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COURT CONGESTION AND CRASH PROGRAMS: A CASE STUDY

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Court congestion, and the resultant serious time lapse between filing of pleadings and trial of civil cases, has been for years a major problem of both state and federal court systems. The Federal District Courts in particular face a growing backlog of pending civil cases. In the spring of 1966 the United States District Court for the District of Colorado conducted an intensive six-week program designed to reduce the Court's backlog. The operation and effects of the program were studied by the Administration of Justice Program of the College of Law at the University of Denver. Professor Sykes and Mr. Isbell report the findings of this study and examine the question of whether judicial manpower might have been more efficiently employed during the program. The Court must continue to experiment with small, tentative changes, and systematically evaluate the effectiveness of the changes, if remedies for congestion are to be found. These experiments might be directed at such goals as more accurate estimation of length of trials, more precise prediction of which cases will be settled out of court, and more efficient management of judicial time for performing nontrial duties.

DELAY in court has long been viewed as a serious defect dogging our legal system, and over the years society has attempted to cure it with a variety of remedies. Yet despite the imagination and effort devoted to getting rid of this *malaise* of the law, it appears that we are not much better off than we were 60 years ago when Roscoe Pound delivered his address on "The Causes of Popular Dissatisfaction with the Administration of Justice" at the annual meeting of the American Bar Association in 1906.[1] Court congestion is still a critical social problem, a basic threat to legal rights, and a major weakness of our tribunals.

The United States District Courts have suffered from this difficulty along with the variety of state courts. In recent years, however, the situation in state courts appears to have improved while the situation in Federal District Courts has grown worse; and the need

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[1] *Reprinted in* 8 BAYLOR L. REV. 1 (1956).

for effective remedial action in the Federal system has become ever more pressing. Between 1960 and 1965, civil cases filed in all United States District Courts increased approximately 17%, from 57,791 cases to 67,678 cases. Although the percentage of cases terminated also increased during this period, cases were still coming into the courts at a faster rate than they could be disposed of. As a consequence, the backlog of cases grew from 61,251 in 1960 to 74,395 in 1965. The United States District Courts, despite the fact that they had increased the rate of disposition between 1960 and 1965, were being confronted with increasing congestion.[2]

A part of the increase in filings can be attributed, of course, to the increase in the population in the United States which went from some 181 million in 1960 to 195 million in 1965, a growth of about 8%. Since the United States Census Bureau has estimated that the population may very probably grow to 380 million by the year 2010, approximately double the 1960 figure, it is clear that the courts will undoubtedly be faced with a greatly expanded work load which cannot be solved by minor tinkering with the system.[3]

On July 1, 1964, the United States District Court for the District of Colorado, (hereinafter referred to as the Colorado U.S. District Court) had a backlog of 426 civil cases pending. During the ensuing fiscal year, 586 new cases were filed and 518 cases were terminated, increasing the backlog to 494 cases — a growth of about 16%. At this rate, the backlog of the Colorado U.S. District Court would double in six or seven years, although, fortunately, it would still not approach the staggering burden of the Southern District of New York (10,180 civil cases pending, July 1, 1964), Eastern District of Pennsylvania (5,287 cases pending), or Eastern District of Louisiana (3,952 cases pending).[4]

In 1965 the Colorado U.S. District Court ranked very near the midpoint for all United States District Courts in terms of the amount

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[2] *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S., DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. (1965). *See generally Lagging Justice,* 328 ANNALS (1960).

[3] The projections vary between 438 million and 322 million, depending on different assumptions concerning the birth rate. J. SIEGEL, M. ZITTER, & D. AKERS, PROJECTIONS OF THE POPULATION OF THE UNITED STATES, BY AGE AND SEX: 1964 TO 1985, WITH EXTENSIONS TO 2010, at 55 (U.S. Bureau of the Census, Current Population Rep., Ser. P-25, Pub. No. 286, 1964). Projections for Colorado for the year 2010 are not available, but the Bureau of the Census has made estimates for 1985, ranging from 2,971,000 to 2,726,000. Since Colorado had a population of 1,754,000 in 1960, this could well mean an increase of about 65% in 25 years. *See* U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REP., SER. P-25, PUB. NO. 326, ILLUSTRATIVE PROJECTIONS OF THE POPULATION OF THE STATES: 1970 TO 1985, at 14-15 (1966).

[4] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, *supra* note 2, at 174-75, app. table C1.

of time between a case being "at issue" and coming to trial.[5] This fact, however, must be interpreted with caution. A premature complacency about dealing with delay with apparently somewhat greater efficiency than many United States District Courts may be misleading, since Colorado's slightly better performance may be due, at least in part, to the types of cases filed and the relatively lower frequency of jury trials, rather than to greater efficiency in administrative procedures.

The distribution of types of cases filed in the Colorado U.S. District Court differs slightly from the distribution of cases filed in all United States District Courts. There is a somewhat larger percentage of contract actions and a somewhat smaller percentage of tort actions in Colorado; and since, in general, contract actions require less trial time than tort actions, the difference in the types of cases filed may help explain Colorado's slight edge in the number of months between cases "at issue" and trial — a median of 10 months in Colorado compared to approximately 11 months for all Federal District Courts. In addition, in the Colorado U. S. District Court there are relatively fewer jury trials in civil and criminal cases, and this, too, may help to speed the judicial process.[6]

I. THE CRASH PROGRAM — OBJECTIVES AND RESULTS

In any event, a desire to better the situation prompted the Court, under the direction of Chief Judge Alfred A. Arraj, to undertake an intensive six-week program to see what could be done about the growing number of cases awaiting court action. From the middle of April 1966, to the end of May 1966, two judges trying cases five days a week were to be added to the Court's normal complement of three judges.[7]

In order to determine the effect of the program (which one newspaper termed rather dramatically a "massive assault on the backlog"), the Court invited the Administration of Justice Program of the College of Law at the University of Denver to study its

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[5] As Milton Green has pointed out, "Considerable difficulty is encountered in ascribing a precise meaning to the term 'at issue.'" We are using it here, as Green suggests, to refer to

> the status of a case when final pleadings on both sides have been filed and preliminary motions have been disposed of. In some jurisdictions, however, the term is used in a different sense. For instance, in New Jersey a case is considered "at issue" when the first answering pleading is filed, whereas in New York a case is not considered "at issue" until the pleadings have been completed, all preliminary motions made and determined, and a certificate filed by the attorneys indicating that the case is ready for trial.

Green, *The Situation in 1959*, in *Lagging Justice*, 328 ANNALS 7, 9 n.7 (1960).

[6] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE, *supra* note 2, at 204.

[7] The additional judicial manpower was to be drawn from Federal District Courts in other states, depending on the work load of these judges in their courts.

operation during this period.[8] The Court started with 111 cases which it intended to dispose of during the six-week period, in order to reduce its backlog to more manageable proportions; and the outcome of these cases was as follows:

Cases Disposed of Prior to the Crash Program

1 case went to trial before the crash program got underway and was disposed of by the Court;

1 case was disposed of before the crash program by a default judgment;

1 case was disposed of before the crash program by a summary judgment;

33 cases were settled out of court before the crash program and thus did not require a trial.

Cases Disposed of During the Crash Program

29 cases were settled during the crash program (of these 29 cases, 7 involved a total of approximately 24 hours of trial time as a part of the process of settlement);

32 cases were completed by trial during the crash program and were disposed of by the Court;

3 cases were disposed of by the Court during the crash program by a summary judgment.

Cases Not Disposed of at the End of the Crash Program

7 cases were postponed for disposition, until after the end of the crash program, at the request of the attorneys;

4 cases were not brought to trial during the crash program, since further action by the Court was required or settlements which had been reached required later official approval.

It would appear, then, that by the end of the Colorado U.S. District Court's crash program, 100 cases of its planned work load of 111 cases, *i.e.* 90%, had been eliminated. In the sense that the great share of the backlog represented by the cases scheduled for this period was disposed of, the crash program could well be acclaimed a success.

However, the following points should be noted:

First, 36 cases were disposed of *before* the crash program had even begun. And of these 36 cases, 33 were settled out of court by agreement between the parties and attorneys.

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[8] The Administration of Justice Program is financed primarily by a grant from the Russell Sage Foundation and has as one of its major objectives the creation of closer bonds between law and the social sciences. Special appreciation is to be expressed to Michael Katch and Robert Minter, students at the College of Law, for their work in the study, and to Mr. G. Walter Bowman and Mr. James Manspeaker of the Colorado District Court for their cooperation.

Second, 64 cases were disposed of *during* the crash program; but of these 64 cases, 29 were settled by agreement between the parties and attorneys.

In short — about one-third of the cases (32) were disposed of by a trial verdict during the crash program.

It is possible that the 32 cases disposed of by trial during the crash program represented a full work load for the judicial manpower available in the six-week period. The original plan, which scheduled more than three times this number for trial, might not be as naive or overly optimistic as it may appear at first glance, since the Court might have been operating with a well-reasoned expectation born of long experience that most cases scheduled for trial will *not* come to trial in fact. Indeed, the act of scheduling a case for trial may increase the chances of settlement, making a trial unnecessary: explicitly planning an event at a definite time and place makes it unlikely that the event will occur.[9]

It is also possible, however, that the 32 cases disposed of by trial during the crash program did *not* represent a full work load for the judicial manpower available in the six-week period. If this were true — if the judges had trial time they were not using — and if additional cases for trial had been available to be substituted for those which had been settled out of court, the total number of cases disposed of both by trial and settlement could have been far greater. If we assume, for example, that (1) the Court had tried and disposed of 32 cases as scheduled; (2) 62 cases had been disposed of by settlement out of court; and (3) 62 additional cases had been substituted for those settled and these additional cases had been brought to trial; then, the Court could have disposed of 156 cases — approximately 41% more dispositions than originally conceived by the crash program. The crucial question, then, is whether the judicial manpower of the Court was fully employed in taking care of the 32 cases disposed of by trial and whether additional cases could have been substituted for those disposed of by settlement.

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[9] If a case has definitely been scheduled for trial, settlement may become more likely because the uncertainties of trial outcome loom larger in the minds of attorneys and a settlement becomes preferable. It is also possible that full, detailed work on a case, on the part of attorneys, may be delayed until it seems certain that a case will go to trial. As this process comes into play, a basis for a mutually acceptable settlement is more likely to emerge and a trial becomes unnecessary. Robert Merton has analyzed the phenomenon of the self-fulfilling prophecy in which the prediction of an event makes its occurrence more likely. *See* R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1949). We seem to be dealing here with the phenomenon of the *self-defeating* prophecy.

Whether the "rush to settlement" under the threat of an impending trial results in more just settlements remains an unexplored issue.

II. TRIAL CALENDARS — PREDICTING LENGTH OF TRIALS

The actual length of the judge's working day has, of course, been subject to much popular debate — and to much misunderstanding. Time spent in trial is in fact only one portion of the judge's work and much effort must be devoted to hearing motions, writing decisions, keeping abreast of the legal literature, pre-trial conferences, et cetera. Furthermore, as one writer has pointed out, "judges are not ordinary employees and the problem of delay in court, if the judiciary is to retain its dignity and independence, is not simply one of time-clock efficiency."[10]

Under the crash program, four days of each week were to be devoted to the trial of cases for the three regular judges of the Colorado U.S. District Court. The fifth day of the week was to be set aside for other judicial duties such as those mentioned above. Thus, the regular judges were to provide a total of 72 days available for the trial of cases during the six-week crash program. As far as the visiting jurists were concerned, each was to spend five days a week on the trial of cases, providing a total of 60 additional days available for trial work. The entire number of trial days available to the Court, then, during the crash program would in theory amount to 132 days.

Now in setting cases for trial, it is necessary for the Court to predict as accurately as possible the length of time each case is expected to take, so that a rational calendar of cases can be established.[11] The predicted lengths of trial for the cases in the crash program were as follows:

Type of Case	*Number*	*Total Predicted Days of Trial Time Required*
Contract	27	49.25
Tort	40	95.25
Actions under Statutes	42	112.00
Real Estate	2	1.50
Total	111	258.00

Since the Court had predicted that the total number of trial days required for the cases in the crash program would amount to 258, it is evident that the Court could not possibly have completed its work if its predictions for the length of cases were correct and if all cases did in fact go to trial.

Such a massive discrepancy could be explained on several grounds. First, it might be argued that the Court did *not* expect that

[10] H. ZEISEL, H. KALVEN, & B. BUCHHOLZ, DELAY IN THE COURT 14 (1959).

[11] These predicted lengths of trial are determined during the course of pre-trial conferences, based on the evaluations of the attorneys and agreed to by the Court.

all the cases in its crash program would actually go to trial but rather that they would be settled before reaching the court or settled quickly after the trial began. Since this is in fact what happened and seems to be the common experience of the Court, we think it is likely that the expectation of settlement was an important element in explaining the Court's scheduling far more trial work than it could actually accomplish.

Second, it is possible that the Court had knowingly accepted overestimated trial times for the cases it had scheduled; and thus its apparent excessive work load could actually have been disposed of within the period of the crash program. The Court would need far less than the 258 days it had predicted — it could accomplish its duties in the 132 days available.

If we take the 32 cases actually tried, to get some information on this last point, we find that the Court had based its plans on the estimate that these cases would require a total of 77.5 days for their disposition. If we assume that a judge spends an average of 6 hours per day in the trial of cases, the 32 cases would have taken 465 hours to complete.[12] In fact, these 32 cases were disposed of in some 292 hours.

In other words, the Court overestimated the time needed for its trial work by a factor of about one and one-half — at least for those cases actually reaching the trial stage.[13]

It is true, of course, that the flow of trial work is not continuous and that a case which ends before its predicted half-day or full-day mark leaves an awkward gap of several hours or more about which little can be done as far as starting another case is concerned. It makes little sense, after all, to begin a case at three o'clock in the afternoon or to expect the parties to a case to present themselves before the Court at a moment's notice. Nonetheless, it appears likely that the predictions of length of trial were grossly inaccurate.

At the same time, the Court with its extra complement of judges could have completed its disposition of 32 cases by trial in about three and one-half weeks, even with these inaccuracies of prediction about length of trial, if the Court had not been faced with unexpected settlements for which no substitute cases could be found in time and which left large holes in the trial calendar.[14] Without the

[12] The number of hours per day a judge spends on trial work in the courtroom is highly variable, depending on the press of other duties, gaps in the trial calendar, local expectations about a "normal" working day, personal work habits, etc. On the whole, however, the calculation of one day being equivalent to approximately six hours spent in trial work on the average does not seem unreasonable. *Cf.* H. ZEISEL, H. KALVEN, & B. BUCHHOLZ, *supra* note 10, ch. 16, at 181-89.

[13] Of the 32 cases going to trial, only 4 cases took longer than expected.

[14] The Court was able to schedule 14 additional cases which had not been a part of the original planning for the crash program. Nine of these cases were disposed of before the program ended and involved a total of approximately 52 hours of trial time.

help of the additional judges, the 32 cases would have required about six weeks and two days for their disposal. On the other hand, if the Court had been more accurate in its predictions in the number of days required for each case, and again assuming the Court had not been left with gaps in its calendar by unexpected settlement, the 32 cases could have been disposed of in approximately two weeks and one day. Without the help of the additional judges, the Court would have needed four weeks and one day.

III. THE NEED FOR CONTINUED EXPERIMENTATION

The essential elements of the Colorado U.S. District Court's crash program, then, can be summarized as follows: (1) the Court attempted to eliminate 111 cases (about one-fifth of its backlog) with 132 judge-days in a six-week period; (2) about one-third of these cases were disposed of by trial and about two-thirds of these cases were settled out of court, either before or during the crash program; (3) approximately 50 judge-days were required for the disposal of cases by trial; (4) about 10 judge-days were used for the cases which had been added to the program;[15] and (5) about 72 judge-days were left vacant, either because of gaps in the trial calendar due to cases which had been settled or because trials took less time than expected.

Since the Court had reserved 18 judge-days for judicial duties other than trials, it would seem that the Court was left with a surplus of some 72 judge-days which was not used with full effectiveness — approximately the time of one judge working for about three months. The question we must face is whether the Court could have been more efficient in its operation.

There is, admittedly, no easy answer and any proposed solutions must rest on a series of assumptions rather than demonstrated fact. Let us assume, however, that 200 cases had been scheduled for trial. If the ratio of cases settled to cases tried had remained the same, approximately 130 cases would have been settled out of court and 70 cases would have gone to trial. If these 70 cases had required an average of 1.5 days for trial (the average trial time observed for cases in the crash program), slightly more than 100 judge-days would have been needed for their disposition. The number of cases eliminated from the backlog would almost have been doubled.

Such a calendar of cases might seem much too venturesome. If cases are not settled out of court as expected, the Court will face a flood of irate attorneys who have been assured of a trial but for

[15] *See* note 14 *supra.*

whom no judge is available. Similarly, if cases tried take longer than expected, the Court will find that its planned work exceeds its capabilities. But the creation of a court calendar *is* a gamble, and the administrators of the Court must strike a balance between being too daring and too cautious. The temptation, of course, is to err on the side of caution, since unused judge time is far less public, far less likely to arouse the criticism of attorneys who have been promised a trial which they do not get. Such caution, however, if carried too far, is all too likely to aggravate the problem we are trying to cure — namely, the problem of court congestion.

CONCLUSION

It is our opinion, then, that if more effective remedies are to be found for reducing the backlog of the Court, the Court must reconsider its calendaring of cases and be more willing to experiment. This does not mean that the Court needs to rush to extreme innovations; small, tentative changes can be introduced, their effects evaluated, and further changes fed into the system based on experience.

Three possibilities suggest themselves immediately. First, the prediction of length of trial should be made more accurate. This would require a careful examination of the factors which are now being used (perhaps on an intuitive basis) to estimate the length of trial, prolonged and systematic comparisons of estimates and reality, the discovery of new factors, and the creation of prediction formulas in which the factors could be given their appropriate weights. It may turn out that informed judgments, without the use of formulas, are a better device; but in that case, the element leading to the consistent overestimation of length of trial should be detected and eliminated.

Second, an effort should be made to determine more precisely which cases are most likely to settle out of court and which cases are most likely to go to trial. This would require the same sort of empirical study, using observed cases and extrapolating to the future. The determination could be rather crude, at least in the beginning; but it would then be possible to construct a more rational pool of cases scheduled to be tried in a given time period, since a better balance could be achieved between cases likely and unlikely to reach the trial stage. In any event, it seems quite possible that more cases could be scheduled for trial than is true at the present time, if the procedures of the crash program are similar to those usually used by the Court, on the expectation that the majority of these cases will not in fact need to be tried.

Both length of trial and settlement out of court might seem to be matters so filled with chance, so subject to imponderables, that

greater accuracy of prediction is impossible. We do not believe this to be so, however, and we believe that there are regularities to these events which can be discovered and used by the Court. There will remain, of course, some margin of error, but within this area of the unknown the Court could be less wary of scheduling cases which will have to be postponed. The discomfiture of attorneys, witnesses, and so on must be weighed against delays in trial; and the latter may be far more costly in the long run, in terms of the administration of justice.

Third, reserving the fifth day of the week for judicial duties other than trial work may be leading to a serious loss of the Court's efficiency, despite its apparent convenience for the judges. These judicial duties might better be performed in the gaps left by cases finished more quickly than expected or cases settled out of court so near their scheduled trial date that a substitute cannot be found. This point, however, is rather debatable since these nontrial duties may require large blocks of uninterrupted time.[16] The Chief Judge has indicated that he does not believe such a solution is workable, but the issue is worth examining more closely in light of the judges' experience with such matters and their most efficient habits of time management.

In short, the Colorado U.S. District Court, like any system of administration can, we think, benefit from self-analysis, research, and experimentation — and the willingness to take chances which is a means of survival for modern organizations. Some of these experiments must inevitably fail and the Court will be criticized. The ability to withstand such criticism is one portion of the courage needed to provide our society with the highest levels of justice.

[16] *See* Drucker, *How to Manage Your Time: Everybody's No. 1 Problem*, 233 HARPER'S, Dec. 1966, at 56. Finding the appropriate time for the writing of decisions, preliminary hearings, etc., may be no less difficult than the scheduling of trials.