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PRIVATE LITIGANTS AND THE COURT CONGESTION PROBLEM

GEORGE L. PRIEST*

Litigation delay has proven a ceaseless and unremitting problem of modern civil justice. Civil court delay has been the central focus of serious and concentrated reform in the United States since the late-1950s. The congestion problem has been examined in a series of detailed empirical studies, and legislators and court administrators have introduced reform after reform to try to cure it.

Three decades later, it is apparent that little, if any, progress has been made. Most of our country’s major urban courts remain plagued by congestion. Despite the extraordinary legislative and administrative consensus for reform, no single measure has been shown consistently to reduce delay. Moreover, though many jurisdictions have escaped congestion problems, there is little understanding of what structural or procedural characteristics of their civil justice systems allow them to promptly clear their judicial calendars.

Much of our understanding of litigation delay has been influenced by the early important work of Zeisel, Kalven, and Buchholz. The Zeisel team approach derives from their view of the litigation delay problem in terms of the metaphor, drawn from the lumber industry, of a logjam. As Zeisel, Kalven, and Buchholz saw the problem, cases flow into a court calendar in the way logs float into a lake. The determinants of the size of the logjam at any point are the rate that logs flow into the lake, the rate that logs flow out of the lake, and the number of logs stuck in the lake from earlier imbalances in the flow.

The Zeisel team carefully studied the New York City civil and criminal


1 Litigants and reformers have complained about litigation delay for generations. For a historical account of these complaints, see ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS (National Center for State Courts 1988); see also H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT xxiii-iv (1959) [hereinafter H. ZEISEL].

2 See generally H. ZEISEL, supra note 1.
courts, and the logjam metaphor seemed to describe perfectly New York's congestion problem. The Zeisel team found that, although the current level of litigation delay was substantial, the New York courts were close to achieving "currency" in their annual case workload: that is, with only modest improvement, the number of annual dispositions would equal the number of new case filings. They concluded that, if courts were close to achieving dispositions equal to filings, then the principal source of congestion was the large number of past cases that, like the old logs on the lake, had accumulated on the judicial calendar. It followed that the litigation delay problem could be solved by introducing, first, measures to achieve actual caseload currency and, second, measures to eliminate past cases causing the backlog. According to this approach, if caseload currency could be achieved, then the congestion problem could be solved by a one-time removal of the litigation backlog. Indeed, the Zeisel team claimed that, had the New York courts eliminated the accumulated litigation backlog in 1921, they would have enjoyed no further civil litigation delay for the succeeding 25 years.

The Zeisel team proposed reforms to achieve these two goals: first, caseload currency and, second, progressive elimination of the backlog. The authors did not believe that any single reform measure would be sufficient; they recommended a set of procedural and management changes to cumulatively attack the problem. They recommended diverting cases from the jury list through increased pre-trial settlement efforts; speeding the flow of individual cases by improving management and administration; bifurcating trials; employing impartial medical witnesses; and changing substantive law to simplify jury deliberation and aid settlement. Finally, they recommended that legislatures substantially increase the number of judges avail-

3 Although the Zeisel team (and many subsequent scholars) studied delay in the criminal courts, the principal focus of the analysis was on civil cases, in particular civil jury cases, because neither criminal case delay (especially since the enactment of the various speedy trial acts) nor civil bench delay has approximated civil jury delay.

4 Zeisel and Kalven had a substantial normative stake in solving the litigation delay problem. They were very concerned that, since civil jury cases were the only set suffering substantial delay, the congestion problem might fuel efforts to eliminate the civil jury. Thus, to solve the delay problem was to defeat the opponents of the civil jury. For their more prominent defense of the institution of the civil jury, see H. Kalven & H. Zeisel, The American Jury (1960).

5 H. Zeisel, supra note 1, at 22.

6 Id. at 17.

7 Id. at 12.

8 Id. at 99.

9 H. Zeisel, supra note 1, at 11, 120.

10 Id. at 90 (recommending comparative negligence).
able for jury trials. Indeed, in one of the most innovative features of the analysis, the Zeisel team derived a technique by which a legislator or a court administrator in any jurisdiction could precisely calculate the number of judges (or equivalent judge-years) required to progressively reduce the backlog and, thus, eliminate litigation delay. The team estimated that the New York courts could totally eliminate the backlog (then an average of 29.8 months between suit and trial) by a one-time infusion of 11.7 judge-years.

The Zeisel team analysis was enormously influential, and many of their reform proposals were implemented in the years immediately following publication in 1959. But the confidence and optimism of their approach was never again equalled. Every subsequent study of litigation delay and of the reforms instituted to reduce it, has found that none of the reforms proposed by the Zeisel team, nor any more recent measure, has had any systematic effect on litigation delay. For example, an important 1978 report by the National Center for State Courts found that management and calendaring systems have no systematic effect. Similarly, pre-trial settlement programs seem to have little influence; indeed, according to the 1978 study, the most settlement-intensive courts have the longest delays. Moreover, and most damagingly, the study found that differences across jurisdictions in the number of available trial judges or in the judge-caseload ratio are unrelated to litigation delay. The 1978 study rejected the Zeisel team logjam hypothesis and proposed that the sources of litigation delay are far more subtle: a jurisdiction’s “local legal culture” and its informal rules of litigation behavior—which, at once, define and circumscribe judge, attorney, and litigant expectations of caseflow.

Subsequent work over the past decade seems to confirm this conclusion. In a recent significant study, the National Center for State Courts finds, again, that reforms implemented in many jurisdictions since 1976 to reduce delay have not systematically improved the congestion problem. This 1988 study concludes that litigation delay is not correlated with the size of the court system, jurisdiction population, the composition of the caseload, the number of judges, or the number of cases pending per judge. Nor does

11 Id. at 8, 17, 63-66.
12 Id. at 58-67.
13 Id. at 63-67.
14 Indeed, in Illinois, all of them were adopted. See generally infra Part II.B.
17 Id. at 33.
18 Id. at 24.
19 Id. at 53-54.
adoption of more sophisticated settlement methods, such as Alternative Dispute Resolution ("ADR"), correlate with speed of disposition; even mandatory ADR rules seem to have little effect. The 1988 study concludes that there is no correlation between delay and calendaring, or between delay and the level of system automatization. The study is able to identify several jurisdictions in which reform measures—chiefly stricter case management procedures—appear correlated with low delay levels. But the clearly unsystematic character of the relationship suggests a troublesome question of causation: Does strict case management actually reduce delay or is strict case management only feasible in jurisdictions without overwhelming backlogs?

The National Center's 1988 Report, like its seminal study a decade earlier, falls back for explanation of delay on the significance of local legal culture and litigation mores. Thus, reform measures have been ineffective, the Report concludes, because they affect only incidentally the deeper and subtler determinants of local legal culture that pattern the expectations of the participants in the litigation process. At this level, the legal culture hypothesis is irrefutable but, regrettably, tautologous. No study has identified with any clarity the characteristics of low-delay cultures or has suggested how such cultural norms can be transported from one jurisdiction to another. As a consequence, to fully accept the legal culture hypothesis is essentially to paralyze public policy regarding litigation delay.

This paper presents yet a further effort to explain civil court congestion. The paper attempts to evaluate civil litigation delay by examining the problem in the broader context of parties' economic motivations to settle or litigate disputes. Virtually all previous studies of the congestion problem have ignored the role of litigants, presuming—most often implicitly—that litigant decisions to file a case or to proceed to litigation rather than settle are fixed and not influenced by the level of delay itself. As we shall see, the extent of congestion has an important influence on the ability of the parties to settle a dispute and the parties' ability to settle, in turn, affects the success of reform efforts targeted to reduce delay.

The paper also presents preliminary empirical evidence of the effectiveness of various delay reduction programs. The paper analyzes civil cases

MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS 193 (1988) [hereinafter B. MAHONEY].

21 Id.
22 Id. at 194.
23 Id. at 84.
24 Id. at 87-89.
25 For an early and extremely perceptive discussion of this approach, see Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. LEGAL STUD. 399 (1972).
26 But see id. (an important exception to this point).
filed and litigated in the Cook County, Illinois (Chicago) courts from 1959 to 1979. For years, the Cook County courts have been widely perceived as suffering the most egregious civil litigation delay in the country. More importantly for this study, in response to this perception, the Illinois Legislature and the state's court administrators between 1959 and 1979 introduced almost every type of reform proposed to reduce litigation delay. Though the empirical analysis is preliminary, it appears highly suggestive of the importance of litigant decisions to the delay problem.

Part I presents the economic model of the paper. It describes the determinants of litigants' decisions to press a dispute to trial and how these decisions are affected by differential litigation delay. This analysis explains why the various litigation delay reduction efforts have and have not proven effective. Part II presents the empirical analysis. Section A presents evidence illustrating the interaction between delay levels and litigant decision-making. Section B, then, discusses the history of litigation delay reforms in the Illinois courts over the 1959-79 period. It shows how litigation delay has changed in the Chicago courts over the period and what the impact of the various reform initiatives actually was. Finally, Part III sketches the implications of the influence of the decisions of private litigants for issues of civil procedural reform.

I. THE INFLUENCE OF DELAY ON LITIGATION-SETTLEMENT DECISIONS

This paper attempts to evaluate the court congestion problem by analyzing the relationship between litigation delay and the broader process of civil litigation and settlement. It is well-known that only a small proportion of disputes are ever litigated to judgment, but the implications of this proposition have never been systematically introduced into the study of litigation delay. In order to more completely understand the congestion problem, it is necessary to develop a more comprehensive approach toward the determin-
nants of the proportion of disputes that are litigated to judgment and how changes in this proportion interact with changes in litigation delay. This paper elaborates the theory that the determinants of litigation are largely economic. As an initial premise, I view a legal claim or defense as an investment opportunity (for the defendant, an opportunity to reduce a loss) which litigants will pursue chiefly with reference to anticipated costs and benefits. The paper ignores—or, more precisely, considers as occurring randomly—litigation that proceeds on grounds of principle or personal animus—cases in some way "destined" for trial. I do not mean to minimize litigation of this nature. Nevertheless, in contexts in which, as we shall see, average suit-to-trial delays are 4.71 years and average incident (e.g., accident or contract breach)-to-trial delays are 5.68 years, lingering personal animus may not be substantially more significant than solely economic considerations as a determinant of the decision to litigate or settle.

A. Preliminary Assumptions: A Picture of the Litigation Process

For purposes of this paper, I presume that the sources of underlying disputes—accidents, and contract misunderstandings—are exogenous. Given a dispute, the parties face the choice of litigating to judgment or settling. In evaluating these options, I assume that the parties (with or without attorneys) attempt to estimate the likelihood of success as well as the costs of proceeding either to settlement or trial. I assume, next, that both parties estimate these likely outcomes knowing that some error attends their estimates. These estimates of likely outcomes will inform the parties' litigation-settlement negotiations and largely determine whether the dispute continues. A plaintiff will settle with a defendant whenever the defendant’s maximum offer exceeds the plaintiff’s minimum demand. Since the joint costs of proceeding to litigation most often will exceed the joint costs of settlement, litigation is likely to occur only where the plaintiff's estimate of its chances of success upon trial is greater than the defendant's estimate of

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31 For earlier discussions of the theory, see Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1971); Posner, supra note 25; Priest, Selective Characteristics of Litigation, 9 J. Legal Stud. 399 (1980); Priest & Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984) [hereinafter Priest & Klein].
32 The very large majority of trial cases in the empirical sample involve personal injury; indeed, over sixty-five percent are auto collision cases.
33 Never bringing an action (or not even complaining about the incident) may be regarded either as ultimate settlement or, more simply, a non-dispute.
34 A more detailed description of the estimation process appears in Priest & Klein, supra note 31, at 6-22.
35 Of course, it is possible that bargaining problems may lead to litigation even where the defendant’s offer exceeds the plaintiff’s demand, but I presume such occasions to occur randomly.
COURT CONGESTION

the plaintiff's chances. If we assume that half the time plaintiff's estimates of success exceed defendant's and half the time the reverse, and if we also assume that plaintiffs and defendants are randomly sorted among each other with respect to these expectations, then it follows that fifty percent of all disputes will certainly settle since fifty percent of the time plaintiffs will have lower expectations of success than the defendants with whom they are matched. The important question for analyzing litigation-settlement decisions, then, is what determines the behavior of the remaining fifty percent.

B. The Litigation-Settlement Decision Defined More Precisely

As described above, a sufficient condition for litigation, as opposed to settlement, is that the plaintiff's minimum demand exceed the defendant's maximum offer. Let,

\[ \begin{align*}
(1) & \quad \text{(a) Plaintiff's minimum demand} = P_P J_P - C_P + S_P, \\
& \quad \text{(b) Defendant's maximum offer} = P_D J_D + C_D - S_D,
\end{align*} \]

where \( P_P \) and \( P_D \) are the subjective probabilities of the plaintiff's success upon litigation to the plaintiff and defendant, respectively; \( J_P \) and \( J_D \) are the expected values of the judgment to the parties respectively; \( C_P \) and \( C_D \) are the respective litigation costs; and \( S_P \) and \( S_D \) are the respective settlement costs. As I have shown elsewhere, the simple formulation in equation (1) is sufficiently general to allow consideration of strategic litigation or differential litigant bargaining power.

The equations in (1), above, can simply be rearranged to show that the probability of litigation rather than settlement, \( (Pr_L) \), is a function of the difference between \( P_P \) and \( P_D \), the parties' expectations of the plaintiff's chance of success; the anticipated judgment, \( J \) (where, for simplicity, \( J_P = J_D = J \)); and the difference between litigation costs, \( C_P + C_D \), and settlement costs, \( S_P + S_D \). Thus,

\[ \begin{align*}
(2) & \quad Pr_L = f (P_P - P_D) J > (C_P + C_D) - (S_P + S_D).
\end{align*} \]

A straightforward implication of this formulation is that the likelihood of litigation to judgment rather than settlement increases as the difference between the plaintiff's and defendant's estimates of success, \( P_P > P_D \), in-

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36 I neglect the effect of litigation costs here. For a more precise description of conditions for litigation, see infra Equations (1) through (3); infra notes 38-42 and accompanying text.

37 Though perhaps not without difficulty. See supra note 35.

38 For a more detailed description of the settlement process and the significance of the interaction of litigant optimism and pessimism, see infra Part I.B.

39 This model derives from Landes, supra note 31, at 66-69, and Posner, supra note 25, at 418-19 n.29.

40 See Priest & Klein, supra note 31, at 24-25.
creases; as the expected judgment, J, increases; and as settlement costs become a greater fraction of litigation costs, that is, as the term \((C_p + C_d) > (S_p + S_d)\) decreases. Conversely, settlement is more likely the smaller the difference between the parties’ estimates of success; the lower the expected judgment; and the greater litigation costs are relative to settlement costs.

Delay between suit and trial reduces the present value of the expected judgment. The extent of the reduction in present value will depend on the length of delay and on the effective time value of money, represented by the interest rate. Thus,

\[
(3) \quad \Pr L \text{ (with delay)} = f (P_p - P_d) \frac{J}{(1 + i)^t} > (C_p + C_d) - (S_p + S_d),
\]

where \(i\) is the interest rate\(^4\) and \(t\), the period or periods between suit and trial.\(^4\)

Equation (3) shows that litigation delay, by reducing the expected value of the judgment, also reduces the likelihood of litigation. Again, it is well established that the likelihood of litigation increases as the stakes of the case increase, since differences between the parties’ estimates of success become more likely to outweigh the difference between litigation and settlement costs.\(^4\) It follows, thus, that litigation delay, by reducing the present value of the potential judgment in a dispute, reduces the likelihood of litigation. Equation (3) shows that, if litigation costs, settlement costs, and the parties expectations of success are held constant, there is an inverse relationship between delay and the probability of litigation. As trial delay increases, the expected value of the judgment decreases. Delay, thus, increases the probability of settlement. Conversely, again holding other factors constant, as delay decreases, the expected value of the judgment increases and the likelihood of litigation increases.

The inverse relationship between trial delay and the expected value of judgments suggests the existence of a dynamic interactive relationship between changes in the extent of court congestion and changes in the volume of litigation. As shown in equation (3), the expected duration of delay before trial will affect the expected value of a judgment and, thus, the parties’ settlement offers. Changes in delay will change these expected values and correspondingly change the parties’ settlement offers. As delay increases, the range of expected judgments declines and differences between litigants’

\(^4\) For a consideration of the effect of prejudgment interest awards, see infra notes 53–54 and accompanying text.

\(^4\) Of course, the reduction in present value of the expected judgment begins the moment the plaintiff suffers the loss—the incident date—rather than at the inception of the suit. Since the inception of the suit, however, is largely within the control of the plaintiff or the plaintiff’s attorney, I neglect the period between incident and suit.

\(^4\) See, e.g., Landes, supra note 31, at 67-71; Priest, supra note 31, at 417.
settlement demands and offers decline. As a consequence, some set of marginal litigants will become more likely to settle than to litigate their disputes. Conversely, as delay declines, the range of expected judgments increases, in turn increasing the differences between litigants’ settlement demands and offers. Some set of marginal litigants will become relatively less likely to settle and more likely to litigate. Changes in litigation delay, thus, generate offsetting changes in the proportion of cases brought to trial.

This interactive relationship between delay and the probability of litigation suggests that there is likely to be some equilibrium level of delay within any jurisdiction. That is, if the likelihood of parties failing to settle and, thus, pressing disputes to trial rises and falls as litigation delay decreases and increases, then court congestion in any jurisdiction is likely to vacillate around some equilibrium level. As litigation delay declines from the equilibrium, fewer cases settle (because expected judgments become higher), more cases proceed to trial, and court congestion increases back toward the equilibrium level. Conversely, as court congestion increases, more cases settle (because expected judgments become lower), and court congestion declines toward the equilibrium again.

The concept of an interactive relationship between delay and litigation volume as well as the concept of a congestion equilibrium suggests that the logjam or backlog metaphor, dominant in the delay literature, incorporates a significant misconception. The Zeisel team presumed that the rate that disputes were brought to litigation was constant or, at least, exogenous with respect to court congestion itself. As a consequence, they concluded that court congestion could actually be eliminated by equalizing the level of filings and dispositions and then plucking off the accumulated litigation like logs off the lake. The economic approach, however, suggests that this strategy is likely to be futile. Reducing congestion and delay increases the expected value of litigation and increases the volume of litigation. In terms of the metaphor, plucking logs off the lake increases the rate that logs flow into the lake. The rate of flow will increase until the equilibrium logjam for the jurisdiction is again attained.

Indeed, even the achievement of caseload currency, which all reformers have agreed to be the first objective in congestion reform, may be unattainable. The interactive relationship between delay and the proportion of dis-

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44 Of course, no one has ever presumed that delay between suit and trial could be totally eliminated—that is, that a trial would occur instantaneously upon suit—since all must concede that some time is necessary for trial preparation. Yet, there has remained the ambition of reducing delay to some minimal period corresponding to no more than necessary preparation time. For modern illustrations of this view, see the efforts of various states and the ABA to establish time standards for civil trials, discussed in B. Mahoney, supra note 20, at 109.

45 See H. Zeisel, supra note 1. See also supra notes 3-4 and accompanying text.
putes that proceed to litigation implies that, as courts process cases with
greater and greater rapidity, the expected values of judgments will increase,
and more disputes will result in trial rather than settlement. In terms of the
logjam metaphor, dredging the river to allow logs to flow faster out of the
lake simultaneously increases the rate that logs flow into the lake. Again, this
is the concept of a congestion equilibrium.

The Zeisel team acknowledged that reducing delay might increase the
attractiveness of litigation. Indeed, in their calculations of the number of
judge-years necessary to eliminate the filings backlog, they attempted to
adjust for this effect. How did they calculate the expected increase in filings?
They noted that there was substantially less delay for bench trials than for
jury trials, and so interviewed attorneys for parties who had waived jury
trials in favor of bench trials, in order to determine how frequently such
waivers were motivated by the substantially shorter bench trial delay.\(^{46}\)

The Zeisel team technique, however, neglects the effect of delay on
settlement decisions. The parties whose litigation decisions will be affected
by a reduction in the backlog are not merely those who have chosen relatively
more immediate bench trials rather than less immediate jury trials, but
all potential litigants. Delay will affect the magnitude of the expected judg-
ment for every litigant. Again, the Zeisel team's approach mistakes the
character of the effect. According to the economic approach, the degree of
delay affects the likelihood of litigation by affecting the expected value of
judgments. The appropriate inquiry, thus, cannot be to ask a particular
litigant whether he or she would have shifted from a bench trial or litigated to
judgment rather than settled if delay were reduced. Instead, the inquiry must
determine the extent to which a reduction in delay would increase differ-
ences in settlement offers, generating litigation, as well as the extent to
which an increase in delay would reduce differences in settlement offers,
generating settlements. Obviously, interviews with litigants or attorneys are
imperfect means of evaluating these prospects.

In an early pathbreaking paper, Judge Posner, anticipating much of the
analysis here, invoked the freeway metaphor to describe the effect of reduc-
ing delay on the litigation rate. According to the metaphor, adding a new lane
to a congested freeway fails to reduce traffic congestion because drivers who
previously had chosen faster sideroads shift to the temporarily less con-
gested freeway.\(^{47}\) But even this description understates the subtlety of the
congestion equilibrium effect. The freeway effect operates through drivers
consciously evaluating relative levels of congestion as between one route
and another. In contrast, the congestion equilibrium effect operates through

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\(^{46}\) The Zeisel team found only a small number who claimed to have chosen bench
trials because of lower delay. On this basis, the team calculated that reducing jury
trial delay would generate greater litigation, but only a small amount, equivalent to an
increase in the judicial workload of 3.6 percent or 0.6 judge-years. H. Zeisel, supra
note 1, at 63-66 & n.9.

\(^{47}\) Posner, supra note 25, at 448.
an invisible hand: Differential levels of court congestion affect the litigants’ respective dollar estimates of the value of the case. Litigants choose as between litigation and settlement (the equivalent of the freeway or the sideroad), not on grounds of speed of disposition, but by whether, as a silent consequence of discounting the judgment, the defendant’s offer is rendered greater or less than the plaintiff’s demand.

The interaction between court congestion and litigation volume begins to explain why virtually all studies of the litigation delay problem have failed to discover a systematic effect of any reform initiative designed to reduce delay. As reported above, the 1988 study of the National Center for State Courts finds no consistent effect on delay of either stricter case management or mandatory settlement procedures. Nor does it find systematic relationships between delay and the number of judges within a jurisdiction or the size of the judicial caseload. These results are less surprising, however, when it is appreciated that reducing court congestion will instantaneously initiate a change in the expected value of litigation that, in turn, will increase congestion, diminishing the effect of any reform.

Although a cross-jurisdictional study is too ambitious for this paper, equation (3) defines the determinants of the congestion equilibrium within any jurisdiction. Congestion equilibria will vary across courts according to differences in the range of expected judgments, J; in the magnitude of litigation costs, \( C_p + C_d \) and in settlement costs, \( S_p + S_d \); in the interest rate, \( i \); and in procedural and administrative characteristics that affect the duration of delay, \( t \). For example, holding other factors constant, jurisdictions whose citizens suffer more serious injuries or whose juries award greater damages for the same injury will have longer delay equilibria, because of the greater likelihood of litigation where the stakes of the case are higher. Conversely, again holding other factors constant, jurisdictions with relatively higher litigation costs will have relatively lower congestion equilibria. As another example, smaller or better contained jurisdictions may have lower congestion equilibria because settlement costs are relatively lower, perhaps because local attorneys have more to gain from developing cooperative working relationships with opposing counsel due to the greater frequency of future expected interaction. Other characteristics of what has been called “local legal culture” may have economic bases of this nature.

The congestion equilibrium approach does not imply that procedural or management reforms to reduce litigation delay will be without effect whatsoever. Rather, the approach implies that any calculation of the extent to which procedural or management reforms will reduce court congestion must be adjusted because of the offsetting effect on parties’ choices as between litigation and settlement. Indeed, equation (3) shows how to empirically estimate the dimensions of the offsetting effect.

48 B. Mahoney, supra note 20, at 193.
For example, the Zeisel team showed the first step in predicting the extent of backlog reduction by increasing the number of dispositions, say, by increasing the number of judges.\textsuperscript{49} Equation (3) shows that efforts to expedite case disposition will affect the congestion equilibrium through changes in the variable, $t$, representing the period between filing and trial.\textsuperscript{50} As $t$ declines, the left-hand term of the equation increases and, thus, the probability of litigation increases. The increase in the probability of litigation will be a function of the relative magnitude of $t$ in comparison to the magnitudes of the other litigation variables: $(P_p - P_o)$, $J$, $(C_p + C_o)$, $(S_p + S_o)$, and $i$. Thus, a given change in $t$ will have a differential effect on the probability of litigation depending upon the values, within any jurisdiction, of the range of judgments, of differences in the parties' expectations of success, and of differential litigation and settlement costs.

Here, too, we see reasons why previous empirical analyses of congestion reform efforts have failed to show systematic effects of particular reforms. The effect of any single reform measure will differ across jurisdictions as the values of the litigation variables within the jurisdictions differ. Thus, for example, a doubling of judges within one jurisdiction may have a substantially different effect from a doubling of judges in another jurisdiction if there are differences between the jurisdictions in the range of $J$, in $P_p - P_o$, or in relative litigation or settlement costs. Similarly, even within a single jurisdiction, equation (3) shows that a reform such as a doubling of judges in one year may have a substantially different effect than a doubling in a different year even if only $i$, the interest rate, changes over the years.

Again, the congestion equilibrium approach does not imply that all efforts to reduce court congestion are useless. Put differently, the proposition that all jurisdictions will face congestion equilibria does not mean that the congestion equilibrium within a jurisdiction cannot be changed.\textsuperscript{51} A reform initiative may in fact accelerate the disposition of litigation though it does not substantially affect the magnitude of the case backlog. A better measure of the effectiveness of delay reform initiatives than the magnitude of the backlog or the average time from suit to trial, is the volume of trial dispositions.

A more complete model than is presented in equation (3) would also incorporate the effect of delay on litigation and settlement costs. For example, in an extreme case, where the parties expected that all litigation and

\textsuperscript{49} H. Zeisel, supra note 1, at 58-67. I call this the first step because the Zeisel team did not adequately take into account parties' litigation decisions. See supra note 46 and accompanying text.

\textsuperscript{50} A more complete model than that available for this paper, would describe $t$ as a function of cumulative filings, dispositions and the procedural determinants affecting them.

\textsuperscript{51} I am grateful to Daniel Rubinfeld for encouraging me to emphasize this point.
settlement costs would be expended at the time of trial, equation (3) would be rewritten to deflate the difference between litigation and settlement costs, \((C_p + C_d) - (S_p + S_d)\), by \((1 + i)^t\). Where litigation and settlement costs are expended or expected to be expended at points intermediate between suit and trial, the deflation must be adjusted.\(^5\)

Similarly, the model in equation (3) is sufficiently general to evaluate the effect on the probability of litigation of other procedural changes such as the award of prejudgment interest.\(^5\) More generally, the effect of prejudgment interest on litigation and settlement can be captured by amending the denominator in equation (3) to read \((1 + i_m - i_i)^t\), where \(i_m\) equals the market interest rate and \(i_i\), the legal prejudgment interest rate. According to this formulation, litigation congestion will continue to reduce the likelihood of litigation as long as the prejudgment interest rate is less than the market interest rate. Where the prejudgment rate is greater than the market rate, congestion increases the likelihood of litigation by increasing the expected judgment.

Regrettably, it is beyond the ability of this paper to incorporate these various complications or to attempt to test the validity of the congestion equilibrium approach systematically across jurisdictions or over time. The remainder of the paper, instead, presents some preliminary empirical evidence no more than suggestive of the power of the approach. Part II, Section A examines the plausibility of some of the assumptions of the model, and presents a direct test of the congestion equilibrium hypothesis from the Chicago data. Section B, then, looks more carefully at the effects of reform efforts to reduce litigation delay in the Cook County courts.

II. THE CONGESTION EQUILIBRIUM HYPOTHESIS AND THE CHICAGO COURTS

A. The Theory Examined

This section attempts to evaluate whether it is plausible that the decision to litigate or settle is sufficiently sensitive to changes in litigation delay to generate a congestion equilibrium. The economic model in equation (3) itself derives the equilibrium implication solely from an assumption of economically rational behavior. The relative fluidity of the congestion equilibrium


\(^5\) For an earlier discussion of this question, see Posner, supra note 25, at 421.

\(^5\) In Illinois from 1959 to 1979, prejudgment interest was not available in personal injury actions.
process will be determined, however, not by assumption, but by various empirical characteristics of litigation within a jurisdiction. In particular, movements around a congestion equilibrium will be influenced by what might be called the elasticity of supply of litigation. Supply elasticity indicates the existence of some set of litigants who are marginal as between litigation and settlement. The existence of marginal litigants is determined by the relative continuity of the distribution of settlement demands and offers.

Table 1 considers litigation supply. Table 1 shows jury verdicts as a proportion of jury trial filings for the county and municipal departments of the Cook County Circuit Courts. These figures present a more accurate calculation of the proportion of filed cases actually tried to a verdict than has (to my knowledge) ever been available. Virtually all current estimates of verdict-to-suit ratios calculate current year verdicts against current year filings. Such a calculation is appropriate, however, only where all trials occur in the same year as suit. This study, in contrast, employs litigation data representing a very long time period. Of the twenty years of data available, I have been able to track individual suits from the year of filing until trial for fourteen of the years.

<table>
<thead>
<tr>
<th>Year</th>
<th>County</th>
<th>Municipal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1958</td>
<td>2.36</td>
<td></td>
</tr>
<tr>
<td>1959</td>
<td>3.01</td>
<td></td>
</tr>
<tr>
<td>1962</td>
<td>3.60</td>
<td></td>
</tr>
<tr>
<td>1963</td>
<td>4.03</td>
<td>3.38</td>
</tr>
<tr>
<td>1964</td>
<td>3.27</td>
<td>1.78</td>
</tr>
<tr>
<td>1965</td>
<td>3.45</td>
<td>1.62</td>
</tr>
<tr>
<td>1966</td>
<td>3.96</td>
<td>2.20</td>
</tr>
<tr>
<td>1967</td>
<td>4.09</td>
<td>2.78</td>
</tr>
<tr>
<td>1968</td>
<td>2.61</td>
<td>3.23</td>
</tr>
<tr>
<td>1969</td>
<td>2.97</td>
<td>2.36</td>
</tr>
<tr>
<td>1970</td>
<td>4.90</td>
<td>1.50</td>
</tr>
<tr>
<td>1971</td>
<td>3.49</td>
<td>2.51</td>
</tr>
<tr>
<td>1972</td>
<td>3.37</td>
<td>2.04</td>
</tr>
<tr>
<td>1973</td>
<td>3.11</td>
<td>2.41</td>
</tr>
</tbody>
</table>

Source: Derived from the Cook County Jury Verdict Reporter.

55 With the exception of Laurence Ross's much more constrained study of insurance company claims files. See H. Ross, supra note 29.

56 The data are drawn from a census of jury trials from 1959 to 1979. Data on filings are drawn from the Annual Reports of the Illinois Court Administrator. Some trials occur in Cook County within two years of filing, thus 1958 is the first year for which an accurate filing-to-trial ratio can be derived. The Illinois Court Administrator did...
Table 1 shows that the proportion of suits tried to jury verdicts is far smaller than has generally been appreciated. The conventional wisdom is that roughly four to five percent of suits are ultimately tried to a verdict. Laurence Ross's careful study of 2200 insurance claims showed 4.2 percent of cases reaching trial verdicts. Table 1 shows that, in most years, the proportion of jury verdicts is substantially less than 4.2 percent.

Table 1 measures the magnitude of litigation supply, rather than litigation supply elasticity. That is, Table 1 does not show the extent and responsiveness of marginal litigation, but only the very large number of suits potentially available for trial. The figures in Table 1, however, strongly suggest that the frequency of litigation is likely to be responsive to changes in the extent of litigation delay.

Figure 1 addresses litigation supply elasticity more directly by attempting to identify the existence of a set of marginal litigants whose litigation-
settlement decisions might be importantly affected by changes in litigation delay. Figure 1 presents the distribution of the ratio of defendant settlement offers to plaintiff settlement demands. The data are drawn from traffic collision cases in which liability, rather than damages, was the principal issue generating the litigation. The reporting service that collected the data determined the final settlement offers of the parties prior to the verdict.

The vertical lines in Figure 1 represent numbers of cases according to the ratio of the defendant’s offer to the plaintiff’s demand. Thus, the left-most vertical line shows that, in 38 of the 1913 cases in the sample, the defendant’s offer was only 5 percent of the plaintiff’s demand (as if the plaintiff demanded $1000 and the defendant offered $50). The next vertical line to the right shows that, in 98 cases, the defendant’s offer was 10 percent of the plaintiff’s demand (as if the plaintiff demanded $1000 and the defendant offered $100), and so forth. The right-most vertical line shows that, in 8 cases, the defendant’s offer was greater than 95 percent of the plaintiff’s demand (i.e., for the plaintiff’s demand of $1000, the defendant offered greater than $950).

Figure 1 suggests the existence of a set of marginal litigants whose litigation-settlement decisions might well be responsive to changes in litigation delay. First, Figure 1 displays a nearly uniform distribution of offer-to-demand ratios, with a midpoint of 50 percent. Such a distribution provides strong support for the implications of the economic model of litigation and settlement. Most significantly, the cases represented at the right end of Figure 1, in which the defendant’s offer is a very high percentage of the plaintiff’s demand, suggests marginal litigation subject to influence by seemingly small changes in the expected value of litigation.

58 Traffic collision cases comprise the largest subset (over 65%) of jury verdicts. For the method of identification of cases litigated over issues of liability rather than damages, see Priest, Measuring Legal Change, 3 J.L. ECON. & ORG. 193 (1988). It is because the parties were litigating liability issues, that the midpoint of the distribution of the settlement ratio was fifty percent of the judgment. See Priest & Klein, supra note 31, at 12-20. See also infra note 60.

59 Indicated as 100 percent because of rounding. Obviously, if the defendant’s offer actually equaled the plaintiff’s demand (ratio = 100%), the case would have been settled and would not appear in the sample. Also note that I have deleted reference to 335 traffic liability issue cases in which either settlement data are missing or defendants made no settlement offer.

60 See Priest & Klein, supra note 31, at 19 (in liability cases, plaintiffs on average will win fifty percent of trials regardless of the legal standard).

61 A better way to identify marginal litigants would be to array the raw magnitude of differences in settlement demands and offers, not available for this printing. The settlement ratio in Figure 1 is only suggestive of absolute differences. That is, if the parties agree on the expected judgment, the settlement ratio represents the ratio of $P_d$ to $P_v$, not the extent to which $J(P_v - P_d)$ exceeds the difference between litigation and settlement costs. Given some fixed difference between litigation and settlement
Finally, I report a direct test of the congestion equilibrium hypothesis. Table 2, below, shows the results of a regression of the ratio of trials-to-filings on average delay and on the average interest rate from suit to trial. According to the congestion equilibrium hypothesis, the trial-to-suit ratio, presented in Table 1, should be negatively correlated with the extent of delay. That is, the longer the delay between suit and trial, the lower the expected judgment, and the lower the likelihood that suits will proceed to litigation rather than settlement. Thus, as suit-to-trial delay increases, the proportion of suits litigated to a verdict should decline. Similarly, the trial-to-suit ratio should be negatively correlated with the interest rate over the period between suit and trial. As the market interest rate increases, the expected value of a case decreases, and the frequency of litigation decreases. Thus, again, the trial-to-suit ratio should decrease.

**TABLE 2**

**Determinants of the Trial-to-Suit Ratio**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Parameter</th>
<th>T-ratio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>6.675</td>
<td>1.811</td>
</tr>
<tr>
<td>Suit-to-trial delay*</td>
<td>-1.717</td>
<td>-1.090</td>
</tr>
<tr>
<td>Interest rate</td>
<td>-0.379</td>
<td>-1.200</td>
</tr>
<tr>
<td>R² = 0.155</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D.F. = 8</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Evaluated at 1000 days.

Table 2 provides very suggestive support for the congestion equilibrium hypothesis. Because of limitations in the data, the degrees of freedom for the regression are only eight. Thus, statistical significance is difficult to achieve. Nevertheless, the signs of the regression variables are each consistent with the congestion equilibrium hypothesis. As implied by the hypothesis, as delay increases, the proportion of suits brought to trial decreases. Moreover, as the interest rate increases, the proportion of suits brought to trial decreases. The variables, though not statistically significant at a 95 percent level, show strength.

These data are not determinative of the economic approach, but they do suggest that the congestion equilibrium hypothesis may be a useful starting point for analysis of the effects of efforts to reduce litigation delay. The next section applies the analysis in a review of the history of efforts to reduce costs, the better measure of marginality is the absolute dollar difference between the parties' offers. Put differently, a set of litigants whose offers form a settlement ratio of .60 (because $P_p = 100$ and $P_d = 60$) are more marginal than litigants with a settlement ratio of .95 (because $P_p = 100$ and $P_d = 95$) if the stakes in the first case are $100 and in the second $1000, because .40 times $100 is less than .05 times $1000.
litigation delay in the Chicago courts, evaluating empirically the success or failure of those reforms.

B. Illinois' Fight to Reduce Litigation Delay: History and Effect

Beginning in the late-1950s, the State of Illinois commenced a concentrated effort to reduce congestion in Cook County's civil jury courts. The Zeisel team study, published in 1959, had identified the dimensions of the problem, and had boldly claimed that the problem could be solved.\(^{62}\) Though they had studied the Manhattan courts, comparisons to Cook County were inevitable: The Zeisel team had reported that average civil jury suit-to-trial delay in Manhattan in 1956 was 39 months;\(^{63}\) in 1959 in Chicago civil jury delay was 59 months.\(^{64}\) Though the Zeisel team did not draw attention to the point, they were compelled to acknowledge that the Cook County civil jury courts were among the most congested in the country.\(^{65}\)

In the years following 1959, reducing congestion in Chicago became an obsession for the state's judicial administrators. The principal theme of each of the twenty Annual Reports of the state's chief Court Administrator, 1959-79, was the delay problem in Chicago and the efforts of the preceding year to solve it. Administrators from year to year described the long duration from suit to trial of the average civil jury case as "distressing,"\(^{66}\) "deplorable,"\(^{67}\) "a critical problem";\(^{68}\) the backlog it created was "a millstone around the neck of the courts."\(^{69}\) In 1959, the Court Administrator warned, "It seems probable, if not certain, that extraordinary methods will have to be adopted to dispose of a truly extraordinary burden."\(^{70}\) As we shall see, despite the nearly-annual introduction of new reform measures, the problem of delay did not disappear. Subsection 1 below reviews the efforts to reduce delay; Subsection 2 attempts to measure their effects.

1. The Reform Effort in Illinois, 1959-79

The Illinois Legislature created the court administrator position in 1959 as part of its first effort to control court congestion.\(^{71}\) The Administrator was charged to collect statistics concerning case flow and to institute both case

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\(^{62}\) H. Zeisel, supra note 1, at 18.
\(^{63}\) Id. at 7.
\(^{64}\) Derived from the Cook County Jury Verdict Reporter.
\(^{65}\) See H. Zeisel, supra note 1, at xxi n.1.
\(^{67}\) Id. at 10.
\(^{68}\) 1961 Administrator Report 1, supra note 28.
\(^{69}\) 1959 Administrator Report 13, supra note 28.
\(^{70}\) Id.
and court management procedures to bring civil jury delay under control.\textsuperscript{72} The Administrator was given a deputy responsible for the Cook County courts alone. Over the succeeding twenty years, with approval of the Legislature, the various Administrators attempted every form of delay reduction that had been proposed, closely following the Zeisel team's recommendations: (a) court management improvements; (b) substantive law reforms to simplify case disposition; (c) procedural reforms to speed the flow of the judicial caseload; and (d) expansion of the judiciary.

(a) Management reforms. In 1964, largely upon the urging of the Court Administrator, the Illinois Legislature totally reorganized the state trial courts.\textsuperscript{73} First, the reorganization served to condense the structure and jurisdiction of the trial courts to achieve greater administrative efficiency. Second, as a part of the reorganization the legislation delegated substantially greater authority to the Chief Judge of the Cook County Circuit Court to institute new management procedures. Third, the legislative reorganization strengthened administrative powers of judicial assignment with the express purpose of facilitating the compulsion of often unwilling downstate judges to preside in the Chicago courts on temporary assignment.\textsuperscript{74}

Various other management reforms were implemented during the thirty-year period. In 1965, the Administrator instituted a computerized system for case tracking. In 1961, 1966 and 1974, the Legislature approved the construction of new courthouses to increase the number of jury trial rooms. At various times, the Administrator conducted docket-clearing searches to reduce case backlog.\textsuperscript{75}

(b) Substantive law reforms. Though it is totally unclear that the court congestion problem was a primary motivation for any substantive change in the law,\textsuperscript{76} during the period of study Illinois substantive law was amended

\textsuperscript{72} Id. at 356.

\textsuperscript{73} ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, 1964 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS, at 19-23 (1965) [hereinafter cited by year of Report, i.e., 1964 COURT REPORT].

\textsuperscript{74} Id.

\textsuperscript{75} Many jurisdictions have attempted to “reform” trial delay by instituting procedures that remove stale or dormant cases from the judicial rolls. Several of the examples of successful congestion reform reported in B. MAHONEY, supra note 20, consist of caseload “reductions” of this nature. See, for example, description of the Phoenix civil “Fast-Track” Program, regarded as successful because pending cases dropped thirty-six percent, though median time to jury trial increased. B. MAHONEY, supra note 20, at 124-25. Phoenix’s adoption of the Fast-Track Program was accompanied by a substantial increase in filings. Id. These efforts can only be regarded as successful, however, where congestion is measured in terms of cases pending rather than in terms of the volume of dispositions or suit-to-trial delay. A truly dormant case may clog the judicial rolls, but it does not obstruct the disposition of a live case. Thus, docket clearing of this nature should not be regarded as significant reform.

\textsuperscript{76} The Illinois Legislature prohibits maintenance of legislative history in order to make it impossible to identify the forces driving adoption of legislation.
twice in ways implicating litigation delay. In 1961, the Illinois Legislature adopted the Uniform Commercial Code. The Illinois Court Administrator trumpeted enactment of the Code as an example of law reform that would help remedy the delay problem in Cook County.\textsuperscript{77}

Secondly, in 1965, the Illinois Supreme Court adopted the standard of strict liability for product defects.\textsuperscript{78} The court did not refer to court congestion as a motivation for its adoption of the new doctrine. Many scholars, however, have defended strict liability on the ground that it is a simpler legal standard to administer because the jury need not determine negligence, thus generating shorter trials and lower litigation costs.\textsuperscript{79} Indeed, these administrative and litigation cost savings constitute the chief basis for the important support of many lawyer-economists for our current strict liability regime.\textsuperscript{80}

(c) Procedural reforms. More prominent among efforts to reduce trial delay were a series of procedural changes introduced to simplify the trial process and shorten trial length. In 1961, the Illinois Supreme Court authorized active judicial involvement to shorten voir dire.\textsuperscript{81} The court, in addition, initiated pattern jury instructions,\textsuperscript{82} progressively promulgating individual instructions for the various fields of civil law in succeeding years. Also in 1961, the court authorized the appointment of impartial medical experts—largely on the recommendation of the Zeisel team—so that a trial judge might cut through a succession of conflicting medical witnesses to shorten trial length.\textsuperscript{83}

In 1962, the supreme court authorized bifurcation of trials as between liability and damages.\textsuperscript{84} Throughout the mid-1960s, the supreme court authorized—and the Court Administrator pressed for—active judicial involvement in pretrial settlement hearings during summers when trial courts were in recess in order to reduce case backlog.\textsuperscript{85} Finally, in 1975, the Chief Judge of the Cook County Circuit Court created a special medical malprac-

\textsuperscript{77} See, e.g., 1961 ADMINISTRATOR REPORT 50-51, supra note 28; 1962 ADMINISTRATOR REPORT 7, supra note 28; 1963 ADMINISTRATOR REPORT 5, supra note 28.

\textsuperscript{78} Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

\textsuperscript{79} For a review of the argument see Ver Steeg, Strict Liability and Judicial Resources, 3 J. LEGAL STUD. 217, 244-48 (1974).

\textsuperscript{80} Landes & Posner, A Positive Economic Analysis of Products Liability, 14 J. LEGAL STUD. 535 (1985) (concluding that strict liability and negligence are equivalent in terms of creating incentives for accident reduction, but supporting strict liability over negligence on administrative savings grounds).

\textsuperscript{81} 1961 ADMINISTRATOR REPORT 51-52, supra note 28.

\textsuperscript{82} Id. at 52.

\textsuperscript{83} H. ZEISEL, supra note 1, at 120-27.

\textsuperscript{84} 1961 ADMINISTRATOR REPORT 52-53, supra note 28.

\textsuperscript{85} Id. at 53 (it is not clear that this reform was ever implemented). See infra notes 96-97 and accompanying text.

\textsuperscript{86} 1967 COURT REPORT 13, supra note 73.
tice trial division. The chief judge believed that a division of judges allowed to specialize in the medical malpractice field might develop procedural and substantive efficiencies to accelerate the disposition of medical malpractice suits.

(d) Expansion of the Judiciary. Again, following Zeisel team recommendations, the Illinois Court Administrator lobbied heavily for legislation that would add judges to the Cook County courts. These efforts were quite successful. The judiciary was expanded by making permanent additions to the number of sitting judges, by lengthening the judicial work-year through new summer sessions and new constraints on vacation time, and by assigning downstate judges to hear trials in the Cook County courts. From a base of 20 judges in 1959, the Legislature authorized 17 new judgeships for Cook County for 1963; 10 more for 1976; 30 more for 1977; 11 more for 1978; and 9 more for 1979. Table 3 displays the size of the Cook County Court judiciary over the period 1959-79. Column 1 shows the number of permanently sitting judges and column 2, the number of temporary assignments calculated in equivalent judge-years. Though the number of available judges grew dramatically, the number actually assigned to civil jury trials, indicated in column 4, was much lower, especially in the later years.

(e) Summary. In summary, below by year are the efforts to reduce court congestion in Cook County from 1959-79:

1959: Creation of Court Administrator position;
1961: Active judicial voir dire; pattern jury instructions; impartial medical experts; Uniform Commercial Code; new Chicago courthouse;
1962: Bifurcated trials; summer pre-trial program;
1963: 17 new judgeships;
1964: Total reorganization of courts;
1965: Case management computerization; strict products liability;
1966: New Chicago courtrooms;
1967: Increased assignments of downstate judges to Cook County;
1974: New Chicago courtrooms;
1975: Specialized malpractice division;
1976: 10 new judgeships;
1977: 30 new judgeships;
1978: 11 new judgeship;
1979: 9 new judgeships.

87 1975 COURT REPORT 43, supra note 73.
89 H. ZEISEL, supra note 1, at 206-20.
90 The years indicated for the expansion of the Cook County judiciary represent the years in which the new judges took office, not the years in which the new judgeships were authorized.
TABLE 3  
County Judges, Cook County, Illinois, 1959-79

<table>
<thead>
<tr>
<th>Year</th>
<th>Permanent Assignments*</th>
<th>Total Available</th>
<th>Total Assigned to Jury Trials</th>
</tr>
</thead>
<tbody>
<tr>
<td>1959</td>
<td>20</td>
<td>n.a.</td>
<td>20?</td>
</tr>
<tr>
<td>1960</td>
<td>20</td>
<td>7.3</td>
<td>27.3</td>
</tr>
<tr>
<td>1961</td>
<td>20</td>
<td>n.a.</td>
<td>n.a.</td>
</tr>
<tr>
<td>1962</td>
<td>20</td>
<td>n.a.</td>
<td>n.a.</td>
</tr>
<tr>
<td>1963</td>
<td>37</td>
<td>n.a.</td>
<td>37?</td>
</tr>
<tr>
<td>1964</td>
<td>37</td>
<td>n.a.</td>
<td>37?</td>
</tr>
<tr>
<td>1965</td>
<td>37</td>
<td>n.a.</td>
<td>37?</td>
</tr>
<tr>
<td>1966</td>
<td>37</td>
<td>n.a.</td>
<td>37?</td>
</tr>
<tr>
<td>1967</td>
<td>37</td>
<td>1.83</td>
<td>38.83</td>
</tr>
<tr>
<td>1968</td>
<td>37</td>
<td>5.58</td>
<td>42.58</td>
</tr>
<tr>
<td>1969</td>
<td>37</td>
<td>3.93</td>
<td>40.93</td>
</tr>
<tr>
<td>1970</td>
<td>37</td>
<td>3.29</td>
<td>40.29</td>
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<tr>
<td>1971</td>
<td>37</td>
<td>8.97</td>
<td>45.97</td>
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<td>1972</td>
<td>37</td>
<td>8.33</td>
<td>45.33</td>
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<td>1973</td>
<td>37</td>
<td>5.88</td>
<td>42.88</td>
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<td>1974</td>
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<td>5.74</td>
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<tr>
<td>1978</td>
<td>88</td>
<td>1.97</td>
<td>89.97</td>
</tr>
<tr>
<td>1979</td>
<td>97</td>
<td>9.86</td>
<td>106.86</td>
</tr>
</tbody>
</table>


* Assignments to jury trials in equivalent judge years.
** Due to summer trial sessions.

2. The Empirical Effects of the Reform Initiatives

How effective were these reform efforts in reducing litigation delay? Figure 2 presents changes in suit-to-trial delay from 1959 to 1979 in the county (unlimited jurisdiction) courts. As is clear from the graph, county court delay remained relatively constant from 1959 through about 1971 despite all of the reform efforts described above. Delay substantially declined from 1971 to 1972 and from 1972 to 1973. But after 1974, suit-to-trial delay began to gradually increase, rising more rapidly after 1976.

A simple comparison of Figure 2 to the list of reform initiatives, above, does not show much of a correspondence between changes in delay and any of the various reforms instituted in Illinois during the period. Most surprisingly, the only substantial decline in delay occurred at the end of the one period over the 20 years in which there was no congestion reform activity whatsoever. Moreover, the increase in delay in the succeeding years, 1976-
79, coincides exactly with the extraordinary expansion in the number of Cook County judges. It is simple comparisons of litigation delay reform initiatives with average delay figures of this nature that have led most commentators to conclude that reform has little effect on litigation delay.

I report below, however, somewhat more discriminate, though still preliminary, empirical analysis of how the various reform efforts in the Cook County courts influenced case disposition. This empirical analysis differs from earlier studies of delay principally in the ability to focus on changes in the disposition of specific case-types affected by a particular reform. As we shall see, though the congestion equilibrium effect may mask the effect of reform where cases are analyzed in the aggregate, it is possible to observe reductions in case disposition time for specific categories of affected cases. I must emphasize, however, that the empirical analysis is very preliminary. This paper only initiates the work necessary to fully comprehend the processes determining litigation delay.

(a) Substantive law reforms. As described above, Illinois adopted two changes in substantive law during the period that might have affected litigation delay: the Uniform Commercial Code and the standard of strict liability for product defects. The Uniform Commercial Code was adopted in 1961—too near the beginning of the sample to allow a pre- and post-adopter comparison. There are strong reasons, however, to doubt that the Code had much effect on case processing: first, the Code’s sales law provisions differ

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91 See supra notes 76-80 and accompanying text.
little from the Sales Act that preceded it; and second, secured transaction litigation seldom reaches a jury. In 1959 and 1960, no cases were tried to juries on Code issues; from 1961 through 1979, there were only 19 Code cases.

In contrast, there was substantial products liability litigation tried to juries. Does the substitution of strict liability for negligence shorten trial length because it simplifies factual issues of liability? During the six years preceding the supreme court’s adoption of the strict liability standard—that is, under negligence—average trial length in products liability cases was 5.12 days. During the six years following adoption of strict liability, average trial length was 6.88 days—a substantial increase.

These summary statistics, however, conceal other differences in cases litigated under the two standards. Table 4 displays the results of a regression of trial length (in days) for the twenty years of products liability cases on the following variables: number of expert witnesses per case; number of plaintiffs and defendants per case; the stakes of the case represented by the average of the defendant’s offer and the plaintiff’s demand (valued in 1984 dollars); and a dummy variable for cases litigated under the strict liability standard. All of the variables except the strict liability dummy are strongly significant in the expected direction. Trial length in products liability cases increases as the number of expert witnesses increases, as the number of plaintiffs and, separately, defendants increases, and as the stakes of the case are greater. Table 4 reveals, however, that holding these other variables constant, the adoption of the strict liability standard had an insignificant effect on trial length in products liability cases.

(b) Management and Procedural Reforms. Many of the management and procedural changes adopted over the period to reduce delay were introduced in 1959 and 1961, too early to allow a comparative measure of their effects.92

92 In particular, because one of the 1959 reforms was to initiate compilation of trial data.
Two later procedural reforms, however, can be examined: judicial selection of impartial medical experts, and the creation of the specialized medical malpractice trial division. I shall also discuss the bifurcation of trials.

i. Impartial medical experts. The Zeisel team recommended that judges call impartial medical experts to speed trials by short-circuiting prolonged testimony of conflicting medical witnesses. Throughout the period, the Administrator consistently urged judges to expand use of impartial experts. These promptings, however, were largely unsuccessful. Most commonly, impartial experts were employed in divorce and custody actions. The height of use in Cook County civil actions occurred in 1972 when judges employed 25 medical experts in 610 Cook County courts cases. As a consequence, the institution of the impartial medical expert had little effect over the period of study.

ii. Specialized trial division for medical malpractice cases. In 1975, the Chief Judge of the Cook County courts designated a separate division to specialize in medical malpractice trials. At the time, insurers and doctors were concerned about the then-current crisis in medical malpractice insurance. The creation of a division of trial judges to specialize in medical malpractice cases was thought, first, to allow the development of greater judicial expertise in the field in order to reduce the variance in trial court outcomes and, second, to accelerate the disposition of medical malpractice cases. Was the specialized malpractice division successful in speeding trial disposition? Of malpractice cases tried to juries from 1959 to 1975, prior to the creation of the division, average trial length was 5.41 days. Of cases tried after specialization, average trial length increased to 7.07 days. To determine whether this difference is attributable to differences between pre- and post-division cases in terms of the complexity of the case (for which the number of expert witnesses or parties is a surrogate) or in terms of the stakes of the case—as was true of products liability cases—I have regressed malpractice trial length on these variables and on a dummy representing creation of the division. Table 5 shows significantly positive relationships, as to be expected, between malpractice trial length and the number of experts, the number of defendants, and the stakes in the case. Table 5 also shows, however, that holding these variables constant, malpractice trials were significantly longer after creation of the malpractice division than before. The precise causative link between creation of a specialized medical malpractice division and longer trials requires further study.

94 The chief judge’s reform was, perhaps, viewed as a substitute for the malpractice peer-review screening panel which was created by the Illinois Legislature in 1974 and ruled unconstitutional by the Illinois Supreme Court in 1976. See supra note 88. For a discussion of the medical malpractice crisis of the mid-1970s and of the various reform efforts to solve it, see P. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY, 97-118, 137-208 (1985).
TABLE 5
Determinants of Trial Length (in days) in Medical Malpractice Cases

<table>
<thead>
<tr>
<th>Variable</th>
<th>Parameter</th>
<th>T-stat.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>1.45</td>
<td>1.27</td>
</tr>
<tr>
<td>#Witnesses</td>
<td>.54</td>
<td>3.31</td>
</tr>
<tr>
<td>#Plaintiffs</td>
<td>.49</td>
<td>0.55</td>
</tr>
<tr>
<td>#Defendants</td>
<td>1.04</td>
<td>2.97</td>
</tr>
<tr>
<td>Stakes</td>
<td>.61</td>
<td>4.62</td>
</tr>
<tr>
<td>Malpractice Division</td>
<td>1.21</td>
<td>2.23</td>
</tr>
</tbody>
</table>

R² = .355

Source: Derived from the Cook County Jury Verdict Reporter.

Even if the creation of the specialized division did not control trial length, did it achieve the second goal: reduction of suit-to-trial delay? It is plausible that providing special treatment to particular categories of cases through special docketing procedures, trial assignments, and the like might substantially affect suit-to-trial delay. Though the congestion equilibrium theory implies that, with a reduction in delay, more suits will proceed to litigation than to settlement, within a small category of cases, the adjustment may be constrained. Indeed, malpractice cases provide a good example of the point: Over the 20 years of the study, only 339 malpractice cases in total were tried to juries.

In fact, suit-to-trial delay in medical malpractice cases diminished dramatically following the creation of the specialized malpractice division. Over the fifteen years prior to creation of the division, average suit-to-trial delay was 4.53 years. Over the five years after creation of the division, average suit-to-trial delay dropped to 3.21 years. Although the number of medical malpractice cases is too low to provide more than suggestive evidence of the congestion equilibrium effect, there appears to have been a corresponding increase in the rate of malpractice litigation, as one would expect with a reduction in delay. During the 15-plus years prior to creation of the division, malpractice trials occurred at a rate of 1.22 per month; after creation of the division, at a rate of 2.13 per month.95 Finally, there is very suggestive evidence of movement back toward an equilibrium following creation of the division. For the four and one-half years of the sample, after creation of the specialized division, suit-to-trial delay in malpractice cases steadily increased: 1975, 2.43 years; 1976, 3.08 years; 1977, 3.34 years; 1978, 3.47 years; and 1979, 3.77 years.

iii. Bifurcated trials. Bifurcating trials between issues of liability and damages is a procedural reform supported on two separate grounds. First,

95 A proper comparison of litigation rates, of course, would examine the rate of trials to malpractice suits, not available for this study.
some advocates believe that bifurcation will discipline juries, either by
forcing them to assign liability without reference to evidence of seriousness
of injury or by forcing them to measure damages without reference to the
aggravated nature of the tort. Bifurcation for this reason, however, has
nothing to do with court congestion.

The second ground of support for bifurcation is as a method of enhancing
the settlement process by narrowing the range of disagreement between the
parties. Recall from equation (1) that the plaintiff’s minimum settlement
demand and the defendant’s maximum settlement offer are each calculated
in terms of the multiple of the parties’ subjective estimates of both the
likelihood of success at trial and the expected judgment. Thus, the
litigation-settlement decision is determined by whether the multiple $P_pJ_p$
minus the multiple $P_dJ_d$ is greater or less than the difference between litiga-
tion and settlement costs. The objective of bifurcation is to reduce $(P_pJ_p
- P_dJ_d)$ in order to encourage settlement by eliminating one of the terms of both
multiples.

More precisely, the theory of bifurcation to enhance settlement derives
from an assumption about the production function of litigable issues. The
assumption is that there are savings to be gained from litigating liability and
damages issues separately rather than jointly because separate litigation will
facilitate the parties’ settlement on subsequent issues. In terms of the model,
if we denominate litigation costs, $(C_p + C_d) = C$, and settlement costs, $(S_p +
S_d) = S$, and then distinguish between litigation and settlement costs attrib-
utable to issues of liability as $PC$ and $PS$, and litigation and settlement
costs attributable to issues of damages as $JC$ and $JS$, then the theory of
bifurcation to enhance settlement assumes that, given some judgment, the
difference between the parties’ predictions of liability can be greater than the
difference between litigation and settlement costs related to liability while,
given the assignment of liability, the difference between the parties’ predic-
tions of the judgment can be less than the difference between litigation and
settlement costs related to the judgment. Thus,

\[(4) \quad (P_p - P_d)J \text{ (given } J) > PC - PS, \text{ while} \]
\[(P(J_p - J_d) \text{ (given } P) < JC - JS. \]

Of course, the cost savings may be achieved as well by first litigating
damages issues.\textsuperscript{96}

In Illinois, compulsory judicial bifurcation of trials was authorized in 1962
but, apparently, was never implemented.\textsuperscript{97} There is some evidence from the
sample, however, that suggests the potential of compulsory bifurcation for
affecting the speed of disposition. Of the roughly 13,000 cases in the trial

\textsuperscript{96} Of course, for jurisdictions retaining contributory negligence as a complete bar
to recovery, bifurcation can save costs if the liability trial results in a defendant
victory.

\textsuperscript{97} Personal communication from Judge Jerome Lerner, Cook County Circuit
Court.
sample, by agreement of the parties, 979 were litigated either on liability
issues only (207 cases) or damages issues solely (772 cases). Voluntary
bifurcation, of course, is substantially different from compulsory bifurca-
tion (or, more probably, bifurcation under judicial pressure). In the first in-
stance, however, I would expect cases voluntarily tried on liability
issues only or damages issues only to be cases involving greater underly-
ing uncertainty on those issues than cases selected at random or based on some
judicial judgment of appropriateness for bifurcation. In voluntarily bifur-
cated cases, we know that the parties' disagreement over the resolution of
the single issue is greater than the difference between litigation and settle-
ment costs relating to that issue, a fact that cannot be assumed for the
randomly chosen case. Thus, I would expect trial length in voluntarily
bifurcated cases to exceed trial length in cases chosen for bifurcation on
other grounds.

How does trial length in bifurcated cases compare? Average trial length
during the 20-year period in non-bifurcated cases was 6.325 days. Average
trial length in voluntarily bifurcated trials was substantially less. Trial length
for trials solely on issues of liability averaged 3.82 days; trial length for trials
solely on the issue of damages averaged 3.27 days. If the voluntarily bifur-
cated cases were exactly the same as non-bifurcated cases, then, on average,
bifurcation would increase total trial time (3.82 days + 3.27 days = 7.05 days
which is greater than the 6.325 day average). If, as I suspect, the voluntarily
bifurcated trials are the more difficult and troublesome, there may be savings
available from more systematic bifurcation. Perhaps further study could
identify other dimensions distinguishing voluntarily bifurcated cases from
the average.

(c) Expansion of the judiciary. In all jurisdictions, the most common
method of attacking the court congestion problem is to increase the number
of judges assigned to jury trial cases, and expansion of the judiciary was the
most important effort to reduce court congestion in Chicago. As described in
Table 3, the Illinois Legislature progressively increased the size of the Cook
County judiciary over the twenty years of the study. As has been true in
studies of other jurisdictions, however, there was little evidence that these
additions to the Cook County judicial workforce served to decrease delay. In
fact, most depressing was the discovery that suit-to-trial delay continued to
increase sharply in the late 1970s though there were yearly increases in the
judiciary from 1976 through 1979.98

The congestion equilibrium theory, of course, suggests why it is difficult to
observe reductions in suit-to-trial delay from increasing the size of the
judiciary: as the judiciary is enlarged to increase the number of dispositions,
the proportion of cases litigated rather than settled increases to offset the
effect. As explained earlier,99 however, although the parties' litigation-

98 Compare supra Table 3 with supra Figure 2.
99 See supra note 51 and accompanying text.
settlement decisions will tend toward some equilibrium level of delay, the
equilibrium will be different if the underlying size of the judiciary has
changed.

To attempt to identify the difference, I have regressed suit-to-trial delay
(in days) on the various litigation variables and on some new variables
including the average number of verdicts in the years between suit and trial,
average trial length (in days), numbers of cases pending, numbers of new
filings, and the average number of trial judges (or judge-year equivalents) in
the years between suit and trial. See Table 6.

The results of the regression are interesting, though further work is needed
to fully understand the process described here. The variables introduced as
proxies for the complexity of the case (numbers of expert witnesses, plain-
tiffs and defendants) are all insignificant. Curiously, the stakes variable is
negative and the verdicts variable positive, results which, at this point, I do
not fully understand.\textsuperscript{100} As one might expect, average trial length is posi-
tively correlated with delay, indeed strongly positively correlated.

The remaining variables seem to be consistent with the implications of the
congestion equilibrium hypothesis. Perhaps of equal importance, they finally
provide proof of the common sense belief that additions to the judiciary must
have some effect on suit-to-trial delay. The filings variable is insignificant, as
might be suggested by the congestion equilibrium theory. That is, the point
of the equilibrium hypothesis is that court congestion is not substantially
affected by the volume of filings, since only a very small proportion of filed
suits ever reach trial. The cases pending variable, however, is positively
related to suit-to-trial delay, though the magnitude of the effect is notable.

\begin{table}
\centering
\caption{Determinants of Suit-to-Trial Delay (in days)}
\begin{tabular}{lll}
\hline
Variable & Parameter & T-Ratio \\
\hline
Intercept & -365.57 & -1.79 \\
# Witnesses & -2.58 & -0.69 \\
# Plaintiffs & -5.99 & -0.55 \\
# Defendants & 3.91 & 0.45 \\
Stakes (at $10k) & -3.47 & -6.36 \\
Avr. Verdicts & 0.82 & 8.75 \\
Med. Trial Length & 645.22 & 11.13 \\
Filings, yr. suit & -0.04 & -1.10 \\
Cases Pending & 0.01 & 10.87 \\
Avr. Judges & -47.12 & -33.84 \\
$R^2$ & 0.3951 \\
\hline
\end{tabular}
\end{table}

Source: Derived from the \textit{Cook County Jury Verdict Reporter}.

\textsuperscript{100} These relationships seem robust to various specifications of the regression.
According to the regression, it takes an increase of 100 cases pending (that is, not disposed of by settlement or verdict) to increase suit-to-trial delay by one day of the roughly five-year average delay.

The variable representing the average number of judges over the period between suit and trial is of substantial import. It shows that increases in the number of judges hearing cases significantly affects litigation delay, a result largely unconfirmed in earlier studies of the court congestion problem. The regression shows that the addition of a single judge (over the average 5-year period between suit and trial) reduced average suit-to-trial delay by 47 days. As the t-statistic shows, the relationship is highly significant.


The empirical results reported above seem to support the proposition that modest reductions in litigation delay can be achieved, though the congestion equilibrium effect will constrain their ultimate success. There remains a puzzle, however, with respect to broader changes in suit-to-trial delay experienced in the Chicago courts during the 20 years of the study. Figure 2 shows that between 1959 and 1970, there were only small variations in suit-to-trial delay, suggestive of the equilibrium effect. Yet, Figure 2 also shows that, following 1970, average suit-to-trial delay diminished dramatically, from 5 to 3.5 years. None of the delay reform initiatives examined in the preceding subsections seem temporally related to the decline in pretrial delay after 1970. But the sharp decline in litigation delay also seems inconsistent with the congestion equilibrium hypothesis. What happened in 1971?

The answer is straightforward. In 1970 the Illinois Supreme Court restricted the jurisdiction of the county (unlimited jurisdiction) courts and expanded the jurisdiction of the municipal courts by increasing the minimum ad damnum for county court jurisdiction from $10,000 to $15,000.101 This shift in jurisdiction allowed an immediate transfer of 4,806 cases from the county to the municipal courts.102 This represented a transfer of 11.5 percent of the county department's civil jury trial cases in 1970 and, if measures of damages remained constant, a comparable shift in subsequent years. Even in the context of some equilibrium level of litigation delay, a massive shift in caseload of this nature would necessarily generate a reduction in pretrial delay.

There is very suggestive evidence of the restoration of the congestion equilibrium following the shift in jurisdiction. First, Figure 2 shows a progressive increase in litigation delay after 1972. Secondly, Table 1, presenting data on the ratio of trials to filed suits, shows striking support for the

101 ILL. ANN. STAT. ch. 110A, para. 295 (Smith-Hurd 1985) (Supreme Court Rule 295(i) (effective July 1, 1970)).
102 See 1970 COURT REPORT 56, supra note 73.
congestion equilibrium hypothesis. Again, the hypothesis provides that litigation delay will be inversely related to the rate of litigation. Table 1 shows that, in 1970, at the time of the massive shift in caseload, there were dramatic changes in litigation rates in both the county and municipal courts. The litigation rate in the newly-relieved county courts increased sharply (from 2.97 to 4.90 percent), and the litigation rate in the newly-clogged municipal courts decreased almost as sharply (from 2.36 to 1.50 percent). In the years following 1970, however, the equilibrium level of delay in each respective court began to be restored: The proportion of litigated cases declined in the county courts and increased in the municipal courts.

III. Conclusion: The Implications of Litigant Influence on Court Congestion

The preceding Part showed substantial, though still only suggestive, evidence of the congestion equilibrium process at work. The evidence indicates why previous studies of litigation delay have failed to discover effects from efforts to reduce delay. And it explains why, in Illinois, despite two decades of continuous reform, the only apparent influence on average delay was a one-time redefinition in the jurisdiction of the courts.

The congestion equilibrium hypothesis compels a rethinking of the litigation delay problem. Most importantly, it demonstrates that litigants themselves, as they negotiate over settlement or litigation, centrally determine the extent of delay. The delay problem is not merely a function of the choice of procedural rules, of management techniques, of a jurisdiction’s litigation mores, or even of the volume of underlying disputes. Changes in procedures or management, like changes in litigation volume, will affect the extent of delay, but they will also affect the settlement negotiations of the parties, generating the equilibrium.

The equilibrium concept implies that the parties’ litigation decisions will serve to offset the effects of congestion reform. Indeed, the more effective a particular reform, the greater the offsetting response, as parties choose to litigate rather than settle their disputes. The congestion equilibrium hypothesis does not imply that reform will have no effect. An effective reform measure may well generate a new and lower equilibrium level of congestion.

The importance of litigant decisionmaking to the congestion level, however, implies that massive reform investments would be required to achieve significant reductions in delay. For a jurisdiction like Cook County, for example, the investment necessary to substantially reduce delay may not be practically feasible. Indeed, there have been massive investments in congestion reform in Cook County. It will be recalled that the Illinois Legislature at various points during the period of study dramatically increased the size of the Cook County judiciary: In 1963, the judiciary was nearly doubled; later between 1976 and 1979, progressive additions of judges ballooned the
judiciary to 2.6 times its 1975 level. Yet the effect of these reforms on average delay were totally counteracted by the parties' litigation-settlement decisions.

The congestion equilibrium hypothesis suggests that a new approach must be taken in evaluating reform efforts. Changes introduced to reduce delay appear ineffective when their effects are measured in terms of average delay between suit and trial because the counter-reactions of the parties restores, at least in part, the previous suit-to-trial equilibrium. A better measure of the effect of reform, however, is the number of tried cases. A reform effort may increase the output of the courts though average delay is unchanged.

The congestion equilibrium hypothesis also suggests that policymakers must reevaluate their normative ambitions for congestion reform. Most reformers, following Zeisel, Kalven, and Buchholz, have presumed that, with a proper commitment to reform, litigation delay could eventually be reduced to modest proportions. Given such a view, the only policy issue is whether the normative harm from delay is equal to the costs of the reform introduced to reduce it. The conception of a congestion equilibrium upsets this seemingly straightforward normative approach. According to the analysis of this paper, there will remain some equilibrium level of congestion within a jurisdiction regardless of the level of investment toward reducing delay. Reform efforts can do little more than increase the number of available jury trials for some set of cases. No substantial effect on the level of delay can be achieved.

The normative policy issue relating to court congestion, thus, becomes much more difficult. The consensus so often obtained in favor of congestion reform has stemmed importantly from the fact that there are no clear normative grounds in favor of delay; thus, everyone agrees that delay ought to be reduced. Where it is acknowledged that delay is inevitable and that all that can be achieved by reform is a shift from settlement to trial, consensus disappears. Though some commentators promote litigation as an end in itself, the end is impractical if applied without discrimination. In 1979 in Cook County, for example, almost 49,000 cases were pending while only 523 could be tried to juries. The notion of providing access to trial for all cases is unrealistic.

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103 Indeed, the efforts continue. In July 1988, Cook County was given 39 new associate judges, Chicago Tribune, Apr. 18, 1988, § 3, at 2. And in 1989, Cook County Chief Judge Harry G. Comerford told the Cook County Board that “he needs 130 to 140 new courtrooms, at a cost as high as $500 million, and 50 to 60 more judges because of the mushrooming caseload . . . .” Chicago Tribune, May 30, 1989, Chicagoland sec., at 1, col. 2. I am grateful to Geoffrey P. Miller for this information.

104 For a criticism of another common, yet unhelpful, measure of congestion, see supra note 75.

105 See generally Fiss, Against Settlement, 93 YALE L.J. 1073 (1984) (promoting social benefit of judicial pronouncements of public values only available if cases proceed to litigation).
The congestion equilibrium hypothesis suggests that the normative grounds for congestion reform must derive from some theory of the appropriate means of rationing access to the courts. How many and what kinds of cases deserve trials even if they must wait out the equilibrium delay to achieve them? These issues are far more troubling and complex, and the normative apparatus for resolving them is not in place. It is clear, however, that simple hostility to delay, so important in motivating the congestion reform effort in past decades, cannot provide much help.