to the Federal court where the plaintiff resides if the plaintiff had brought the action in his own State court. It must be recognized that a significant number of diversity jurisdiction cases are cases that already have been removed from State courts. In this connection, data provided by the Administrative Office of the United States Courts indicates that about 17 percent of the diversity jurisdiction cases filed during the period January through September 1976 were cases that had been removed from State courts.

Barring in-State plaintiffs from invoking the jurisdiction of the Federal courts in their States, as was pointed out earlier, could create hardship or inconvenience for such plaintiffs.

J. Sections 1302(b), (c), and (d): "The Corporate Local Establishment" and "Commuter Provisions"

Section 1302(b) defines another important exception to diversity jurisdiction—a corporation, partnership, unincorporated association or sole proprietorship having its principal place of business in the United States may not invoke Federal diversity jurisdiction in any State where it has mantained a "local establishment" for more than 2 years. This is a substantial change to existing law and the purpose is to limit the ability of a corporation or other business organization to claim the stranger's right to a Federal forum in a State where it has engaged in regular business activity.

Similarly section 1302(c), the "commuter" provision, provides that individual citizens are barred from invoking Federal diversity jurisdiction, or originally or on removal, in States where they had their principal place of business or employment for more than 2 years.

By denying plaintiffs original diversity jurisdiction in the Federal courts in States where their business or employment is, this provision treats such plaintiffs the same way resident defendants have always been treated regarding removal. The policy with regard to commuters and corporations is consistent with the original purpose of diversity jurisdiction: when they are strongly established in the State, their cases as plaintiff or defendant can be heard in State court without fear of local bias.

Subsection (d) provides that the 2-year period provided in subsections (b) and (c) is measured from the time the claim arises.

Impact On Federal Caseload

These sections will most likely reduce the Federal caseload. However, information is not readily available that would give an indication of the number of corporations, other businesses, or commuters who would be prevented from invoking Federal diversity jurisdiction if the provisions of sections 1302(b), (c), and (d) were enacted. This provision could have a significant impact on the Federal caseload, especially with regard to commuters, since it is known that certain areas if the country have a large number of commuters.

K. Sections 1302(e) and 1302(f)—Further Exceptions

Section 1302(e) prevents persons from invoking Federal diversity jurisdiction, either originally or on removal, in actions arising under workmen's compensation laws in any State. Present law, 28 U.S.C. 1445(c), already prohibits removal of workmen's compensation cases. Section 1302(e) is designed to oust Federal jurisdiction in workmen's compensation cases on the ground that they are more appropriate for State determination (ALI Study, at 133).

Although 28 U.S.C. 1445(a) already prohibits the removal of such cases, section 1302(f) provides that no person can invoke diversity jurisdiction of the Federal courts, either originally or on removal, in any civil action against a railroad or its receiver or trustees under sections 51 through 60 of title 45, U.S. Code. Sections 51 through 60 concern the liability of common carriers by railroad for injuries to employees.

Impact On Federal Caseloads

Most likely section 1302(f) would not increase the Federal caseload since actions arising under sections 51 through 60 of title 45, U.S. Code, usually are handled as "Federal question" cases and are already within the jurisdiction of the U.S. District Courts. Procedurally, "Federal question" cases take precedence over diversity of citizenship cases. The railway liability cases can be initiated in State courts because the Federal district courts have concurrent jurisdiction in these matters with the courts of the several States.

L. Venue—Section 1303

The venue provisions of H.R. 5546 complement section 1302(a) by eliminating the residence of the plaintiff as the place to bring a diversity action because plaintiffs are denied Federal jurisdiction in their home State under 132(a). Under this new section, a plaintiff could bring his suit only in the district where all defendants reside or where the claim arose; he could not bring his suit in his own home State. Under section 1303, a corporation resides in every district of every State where it is incorporated and where it has its principal place of business. A partnership or unincorporated association resides where it has its principal place of business. Corporate residency is more limited here than in the present venue statute, 28 U.S.C. 1391(c), which makes a corporation a resident, for venue purposes, of all districts where it is doing or is licensed to do business rather than where it has its principal place of business. Under this new provision, since a plaintiff cannot now bring an action in Federal court in his own State, he nevertheless would not be permitted to shop at length for a Federal forum.

Section 1303(e) repudiates the common law concept of "local action," and provides that actions for trespass or harm done to land may be brought in any of the districts specified in subsection (a).

M. Removal—Section 1304

This section, which reduces a defendant's access to Federal court, provides certain specific circumstances under which an action brought in a State court can be removed by a defendant. The defendant can remove only if he is not a citizen of the State in which the action was brought, so that an individual citizen is barred from invoking the removal jurisdiction within his home State. Business enterprises with "local establishments" and "commuters" are denied removal jurisdiction just as they are denied original jurisdiction in section 1302. In effect, actions involving "commuters" and corporations with "local establishments" can reach the Federal court only when an out-of-State plaintiff originally chooses to invoke Federal jurisdiction. Subsection (b) provides greater access to the Federal courts, since it modifies presently controlling case law and provides that multiple defendants can request removal if any one defendant is not a citizen of the State in which the action was brought.

Section 1304(c) provides that a plaintiff defending a counterclaim is treated as a defendant for removal purposes so that he can remove the action if he could have removed it had the counterclaim been brought against him as an original action. The present statute does not address this matter, although *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), holds that the word "defendant" in the removal statute meant what it said and did not include a plaintiff called upon to defend a cause of action asserted in a counterclaim. This proposed section 1304(c) would legislatively overrule this case.

Section 1304(d) would permit a defendant to remove if such removal would otherwise be barred solely because the amount claimed against him in State court action is under $25,000, so long as the counterclaim arises out of the same transaction or occurrence as the other party's claim and exceeds the sum or value of $25,000, exclusive of interests and costs. The effect of this section would be that the party with the small claim could not rush to the State courthouse to bring suit to forestall an adverse action in the Federal court.

Impact On Federal Caseload

We are unable to estimate the extent of the impact these provisions would have on the caseload of the Federal district courts.

N. Section 1305: Change of Venue on Motion of Defendant

Transfer may be made to *any other* Federal district court on motion of defendant. This differs from the current transfer of venue statute, 28 U.S.C. 1404, that provides for transfer only to courts where the action "might have been brought." However, subsection (b) would preclude transfer where any plaintiffs or all defendants would otherwise be barred under section 1302, in order not to frustrate the policy of that section by allowing such a transfer to a Federal forum.

Subsection (c) would provide that the choice of law in a change of venue situation is that the transferee court shall apply the rules that the transferor court would have been bound to apply. Thus the plaintiff would retain the benefit he had originally in the selection of a forum with favorable choice-of-law-rules.

Impact On Federal Caseload

Since venue governs which court having jurisdiction is the proper one for trial, a change in venue from one Federal district court to another should not affect the Federal caseload.

O. Section 1306: Change of Venue on Motion of Plaintiff

The plaintiff could request a transfer to another district court for convenience of parties or otherwise in the interest of justice but only to a district where venue "would be proper for an original action and the defendants amenable to process," and where the district is one in which the plaintiffs would not be precluded from invoking jurisdiction by reason of section 1302.

Subsection (b) would provide for transfer where the venue is laid in the wrong district. However, when the plaintiff transfers, the choice of law is the State law of the transferee court. If the plaintiff fails to bring the proper action in the first place, he may be liable for costs.

Impact On Federal Caseload

Since venue governs which Federal judicial district is the proper one for trial, a change in venue would not affect the Federal caseload.

P. Section 1307—Joinder of Parties

Section 1307(a) and the present law, 28 U.S.C. 1359, are identical in their effect. Both bar joinders that are improperly made or are made in order to invoke the jurisdiction of the court.

However, situations may arise where the prevention or creation of Federal jurisdiction was "the object" of the assignment, sale, or other transfer even though more than one reason could be made to appear. Under section 1307(b), if the existence of such an object can be shown, jurisdiction shall be determined as if such sale, assignment, or other transfer had not occurred.

In other words, the overall objective of this proposed section is to prevent assignments, sales, or other transfers when the purpose or object is to invoke a Federal forum which otherwise would have been unavailable.

Further, 28 U.S.C. 1332, which contains general diversity requirements, would be repealed as well as 13 U.S.C. 1391(a) and a portion of 13 U.S.C. 1391(b), where venue requirements founded on diversity of citizenship are concerned.

Sections 1404 and 1406 of title 28, concerning change of venue and cure or waiver of defects respectively, would be amended by a cross reference to Chapter 84 (this is a new chapter which will incorporate the provisions of H.R. 5546 if passed) for special provisions relating to venue in diversity of citizenship jurisdiction cases.

Finally, the bill provides for the Act to take effect 60 days after the date of enactment. We suggest that any potential problems concerning pending litigation might be avoided if, in a manner similar to H.R. 761 or H.R. 7243, the bill were made to apply "only to actions filed" or "only to actions commenced" 60 days after the date of enactment.

V. Analysis of H.R. 761

H.R. 761 would abolish the diversity of citizenship jurisdiction of the Federal courts. The traditional explanation for diversity jurisdiction is the fear that State courts would be prejudiced against those litigants from out of State. However, the decision to retain or abolish such jurisdiction should depend on the utility of the jurisdiction in today's society. In this regard, Currie, "The Federal Courts and the American Law Institute," 36 U. Chic. L. Rev. 1 (1969), states that the ALI proposals (which are similar to H.R. 5546) are so complicated that they will invoke more jurisdiction litigation in an already over-complicated area. Moreover, the actual showing of local prejudice or local influence against the litigant from out of State has been nearly impossible to make.

Further arguments against diversity jurisdiction are that (1) it congests the Federal courts, (2) it interferes with State autonomy since Federal courts have to decide cases arising under State law, and (3) it diminishes incentives and energies for State reform. (See Wright, "Law of Federal Courts" at 76.)

Nevertheless, the basic issue in determining whether diversity jurisdiction should be abolished is whether, on balance, there is any real justification for retaining diversity jurisdiction, *e.g.*, whether local prejudices against out-of-Staters are so significant as to be a danger, whether the existence of concurrent jurisdiction is necessary to spur higher standards when such jurisdiction exists anyway in Federal question cases and whether preventing plaintiffs from invoking jurisdiction of the Federal courts in their own districts could cause hardship or inconvenience for a plaintiff who for one reason or another cannot get jurisdiction over the defendant in the plaintiff's State court. Resolution of this issue is for the Congress.

We hope this information will prove useful to you.

Sincerely yours,

R. F. KELLER,
Deputy Comptroller General of the United States.

Source: U.S. Congress 1977, pp. 283–293.

NOTES

1. The same legislation was being considered by the 96th Congress in early 1980.

2. An example was provided by an examination of the docket of the Eastern District of Pennsylvania (which encompasses Philadelphia), which found that 7.6 percent of all original diversity cases in that district court would have been eliminated by the commuter proposal.

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NOTE:
This list includes the names of those who attended one or both meetings of the group, on February 9 and on October 27, 1978.