COMMENT

COMMENTS ON JUDGES' OPINIONS ON PROCEDURAL ISSUES

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INTRODUCTION

Last year, America intensified its addiction to opinion polls. People seemed to care deeply about what Iowans think of adultery committed by those who preach new ideas or the Gospel, or about how the inhabitants of New Hampshire respond to pencilled-in eyebrows and protectionism, or about who won the CBS joust between Daniel the Courage-Giver and Sir George of the Immaculate Resume.

Conducting a poll to determine what judges think of the state of the union's courts seems a trifle pedestrian by comparison. The problems of delay and expense that plague our judicial system, however, seem certain to be with us longer than most of that crop of candidates, and the courts themselves, and may persist even as long as the federal deficit.

My function with respect to this poll of judges is to step back from the trees of responses to individual questions already presented clearly and capably, and divine a forest or two of implications for those who seek to make our courts more effective and efficient dispensers of justice. In section I, I focus on broader concerns as illuminated by series of responses in the poll. In section II, I make hit-and-run observations about particular questions or responses in the survey.

I should emphasize from the beginning that I am not what one could call a grizzled hiker on the trails. I have yet to appear before a trial judge in court. My judicial clerkships both placed me at the elbow of appellate, not trial, judges.¹ I do not make artists' renderings of poignant testimony. Should my assertions provoke disagreement, I reserve the right to retreat behind the excuse of inexperience.

Each subsection begins with a statement that I glean from the survey data, after which I discuss the statement in more detail.

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¹ One of the judges that I clerked for, at a function in his honor attended by both trial and appellate judges, referred to the trial judges of his circuit as "the learned opposition." They laughed.
I. Discussion

A. Judges are able to resolve at least half of all litigation before them within a year of its initiation and to resolve more than 80% of all litigation within two years of its initiation.

The health of courts, as measured by delay in resolving cases, is not Olympian, but judges' perceptions do not to my mind support assertions that the courts are generally chin-deep in delay. Three-fourths of judges in the federal courts report that the typical case that will settle does so within a year. More than half of federal judges believe that the typical case that will not settle goes to trial within a year, and over 90% of federal judges feel that the typical case bound for trial reaches its destination within two years. In the state courts, just over half of the judges believe that the typical case that settles will do so within a year. Just under half of state judges think that the typical case that will not settle goes to trial within a year, and over 80% of them believe a typical case's trial occurs within two years of its filing. A year or two is a long time to wait for justice if you have been crippled or bankrupted by the actions of the defendant; nonetheless, Jarndyce v. Jarndyce it is not.

B. Judges blame lawyers and legislators for delays in court—certainly not themselves or their staffs, and probably not the parties to litigation.

The pollsters offered judges a list of more than a dozen causes of delay in litigation from which to choose; some insights may be gleaned by bringing together the judges's responses. I will take the "major cause of delay" column as the measure of merit.

In both state and federal courts, it is clear that trial judges currently on the bench do not see themselves or their fellow trial judges as the cause of much delay. Only 7% of state trial judges (and 3% of federal trial judges) believe that laggard colleagues are a major cause of delay, and just 1% of all judges

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2 Table 9.7. All tabular references are to a survey conducted by Louis Harris and Associates in the fall of 1987 entitled Judges' Opinions on Procedural Issues. A summary of this poll is presented infra at pages 731-63. Tabular results not included in the summary may be obtained upon request from Louis Harris and Associates, Inc.

3 Table 9.9.

4 Table 9.7.

5 Table 9.9.

6 C. Dickens, Bleak House 364-72 (1853).

7 Tables 1.1, 1.2. These two tables are the source for any data in this and the next paragraph that are not accompanied by a specific citation.

8 I use a percentage in parentheses without other explanation to indicate the percentage of federal judges giving a particular response to the question under discussion. I should warn the reader that the tables in the report of the survey's results typically present statistics on the federal courts first.
consider fear of reversal by their appellate "supervisors" as a conspicuous contributor to delay. Indeed, judges perceive themselves as sufficiently efficient that they need no greater latitude in decisionmaking; only 5% (3%) felt that insufficient judicial discretion was a major cause of delay.

Similarly, judges find their current support staffs nearly blameless as a cause of delay. Only 9% (6%) see calendar administration as a major cause of delay, and just 8% (5%) blame the unwritten rules and common practices of case management. Eighty-three percent (92%) rate the administration of their court system as good.

Whom do judges blame for delay? Lawyers, mostly. The judges clearly blame lawyers for taking more cases than they can handle effectively (33% of state judges and 20% of federal judges believe this to be a major cause of delay). Presumably, judges blame attorneys for abuse of the discovery process, which an even higher percentage of those polled took to be a major cause of delay (34% of state judges and 47% of those on the federal trial bench). Attorneys are also responsible for major delays through both their deliberate abuse of the litigation process (according to 12% of state judges and 18% of the federal judges) and sheer incompetence (11% and 10%, respectively). The number of frivolous suits and defenses, another frequently mentioned major cause of delay (14% and 21%, respectively), is likely to stem in part from the decisions of attorneys, though one might also place some blame upon the litigants.

Lawmakers, by failing to provide the judiciary with sufficient resources, are the other leading villain in the saga of delay. The lawyer-packed legislatures have failed to provide sufficient judges for the caseload, which is the leading major cause of delay according to state judges (37%) and the runner-up according to federal judges (30%). The complete state legislature should also consider providing more people to help the judges with their tasks, as a majority of state judges thought inadequate staff and administrative support for judges was a cause of delay.

One has some difficulty gleaning from this particular data the extent to which judges hold the parties themselves responsible for delay. Roughly

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9 Few of us have not heard the story of the trial judge who was invariably reversed by his appellate overseers. One day, the appellate court finally upheld one of his rulings, and the reporter covering the court excitedly called him for his comment on this unprecedented event. "Well," says the trial judge, "I still think I was right."

10 Table 4.1.

11 If one broadens the measure of merit to be the aggregate of percentages of judges who believe that a particular factor is a major or a minor cause of delay, the figures attaching to the factors involving judges and judicial administration are all less than 50%, while the percentages of judges who believe that the factors relating to practicing attorneys are a major or minor cause of delay are all above 70%, with a high of 93% (for the percentage of federal judges who believe that abuse of the discovery process causes delay).

12 Tables 1.1, 1.2.
equal amounts of judges believe that the litigants on the one hand and the
lawyers on the other deliberately abuse the legal process to cause delay, an
equivalence that I take to mean that judges have some difficulty in separating
lawyers from their clients. The judges’ responses on the causes of excessive
costs supports the hypothesis that judges tend not to blame the parties for
delays in the courts: only 12% (25%) of judges thought that clients exercised
insufficient control over their hired guns, while the gunslingers themselves
were blamed for excessive costs at rates that generally exceeded 25% and
sometimes soared to or above 50%.

C. Judges chose discovery abuse as the leading cause of excessive
litigation costs from the list of choices provided. One must nonetheless
be cautious in relying upon judges’ opinions about the sources of
excessive litigation costs.

Long delays and excessive costs are generally considered the twin banes
of modern litigation. As we have seen, judges believe that discovery abuse is
a crucial cause of delay. With respect to costs, the primary evil also goes by
the name of discovery. All three questions concerning costs that involved
discovery provoked not less than 45% of the responding judges to say the
given factor was a major cause of excessive litigation costs, while none of
the other six questions provoked even 35% of the respondents to judge it a
major cause of excessive costs.

One might therefore wish to reconsider, with at least as much care as one
has considered them in the past, the myriad of reforms that modern Atlases
might employ as levers to lift the worldly woes of discovery from the
shoulders of the courts. States with relatively lax standards might wish to
adopt the relatively firm standards of the Federal Rules. To the extent that
a judge’s familiarity with a case makes it easier for her to spot discovery
abuse, and to the extent that following a case from cradle to grave usefully
increases a judge’s familiarity with that case, state courts that routinely
assign a single case to several different judges in its lifetime might wish to
reconsider their case-assignment policies. To the extent that the requisite
familiarity with the case need only be during its discovery phase, courts
might wish to consider using a single magistrate or master to handle a case
during discovery.

Whichever particular factor raises the ire of judges with respect to litiga-
tion costs, one should nonetheless take some of the judicial conclusions
about those costs with a microgram or two of salt. Judges do not pay the bills
for litigation; clients do. Judges do not decide what prices and quantities of
service go into the bills for litigation; lawyers do. A judge may have a guess

13 Tables 8.1, 8.2.
14 Id.
15 Id.
16 See infra pp. 774-72.
as to how much preparation went into a particular case, but he cannot know what it really costs. Certainly, for example, a judge will not know what dead-end avenues the attorney pursued but eventually decided not to raise in court, and those dead-end pursuits are often part of the expenses of the case. Judges may speculate as to how much discovery is necessary in a case, but I doubt they read every request or deposition, or that they know how much effort it took the responding party to provide the answers. 17

D. Although judges apparently feel that the way to solve many of the problems of delay is to devote more resources to the judicial system—more judges, more support staff (for state judges, at least), and more lawyers—we would be incautious to believe that such measures will actually alleviate the problem of delay so long as we continue to keep the fees for access to the courts low.

Judges clearly believe that there are not enough judges. 18 Moreover, state judges believe that they do not have enough staff to support them sufficiently. 19 And despite the fact that judges are likely to blame the lawyers practicing before them for most of their problems, 20 many judges also believe that delays occur because there is a shortage of lawyers. Thirty-three percent of state judges (and 20% of federal judges) believe that “lawyers who take more cases than they can handle effectively” are a major cause of delay, and another 56% (62%) believe that such attorneys are a minor cause of delay. 21 Twenty-four percent of state judges (though just 7% of federal judges) believe that unavailability of counsel 22 is also a major cause of delay. 23

17 I qualify my remarks throughout this paragraph with the acknowledgement that virtually every judge used to be a lawyer, Table 9.1, and thus remembers what practice—and therefore billing—was like. Nonetheless, the view from the benches differs from the view from the trenches. In addition, a great many judges have been on the bench for some time, and their memories of their practice thereby become gradually less relevant to current practice.

18 “Too few judges for the caseload” is the leading major cause of delay cited by state judges (37%). Table 1.2. The same factor is the second most frequently cited major cause of delay for federal judges (30%). Table 1.1.

19 Twenty percent of state judges believe that “inadequate staff and administrative support for [the] judge” is a major cause of delay, while only 3% of federal judges believe so. Tables 1.1, 1.2.

20 See supra pp. 766-68.

21 Tables 1.1, 1.2.

22 I assume that “unavailability of counsel” in this response refers to counsel being unavailable on cases for which they are responsible. Nonetheless, even if “unavailability of counsel” in this response instead means that there are litigants who must proceed pro se, there is still a problem to which the solution is most naturally the addition of more lawyers to the pool of practicing attorneys.

23 There are, of course, explanations for these figures that need not stem from a shortage of attorneys. There might, for example, be plenty of attorneys, but not
The response of judges and others, to these perceptions of various shortages, seems to be to ask, please, sir, for more—more judges, more staff, more lawyers. We should be cautious, however, about whether such additions might also bring proportionally more litigants, at least if no other changes accompanied the increase in resources dedicated to the judicial system. The continued growth of the federal judiciary has done little to stem the tide of increasing litigation.

A more extended argument is what I call “freeway follies.” Cities engage in freeway follies when they build miles and miles of new, non-toll roads to meet the growing demand for passenger-miles only to discover that they have gained nothing but more abstract overpass sculpture. The city begins the process with current estimates of highway use, throws in a factor for population growth, and then builds freeway miles to alleviate current and future excess demand by increasing the supply. Inevitably, an “unpredicted” large number of people move into the area and use the freeways, or continuing users increase the amount that they travel. The freeways stay congested.

Those who have benefited from education about law and economics can construct fairly sophisticated models to explain the “freeway follies” phenomenon. I will attempt a graph-less explanation: when you build new freeways, new people will use them (or old people will use them in new ways), and people won’t stop using them until they become as congested as they were before. Suppose that, disgusted with freeway congestion, I leave for work at 6 a.m. each day to avoid the “rush-hour”; nevertheless, I am on the verge of buying a bicycle helmet and pedalling to work. Then, , , a new freeway arises, and traffic all over the city moves more

enough good attorneys. Nonetheless, improvements in the quality of practicing attorneys are likely to require the increased commitment of many of the same resources—education, supervision, and so forth—as increases in the quantity of practicing attorneys require. Alternatively, the problem might not be in a shortage of the quality or quantity of attorneys but in their inability to screen out unmeritorious cases. For a discussion of the judicial schizophrenia on frivolous cases, see infra pp. ___. There might also be cases that, from the judicial point of view, are neither sufficiently meritorious to be pursued by busy attorneys nor sufficiently frivolous to be discouraged with sanctions. Such cases do not exist from the economist’s point of view, however—at least not in the cases of attorneys who work on the basis of contingent fees: attorneys in that situation will invest their own time only if they believe that the client is sufficiently likely to reap a reward from the judicial system substantial enough to justify the opportunity costs of representation (to the attorney), and such an award is presumably a measure of the case’s underlying merit. As to attorneys paid on the fee-for-service basis, one must blame the clients rather than the attorneys for expending large sums on unmeritorious litigation.

24 Cf. 1 C. Dickens, Oliver Twist 29 (1838).

25 Cf. Table available upon request from Louis Harris and Associates, Inc. (77% of federal judges and 51% of state judges believe that they would benefit from a continuing-education course on economics and the law).
smoothly. I cease staring fondly at bicycle ads and decide in addition that I can now sleep in and leave for work at 8 a.m. Those deciding where to purchase a house can now buy one farther away from the city, believing they can still get to work on time. The combination of these decisions soon eats away the harvest of congestion-free traffic from the new freeway, and the congestion eventually becomes as bad as before—though more people get to use the freeways.

One must be aware in adding resources to the judiciary that the courts are a lot like freeways. They are presently thought to be excessively congested. They are free to use—an attorney can cost a great deal, just as a car can, but access to the court or freeway itself involves little monetary outlay. Adding more resources may result in a temporary clearing of the lines. Soon, however, there is likely to be an influx of those who would not have bothered suing in the old, ultra-crowded courts—those who would not have brought any action at all anywhere, or would have shopped for a less congested forum, or would have used arbitration. New litigants are likely to continue to pour into the courts until congestion is as bad as it was before. One should also remember that legislatures may, in contemplating legislation, cast an eye on how much congestion exists in courts. If so, they would likely become less hesitant to provide for causes of action after doling out more resources to the judiciary.

The short-run answer to freeway follies, at least for the economist, is to charge individuals a toll equal to the costs of congestion that their presence on the road wreaks upon others. A driver contemplating use of the freeway would then worry not only about the inconvenience that he is personally about to suffer, but also, through the medium of the toll, about the inconvenience that he is about to impose upon others. The driver will scoot down the on-ramp only when she is willing to pay all the costs generated by doing so. This does not lead to zero congestion, of course, but rather to the efficient amount of congestion, which is all an economist ever desires.

This answers the short-run question of how to regulate use of existing freeways. The proper amount of freeways to build in the long run depends upon charging freeway users for freeway construction—which is usually the stated purpose of tolls, though one mysteriously finds state governments continuing to collect tolls years after the bonds that financed the road have been paid off. Otherwise, freeway users will receive a “free ride” not only on the roads but at the expense of those who pay taxes but do not use the freeways.26

The analogous solution for the courts in the short run is to charge higher court costs to force litigants to consider not only the inconvenience that they suffer by using clogged courts, but also the inconvenience that their case will

26 Los Angeles is perversely blessed in this particular consideration of equity: since every living soul plies the freeways, general taxes are perfectly equitable.
cause to all others whose cases thereby proceed at a slower pace. In addition, one might also want court costs to rise in the long run until the courts supported themselves or at least came closer to doing so. If those who use the courts are not willing to foot the bill, they are receiving a free ride on the backs of the general taxpayers. One could use the revenues thereby generated to pay more judges, or more magistrates, or more support staff, or otherwise, in pursuit of a smoothly running court system.

This would be the efficient solution, but I do not think that it is likely to be a politically popular one. "Free" access to the courts is a pillar of democracy in the minds of most of those who deliver speeches on the floors of courtrooms and of Congress—even though small court access fees are generally charged even now, and those who proceed without the typically costly services of an attorney are not likely to proceed very far. Proponents of free access will raise the specter of individuals who are unable to pay court fees because of the heartlessness of the potential defendant that the barred suit would redress. Those proponents will undoubtedly ignore the possibility that the court could waive the fee requirement in cases of need, and that the court could wait until a case is resolved before insisting upon the payment of these higher court costs. I can see little wrong with requiring someone who nets a few million dollars from a suit to cough up reasonable fees for real court costs. The speechmakers will lament the fact that we can go to the moon and can contemplate spending a trillion dollars on a Star Wars defense, yet we cannot make our courts available to all. Perhaps those arguments will prevail, but I would hope that some brave jurisdiction might be able to muster sufficient courage to move, at least on an experimental basis, towards charging more for access to its courts.

E. Judges often do not or cannot take advantage of the discretion afforded them to fight problems like discovery abuse and frivolous litigation.

Forty-seven percent of federal judges find discovery abuse to be a major cause of delay (the front runner for causes of delay to federal judges, while state judges find such abuse to be the runner-up to a shortage of judges). In contrast, only 3% of federal judges believe that a lack of judicial discretion contributes to delay. This small number seems sensible. The Federal Rules do, after all, allow judges to charge a party for any fees incurred by a party because its opponent’s stance on a discovery matter is not "substantially

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27 One could also attempt to build so many courts so quickly that no amount of litigiousness or access-minded legislation could strain them. This seems an unlikely course of action in light of the probable costs.

28 Tables 1.1, 1.2.

29 Table 1.1. I note that 6% of federal judges believed that greater judicial discretion or authority in the discovery process would be the single most beneficial step towards improving discovery. (Table available upon request from Louis Harris and Associates, Inc.).
In addition, a 1983 amendment to the Rules gives judges a great deal of scope in limiting discovery requests they deem abusive:

The frequency or extent of use of . . . discovery methods . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.31

In light of the Federal Rules on discovery, one might agree with judges that they have the requisite discretion to stop any discovery abuse that they identify. One might wonder why, therefore, so much discovery abuse continues—at least according to judges.

I will advance two hypotheses—though I encourage others to advance other explanations. The first is that judges are cousins to the Wall Street lawyers who, until the market crash of October 1987, whined about how much less money they made than did investment bankers. The lawyers, however, had it perfectly within their power to quit and make more money at an investment bank, and most of us properly ignored their whinings. The judges, analogously, have it within their power to stop discovery abuse. Those who forward this hypothesis may advance some psycho-sociological reason why judges indulge in the ritual of complaints about discovery abuse, but the rest of us can feel comfortable in ignoring the judges’ complaints.

I will pull up short on this path, however, and advance the second hypothesis, which is that judges are instead similar to an American infantry soldier on night patrol in Viet Nam. Shadowy figures sometimes rustled in those jungles. They could be friends; they could be the enemy; they could be water buffalo. Spraying the jungle with automatic-weapons fire at every turn was not, however, a practical response. Discovery abuse may be similarly difficult to identify in the jungle of litigation. Legitimate requests in complicated cases may be difficult to distinguish from abusive requests. Applying wholesale sanctions on the courtroom is probably not a good idea. You may know that the enemy or abuse is out there somewhere—which explains judges’ perceptions of the problem’s pervasiveness—and you may appear to have the tools to combat it, but you wind up frustrated and ineffectual.

Choosing between the two hypotheses is mainly a matter of one’s prejudices about judges. One might garner some support for the whining-lawyer hypothesis, however, from the fact that fully one-third of federal judges believe that a greater exercise of judicial discretion would do the most to improve the discovery process, as opposed to about 40% who feel that

30 FED. R. CIV. P. 37(a)(4).
31 FED. R. CIV. P. 26(b)(1).
changes in unwritten practices would do the most and about 20% who believe changes in the Rules would yield the best result. Nonetheless, this question gave judges only those three options from which to choose and simply asked which measure would do the most, not whether any of the measures would actually have any effect. Left to choose reforms to the discovery process on their own, only 8% of federal judges suggested greater judicial supervision or intervention as the most effective way to improve discovery.

If one seeks less ambiguous ground from which to chide judges for failing to employ the sanctions at their disposal, while claiming that the underlying problem is serious, I would direct attention to the question of frivolous suits and defenses. Ninety-one percent of federal judges believe that these meritless cases are a major or minor cause of delay in litigation; 78% of state judges feel the same way. Nonetheless, only 84% of federal judges and 52% of state judges have ever imposed sanctions against a party in the last three years for bringing a frivolous suit, motion, or defense. The standards for imposing sanctions in such an instance do not always make such an imposition simply a matter of judicial whim, but one must certainly wonder why judges believe frivolous actions to be a very large problem, yet do not more frequently impose sanctions against parties for pursuing frivolous suits or defenses.

F. Judges are suspicious of sweeping statements of reform but somewhat more amenable to specific reforms with respect to the roles of expert witnesses and juries.

Practitioners of law and psychology, or at least of law and poll-taking, might note that judges seem more favorably inclined towards specific reforms than abstract ones, at least in the field of expert witnesses. Only 16% of state judges (and 21% of federal judges) answered "Yes" to the question: "Do you think that the rules relating to the qualifications and use of expert witnesses in your jurisdiction should be made more restrictive?" Consistently higher percentages, however, favor specific restrictions. Thirty-three percent of state judges (and 34% of federal judges) favor greater restrictions on who is qualified to be an expert witness; 36% (39%) favor greater restrictions on the specific issues on which a particular expert witness can testify. The percentages are higher—though not by much—when one limits the inquiry to cases involving scientific or technical issues. Thirty-seven percent of state judges (33%) favor special rules on expert-witness qualifications in

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32 Table 2.2.
33 Table available upon request from Louis Harris and Associates, Inc.
34 Tables 1.1, 1.2.
35 Table 8.
36 Table 3.2.
37 Table 3.5.
such cases; 42% (32%) favor special rules as to what kind of evidence is acceptable.\textsuperscript{38} A significantly higher percentage of judges (70% for state judges and 76% for federal) favor using independent expert witnesses,\textsuperscript{39} which may be read as an implicit criticism of the traditional treatment of expert witnesses.

An arguably similar situation occurs with respect to juries. In the abstract, at least two-thirds of the judges polled believe that juries make a serious effort to apply the law, that right to trial by jury is an essential safeguard for "routine civil cases," and that jurors rarely fail to apply the law because they do not understand it.\textsuperscript{40} The situation is somewhat different, however, once one gets down to specific cases. The "essential safeguard" in "routine" cases is not thought essential in "minor civil cases involving small sums of money"—which sound like routine cases to me—because more than two-thirds of state judges and a slight majority of federal trial judges believe that there should be a limitation on the use of juries in such cases.\textsuperscript{41} And in "some complex civil cases," a slim majority believes that it would be preferable for the jury to retreat from the fray completely and to use a panel of experts instead.\textsuperscript{42}

A substantial majority of judges—68% of state judges and 63% of federal judges—also believe that a "serious study should be made of alternatives to trial by jury for certain types of cases." Unless judges are simply trying to drum up some business for their colleagues in the academy, this response indicates that judges are at least disenchanted enough with the jury system to consider some alternatives.

G. \textit{The caricatures of state judges as aging, closed-minded conservatives and federal judges as sage and liberal dispensers of justice are overdrawn.}

Perhaps I have spent too much time in the company of liberals, but it seems to me that most of those involved with the law have a different mental image of a state judge than they do of a federal judge. Most harbor the view that state judges tend to be a bit backward, closed-minded, conservative, and "political" in the pejorative sense of that word now in fashion—in summary, not exactly rednecks in robes, but not Louis Brandeis either. The caricature of the federal judge, in contrast, is of an intellectually open-minded, liberal sage—not exactly Louis Brandeis, but hardly Sheriff Clark.

\textsuperscript{38} Table 3.6.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} Table 7.1.
\textsuperscript{41} Table 7.3.
\textsuperscript{42} Table 7.2. The belief is itself somewhat soft-edged, as only a minority of judges would like to see limitations on the use of juries in "complex civil cases involving highly technical and scientific issues" or in "very complicated business cases."
Perhaps these images are somehow holdovers from the brief, shining period from *Brown v. Board of Education*\(^3\) to *Milliken v. Bradley*,\(^4\) but they linger nonetheless.

The very first table\(^5\) shows that some, but hardly all, of the data is in accord with these stereotypes. As to how “political” judges are, more than three-quarters of state judges face elections (at least after an initial appointment), while federal judges, of course, are unaccountable to any electorate. Nonetheless, three times as many federal judges as state judges held elective office immediately before coming to the bench—though the percentages for both are tiny (3% of federal judges and 1% of state judges) and the ratios are therefore somewhat suspect.\(^6\) The percentages of those who have ever held or sought political office, whether elected or appointed, are strikingly similar for both state and federal judges.\(^7\)

As to which set of judges is more set in its ways, federal judges have generally been on the bench considerably longer than their state-court counterparts\(^8\)—a difference that may relate to the fact that the latter are subject to the occasionally fickle tastes of those who vote for judges—and federal judges generally earn quite a bit more money than do state judges.\(^9\)

Nonetheless, state and federal judges are strikingly similar in a number of dimensions. I have already mentioned one of these similarities: the frequency with which they, at some point prior to becoming a judge, held political office. There are at least two similarities between state and federal judges that I have not mentioned: their occupations immediately before becoming a judge,\(^10\) and—most importantly for proving the invalidity of stereotypical caricatures—their self-descriptions of their political philosophies.\(^11\) Liberals, conservatives, and middle-of-the-roaders do not inhabit the state courts in any proportions noticeably different from their mixture in the federal courts.

State courts are more conscientious than federal courts about providing judges with continuing education,\(^12\) and state judges are roughly as conscientious about attending.\(^13\) Both state and federal judges extend their enthusiasm to continuing education not sponsored by the jurisdiction, with 71% of state and 73% of federal judges having participated in such a program

\(^{34}\) 347 U.S. 483 (1954). The opinion was unanimous.
\(^{45}\) Table 9.1.
\(^{46}\) Id.
\(^{47}\) Id.
\(^{48}\) Id.
\(^{49}\) Id.
\(^{50}\) Id.
\(^{51}\) Id.
\(^{52}\) Table available upon request from Louis Harris and Associates, Inc.
\(^{53}\) Id.
at least once. More than 90% of both state and federal judges found the continuing education sponsored by their jurisdiction to be extremely useful or somewhat useful, and more than 85% of both groups found the programs outside their jurisdiction to be good.

On every specific area of education but one, most judges believe that they would benefit from a continuing-education course. I am not sure whether I find this comforting, on the theory that an eager judiciary is a good judiciary, or disturbing, on the theory that an ignorant judiciary is a bad judiciary. My feelings, whatever their directional vector, should clearly be of the greatest magnitude with respect to substantive legal issues and the rules of evidence, as the highest percentage of judges believed that courses on these subjects would be beneficial to them. Only a bare majority of state judges would find useful a course on economics and the law, while more than three-quarters of federal judges would find such a course beneficial.

H. State judges feel overworked and underhelped in comparison to federal judges.

The relatively poor support that state judges receive might also account for the difference in processing efficiency, at least if one believes that secretaries, word processing, law clerks, and law libraries add to one’s efficiency. State trial judges are, relatively speaking, definitely underserved in these areas. Perhaps I am a bit prejudiced as a former law clerk who has employed both word processing and some well-stocked libraries, but I think that this sort of support can free up a judge’s time to allow him to concentrate on doing justice rather than research or proofreading. I would argue at the very least that the 3% of state trial judges who do not even have an office to themselves should receive one.

One might note that the judges themselves appear to feel these differences in their staff support and accoutrements. Twenty percent of state judges believe that inadequate staff and administrative support is a major cause of delay in litigation, while only 3% of federal judges believe that inadequate support is a major reason for delays.

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54 Id.
55 Id.
56 Id.
57 Id. The exception is a course in stress management for federal judges.
59 Table 9.17.
60 Tables 1.1, 1.2.
II. Observations

The enthusiasm for bifurcation of trials verges on the glowing. Judges can use it, do use it, and are glad that they use it for a whole host of reasons. The 11% of state judges (and 2% of federal judges) who practice in jurisdictions that prohibit bifurcation doubtless wish that their courts would, as one of America’s most prominent advisors might put it, wake up and smell the coffee.

The question on expert witnesses shows that 98% of state and 99% of federal judges would oppose less restrictive rules on expert witnesses. This near-unanimity is worthy of note, as are the facts that only 1% of judges who have ever bifurcated a case typically try the issue of damages first and that 97% or more of judges take advantage of continuing-education courses for judges.

I note that the questions about the effectiveness of changes in the rules governing expert witnesses must tantalize anyone interested in optimizing the restrictiveness of such rules. Those rules have been changed in both directions (and even significantly modified along some dimension not related to restrictiveness at all, in 15% of the cases), and a majority of those changes have improved matters either somewhat or great deal. Unfortunately for those who might wish to know how to change their own rules governing expert witnesses, it is impossible to tell, from the responses to the poll, which direction of movements results in which magnitude of improvement.

A similar, though lesser, problem of conflation seems to exist with respect to administrative practices in various jurisdictions. The surveyors made both the positive inquiry as to what practices are in place and the normative inquiry as to which should be in place. Because one cannot, however, distinguish in the latter responses those who already use a given administrative practice from those who do not, one cannot tell what percentage of those in courts that do not use the practice wished that their court did. For example, 62% of state judges work in courts that use mediation, while 84% favor using mediation. As much as 100%, or little as 60%, of state judges

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Notes:

61 Table 5.1.
62 Tables 5.2, 5.4.
63 Table 5.3.
64 Table 5.6.
65 Table 3.2. Indeed, this statistic is almost the only evidence I know of that argues against the maxim: “Two judges, three opinions.”
66 Table 5.5.
67 Table available upon request from Louis Harris and Associates, Inc.
68 Tables 3.3, 3.4.
69 Table 4.2.
70 Id.
71 Id.
not using mediation might therefore favor using mediation. One should therefore be cautious about inferring from these two tables alone that extending these administrative practices to jurisdictions where they are not already practiced will garner a predictable amount of support from the judges in those jurisdictions.

As I read it, the inquiry into the frequency of when bifurcation is granted or required suffers from a problem of omission. For those judges who have granted or required any bifurcations, one knows how often they have done so in the past three years, but one does not know how many other cases they tried during that time. The proportion of cases in which judges use bifurcation—which would seem to me to be the datum of interest—therefore remains unknown. A similar problem exists with respect to judicial reductions to the damage awards rendered by juries, because once again the survey shows the number of trials in which the individual judge takes such an action, but not the total number of trials over which the individual judge presides.

If all of the judges opposed to mediation already use mediation, then 100% of the judges not using mediation will favor using mediation. Sixteen percent of judges are opposed to mediation, according to Table 4.2. If every one of those judges already uses mediation, then 46% of all judges will be those who use mediation and favor mediation. (Sixty-two percent of all judges use mediation, and 16% of all judges use mediation but do not favor it.) If 46% of all judges favor mediation and use it, and 84% of all judges favor mediation, then 38% (84%-46%) of all judges will favor mediation but not be using it. As luck would have it, 38% is also the percentage of all judges who do not use mediation, and therefore 100% [38%/38%] of those not using mediation would favor using mediation.

Suppose instead that none of the 16% of judges opposed to mediation already uses mediation. This means that all of the 16% of judges who oppose mediation come from the pool of those who do not use mediation. Because 38% of all judges do not use mediation, and 16% of all judges do not use mediation and oppose using mediation, then 22% of all judges fall into the category of those who do not use mediation and favor using it, and 60% of all judges not using mediation would therefore favor using mediation (22%/38%).

One is unable to venture even a guess—at least from the survey data alone—as trial judges were apparently not asked to estimate how many cases they typically see brought to trial in a given time period, or even how many their court brings to trial in a given amount of time.