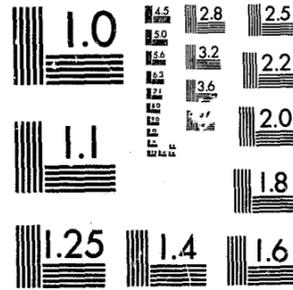


National Criminal Justice Reference Service

ncjrs

This microfiche was produced from documents received for inclusion in the NCJRS data base. Since NCJRS cannot exercise control over the physical condition of the documents submitted, the individual frame quality will vary. The resolution chart on this frame may be used to evaluate the document quality.



MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

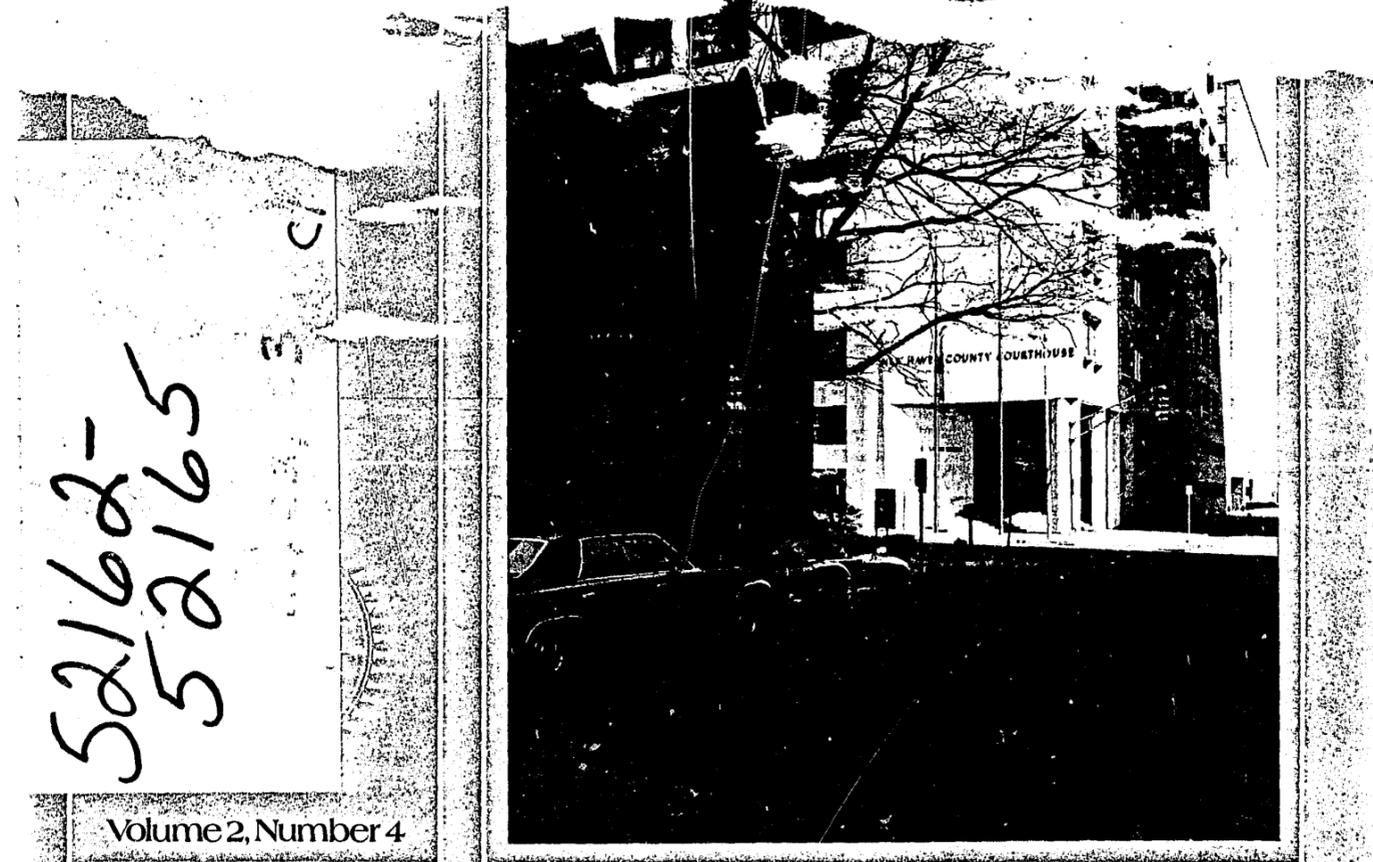
Microfilming procedures used to create this fiche comply with the standards set forth in 41CFR 101-11.504.

Points of view or opinions stated in this document are those of the author(s) and do not represent the official position or policies of the U. S. Department of Justice.

National Institute of Justice
United States Department of Justice
Washington, D. C. 20531

State Court Journal

Published by the National Center for State Courts



Volume 2, Number 4

State Court Journal

Fall 1978

Volume 2, Number 4

NCJRS

NOV 14 1978

Contents



Edward B. McConnell, Director
Robert Rich, Editor
Gordon Penman, Associate Editor

Editorial Committee

Alexander B. Aikman
Margaret Maes Axtmann
Douglas C. Dodge
Lorraine R. Moore
Elizabeth A. Prescott

New Haven County Courthouse Building
Architect: William S. Peterson & Associates
Photographer: Allan Greenburg



Fall 1978

Justice Delayed: The Pace of Litigation in Urban Trial Courts <i>Thomas Church, Jr., Alan Carlson, Jo-Lynne Quong Lee, and Teresa Tan</i>	3	52162
A History of the Lay Judge <i>Theodore J. Fetter</i>	9	52163
Plea Bargaining Revisited <i>Douglas C. Dodge</i>	13	52164
Court Change Strategies <i>Victoria S. Cashman</i>	19	52165

Project Reports

Other Projects

Case Inventory Reduction Seminar	27
Idaho Clerk's Manual	27
Washington Forms Project	27
South Central Juvenile Care Center Evaluation	27
North Carolina Bar Foundation Project Relating to Calendar Management and Judge Rotation	27
An Assessment of Delaware County's (Pennsylvania) Court of Common Pleas Courtroom Needs to the Year 2000	28
Virginia Forms Design and Record Retention	28
Louisiana Benchbook Evaluation Project	28
Kentucky Consulting Service Agreement Project	29
Rhode Island Superior Court Operations Manual	29
Administrative Staffing Implications of Court System Unification in North Dakota	29

Departments

Projects in Progress	30
Recent Publications	31
Washington Perspective	33
Rank Order of Judicial Salaries, Income, and Population	34

© 1978, National Center for State Courts. The *State Court Journal* is published quarterly by the National Center for State Courts for those interested in the field of judicial administration. Address communications to Executive Editor, *State Court Journal*, National Center for State Courts, 300 Newport Avenue, Williamsburg, Virginia 23185. ISSN: 0145-3076. This project was supported by Grant Number 78-TA-AX-0012 awarded by the Law Enforcement Assistance Administration, United States Department of Justice. Points of view or opinions stated are those of the National Center for State Courts and do not necessarily represent the official position of the United States Department of Justice.

52162

NCJRS

NOV 14 1978

ACQUISITIONS

Justice Delayed: The Pace of Litigation in Urban Trial Courts

by Thomas Church, Jr., Alan Carlson, Jo-Lynne Quong Lee, and Teresa Tan
The Honorable Kenneth Chantry, Project Director
Larry L. Sipes, Project Co-director

The Honorable Kenneth Chantry is former presiding judge of the Los Angeles Superior Court. He is currently the research director for the National Conference of Metropolitan Courts. He is also chairman of the board of directors of the Beverly School of Law at Whittier College.

Larry L. Sipes is the regional director of the National Center's Western Regional Office. He received a BA degree magna cum laude from the University of Southern California and a JD cum laude from New York University School of Law, where he was a Root-Tilden scholar. He has served as director of the California Chief Justice's Select Committee on Trial Court Delay, as special counsel for the California Constitution Revision Commission, and as an assistant United States attorney.

Thomas Church, Jr., received his BA from Whitman College and both his MA and PhD from Cornell University. He is currently on leave from Oakland University in Michigan, where he is an associate professor of political science.

Jo-Lynne Q. Lee holds a BA from Brooklyn College and a JD from Columbia University. Before joining the National Center as a staff attorney she was assistant district attorney for Bronx County, New York.

Teresa Tan received her AB from Smith College and both her MA and JD degrees from the University of California at Berkeley. She is a staff attorney for the National Center for State Courts.

Alan Carlson received his BS in industrial engineering from the University of California at Berkeley and his JD degree from Hastings College of Law. He is a staff attorney for the National Center for State Courts. Prior to his work with the Center he was involved with a major transportation study at the University of California at Berkeley.

This article summarizes the findings of an 18-month research project on trial court delay recently concluded by the National Center for State Courts and the National Conference of Metropolitan Courts.* The methodology, findings, and recommendations are set forth in greater detail in the full project report, *Justice Delayed: The Pace of Litigation in Urban Trial Courts*.

The project was ambitious in scope. Civil and criminal case processing was examined in 21 metropolitan courts across the United States using comparable time and work-load measures. In addition, scores of judges, attorneys, and court employees were interviewed and hours of court proceedings were observed. This combined information provides a unique data base with which to examine much of the conventional wisdom concerning trial court delay.

Delay in the disposition of civil and criminal cases is a phenomenon with a long and notorious history. Early studies of delay were restricted to one court. Their usefulness is obviously limited by

*This project was funded by Grant No. 76-DF-99-0076 awarded by the Law Enforcement Assistance Administration, United States Department of Justice, with matching funds from the National Center for State Courts and the National Conference of Metropolitan Courts. Points of view and opinions are those of the authors and do not necessarily represent the official position of the United States Department of Justice.

problems of generalizing from one court to all courts. The comparative measures generated in this project permit an examination of delay from a much broader perspective. Probably for the first time an important set of questions concerning case delay in state trial courts can be addressed. These questions are divided into two categories, distinguishable by both the nature of the queries and the methods used to answer them.

Basic research questions make up the first set of concerns: Why are cases disposed of at a faster rate in some courts than in others? What factors account for the pace of litigation in a given court? Because of the exploratory nature of the study, the approach to these questions was inductive. "Faster" and "slower" courts were examined in order to determine what elements in the structure, operations, and environment of the courts distinguish them. The ultimate goal of this aspect of the project was formulation of a general theory of the determinants of the pace of civil and criminal litigation in state trial courts.

Delay in the disposition of civil and criminal cases is a phenomenon with a long and notorious history.

The second set of issues has an explicit policy focus, being concerned with identifying the most promising approaches for expediting litigation in a particular court system.

It appears, as explained in subsequent sections of this article, that the fundamental causes of trial court delay are not to be found in the factors most often suggested by scholars and practitioners. Delay is not restricted to overworked courts, those with high trial

Fall 1978

rates, or those with a large proportion of serious or complex cases. There is, in fact, very little relationship between these aspects of trial courts and the pace of litigation. Case processing time is most strongly related to a particular set of informal attitudes, expectations, and practices of all members of a legal community. These elements of the "local legal culture" set the pace and in some jurisdictions foster a leisurely pace of litigation. They color the level of concern judges and lawyers have toward the amount of time cases should take to disposition; they affect the amount of control or management courts exercise over pending civil and criminal cases. This latter element—court control of the pretrial life of all litigation—summarizes the major policy conclusion of the project: courts that are genuinely concerned with delay reduction will achieve the most promising results by a commitment to active control of case progress from filing to disposition.

COURT STRUCTURE AND COURT DELAY

Structural aspects of court systems that have been asserted to be crucial to court performance were examined: a) court size; b) judicial work load; c) settlement and trial activity; d) calendaring system; and e) case management practices. Taken together, these aspects of court structure could be said to make up the "traditional model of court delay."¹ The central feature of this model is the assumption that delay in litigation is a product of burdensome work loads or inefficient court structure and case-handling procedures.

The primary measure used to assess civil case processing speed was median time from filing to disposition for tort cases. Two other civil dimensions were used for measurement: a) the median days from initiation of the lawsuit to disposition for all civil cases placed on

Table 1
Civil Disposition Time Measures

Jurisdiction ^a	Median Tort Disp'n. Time ^b (in days)	Median Trial List Disp'n. Time ^c (in days)	Median Time to Jury Trial ^d (in days)
New Orleans, La. (Orleans Parish Civil Dist. Court)	288	357	*
Ft. Lauderdale, Fl. (17th Judicial Circuit Court)	298	368	458
Phoenix, Ar. (Maricopa Co. Superior Court)	308	416	607
Portland, Or. (Multnomah Co. Superior Court)	310	*	464
Dallas, Tx. (Dallas County Dist. Courts)	322	*	*
Miami, Fl. (11th Judicial Circuit Court)	331	408	412
Cleveland, Oh. (Cuyahoga Co. Court of Common Pleas)	384 ^h	*	660 ^c
Seattle, Wa. (King Co. Superior Court)	385	412	476
St. Paul, Mn. (2nd Judicial Dist. Court)	*	440 ^f	437 ^f
Atlanta, Ga. (Fulton Co. Superior Court)	402	*	628 ^c
Oakland, Ca. (Alameda Co. Superior Court)	421	569	*
Minneapolis, Mn. (4th Judicial Dist. Court)	*	710 ^f	734 ^f
Philadelphia, Pa. (Phila. Co. Court of Common Pleas)	*	713 ^g	716 ^g
Pontiac, Mi. (6th Judicial Circuit Court)	555	*	804
San Diego, Ca. (San Diego Co. Superior Court)	574	608	846
Pittsburgh, Pa. (Allegheny Co. Court of Common Pleas)	583 ^g	727 ^g	906 ^g
Houston, Tx. (Harris Co. District Courts)	594	*	840
Newark, N.J. (Essex Co. Superior Court)	654	*	680 ^c
Detroit, Mi. (3rd Judicial Circuit Court)	788	904	1231
Bronx County, N.Y. (Bronx Co. Supreme Court)	*	980 ^f	1332 ^f
Boston, Ma. (Suffolk Co. Superior Court)	811	*	*

Note: On all tables in this book, medians are based on at least 20 cases unless indicated to the contrary.

- * Data unavailable or not applicable.
- ^a Unless indicated to the contrary, on this and the civil tables that follow, courts are listed in order of tort disposition time. Where that measure is unavailable, the court is placed in the ordering where it seems most appropriate according to the other two measures. Official court names will be omitted from the remaining tables in the chapter, as will the footnotes below explaining exceptions in the data for individual courts.
- ^b Median days from court filing to filing of the document that officially closed the case at the trial court level for all tort cases (including workmen's compensation cases). Those cases dismissed for lack of prosecution by the court are not included.
- ^c Median days from court filing to filing of the document that officially closed the case at the trial court level for all cases placed in the pool of cases awaiting trial.
- ^d Median days from filing to commencement of trial for cases ending in a jury verdict.
- ^e Measure is to the verdict, rather than commencement of jury trial.
- ^f Measure is from service of the complaint, not filing with the court. Court allows cases to progress to trial readiness prior to filing.
- ^g Includes only "major" cases that did not pass through the court's mandatory arbitration program for lawsuits involving less than \$10,000.
- ^h Includes cases resolved by arbitration.

Table 2
Criminal Disposition Time Measures

Jurisdiction ^a	Median Upper Court Disposition Time ^b (in days)	Median Time to Jury Trial ^c (in days)	Median Total Court Disp'n. Time ^d (in days)
Wayne County, Mi. ^e (3rd Judicial Circuit Court)	33	81	64
San Diego, Ca. (San Diego Co. Superior Court)	45	67	71
Atlanta, Ga. (Fulton County Superior Court)	45	73 ^f	77
New Orleans, La. (Orleans Parish Criml. Dist. Court)	50	*	67
Portland, Or. (Multnomah Co. Superior Court)	51 ^g	56 ^f	67 ^h
Seattle, Wa. (King County Superior Court)	56 ^g	84 ^g	32
Pittsburgh, Pa. (Allegheny Co. Court of Common Pleas)	58	92	103
Oakland, Ca. (Alameda County Superior Court)	58	89	116
Minneapolis, Mn. (4th Judicial District Court)	60	76	*
St. Paul, Mn. (2nd Judicial District Court)	69	69	74
Cleveland, Oh. (Cuyahoga Co. Court of Common Pleas)	71	89	103
Pontiac, Mi. (6th Judicial Circuit Court)	78	168	122
Miami, Fl. (11th Judicial Circuit Court)	81	84	106
Phoenix, Az. (Maricopa County Superior Court)	98	129 ^f	114
Ft. Lauderdale, Fl. (7th Judicial Circuit Court)	99	147 ^f	105
Houston, Tx. (Harris Co. District Courts)	99	160	181 ⁱ
Newark, N.J. (Essex Co. Superior Court)	99	140	209
Dallas, Tx. (Dallas Co. District Courts)	102	*	115
Philadelphia, Pa. (Phil. Co. Court of Common Pleas)	119 ^g	121 ^g	168 ^j
Boston, Ma. (Suffolk Co. Superior Court)	281 ^k	278 ^f	*
Bronx County, N.Y. (Bronx County Supreme Court)	328	405	343

- * Data unavailable or not applicable.
- ^a Unless indicated to the contrary, on this and the criminal tables that follow, courts are listed in order of upper court disposition time. Most explanatory footnotes below are excluded on remaining criminal tables.
- ^b Median days from date of filing of formal charges in general jurisdiction court to date of either guilty plea, trial verdict, dismissal, or formal determination of entry into diversion program.
- ^c Median days from date of filing of formal charges in general jurisdiction court to date trial commenced for cases where disposition was reached by jury verdict.
- ^d Median days from date of arrest to date of either guilty plea, trial verdict, dismissal, or formal determination of entry into diversion program.
- ^e The criminal jurisdiction of the Third Judicial Circuit Court includes all of Wayne County *except* the city of Detroit. Because of this fact, the jurisdiction will be referred to as Wayne County in the criminal tables that follow.
- ^f Verdict date used as substitute for date trial commenced.
- ^g Date of arraignment on formal charges used as substitute for date of filing of charges in the court of general jurisdiction.
- ^h Arrest date unavailable; date case opened in circuit court used. This date is within two days of the arrest date.
- ⁱ Arrest dates were unavailable for a large number of cases in this sample. There is a danger, therefore, that this figure may not be representative.
- ^j The sample of felony dispositions provided by the court computer system includes a considerably greater proportion of homicide, robbery, and rape offenses than aggregate data supplied by the court would suggest.
- ^k Figures do not include cases categorized as "dead docket."

line for trial; and b) the median days from initiation of legal action to commencement of jury trial. (See Table 1.)

The major criminal measure was median time from filing in the general jurisdiction court to a formal determination of guilt, innocence, or dismissal of the case. Two other measures used were the median days from arrest to disposition and the median days from indictment or information to commencement of jury trial. (See Table 2.)

Size of Court

Although it is seldom explicitly asserted in the court delay literature, a strong impression was encountered among practitioners that long case duration was predominantly a problem of large urban courts. Alternatively, these practitioners believed that expeditious disposition of cases was probably possible only in smaller courts that presumably handle a smaller volume of less serious or complex litigation.

Both speed and backlog are the result of local legal culture.

Civil processing time was compared across the 21 courts with five indices of court size: total judges, judges assigned to civil matters, total civil filings in 1976, 1976 tort filings, and jurisdictional population. By whatever index chosen, size of court bears little relation to civil processing time. If anything, as these indices of court size increase, there is a tendency for disposition time to *decrease*. (See Table 3.)

Criminal court practitioners, in common with their civil brethren, also asserted that large courts with numerous cases and comparatively "heavy" crime cannot be expected to dispose of cases as expeditiously as smaller courts. Table 4 relates general trial court processing time to five indices of criminal court

size: total authorized judges, judges assigned to criminal cases, total 1976 criminal filings, 1976 felony filings, and 1975 population. (See Table 4.)

No clear pattern emerges on the criminal side either. Although there is a slight tendency for the slower criminal courts to be somewhat larger than the very fastest of the civil courts, the courts with the longest criminal disposition times are not large in any of the dimensions examined.

Court Work Load and Backlog

Perhaps the most common assertion

of the cause of court delay is an alleged imbalance of court resources to work load. The literature of court delay is replete with references to overworked judges and understaffed courts.² Most of the court officials interviewed also believed inadequate resources—particularly an insufficient number of judges—to be a problem in their courts and a cause of delay as well.

Data of a cross-comparable nature were developed on civil and criminal filings per judge and the number of civil and criminal cases pending per judge.

When either of these two measures of individual judge work load is compared with disposition time measures, no pattern emerges. That is, the courts with the highest work loads are not the courts with slowest disposition times, nor are the comparatively underworked courts speedier.

In order to investigate the relationship between civil and criminal processing time and backlog, a *backlog index* was constructed for each court. For both civil and criminal cases, the measure consisted of the number of cases

pending at the beginning of 1976 divided by the number of 1976 dispositions, thereby relating the number of pending cases to yearly terminations. (See Tables 5 and 6.) The higher the backlog index, the more pending cases a court has relative to its yearly productivity. When disposition time is related to our backlog index, a clear pattern emerges for both civil and criminal cases. The higher a court's backlog, the slower its cases move to disposition. Slower courts, in other words, are backlogged courts. Notwithstanding this pattern relating speed of disposition to backlog, it is not this study's conclusion that back-

log is the cause of delay. Rather, a court's backlog as well as its speed is a symptom of delay caused by other factors, which will be discussed below.

Work load is a function not simply of the number of cases a court must process but also of the type of cases in the caseload. It was not possible to determine the quantity of complex civil litigation in a court or to determine its effect on processing time. On the criminal side, data suggest that differences among courts in the pace of criminal litigation are remarkably independent of the proportion of more serious crime in their caseloads. Although serious

cases usually move slower than less serious cases, courts that are comparatively slow in disposing of serious cases are similarly slow with less serious cases. The reverse is also generally true. The clear inference is that differences in the pace of criminal litigation, and perhaps civil litigation, among trial courts cannot be ascribed to heavy concentrations of complex cases.

Trial and Settlement Activity

Trials, especially jury trials, consume a considerable amount of judge time in most state trial courts. The extensive resources in time and money expended by the typical jury trial add considerable support for programs that encourage pretrial settlement of civil and criminal cases. Efforts to decrease the proportion of cases requiring jury trial include mandatory settlement conferences, plea bargaining conferences, and a host of other techniques to encourage nontrial dispositions. All of these strategies are based on the assumption that a court can dispose of more cases by lowering the proportion of its cases that require jury trial. If this assumption is correct, courts with a relatively low proportion of jury trials should be more productive than trial-intensive courts. Despite project data that reveal considerable differences in the proportion of civil and criminal cases proceeding to trial in the courts examined, however, the trial rate has little to do with either case output per judge or disposition time. Courts with a relatively high proportion of jury trials are neither less productive nor slower than courts with fewer jury trials. Furthermore, the civil data indicate that the courts with the most intensive settlement efforts by judges tend to be the courts with the slowest disposition times.

Calendaring System

One of the great disputes in judicial administration concerns the relative

Table 3
Court Size—Civil

	Median Tort Disposition Time (in days)	Median Trial List Disposition Time (in days)	Total Judges ^a	Civil Judges ^b	1976 Civil Filings ^c	1976 Tort Filings	1975 Population (in thousands)
New Orleans, La.	288	357	6	6	*	2,349	564
Ft. Lauderdale, Fl.	298	368	27	17 ^e	14,537	4,072 ^e	863
Phoenix, Ar.	308	416	31	17	18,776	4,320	1,218
Portland, Or.	310	*	17	*	6,609	*	536
Dallas, Tx.	322	*	25	12	13,297	4,366 ^e	1,399
Miami, Fl.	331	408	43	24 ^e	25,743	12,456 ^e	1,439
Cleveland, Oh.	384	*	26	*	14,397	8,158	1,603
Seattle, Wa.	385	412	24	*	16,455	2,791	1,149
St. Paul, Mn.	*	440 ^d	12	*	1,741 ^f	*	476
Atlanta, Ga.	402	*	11	*	4,068	*	584
Oakland, Ca.	421	569	24	13	10,747	3,825	1,088
Minneapolis, Mn.	*	710 ^d	17	12 ^e	4,413 ^f	1,323 ^{e f}	926
Philadelphia, Pa.	*	713	54	17	3,620 ^f	1,454 ^f	1,825
Pontiac, Mi.	555	*	11	*	8,375	1,715 ^e	968
San Diego, Ca.	574	608	28	17	22,302	3,050	1,588
Pittsburgh, Pa.	583	727	31	16	4,444 ^f	2,481 ^f	1,517
Houston, Tx.	594	*	38	18	21,191	9,770	1,964
Newark, N.J.	654	*	26	8	6,284 ^g	3,323 ^e	885
Detroit, Mi.	788	904	33	25	23,583	7,389 ^e	2,537
Bronx County, N.Y.	*	980 ^d	39	10	3,105 ^f	2,434 ^f	1,377
Boston, Ma.	811	*	19	6 ^e	7,902	*	723

*Data unavailable or not applicable.

^a Total number of judges authorized to general jurisdiction court for civil and criminal divisions.

^b Total number of judges assigned to general civil cases, exclusive of probate and domestic relations to the extent possible.

^c Exclusive of probate and domestic relations to the extent possible. Because of significant differences in statistical procedures across courts, these figures are not strictly comparable.

^d Time from service, not case filing.

^e Estimate.

^f Includes only at issue or trial ready cases.

^g Cases counted only if at least one answer to the complaint is filed.

Table 4
Court Size—Criminal

	Median Upper Court Disposition Time (in days)	Total Judges ^a	Criminal Judges ^b	1976 Criminal Filings ^c	1976 Felony Filings ^d	Popu- lation (thou- sands)
Wayne County, Mi.	33	33	7	4,244	4,028	2,537
San Diego, Ca.	45	28	9	4,254	4,254	1,588
Atlanta, Ga.	45	11	*	5,296	5,296	584
New Orleans, La.	50	10	10	7,525	2,746	564
Portland, Or.	51	17	*	3,627	3,213	536
Seattle, Wa.	56	24	*	4,567	2,625	1,149
Pittsburgh, Pa.	58	31	14	7,949	6,587 ^e	1,517
Oakland, Ca.	58	24	10	2,711	2,648	1,088
Minneapolis, Mn.	60	17	6	2,369	2,305	926
St. Paul, Mn.	69	12	*	1,051	1,011	476
Cleveland, Oh.	71	26	*	6,632	6,632	1,603
Pontiac, Mi.	78	11	*	4,921	*	968
Miami, Fl.	81	43	12	11,741	*	1,439
Phoenix, Az.	98	31	10	7,294	5,218	1,218
Ft. Lauderdale, Fl.	99	27	7	4,081	4,081	863
Houston, Tx.	99	38	15	15,086	*	1,964
Newark, N.J.	99	26	16	7,083 ^e	7,083 ^e	885
Dallas, Tx.	102	25	9	10,457	*	1,399
Philadelphia, Pa.	119	54	43	9,122	*	1,825
Boston, Ma.	281	19	9	3,989	1,965	723
Bronx County, N.Y.	328	39	29	3,518	3,518	1,377

*Data unavailable or not applicable.

^a Total number of judges authorized to general jurisdiction court in civil and criminal divisions.

^b Judges assigned to criminal matters.

^c Total criminal matters filed in 1976. Because of significant differences in statistical procedures across courts these figures are not strictly comparable.

^d Felony defendant-incidents.

^e Estimate from data supplied by court.

merits of two different approaches to the organization of case processing within a court.³ On one side of the disagreement stand adherents of the individual calendar system, where each judge has responsibility for his own caseload and functions almost as an autonomous court. The alternative system, the master calendar, exists in a number of variants. They have in common an allocation of judges to different functions, such as motions, conferences, and trials, rather than to cases. As cases come up for judicial action of some sort, they are assigned at that point to an available judge.

The differences in civil disposition times between the two calendaring systems are striking: the mean of the tort disposition times among individual calendar courts is more than 200 days faster than among master calendar courts. When the courts are ranked according to the civil time measures, the fastest third of the courts in the ranking consists of six individual calendar courts and one master calendar court, the slowest third consists of seven master calendar courts and no individual calendar courts. An indication of higher productivity on individual calendar courts is also suggested, although the data are less conclusive.

Courts with the highest work loads are not the courts with the slowest disposition times.

Data on criminal case processing are less clear. Seven of the nine fastest courts utilize the master calendar, as do the courts with the most criminal case delay. Several individual calendar courts are quite speedy; several are relatively slow. As on the civil side, data on case output per judge suggest that individual calendar courts make more

productive use of judges than do master calendar courts.

Case Management Systems

Probably the greatest observable difference between civil and criminal case processing in the courts examined is in the area of case management. While court monitoring and control of civil case progress are seldom exercised in the courts examined, nearly every court controls the pace of criminal litigation to a considerable degree. No court observed gives counsel in a criminal action the same control over case progress that civil lawyers enjoy.

Diversion and screening programs, and new judgeships, will not necessarily result in a speedier pace of litigation.

In only one of the five courts examined intensively on the civil side did judges exercise any substantial control over civil case progress. And even in that court the conduct and duration of the period from initiation of a suit to attorney stipulation of readiness was left almost entirely in the hands of counsel. The firmness by which judges held counsel to scheduled trial and other appearance dates also varied considerably. But again, in only one court did it appear that attorneys expected a trial might actually begin on the first scheduled trial date. Through artful use of stipulated continuances, allegations of scheduling conflicts, and refusal to file—or readiness to withdraw—a trial readiness document, a skilled attorney in the other courts examined could virtually control the speed at which his cases came to trial—at least in the negative sense of ensuring that he was never compelled to begin a trial before it was convenient.

continued on page 41

State Court Journal

Justice Delayed cont'd

The conduct of the criminal process is markedly different. Each of the five courts examined in depth institute judicial controls at some pretrial point in criminal cases. In the fastest courts this control is established at filing, with a routinized process for setting an early and relatively firm trial date. The slower courts exercise relatively little early control and do not push cases to disposition until much later.

Trial setting and continuance practices for criminal cases also differ markedly from those for civil cases. Both the median days from first scheduled trial date to commencement of trial, and the percent of cases in which trial commences on, or shortly after, the date scheduled, contrast sharply with analogous civil data. For example, an average of 62 percent of the criminal cases commenced trial within two weeks of the first scheduled date. The analogous figure for civil cases is 31 percent. Data on continuance practices indicate that a tight continuance policy alone does not guarantee speedy disposition; but the ability to set firm and relatively early trial dates is a characteristic of faster courts on both the civil and criminal sides.

A THEORY OR MODEL OF CIVIL COURT DELAY

The data outlined in the preceding section suggest that a number of the most important elements of the traditional model of court delay do not help very much to explain the considerable variation among state trial courts in case processing times. Case management seems to explain the variation among criminal courts. The positive

relationship observed between the backlog index and processing time, however, does relate to one theory central to much of the conventional wisdom of civil and criminal court delay. According to this theory, court system delay is caused by, if not defined in terms of, an inherited backlog of pending cases. The dispositional process is conceptualized as a line of cases awaiting trial; the longer the line, the greater the resulting delay. The problem with this backlog-causes-delay model is that it is largely tautological: a court in which the median case is disposed of in three years will necessarily have approximately three years of filed cases pending at any one time, if filings and terminations stay fairly constant.

An alternative conclusion, which is endorsed in the full project report, is that the speed of disposition cannot be ascribed in any simple sense to the length of a court's backlog, any more than it can be explained by court workload or procedures. Rather, both speed and backlog are the result of a stable set of expectations, practices, and informal rules of behavior which, for ease of reference, is termed "local legal culture." Court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it; it also has an accompanying backlog of open files in attorneys' offices. Established expectations and practices, together with court and attorney backlog, produce considerable inertia in the face of attempts to alter the pace of litigation. Thus, an explanation for the failure of most structural and workload variables to explain interjurisdictional differences in the pace of litigation. This also can account for the extraordinary resistance of court delay to solutions based on court structure, resources, or procedures.

Although the relation of legal culture

to processing time cannot be tested as directly as the more formal aspects of court structure and process, there is support for this informal model of court delay in both the quantitative and the qualitative data. Perhaps the most persuasive evidence for the centrality of local legal culture to the pace of civil litigation comes from comparing disposition times in state and federal trial courts. If legal culture strongly influences the overall speed of the resolution of civil disputes in a state trial court, then considerable spillover to other courts in the same geographical location could be expected. In particular, it could be expected that slower federal courts will be in cities where the state courts are slow, and faster federal courts will be in cities where state courts are relatively fast. As Table 7 demonstrates, this is indeed the case.

There is a striking relationship between the scales: the relationship between median disposition time for all civil cases in federal court and state court median tort time is fairly strong. Time to jury trial in the two court systems also compare, although the relationship is less strong. Given the considerable differences between state and federal courts in nearly all aspects of workload, structure, and procedures, this relationship in processing times provides strong support for the existence of a local legal culture that cuts across both state and federal courts in a community. One aspect of that culture is a set of operative expectations and accompanying practices that influence the overall pace of litigation in both courts.

This model of the pace of civil litigation is reinforced by extensive interviews and observation. In the faster courts, attorneys and judges uniformly reported that they were "accustomed to speed," "tuned-in to moving cases along," on "a rather fast track." Speedy disposition was considered the

norm, and concern for getting rid of or moving cases was apparent in both bench and bar.

Lawyers and judges in slower courts often appeared to be as satisfied with their slow pace as their counterparts in faster courts. Those interviewed often suggested that several years were required for cases to "ripen" or "injuries to mature." The existing pace of civil litigation was simply not perceived to be a problem.

Previous research on the criminal justice system has emphasized the central importance of a "local discretionary system" of norms, relationships, and incentives of criminal court participants.⁴ Often it was found that these informal elements of the criminal justice system had more to do with the actual operation of the courts than did formal statutes, rules, and policies.

Courts must balance the desire to keep judges busy in trial with an effort to provide sure trials for cases scheduled.

Few behavioral studies have specifically addressed the problem of criminal court delay. The established importance of an informal system of relationships among judges, defense attorneys, and prosecutors suggests, however, that local legal culture may be as important in criminal cases as in civil cases. If anything, the incentives for delay operating on a number of criminal court participants may be even stronger than on the civil side. Unless a defendant is incarcerated before trial, he typically has little to gain from a speedy trial that may deprive him of his liberty. The defense attorney has an additional reason to resist an early disposition: concern over obtaining his fee. A prosecuting attorney is seldom interested

in pushing a case to disposition if it is evidentially weak. Private defense attorney, public defender, prosecutor, and judge share with their civil practice brethren a common incentive to resist any quickening in the pace of litigation that would result in an increased workload. The limited number of attorneys engaged in criminal practice—and the resulting close and continuing personal contact among those engaged in prosecution and defense work—further allows professional courtesy in criminal courts to decrease objections to delaying techniques such as postponement requests.

Despite these clear analogies to the problem of delay in civil cases, it is important to emphasize the significant differences between criminal and civil case processing. Probably the most crucial difference is the opportunity for supervisory control of the individuals handling criminal cases. Unlike the civil justice system, where attorneys handling cases are either self-employed or work for one of the many private law firms, in criminal cases the prosecution, and often the defense, is handled by lawyers employed by public agencies. These agencies are headed by public officials who have considerable concern that, at the least, subordinates avoid activities that may cause embarrassment. Hence the participants in the actual disposition of criminal cases—the courtroom workgroups—are subject to at least the possibility of management controls not present in the more fragmented civil justice system.

Trial court judges have a much greater role in the processing of most criminal cases than they do on the civil side. Judges typically arraign all criminal defendants and set the amount of their bond. Dismissals and even *nolle prosequis* in many courts may involve judicial ratification. Hence, the functional analogy in criminal cases to the civil

case settled out of court—the plea bargain—very probably involves considerably more judicial participation than most civil settlements. With participation comes both judicial influence and judicial oversight, elements largely missing in the disposition of most civil cases.

These opportunities to exercise control over the activities of criminal trial attorneys would be less significant without the public policy significance of the crime problem and the resulting public and media interest in the operation of all criminal justice agencies. Unlike civil litigation, a subject on which most citizens have little knowledge or interest, crime and criminal cases frequently capture the spotlight. Public officials such as trial court judges and prosecuting attorneys adopt a *laissez-faire* attitude toward criminal case processing at their peril.

The nature of the controls placed on criminal case duration, however, varies considerably from court to court. Indeed, the major procedural factor that distinguishes faster from slower courts of those examined is the strength of case management controls applied and the point in case progress at which they are imposed. Of the courts investigated intensively, those with the speedier disposition times are those with strong controls of case progress applied from filing. Slower courts impose such controls much later, if at all. Interviews with judges and attorneys indicate that the importance of court system expectations and local concern with the pace of criminal litigation are related to the case management procedures applied. Not surprisingly, the courts with the most stringent controls on criminal litigation are the courts in which the expectations and norms of the legal community support an accelerated pace. Alternatively, in court systems with the fewest controls participants evince the

Fall 1978

Table 5
Civil Caseload Data

	Median Tort Disposition Time (in days)	Tort Filings Per Judge ^a	Tort Cases Pending Per Judge ^b	Backlog Index ^c
New Orleans, La.	288	392	*	*
Ft. Lauderdale, Fl.	298	240	*	*
Phoenix, Az.	308	254	*	*
Dallas, Tx.	322	364	339	1.0
Miami, Fl.	331	519	*	*
Cleveland, Oh.	384	*	*	1.2
Oakland, Ca.	421	294	*	*
Pontiac, Mi.	555	*	*	1.4
San Diego, Ca.	574	179	*	*
Houston, Tx.	594	543	821	2.0
Newark, N.J.	654	415	506	1.5
Detroit, Mi.	788	296	800	2.3

*Data unavailable.

^a Tort filings per civil judge—1976.

^b Tort cases pending as of 1/1/76 (or beginning of 1976 fiscal year) per civil judge.

^c Tort cases pending as of 1/1/76 divided by 1976 tort dispositions.

least concern with delay as a problem and similarly have norms and expectations that are consistent with the existent leisurely pace of criminal cases. Courts in which a one-year processing time is considered both normal and acceptable will be less concerned about pushing a six-month-old case than a court where 180 days to trial is the outside limit.

Hence, a court's pace of criminal litigation is based upon both the norms and expectations of court system participants—the local legal culture—and the quantity and quality of the constraints and controls placed upon those individuals' handling of specific cases. In other words, courts that dispose of criminal cases expeditiously will be those in which there is a systemwide expectation or concern for speedy disposition. This situation appears to exist most commonly in courts where the actions of the persons handling criminal cases are subject to some form of constraint or control, whether from an aroused public, a management-con-

scious district attorney, an active state judicial hierarchy, or a speedy-trial standard with meaningful sanctions and few loopholes. These two factors are obviously related. Such environmental constraints as speedy trial or an aroused public, for example, may serve to generate court system concern for expediting criminal case disposition, which in turn might result in tighter court or prosecution controls on processing of individual cases. The two crucial variables are systemwide concern over the speedy disposition of criminal cases, and systemwide controls on the progress of individual cases. Without such concern and control criminal litigation will proceed at the most convenient pace for the individual attorneys, litigants, and judges.

STRATEGIES FOR DELAY REDUCTION

In the following discussion the more commonly proposed remedies for court delay are examined. The analysis is pri-

marily deductive and it evaluates various responses to trial court delay in terms of this study's understanding of its basic causes.

The Resource-Work-Load Nexus: Adding Judges or Decreasing Filings

The assertion that court delay is a result of too few judges facing too many cases is accepted both by commentators and by many of the practitioners interviewed almost as an article of faith. This research provides no conclusive technique to determine whether judges in any particular court are overworked. But the data on both civil and criminal case processing suggest that courts that handle relatively high caseloads per judge are no more likely to be slow than courts with comparatively light caseloads per judge. As noted above, case processing time is strongly affected by the expectations and practices of the attorneys and judges working in a court system and the extent of court control over case progress. Neither of these elements is necessarily affected by changes in the work load of judges, a fact undoubtedly responsible for the observed lack of relationship between work load and processing time.

This analysis suggests that efforts to reduce court filings through diversion and screening programs, and by adding new judgeships, will not necessarily result in a speedier pace of litigation. While these changes may accomplish other goals, it is not expected that they will alter processing times in the absence of other fundamental changes in court attitudes and practices.

Court Settlement Activity

One of the most frequently applied delay reduction strategies involves judges in the attempt to increase the proportion of cases that can be settled through negotiation before trial. Mandatory pretrial settlement or plea bargaining conferences and crash settle-

ment programs are common court responses to problems of backlog and delay. They are premised on the theory that since a negotiated disposition requires less judge time than a trial, a successful conferencing system will increase court productivity without additional judicial resources.

Evaluation of the success of settlement programs is difficult. Judges see a high proportion of cases disposed of in conference and thus conclude that the program is achieving positive results. But it is difficult to determine whether such conferences actually change the trial rate. Even if conferences do dispose of cases that would otherwise have resulted in trial, it is not clear that this change in trial utilization will necessarily increase total court output. In the courts for which relevant

data exist, no significant relationship between trial utilization and individual judge productivity was found: those courts that disposed of proportionately more cases by jury trial did not necessarily dispose of fewer cases per judge. Furthermore, of the courts examined in depth, those with the fastest pace of civil litigation had the least settlement activity by civil court judges and tended to dispose of a higher proportion of cases by jury trial.

The data gathered in this study suggest that extensive court involvement in attorney negotiations is nonproductive. A judge may produce the final nudge needed to crystallize a settlement in selected cases. There is substantial support, however, for the position that dedicating substantial judicial resources to settlement discussions in

Table 6
Criminal Caseload Data

	Median Upper Court Disposition Time (in days)	Filings per Judge ^a	Pending Felonies per Judge ^b	Backlog Index ^c
Wayne County, Mi.	33	575	*	*
San Diego, Ca.	45	473	*	.08
Atlanta, Ga.	45	*	*	*
New Orleans, La.	50	275	*	.29
Pittsburgh, Pa.	58	471 ^d	*	.20
Oakland, Ca.	58	265	48	.14
Minneapolis, Mn.	60	384	53	.17
St. Paul, Mn.	69	*	*	.22
Cleveland, Oh.	71	*	*	.35
Pontiac, Mi.	78	*	*	*
Phoenix, Az.	98	522	*	.33
Ft. Lauderdale, Fl.	99	583	177	*
Houston, Tx.	99	*	*	.67
Newark, N.J.	99	443 ^d	267 ^d	*
Dallas, Tx.	102	*	*	.37
Philadelphia, Pa.	119	233	88	1.54
Boston, Ma.	281	218	515	.78
Bronx County, N.Y.	328	121	102	*

*Data unavailable or not applicable.

^a Felony cases (defendant-incidents) filed per judge assigned to criminal matters—1976.

^b Pending felony cases as of 1/1/76 (or beginning of 1976 fiscal year) per judge assigned to criminal matters.

^c Pending felony cases as of 1/1/76 divided by 1976 felony dispositions.

^d Estimate.

every case increases neither judicial productivity nor speedy dispositions.⁵

Calendaring Systems

The considerable difference in the pace of civil litigation in master as opposed to individual calendar courts has already been described: the mean tort disposition time among individual calendar courts is more than 200 days faster than among master calendar courts. The difference in processing time between individual and master calendar courts is not as pronounced in criminal as in civil case processing. For both criminal and civil courts, however, productivity for judges on individual calendar appears to be considerably

higher than for those on master calendar.

Although conclusive proof on the question is not available, there is the strong impression that the major distinguishing factor in performance under these calendaring systems is the degree of judge accountability in individual calendar courts. Stated baldly, individual calendar systems seem to create incentives for judges to work harder, or to expend their efforts on activities that increase productivity or decrease individual case delay, or both.

One possible explanation for the lack of an analogous finding for criminal cases lies in the amount of controls

present in the criminal process. Most court systems have instituted some form of administrative monitoring of the status of criminal cases independent of the activities of individual judges. The presence of a prosecuting attorney with at least a formal interest in speedy disposition of criminal cases adds a further cohesive element to criminal case processing that is not present on the civil side. Hence, unlike civil cases, criminal cases are subject to a variety of institutional monitoring and control independent of the actions of the judges themselves. The civil system, on the other hand, leaves the judge as the sole source of uniform pressure for speedy disposition. A system that makes an individual judge accountable for moving a specified set of cases may thus have more impact on civil than on criminal case processing time.

These data do not support an unqualified recommendation of the individual calendar system for either civil or criminal cases. They do suggest, however, that the presence of relatively unambiguous measures of individual judicial performance increases productivity and, at least for civil cases, may be responsible for more judicial attention to problems of delay.

Case Management

The basic tenet of the case management philosophy is that the court, not the attorneys, should control the progress of cases in the pretrial period. Individual case progress is monitored to ensure that litigation moves through the various stages prior to trial without unnecessary delay.

Differences in the nature of criminal and civil case processing make the concept of court management and control of criminal cases much less foreign to most state courts than the application of similar controls to civil litigation. Although some state statutes place the

Table 7
State and Federal Court Disposition Times

City	Civil Disposition Time (in days)		Time to Trial (in days)	
	State Court ^a	Federal ^b	State Court ^c	Federal Court ^d
New Orleans, La.	288	305	*	549
Ft. Lauderdale, Fl.	298	122	458	305
Phoenix, Az.	308	244	607	702
Portland, Or.	310	274	464	518
Dallas, Tx.	322	305	*	488
Miami, Fl.	331	122	412	305
Cleveland, Oh.	384	214	660	365
Seattle, Wa.	385	305	476	671
St. Paul, Mn.	*	336	437	732
Atlanta, Ga.	402	274	628	488
Oakland, Ca.	421	274	*	549
Minneapolis, Mn.	*	336	734	732
Philadelphia, Pa.	*	305	716	488
Pontiac, Mi.	555	274	804	671
San Diego, Ca.	574	274	846	671
Pittsburgh, Pa.	583	214	906	427
Houston, Tx.	594	336	840	793
Newark, N.J.	654	365	680	793
Detroit, Mi.	788	274	1,231	671
Bronx County, N.Y.	*	336	1,332	915
Boston, Ma.	811	702	*	732

*Data not available.

^a Median days filing to disposition—tort cases.

^b Median days filing to disposition—civil cases. Source: *Annual Report of the Director of the Administrative Office of the United States Courts—1976* (Washington, D.C.: Government Printing Office, 1976), Table C-5, pp. 318-321.

^c Median days from filing to commencement of trial for cases ending in jury verdict.

^d Median days from filing to commencement of jury or nonjury trial. From *Annual Report of the Director*, Table C-5, pp. 318-321.

responsibility for docket control in criminal cases upon the prosecuting attorney, no court visited adopted the *laissez-faire* attitude toward criminal cases that was common on the civil side. Many courts, often in cooperation with the prosecuting attorney, utilize sophisticated data processing systems to monitor criminal cases, schedule appearances, and ensure that processing time does not exceed relevant speedy-trial limits. The fastest courts have the tightest controls and routinize the process to a considerable extent: cases may deviate from the general pattern but most cases move at a fairly standard pace from arrest to disposition. Project findings suggest that standard management controls are an important element in the comparatively speedy pace of criminal litigation.

Court management of the pace of civil litigation assumes that litigants' interest in speedy resolution may not be well served by total attorney control over the pretrial period. The theory of civil case delay developed in the preceding sections suggests that the settled expectations and practices of all members of a legal community will constitute a powerful force of inertia in the face of any attempt to decrease disposition time in civil cases. Hence, so long as the pretrial period is left entirely in the hands of attorneys, significant reduction in case processing time will be difficult, if not impossible, to achieve.

The major project recommendation is institution of systems for both criminal and civil cases by which the court can monitor and ultimately guide the progress of individual cases from filing to disposition. A major element of such systems should be creation of an expectation that trial will commence on the date scheduled in the absence of exceptional circumstances. If a court is to foster an expectation that trial will begin on the first trial date scheduled, it

obviously must be able to provide a trial on that date or shortly thereafter in those cases that have not settled prior to trial. A court that must postpone a sizable number of cases on their trial dates because of no available courtroom can no more succeed in creating the expectation of trial on its scheduled date than can a court that grants all requests for continuances. Continuance practices, and trial expectations, are thus dependent on trial setting and scheduling practices.

A perfect court scheduling system would provide for every case set for trial to be tried on the date scheduled. At the same time, however, it would ensure that no judge suffered a calendar breakdown in which all his scheduled cases were either disposed of prior to trial or were continued. Perfection is obviously difficult to achieve given the uncertainty involved. Hence, courts must balance the desire to keep judges busy in trial with an effort to provide sure trials in all those undisposed cases scheduled. Most courts have struck this balance by placing almost all emphasis on the side of preventing any loss of trial judge time. Yet if the preceding discussion of the importance of promoting an expectation of trial is correct, this resolution of the scheduling dilemma may both slow dispositions and lessen court productivity.

A court that sets enough cases to virtually guarantee that no judge is idle also ensures that it will seldom be able to try all those cases requiring trial on time. The court will therefore have to grant continuance requests from counsel and postpone the remaining cases on its own motion. Continuance practices will then fluctuate with the state of the calendar on any particular day, serving to lessen the expectation of trial in the minds of attorneys and litigants, postpone settlements, and confuse attorneys' schedules. The project recom-

mendation is for courts to balance the desire to avoid unnecessary lapses in the trial schedules of judges with a concern for promoting an expectation that trial dates will remain firm. A trial setting policy that emphasizes this latter goal will encourage early dispositions, alleviate attorney grievances over the uncertainty and inconvenience associated with vacillating trial dates, while at the same time leaving the court—not the attorneys—in control of this important element in the overall pace of civil litigation.

CONCLUSION

The details of a model case management system have not been spelled out here. That would be considerably beyond the scope of this research and the confines of the data. The basic point is that any delay reduction effort—whether it be a crash program with a temporary infusion of judges, a long-term effort to conduct more trials with existing resources, or a program to control the time spent in discovery or pleadings—should be accompanied by controls at all stages of the civil process. If not, the built-in inertia of attorney backlog, together with settled local practices and expectations, may simply produce a shift in the time saved in one part of the process to some other period.

Institution of court control over the movement of cases may not be an easy affair in many courts. In particular, considerable civil attorney resistance to a change in scheduling prerogatives is virtually assured in those courts where lawyers have traditionally controlled the pace of litigation. What is needed in order to resist this pressure is genuine court concern with delay as a social and institutional problem and a firm long-term commitment to its resolution on the part of judges. □

Fall 1978

NOTES

¹For a discussion and analysis of the literature that supports this model, see T. Church, Jr., *et al.*, *Pretrial Delay: A Review and Bibliography* (Williamsburg, Va.: National Center for State Courts, 1978).

²See, e.g., Zeisel, Kalven, and Buchholz, *Delay in the Court* (Boston: Little, Brown and Co. 1959), p. 3; M. Rosenberg, "Court Congestion: Status, Causes, and Proposed Remedies," in *The Courts, the Public and the Law Explosion*, ed. H. Jones (Englewood Cliffs: Prentice-Hall, 1965), pp. 38-46; R. S. Miller, "A Program for the Elimination of the Hardships of Litigation Delay," *Ohio State Law Journal* 27 (1966): 406; J. P. Frank, *American Law: The Case for Radical Reform* (New York: Macmillan Co., 1969), pp. 3-4.

The National Manpower Survey of Courts indicates that 40 percent of responding officials believe inadequate resources to be the primary cause of delay. "Background Paper on Issues and Data Relating to Sources of Case Backlog and Delay in the State Courts," mimeographed (Washington, D.C.: Courts Technical Assistance Project, American University).

³For a discussion of the various arguments for and against the two calendaring systems, see M. Solomon, *Caseflow Management in the Trial Court* (Chicago: American Bar Association, Commission on Standards of Judicial Administration, 1973); California Judicial Council, *Master-Individual Calendar Study*, prepared by John Fall and Associates (San Francisco: California Judicial Council, 1974).

⁴The term is Raymond Nimmer's. See R. T. Nimmer, "A Slightly Moveable Object, A Case Study in Judicial Reform in the Criminal Justice Process/The Omnibus Hearing," *Denver Law Journal* 48 (1976): 206-30. See also T. Church, Jr., "Plea Bargains, Concessions and the Courts: Analyses of a Quasi-Experiment," *Law and Society Review* 10 (1975): 377-401.

⁵"Judicial participation in settlement produces mixed results. A limited role may be valuable, but data suggest that a large expenditure of judicial time is fruitless." S. Flanders, *Case Management and Court Management in United States District Courts* (Washington, D.C.: Federal Judicial Center, 1977), p. 37. See generally, M. Rosenberg, *The Pretrial Conference and Effective Justice* (New York: Columbia University Press, 1964).

END