# Bench Presence: Toward a More Complete Model of Federal District Court Productivity

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**Abstract**

This Article considers what it means for a federal district court to be productive, and how such productivity might be assessed. Previous studies have focused almost exclusively on the speed of case processing, equating a court's productivity (explicitly or implicitly) with the court's rate of docket clearance or a case's average time from filing to disposition. This thin definition of "productivity," however, is not consistent with either classical economic understandings of the term or common public expectations of the courts. In particular, analyzing the speed or efficiency of a court says nothing about whether the parties or the public view the adjudicative process as accurate, fair, transparent, and dignified.

We seek to bridge the disconnect between existing measures of court productivity and real-world expectations of the district courts by offering a more robust model of district court productivity that explicitly incorporates measures of accuracy and procedural fairness. We then introduce a new metric for procedural fairness called bench presence. Bench presence is a measure of the time that a district judge spends on the bench, presiding over the adjudication of issues in a public forum. Bench presence provides a rough but meaningful proxy for many components of procedural fairness, by quantitatively capturing the degree to which parties and the public are directly exposed to the judge's

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practices and procedural safeguards. It also refocuses the discussion of court productivity on the core role of the district judge: presiding over trials and open hearings.

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## I. INTRODUCTION

What makes a federal district court productive? Can a district court improve its productivity over time? And which district courts are the most productive today? The answers depend, of course, on how "productivity" is defined, but intuitively these questions are important. The ability of federal district courts to provide satisfactory forums for dispute resolution may influence the willingness of individuals to submit their disputes to the courts, which in turn may affect access to justice, the allocation of judicial resources, and overall public confidence in the judiciary. Understanding what makes federal district courts productive, and how that productivity can be sustained or improved, is essential to understanding the future of the federal courts as an institution.

Questions concerning district court productivity are also timely. After many years of efforts to measure aspects of the appellate process,[1]

1. Major recent symposia on this topic include the Duke Law Journal's Conference on Measuring Judges and Justice, held at Duke Law School in 2008, and the Florida State University Law Review's 2005 symposium on Empirical Measures of Judicial

researchers are increasingly turning their attention to the trial courts. For some scholars, the federal district courts provide a rich source of data by which to understand the mechanics of civil case processing.[2] For others, the district courts represent the next frontier for the study of decisionmaking by judges[3] or lawyers.[4] Providing a meaningful definition of court productivity and a meaningful way to measure that productivity may help inform (and even unify) these different strains of research. Moreover, the requisite conceptual tools of productivity measurement are already in place. Modern productivity theory evaluates public sector institutions both with respect to the quality of the services they provide and the efficiency with which they provide them. As highly recognizable public institutions, federal district courts need only adapt the roadmap used by other public sector entities to create the framework for their own comprehensive productivity assessment.

To date, however, a comprehensive analysis of the district courts has not emerged. Instead, court "productivity" studies focus nearly exclusively on timeliness measures, such as the time from case filing to disposition or the number of motions that are not resolved within six months. To be sure, these studies provide valuable insights into the efficiency of court services. But they are not truly *productivity* assessments insofar as they fail to also address the effectiveness or quality of those services. To deem a district court "productive" simply because it clears its docket expeditiously is to disregard a substantial component of the court's social and institutional role.

We seek to bridge the disconnect between existing analyses of court productivity and real-world expectations of the district courts by offering a more robust model of district court productivity that explicitly incorporates two broad measures of the quality of adjudication. These

Performance. *See* Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001, 1003 (2005) (describing the Florida State symposium); David F. Levi & Mitu Gulati, *"Only Connect": Toward a Unified Measurement Project*, 58 DUKE L.J. 1181, 1189 (2009) [hereinafter Levi & Gulati, *"Only Connect"*] (describing the Duke symposium).

2. *See, e.g.*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS (2009) [hereinafter CIVIL CASE PROCESSING].

3. *See, e.g.*, David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 699–700 (2007); Pauline T. Kim et al., *How Should We Study District Judge Decision-Making?*, 29 J.L. & POL'Y 83 (2009); David F. Levi & Mitu Gulati, *Judging Measures*, 77 UMKC L. REV. 381, 403–12 (2008) [hereinafter Levi & Gulati, *Judging Measures*]; Ahmed E. Taha, *Information and the Selection of Judges: A Comment on "A Tournament of Judges,"* 32 FLA. ST. U. L. REV. 1401 (2005).

4. *See, e.g.*, Christina L. Boyd et al., *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253 (2013).

measures are accuracy and procedural fairness. Accuracy considers the appropriateness of case outcomes, while procedural fairness embraces the expectations of due process. We situate the model in the specific context of the federal district court—which is first and foremost a *trial* court—explaining how adjudicative quality should be measured in light of the district court's unique societal role.

After describing the full model, we turn specifically to the procedural fairness component of adjudicative quality, and introduce a new metric called bench presence. Bench presence is a measure of the time that a federal district judge spends on the bench, presiding over the adjudication of issues in an open forum. Bench presence provides a rough but meaningful proxy for procedural fairness by quantitatively capturing the degree to which parties and the public are directly exposed to the judge's practices and procedural safeguards. It also refocuses the discussion of district court performance on the core role of the district judge: presiding over trials and open hearings. Moreover, bench presence is immediately measurable, through data already collected by the Administrative Office of the U.S. Courts.

The primary aim of this Article is to provide the context and intellectual foundation for bench presence as an essential component of district court productivity. We further aim to explain how bench presence fits comfortably within both traditional notions of the district judge's role and responsibility and modern understandings of court measurement. Part II examines previous attempts to measure and define district court productivity, and explains where and how these efforts have fallen short. In particular, we describe how concerns about docket efficiency came to overshadow both the district judge's traditional role and the measurement of adjudicative quality. In Part III, we offer a more complete model of district court productivity, which draws on modern lessons of productivity measurement for public sector services. Our model brings the vision of district court productivity up to date by including express measures of procedural fairness and outcome accuracy to assess the overall quality of the district court's services.

We formally introduce bench presence in Part IV. First, we explore the elements of procedural fairness in district court adjudication, and describe how those elements are inextricably intertwined with the district judge's traditional courtroom role. We then consider the limitations of bench presence as a proxy for procedural fairness, but also highlight its considerable benefits. We close by reflecting on ways in which a general bench presence measure might be refined and sharpened to create a more precise metric.

Ultimately, we seek to redirect the discussion of district court productivity back toward the traditional (and still central) courtroom role

of the district judge. Along the way, we hope to alleviate a procedural critique of court measurement efforts. Previous attempts to measure judicial activity have been criticized because they were conducted primarily by non-judges who do not (and indeed cannot) have a complete appreciation for the nuances of the judicial process.[5] In response, Dean David Levi (a former district judge himself) and Professor Mitu Gulati have encouraged judges and academics to work together to develop judicial measures that both accurately reflect the judicial process and offer meaningful information to court observers.[6] We take up that invitation here in the hope that our shared interests and individual expertise will help bridge some of the gaps between the judiciary and the academy, ultimately to the benefit of all users and observers of the judicial system.[7]

## II. DEFINING AND REDEFINING DISTRICT COURT PRODUCTIVITY

The measurement of "productivity" in government services began in earnest in the United States in the early twentieth century,[8] and the concept has been highly developed and refined over time. Modern measures of public sector productivity attempt to account both for the

5. *See, e.g.*, Harry T. Edwards, *The Effects of Collegiality on Judicial Decision-Making*, 151 U. PA. L. REV. 1639, 1656 (2003); Kim et al., *supra* note 3, at 84–86; Levi & Gulati, *"Only Connect," supra* note 1, at 1188–89; Marin K. Levy, Kate Stith & Jose Cabranes, *The Costs of Judging Judges by the Numbers*, 28 YALE L. & POL'Y REV. 313, 323 (2010).

6. Levi & Gulati, *"Only Connect," supra* note 1, at 1188–89; Levi & Gulati, *Judging Measures*, *supra* note 3, at 388–89.

7. Collectively, we both share a deep commitment to open courthouses, jury trials, and a better understanding of the unique role of the federal district courts. Individually, Judge Young brings more than a quarter-century of experience on the federal bench, as well as state trial court experience and a wealth of writings about the district judge's roles and responsibilities from an insider's perspective. *See, e.g.*, WILLIAM G. YOUNG, REFLECTIONS OF A TRIAL JUDGE 174–84, 271–86 (1998) [hereinafter YOUNG, REFLECTIONS]; Hon. William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT'L & COMP. L. REV. 305 (2009) [hereinafter Young, *Lament*]; William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 30; Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006) [hereinafter Young, *Vanishing Trials*]. Professor Singer brings an established interest in the quantitative analyses of court operations, as well as the sociological dimensions of judicial evaluation. *See, e.g.*, Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7 (2008) [hereinafter Kourlis & Singer, *Performance Evaluation*]; Rebecca Love Kourlis & Jordan M. Singer, *Managing to the Goals of Rule 1*, 4 FED. CTS. L. REV. 1 (2009); Jordan M. Singer, *The Mind of the Judicial Voter*, 2011 MICH. ST. L. REV. 1443 (2012).

8. *See* Geert Bouckaert, *The History of the Productivity Movement*, 14 PUB. PRODUCTIVITY & MGMT. REV. 53, 53–57 (1990); Ronald C. Nyhan & Herbert A. Marlowe, Jr., *Performance Measurement in the Public Sector: Challenges and Opportunities*, 18 PUB. PRODUCTIVITY & MGMT. REV. 333, 334 (1995).

quantity of services provided by the government institution (an efficiency measure) and the quality of those services (an effectiveness measure). Court productivity studies, however, have not caught up to modern methods. They continue to focus exclusively on the efficiency of case resolution, analyzing criteria such as time from filing to disposition or the number of cases dismissed without court action, without asking whether the quality of these dispositions is satisfactory, or whether that quality can be improved. Indeed, there has been very little discussion in court productivity studies as to what the quality of adjudication even means. Such limitations were understandable at the genesis of court productivity studies in the 1970s, when an efficiency focus was the measurement norm. But much has changed in productivity measurement over the past four decades. It is time to develop a more robust model of court productivity that better reflects the multifaceted nature of the district courts' work.

### *A. Evolving Understandings of Public Sector Productivity*

From its origins in private sector manufacturing, productivity was initially understood to measure how efficiently products could be made given the available resources. As one commentator has explained, "[p]roductivity generally [was] defined as a ratio relating output (goods and services) in real terms to one or more inputs (such as labor, capital, energy) associated with that output."[9] Accordingly, manufacturing productivity was concerned with relative levels of output and input: if Factory A produced twice as many widgets as Factory B given the same amount of labor and materials, Factory A was twice as productive, all else being equal. Similarly, if Factory A produced the same number of widgets as Factory B at half the cost, Factory A was also twice as productive, all else being equal. Deliberately excluded from this analysis was any evaluation of the quality of the widgets being produced. "In traditional manufacturing," one commentator noted, such quality assessments "can be eliminated from the productivity function because quality is considered to remain constant."[10]

9. Jerome A. Mark, *Progress in Measuring Productivity in Government*, 95 MONTHLY LAB. REV. 3, 4 (Dec. 1972). Within this general definition, there are numerous variations, ranging from labor productivity (real output per hour of work) to total factor productivity (real output per unit of all inputs). *See* CHARLES STEINDEL & KEVIN J. STIROH, PRODUCTIVITY: WHAT IS IT, AND WHY DO WE CARE ABOUT IT?, FEDERAL RESERVE BANK OF NEW YORK STAFF REPORT NO. 122, at 1 (2006).

10. Christian Gronroos & Katri Ojasalo, *Service Productivity: Towards a Conceptualization of the Transformation of Inputs into Economic Results in Services*, 57 J. BUS. RES. 414, 417 (2004). Productivity theory eventually did add a quality component for manufacturing, and the concept of "total quality management," or TQM, was

This simple manufacturing model eventually migrated to the private service sector, and along the way gained several layers of sophistication and nuance. Most important was the realization that the quality of services could *not* be assumed to remain constant; rather, "[m]any services are intangible and consist of a bundle of services, any of which can be the source of a quality change."[11] This meant, in effect, that a service firm could improve its productivity not only by increasing the quantity of its services provided over time, but also by improving the quality of those services.[12] Quality could be measured by comparing the expected level of service (as defined by both the internal expectations of the service provider and the provider's customer base) to the actual level of service provided.[13]

The subsequent application of productivity analysis to government services added yet another level of refinement and understanding. At first, public sector measurement essentially mimicked private sector methods.[14] By the 1970s, however, researchers came to recognize that the quality of government services must be based not just on a comparison with internal or customer expectations, but also on a comparison with public policy goals.[15] Put another way, the effectiveness of government services must be assessed not only through the lens of customer satisfaction, but also by conformity with enabling legislation, regulations, constitutional provisions, and other public policy expectations set out by legal documents and public officials.[16] For example, the statute establishing the New York State Housing Finance Agency (HFA) articulated a public policy goal of providing moderate-interest loans and tax incentives to low- and middle-income families to help them secure housing in urban areas and to stem the state's urban

prevalent in manufacturing by the 1990s. *See, e.g.*, James E. Swiss, *Adapting Total Quality Management (TQM) to Government*, 52 PUB. ADMIN. REV. 356, 357–58 (1992).

11. Dennis Fixler & Kimberly D. Zieschang, *Incorporating Ancillary Measures of Process and Quality Change into a Superlative Productivity Index*, 2 J. PRODUCTIVITY ANALYSIS 245, 245 (1992).

12. *See id.*; *see also* Gronroos & Ojaslo, *supra* note 10, at 414 (noting that the quality measure considers not just the quality of the service process itself, but also how customers perceive its outcome).

13. *See, e.g.*, A. Parasuraman, Valarie A. Zeithaml & Leonard L. Berry, *A Conceptual Model of Service Quality and Its Implications for Future Research*, 49 J. MARKETING 41, 42 (1985); Mik Wisniewski & Mike Donnelly, *Measuring Service Quality in the Public Sector: The Potential for SERVQUAL*, 7 TOTAL QUALITY MGMT. 357, 358 (1996).

14. *See* Bouckaert, *supra* note 8, at 56–57 (describing federal government productivity measurement efforts in the 1920s and 1930s).

15. *See* Gordon T. Yamada, *Improving Management Effectiveness in the Federal Government*, 32 PUB. ADMIN. REV. 764, 764 (1972).

16. *See generally* Timothy P. Hedley, *Measuring Public Sector Effectiveness Using Private Sector Methods*, 21 PUB. PRODUCTIVITY & MGMT. REV. 251 (1992).

decline.[17] A quality assessment of the HFA's services—and therefore an assessment of its overall productivity—must account not only for its ability to provide loans in a financially responsible manner, but also for its ability to promote the legislative intent of urban regeneration.[18]

From the perspective of productivity analysis, what is true of state agencies is also true of federal courts. Courts are public institutions that provide a public service: the resolution, through adjudication, of disputes between citizens, or between citizens and the state.[19] The productivity of district courts logically must take into account both their efficiency in providing adjudicative services and the overall quality of those services—as measured by litigant and public satisfaction, internal benchmarks, and constitutional and statutory requirements.

### *B. A Static Understanding of Court Productivity*

Unfortunately, the development of productivity analysis for the courts has not kept pace with that of other public sector entities. Rather, district court analysis continues to follow a forty-year-old model in which productivity is defined and measured solely as a function of how efficiently cases are brought to resolution.[20] This model gained prominence under Warren Burger, who made time to disposition and docket control a front-line issue almost immediately upon becoming Chief Justice in 1969.[21] In response to the Chief Justice's directives, researchers at the Federal Judicial Center (FJC) initiated the District Court Studies Project, "a long-range effort . . . to assist the work of the United States district courts," in the 1970s.[22] That project produced a

17. *See id.* at 253.

18. *Id.* at 257.

19. *See* Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 990 (2008).

20. Court productivity measurement seems to have originated as part of a larger surge of interest in measuring federal government productivity during the Nixon Administration. *See* Sig Gissler, *Productivity in the Public Sector: A Summary of a Wingspread Symposium*, 32 PUB. ADMIN. REV. 840 (1972) (describing a major conference on public sector productivity in May 1972); Yamada, *supra* note 15, at 765–67 (describing the 1970 creation of the Office of Management and Budget (OMB), and the expansion of an OMB "cost and management improvement" circular); Elmer B. Staats, Comptroller General of the U.S., Measuring and Enhancing Federal Productivity—A Progress Report, Remarks Before the Conference Board (May 23, 1973) (describing a "joint legislative-executive branch effort" to gauge federal government productivity in the early 1970s).

21. *See* Warren E. Burger, *Annual Report on the State of the Judiciary*, 3 AM. J. TRIAL ADVOC. 63, 64, 68 (1979) (equating judicial productivity with the rate of dispositions per judgeship); Warren E. Burger, *State of the Federal Judiciary*, 14 ST. LOUIS U. L.J. 649, 654–55 (1970).

22. STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS, at ix (1977) [hereinafter FLANDERS, CASE MANAGEMENT].

number of reports, including Steven Flanders's seminal 1977 study, *Case Management and Court Management in United States District Courts*.[23] The Flanders report examined (among other things) the "speed" and "productivity" of civil case processing in two dozen metropolitan district courts, as well as a handful of smaller districts.[24] "Speed" was measured by the number of months that the median civil case and the median criminal defendant remained on a court's docket,[25] while "productivity" was measured as a function of terminations per judgeship and weighted filings per deputy clerk in each court.[26] While the author recognized that "these measures incompletely represent[ed] productivity,"[27] the report retained this limited definition throughout. Indeed, the connection between court "productivity" on the one hand, and the speed and rate of case disposition on the other, was explicit. As Flanders explained, "our goal is to identify the differences between fast courts (those that process cases quickly) and slow courts (those that process cases slowly), and between courts with high disposition rates and courts with low disposition rates."[28]

Subsequent FJC studies similarly drew a direct connection between "productivity" and the expedient termination of the cases on a court's docket. In 1978 and 1980, the FJC released two additional reports flowing from the District Court Studies Project, the first focusing on judicial control of discovery[29] and the second on judicial control of motion practice.[30] Both studies expressly relied upon some of the same data, as well as the identical understanding of "productivity," that was set forth in the Flanders report.[31] Meanwhile, FJC researchers also began a lengthy series of in-depth studies to establish and refine a system of case weights in federal district courts.[32] Again, the emphasis was efficiency;

23. *See generally id.*
24. *Id.* at 1–4.
25. *Id.* at 4.
26. *Id.*
27. FLANDERS, CASE MANAGEMENT, *supra* note 22, at 4.
28. *Id.* at 1.
29. PAUL R. CONNOLLY, EDITH A. HOLLEMAN & MICHAEL J. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978).
30. PAUL R. CONNOLLY & PATRICIA A. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980).
31. *See id.* at 59 app. A, 62 tbl.16; CONNOLLY ET AL., *supra* note 29, at 85 app. A, 87 fig.7. One of the co-authors of both reports later wrote an article expressly connecting court productivity with factors such as disposition rate, a judge's efficiency in case management and calendaring, and docket backlog. *See* Paul R.J. Connolly & Saundra Smith, *How Vermont Is Achieving a Delay Free Docket: The Link Between Judicial Productivity and Case Management*, 23 JUDGES J. 37, 38 (1984).
32. *E.g.*, TERENCE DUNGWORTH ET AL., ASSESSING THE FEASIBILITY OF CASE WEIGHTING AS A METHOD OF DETERMINING JUDICIAL WORK LOAD (1978); TERENCE DUNGWORTH, RESEARCH DESIGN FOR A PERMANENT EVENT-BASED CASE-WEIGHTING

an understanding of how dockets differ across courts and how courts manage those dockets was deemed relevant to the allocation of judicial resources and the assignment of judicial officers.[33]

The identical framework influenced approaches to federal district court productivity into the 1980s. Scholars and policymakers in this era continued to view federal district court productivity as a function of the "rate of case disposition per judge."[34] In the late 1980s, then-Senator Joseph Biden initiated the Task Force on Civil Justice Reform, which led to a Brookings Institution study and recommendations for targeting cost and delay in the civil justice system.[35] The Civil Justice Reform Act of 1990 (CJRA) directly implemented many of the Brookings report's recommendations, establishing pilot projects and reporting requirements to move cases through federal district courts more rapidly.[36]

The Clinton Administration adopted the same understanding of court productivity in the 1990s. Its National Performance Review in 1993 expressly complimented the Judicial Branch for "dramatically improved productivity," noting that cases were moving through the system faster, in part due to the increased use of alternative dispute resolution and the adoption of more advanced computer technology.[37] The FJC similarly conducted a survey of Chief District Judges in 1996 that focused heavily on methods of dealing with the "chronically slow judge,"[38] as well as ascertaining ways that Chief Judges can "ensure that cases move expeditiously in their districts."[39] As docket data became more widely available to the public after the turn of the century, independent researchers also conducted studies to measure cost and delay in district courts and among individual district judges.[40]

The conflation of productivity and efficiency has not been limited to federal district courts. Concurrent with the District Court Studies

SYSTEM FOR THE FEDERAL JUDICIARY (1980); STEVEN FLANDERS, THE 1979 FEDERAL DISTRICT COURT TIME STUDY (1980) [hereinafter FLANDERS, TIME STUDY].

33. *See* FLANDERS, TIME STUDY, *supra* note 32, at 2.

34. Edward A. Tamm & Paul C. Reardon, *Warren E. Burger and the Administration of Justice*, 1981 BYU L. REV. 447, 466; *see also* David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 78 (1981) (equating court productivity with efficiency and the reduction of court congestion).

35. BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION, REPORT OF A TASK FORCE (1989).

36. *See* 28 U.S.C. §§ 471–82 (2006).

37. A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1626, 1637 n.34 (1995).

38. DONNA STEINSTRA, CHIEF DISTRICT JUDGES' MANAGEMENT OF COURT CASELOADS: A SURVEY BY THE FEDERAL JUDICIAL CENTER, APRIL 1996, at 1–3 (1998).

39. *Id.* at 3.

40. *See generally, e.g.*, CIVIL CASE PROCESSING, *supra* note 2.

Project, the National Center for State Courts engaged in an extensive study of state trial courts, focusing exclusively on the causes of delay in those courts.[41] Subsequent studies of state trial courts have similarly confined their analysis to the termination rate of cases or similar measures of efficiency, such as cost of litigation, courtroom use, time to disposition, or the number of outstanding cases or motions.[42] Internationally, judicial productivity has been linked to efficiency measures in studies of other common law countries[43] and by the World Bank.[44] Across time and across courts, "productivity" has commonly been understood as a function of how quickly (and sometimes how cost-effectively) courts resolve the cases on their dockets, and little more.

The longstanding focus of researchers on court efficiency is understandable. From a practical perspective, data on time to disposition and termination rates are relatively objective and easy to obtain.[45] Moreover, systemic efficiency is one of the core values of American justice. The Supreme Court has identified the speedy criminal trial as "one of the most basic rights preserved by our Constitution,"[46] an observation further reflected in modern legislation[47] and procedural

41. *See* THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1979).

42. *E.g.*, PATRICIA A. EBENER ET AL., COURT EFFORTS TO REDUCE DELAY: A NATIONAL INVENTORY (1981); JOHN GOERDT ET AL., EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987 (1989); BARRY MAHONEY ET AL., CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS (1988).

43. *See* Michael Beenstock & Yoel Haitovsky, *Does the Appointment of Judges Increase the Output of the Judiciary?*, 24 INT'L REV. L. & ECON. 351, 351 (2004) (measuring "productivity" by completed cases per judge in Israel); J.J. Spigelman, *Judicial Accountability and Performance Indicators*, 21 CIV. JUST. Q. 18, 22 (2002) (discussing the links among court "productivity," efficiency measures, and judicial salaries in Australia); Stefan Voigt, *On the Optimal Number of Courts*, 32 INT'L REV. L. & ECON. 49, 49–50 (2012) (using "productivity" as the number of cases resolved in a particular time frame).

44. *See* MARIA DAKOLIAS, WORLD BANK, COURT PERFORMANCE AROUND THE WORLD: A COMPARATIVE PERSPECTIVE 7 (World Bank Technical Paper No. 430, 1999) ("Another reasonable indication of system efficiency is found in the time it takes for cases to be resolved. The clearance rate—the percentage of new cases resolved each year—measures court productivity in dispute resolution.").

45. Simeon E. Gordon, *Measurement of Court Delay*, 3 JUST. SYS. J. 322, 322 (1977). Today, most federal case dockets and basic data about filings and case dispositions are available to the public electronically, providing a rich source of relatively reliable data to those who know about it and have the financial capability to access it.

46. Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

47. *See* Speedy Trial Act, 18 U.S.C. § 3161(b), (c)(1) (2006 & Supp. 2008) (establishing, respectively, a thirty-day deadline for bringing an indictment against a defendant and a seventy-day deadline for bringing a defendant to trial in federal criminal proceedings, subject to limited exceptions).

rules,[48] not to mention nearly one thousand years of history.[49] In civil cases as well, the goals of expedient and cost-effective litigation are enshrined in legislation,[50] court rules,[51] and internal court procedures.[52] Finally, efficiency goals are generally concrete and attainable. As early as the 1950s, studies suggested that delays in civil cases were preventable through careful caseflow management,[53] and by the 1980s a substantial and rapidly developing body of literature had given rise to a culture of "managing to reduce delay."[54] Indeed, a variety of case studies on caseflow management have identified particular practices that have been used to clear backlogged dockets[55] or decrease overall disposition times.[56] All this is to say that efficiency in case processing is

48. FED. R. CRIM. P. 48(b) (granting the district judge the discretion to dismiss criminal cases that are not brought to trial promptly).

49. The English favored the speedy criminal trial as far back as the Assize of Clarendon (1166), and preserved it more formally in the Magna Carta and (later) in various state constitutions. *See* Alfredo Garcia, *Speedy Trial Swift Justice: Full-Fledged Right or "Second-Class Citizen?"*, 21 SW. U. L. REV. 31, 34 (1992); *see also* Petition of Provoo, 17 F.R.D. 183, 196 (D. Md. 1955) (citing the Magna Carta: "To no one will we sell, to no one deny or delay, right or justice").

50. The core legislation in the CJRA required each federal district court to develop a civil expense and delay reduction plan, in order "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." 28 U.S.C. § 471 (2006).

51. *See* FED. R. CIV. P. 1 (stating that the entire body of civil rules "should be construed and administered to secure the just, speedy, and inexpensive resolution of every action and proceeding").

52. When the relevant provisions of the CJRA expired in 1996, the Judicial Conference of the United States adopted its own eight-part "alternative cost and delay reduction program," which included a commitment both to case management education and to encouraging the setting of early and firm trial dates. JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT: ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY ASSESSMENT OF PRINCIPLES, GUIDELINES & TECHNIQUES 3–4 (1997).

53. *See* HANS ZEISEL, HARRY KALVEN, JR. & BERNARD BUCHHOLZ, DELAY IN THE COURT (1959).

54. *See, e.g.*, CHURCH ET AL., *supra* note 41; CONNOLLY ET AL., *supra* note 29; CONNOLLY & LOMBARD, *supra* note 30; TERENCE DUNGWORTH & NICHOLAS M. PACE, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990); EBENER ET AL., *supra* note 42; FLANDERS, CASE MANAGEMENT, *supra* note 22; GOERDT ET AL., *supra* note 42; MAHONEY ET AL., *supra* note 42; LARRY L. SIPES ET AL., MANAGING TO REDUCE DELAY (1980); Ernest C. Friesen et al., *Justice in Felony Courts: A Prescription to Control Delay*, 2 WHITTIER L. REV. 7 (1979); Joel B. Grossman et al., *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86 (1981).

55. Roger W. Waybright, *An Experiment in Justice Without Delay*, 52 JUDICATURE 334 (1969); C. William Kraft, III, Comment, *The Accelerated Civil Jury Trial Program in the District Court for the Eastern District of Pennsylvania*, 13 VILL. L. REV. 137 (1967).

56. *See, e.g.*, Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445 (1992).

indeed worthy of attention, and worthy of measurement. It is an important *component* of productivity—but it is only one component.

### *C. The Limitations of Efficiency Analysis*

Assessing district court productivity purely by the rate or speed of case disposition—what we might call the thin view of productivity—is problematic for several reasons. Most obviously, efficiency-only measures of court productivity fail to account for the quality of justice that results from adjudication. The timeliness of a resolution certainly matters, but so do the accuracy of that resolution and the process used to reach it. Indeed, these latter values are deeply engrained in both our constitutional structure and social expectation. Criminal defendants and civil litigants alike anticipate that they will be able to tell their story to an unbiased judge; will be treated in a dignified way and on equal footing with opposing parties; will receive a timely decision that substantially accords with the relevant facts and applicable law; and will receive a thoughtful and reasoned explanation for that decision. For this reason, some scholars have identified efficiency, accuracy, and procedural fairness collectively as the three central values of American adjudication.[57] Because the district court is tasked with promoting and protecting these values, and because they are deeply interwoven, any comprehensive measure of court productivity must take them all into account. In this respect, current measures of court productivity fall short.[58]

Focusing purely on efficiency metrics also discounts the role and responsibility of individual district judges in shepherding cases through the adjudicative process. In contrast to some government agencies in which workers have little discretion or room for variation in performing

57. *See, e.g.*, Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295, 296–97 (1995); STEVE LEBEN, CONSIDERING PROCEDURAL-FAIRNESS CONCEPTS IN THE COURTS OF UTAH 2 (Sept. 2011), *available at* http://bit.ly/155itin.

58. Indeed, some researchers have candidly acknowledged the shortcomings of a pure efficiency analysis, and encouraged the inclusion of qualitative issues in future studies. *See, e.g.*, DAKOLIAS, *supra* note 44, at 5; FLANDERS, CASE MANAGEMENT, *supra* note 22. At least one study has openly acknowledged that equating productivity with case dispositions "ignores considerations of the fairness or quality of the adjudicatory process." Kenneth M. Kaufman, Note, *The All-Purpose Parts in the Queens Criminal Court: An Experiment in Trial Docket Administration*, 80 YALE L.J. 1637, 1657 n.60 (1971). That study nevertheless did equate productivity with efficiency, even deeming the rate of case disposition a "superior index of the court system's productivity." *Id.* at 1657.

their duties,[59] federal district judges are high-skill knowledge workers who are afforded the discretion to select their own tasks (or the order of their tasks) and whose work is multidimensional.[60] District judges today are expected to take on a wide (and ever-expanding) variety of day-to-day tasks: presiding at trial; conducting evidentiary hearings, motion hearings, and arraignments; hearing and assessing plea bargains; sentencing criminal offenders; deciding pretrial and trial motions; occasionally making findings of fact; issuing clearly written and organized opinions and orders; conducting scheduling and status conferences; promoting settlement and mediation; certifying classes for litigation and settlement; approving certain settlement and consent agreements; supervising and monitoring compliance with pre-judgment injunctive relief and post-judgment orders; sanctioning attorneys and parties where warranted; managing multidistrict and other complex litigation; addressing administrative matters; and taking on professional, academic, and community responsibilities. The expansion of these day-to-day tasks in recent decades has been dramatic; many tasks (such as civil case management and management of public law litigation) would have been virtually unknown to a federal district judge in the 1950s.[61]

As a result of this expansion and variation in tasks, judges—like other knowledge workers—must engage in continuous learning and innovation.[62] Accordingly, the quality of a district court's work takes on particular importance. One leading scholar has even suggested that for knowledge workers, the importance of work quality dwarfs that of quantity:

59. Such agencies include "enterprise services [whose] tangible outputs [are] relatively easy to measure," like the postal service (pieces of mail delivered) and the Tennessee Valley Authority (kilowatthours of electricity sold). Donald Fisk & Darlene Forte, *The Federal Productivity Management Program: Final Results*, 120 MONTHLY LAB. REV. 19, 20 (May 1997).

60. *See* David S. Abrams & Albert Yoon, Understanding High Skill Worker Productivity Using Random Case Assignment in a Public Defender's Office 2–3 (Nov. 2007) (unpublished manuscript), *available at* http://bit.ly/166tf7W.

61. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (noting that "the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation"); Patrick Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1422 (2002) ("To my eyes, the federal trial judge has over the last half century been the single most important person in the system, demanding the widest range of skills and training."); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 536 (1986) [hereinafter Resnik, *Failing Faith*].

62. *See* Peter F. Drucker, *Knowledge-Worker Productivity: The Biggest Challenge*, 41 CAL. MGMT. REV. 79, 84 (1999).

> In most knowledge work, quality is not a minimum and a restraint. Quality is the essence of the output. In judging the performance of a teacher, we do not ask how many students there can be in his or her class. We ask how many students learn anything—and that's a quality question. In appraising the performance of a medical laboratory, the question of how many tests it can run through its machines is quite secondary to the question of how many tests [sic] results are valid and reliable. This is true even for the work of the file clerk.
>
> Productivity of knowledge work therefore has to aim first at obtaining quality—and not minimum quality but optimum if not maximum quality. Only then can one ask: "What is the volume, the quantity of work?"[63]

Emphasizing quantity or speed of case processing at the district court level at the expense of quality judicial performance, then, unintentionally tarnishes both measures. Better productivity studies should attempt to account for the knowledge work of the judge and the quality of the resulting justice.

Finally, the thin view of court productivity disregards the unique societal role that the district courts play as a public forum for dispute resolution in the federal system. The federal district courts are *trial* courts, and their legitimacy is rooted in district judges' capacity and willingness to preside over legal disputes in an open courtroom. Public trials are the hallmark of open court adjudication, but many other public proceedings—evidentiary hearings, motion hearings, arraignments, sentencing, even scheduling conferences—also fall within the traditional, essential role of the district judge. An undisciplined mandate to remove cases from the docket as quickly and cheaply as possible may diminish (or even displace) this traditional role, and ultimately weakens the district courts' institutional legitimacy.

We can do better. A comprehensive analysis of federal district court productivity must transcend pure efficiency measures and account as well for the court's unique role as a public forum for dispute resolution and its ability to provide accurate results and a visibly fair process for all parties. Adding in these other pieces presents the opportunity for a much fuller understanding of what it means for a district court to be productive—an understanding that is more consistent with prevailing economic definitions of productivity, constitutional guarantees, and public expectations of the judicial system.

63. *Id.*

## III. FORMULATING A MORE COMPREHENSIVE MODEL

### *A. Shared Expectations About the Adjudicative Process*

Court productivity assessments cry out for measurements of adjudicative quality. But how should such quality be measured? The model used by other public entities suggests an answer. The quality of a court's services may be determined by comparing those services to three sets of expectations: those of employees (judges and court staff), customers (lawyers, litigants, jurors, and other current and potential court users, including the general public), and policymakers (as enshrined in legislation, rules, and constitutional text). At a granular level, this seems to be an overwhelming task: each of these groups (and individuals within the groups) may differ somewhat in their outlook and priorities, and it is not possible to quantify the extent to which one group's expectations should be given preference over another.[64] At a higher level of abstraction, however, two significant commonalities emerge. Specifically, regardless of their social or economic status or role in the court system, Americans expect district court adjudication to feature both a fair outcome and a fair process.[65] Fair outcomes mean that both fact-finding and law application are objectively accurate (or as accurate as possible given the limitations of human cognition).[66] Fair procedures mean that the processes employed to reach case outcomes comport with due process of law and sociological expectations of fair process.[67] These two values—accuracy and procedural fairness—together provide a framework for assessing the quality of district court services.

The importance of accuracy is plain. As more than one commentator has observed, "[a]ccuracy is a central, if not the central, value of adjudication."[68] Accurate fact-finding and accurate application

64. *See* Wisniewski & Donnelly, *supra* note 13, at 364.

65. *See, e.g.*, *Justice at Stake Frequency Questionnaire*, GREENBERG QUINLAN ROSNER RESEARCH INC., at Q36–45 (Oct. 30–Nov. 7, 2001), http://bit.ly/15EDEKL (finding that respondents, constituting 1000 registered voters, believed that "making impartial decisions" and "ensuring fairness under law" were among the most important responsibilities of courts and judges).

66. *See, e.g.*, Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19–26 (2011) (discussing cognitive and psychological challenges to the objective review of facts); Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 837–40 (2011) (noting cognitive challenges in determining the accuracy of witness credibility).

67. *See infra* Part IV.

68. Daniel R. Ortiz, *Neoactuarialism: Comment on Kaplow*, 23 J. LEGAL STUD. 403, 403 (1994). *See also* Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 1 (1994) (arguing that "[t]he degree of accuracy is the central concern of adjudication").

of the law have long been cherished for their connection to substantive justice and fairness.[69] Indeed, without accuracy, "the adjudication of claims on their substantive merits arguably possesses little societal value."[70] The Supreme Court has emphasized factual accuracy as a central concern of procedural due process,[71] and the Court has noted that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."[72]

Accuracy is important not just for the sake of corrective justice, but also for its significant economic and deterrence benefits. Accurate findings on liability may deter unlawful behavior because they increase the likelihood that the guilty are sanctioned and decrease the likelihood that the truly innocent are punished—thereby making harmful acts less attractive and harmless acts more attractive.[73] Similarly, a court's commitment to an accurate finding of civil damages provides an incentive for would-be tortfeasors, contract breachers, and the like to internalize more precisely the level of harm they would create before engaging in unlawful behavior.[74] Accuracy also has ongoing economic relevance to the adjudication of future entitlements, and past acts that govern future conduct.[75] Finally, accurate resolutions—or at least those believed to be accurate—strengthen the court's legitimacy in the eyes of the litigants and the public at large.[76]

69. *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 595–98 (1993) (explaining that accuracy is a dominant consideration regardless of whether one's vision of adjudication is based primarily on utilitarian considerations or individual rights); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 382 (1994); Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 774 (1974); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244–52 (2004) (discussing the accuracy model of procedural justice).

70. Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 618 (2008).

71. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (developing a three-factor balancing test to determine whether a particular procedure violates due process, the second factor of which is "the risk of an erroneous deprivation of [the plaintiff's private] interest through the procedures used"). *See also* Ronald J. Allen, Alexia Brunet & Susan Spies Roth, *An External Perspective on the Nature of Noneconomic Compensatory Damages and Their Regulation*, 56 DEPAUL L. REV. 1249, 1265–70 (2007) (collecting subsequent cases).

72. Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

73. *See* Kaplow, *supra* note 69, at 348; Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1483 (1999).

74. *See* Kaplow, *supra* note 69, at 316; *see also* Ortiz, *supra* note 68, at 409.

75. *See* Kaplow, *supra* note 69, at 369.

76. *See id.* at 382. At least one study further suggests that the perception that the court uses accurate procedures may enhance compliance with the court's final ruling. *See*

The other core value of adjudication, procedural justice,[77] has deep roots in moral philosophy[78] and the public imagination. Indeed, the sense that those engaged in corrective justice must "play by the rules" pervades our everyday lives. Strongly held beliefs that a decision is improper merely because it bypasses established procedural conventions have been observed in non-courtroom contexts such as the employer-employee relationship,[79] controlled experiments with student volunteers,[80] and even in interactions between very young children and their parents.[81]

In legal matters, procedural justice has special resonance. Although the word "fairness" is not found in the Constitution (and the term is of relatively recent vintage in constitutional jurisprudence),[82] requirements of fair process nevertheless appear throughout the constitutional text. The Fifth and Fourteenth Amendments mandate that no person shall be deprived of life, liberty, or property without due process of law,[83] and the Sixth Amendment's guarantees of a speedy and public trial, confrontation of adverse witnesses, and the assistance of counsel[84] all ensure that a criminal defendant may observe and participate in all critical stages of the proceedings against him.[85] Moreover, "due process of law" itself has long been understood to include guarantees of notice,[86]

Norman G. Poythress, *Procedural Preferences, Perceptions of Fairness, and Compliance with Outcomes*, 18 LAW & HUM. BEHAV. 361, 374 (1994).

77. Academic theorists have drawn some distinctions between "procedural fairness" and "procedural justice," but for our purposes the terms may be used interchangeably. *See* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 172 (2005) (adopting the same approach).

78. The belief that legal outcomes must not only be accurate and efficient, but also procedurally just, has influenced theorists from Aristotle to Rawls. For an illuminating overview, see Solum, *supra* note 69, at 238–40.

79. *See* Phyllis A. Seigel et al., *The Moderating Influence of Procedural Fairness on the Relationship Between Work-Life Conflict and Organizational Commitment*, 90 J. APPLIED PSYCHOL. 13, 20 (2005).

80. *See* John Thibault et al., *Procedural Justice as Fairness*, 26 STAN. L. REV. 1271 (1974).

81. *See* Laura J. Gold et al., *Children's Perceptions of Procedural Justice*, 55 CHILD DEV. 1752 (1984).

82. *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 645–47 (2011) [hereinafter Resnik, *Compared to What?*].

83. U.S. CONST. amends. V, XIV.

84. *Id*. amend. VI.

85. *See* FED. R. CRIM. P. 43(a) (requiring as a general matter that a criminal defendant "must be present at: (1) the initial appearance, initial arraignment, and plea; (2) every trial stage, including jury empanelment and verdict; and (3) sentencing"); *see also* Diaz v. United States, 223 U.S. 442, 452 (1912).

86. Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313–14 (1950).

the opportunity to be heard,[87] and an individual's right to participate and engage in dialogue as to legal matters that affect her.[88] Indeed, the Supreme Court has consistently reiterated that the right to notice and a meaningful opportunity to be heard make up "[t]he core of due process."[89]

Even apart from constitutional guarantees, litigants and the general public look to the trappings of procedural fairness in judicial decisionmaking as cues to the legitimacy of the final outcome.[90] One reason for this focus is instrumental: "fair procedures . . . are perceived to produce fair outcomes."[91] This is the case even when outcomes are unpopular or personally detrimental to a party: studies have repeatedly shown that people are more willing to accept case outcomes with which they disagree if they believe that the process that led to those results was fair,[92] even in cases involving criminal justice[93] or controversial social issues.[94] Conversely, if people believe a legal procedure to be unfair or unfairly applied, they are less likely to accept the resulting decisions and less likely to be respectful of the law and legal authorities in the future.[95]

Another reason for public focus on procedural fairness is affective: the opportunity to engage in full and fair procedures confirms our place in the social groups with which we identify.[96] More specifically, the opportunity to engage in the accepted procedures of the American civil

87. Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Grannis v. Ordean, 234 U.S. 385, 394 (1914).

88. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

89. LaChance v. Erickson, 522 U.S. 262, 266 (1998).

90. *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 142 (2011).

91. Hon. Kevin Burke & Hon. Steve Leben, *The Evolution of the Trial Judge from Counting Case Dispositions to a Commitment to Fairness*, 18 WIDENER L.J. 397, 405 (2009) (internal quotation marks omitted).

92. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 120 (2000) [hereinafter Tyler, *Social Justice*]; *cf.* Anne Richardson Oakes & Haydn Davies, *Process, Outcomes, and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 611–12 (2011) (noting that procedural justice may not be sufficient in itself to build litigant confidence if the outcome nevertheless seems incorrect).

93. *See* Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 640–41 (1989).

94. *See* Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

95. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 S.M.U. L. REV. 433, 439 (1992) [hereinafter Tyler, *Psychological Consequences*].

96. Neil Vidmar, *The Origins and Consequences of Procedural Fairness*, 15 L. & SOC. INQUIRY 877, 890 (1991).

and criminal justice systems confirms citizens' identity as valued members in American society, regardless of the outcome of those procedures.[97] Therefore, even if an outcome is recognized as an accurate application of the relevant law to the relevant facts, it will not sit well with the public if the affected parties have not had the opportunity to engage in that "peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for the decision in [their] favor."[98] Of course a fair and accurate outcome matters, but a fair process remains an independent requirement, and perhaps an even more important one.[99] Procedural fairness, then, is seen as a necessary value both for generating fairer outcomes and for building public confidence in the judicial system's ability to generate those outcomes.

As this discussion suggests, accuracy and procedural fairness each have constitutional and sociological dimensions. Constitutionally, these values reflect the tangible characteristics of due process of law: provisions addressing jury trial, confrontation of witnesses, self-incrimination, and the deprivation of liberty and property all reflect a commitment to the American vision of democratic self-governance. Sociologically, accuracy and procedural fairness are the lifeblood of the court's moral authority, and the protection of these values preserves and enhances the legitimacy of the U.S. district courts as an institution.[100] Public expectations about the proper role of the judge largely mirror constitutional values, but these expectations also have a life of their own: even if they were not enshrined in the Constitution, Americans would demand accurate outcomes and fair procedures from their courts. Because the federal district judge is a guarantor of these values, both in

97. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 231–32 (1988).

98. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

99. *See* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86–87 (1988) (holding that the district court incorrectly granted summary judgment against the defendant who had not been properly served, even though the defendant conceded that it lacked a meritorious defense). *See also, e.g.*, Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46, 49–57 (1976) (emphasizing the process values of dignity, equality, and tradition).

100. *See, e.g.*, Patrick E. Higgenbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 51 (1977); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 313 (2004) (noting that "the more legitimacy [the court as an institution] will command, the more likely people will be to comply voluntarily with the commands of the court").

practice and in the public imagination, the judicial resolution of disputes must always strive to be consistent with both.[101]

Moreover, accuracy and procedural fairness influence each other. The desire for accuracy (in the form of error reduction) drives the desire for fair procedures, and the belief that a procedure is fair drives confidence that an outcome is accurate. Accuracy and procedural fairness also mutually influence—and are influenced by—efficiency concerns: an adjudicative process that moves too quickly may prevent the presentation of evidence and argument needed to promote a sense of accuracy and procedural fairness, and an adjudicative process that moves too slowly may deprive injured parties of the opportunity to participate meaningfully in their cases as time and monetary pressures mount. A robust assessment of court productivity must deftly measure and balance all three of these values.

### *B. The Importance of Open Proceedings*

An additional and no less important consideration in measuring the quality of court services is the special role of the district courtroom as a public arena for resolving disputes. As it has done for centuries,[102] the open courtroom today provides a uniquely democratic forum for dispute resolution.[103] The jury trial is particularly characteristic of democratic

101. We construe the three values broadly, and recognize that they overlap in places and subsume a variety of related subvalues. *See, e.g.*, Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 159–60 (2012) (identifying over a dozen values associated with the practice of civil litigation). Because our high-level grouping adequately captures the many subvalues of American adjudication, we are less concerned with the specific boundaries of each value than with the influence of these values on the district judge's role.

102. The use of open courts in England predates the Norman Conquest. *See* Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 182–84 (2009). The Magna Carta expressly provided that court proceedings should be open to the public, and Coke, Blackstone, and Bentham, among others, later construed and expanded upon that concept. *See* Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretations*, 38 BRANDEIS L.J. 613, 625–26, 628–29 (2000); Resnik, *Compared to What?*, *supra* note 82, at 690–92. The importance of open courts carried over to the American colonies, appearing as a written guarantee in the Fundamental Laws of West New Jersey as early as 1676. *See* Resnik, *Compared to What?*, *supra* note 82, at 640. During the Constitutional debates of 1787 and 1788, prominent delegates to many state ratification conventions insisted on explicit provisions guaranteeing (in George Mason's words) the "sacred right" to trial by jury in civil and criminal cases. *See* PAULINE MEIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 44, 56 (discussing the initial development of the draft Constitution), 316–17 (discussing the Massachusetts convention), 245 (Maryland convention), 287–88 (Virginia convention), 316–17 (New Hampshire convention), 418–19 (North Carolina convention).

103. We recognize that the primary justification for open courts prior to the eighteenth century was to demonstrate state power, not to promote or celebrate

activity; indeed, one of us has previously described the American jury as the most stunning and successful experiment in direct popular sovereignty in all history,[104] and with good reason. The combination of jurors' good common sense with proper legal constraints (evidentiary rules, unanimity requirements, and the duty to follow the law) offers the best justice that our society knows how to provide.[105] Even without a jury present, the practice of adjudication in open court is remarkably democratizing: it is a moment in which litigants are obliged to treat each other as equals, and those who are otherwise unwilling are forced to engage in dialogue about their disagreements.[106] As Judith Resnik has observed, "Courts provide opportunities to make meaningful the democratic aspirations to locate sovereignty in the people, to constrain government actors, and to insist on the equality of treatment under the law."[107] At no time are these democratic aspirations more evident than during an open court proceeding:

> Specifically, normative obligations of judges in both criminal and civil proceedings to hear the other side, to welcome "everyone" as an equal, to be independent of the government that employs and deploys them, and to provide public processes enables two kinds of democratic discourses. One is between public observers and "Judge & Co." (borrowing Bentham's reference to judges and lawyers but enlarging it to include litigants as well). The other comes from exchanges among direct participants in an adjudicatory triangle.[108]

In sum, "[o]pen court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private power."[109]

Open court proceedings also carry important symbolic value: at their best, they are emblematic of fair, swift, and transparent justice. The strengths and weaknesses of a party's case, the credibility of evidence, the skill of attorneys, and the demeanor of the judge are all on display in

democratic values. Nevertheless, elements of respect for litigants and avoiding the appearance of arbitrary decision-making in public adjudication stretch back far beyond the 1700s. *See* Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 781 (2008) [hereinafter Resnik, *Courts*].

104. Young, *Vanishing Trials*, *supra* note 7, at 69.

105. *Id*.

106. *See* Resnik, *Compared to What?*, *supra* note 82, at 693.

107. *Id*. at 694.

108. *See* Judith Resnik, *Bring Back Bentham: "Open Courts," "Terror Trials," and Public Sphere(s)*, 5 LAW & ETHICS HUM. RTS. 2, 53 (2011) [hereinafter Resnik, *Bring Back Bentham*].

109. *Id*. at 54.

the open courtroom.[110] To many Americans, the judge and jury are the personification of justice, the members of the community tasked with untangling and resolving legal problems fairly.[111] The adjudication of issues in open court is so engrained in the fabric of American justice that the Supreme Court, writing in the mid-twentieth century, was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country."[112]

We recognize, of course, that the district court—and each district judge—provides services that need not (or cannot) be experienced in the courtroom. These tasks are critical to the administration of justice, and are informed by the same values of procedural fairness, accuracy, and efficiency as those tasks that take place in the public forum. Both private work and public work are necessary components of the court's services. But we subscribe to the view that both public and constitutional expectations require a greater emphasis on public work in the open courtroom. Quality is measured in comparison to expectations, and the federal district court is expected to be a trial court, an open court—no less today than it was at the founding of our Republic.

### *C. From Model to Metrics*

Redefining court productivity to account for the quality of adjudication would bring the concept more in line with accepted usage in other knowledge-intensive service industries, and would provide a richer understanding of what it means for a court to be productive. As importantly, the mere act of measuring the quality of district court adjudication is likely to influence the behavior and priorities of court staff.[113] Just as the ubiquity of metrics for tracking delay has encouraged district courts to process cases more expeditiously,[114] the introduction of

110. *See* Steven S. Gensler & Lee H. Rosenthal, *The Reappearing Judge*, 61 KAN. L. REV. 849, 853 (2013); Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Tenure*, 10 J. APP. PRAC. & PROCESS 247, 263 (2009); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 790 (1981).

111. Robert A. Schroeder, *Twenty-Five Years Under the Missouri Plan*, 49 J. AM. JUDICATURE SOC'Y 105, 106 (1965); Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, *in* WORLD JURY SYSTEMS 2 (Neil Vidmar ed., 2000).

112. *In re* Oliver, 333 U.S. 257, 266 (1948).

113. Put more pointedly, "What gets measured gets done." *See* Robert D. Behn, *Why Measure Performance? Different Purposes Require Different Measures*, 63 PUB. ADMIN. REV. 586, 599 (2003).

114. The decrease in court processing time has been particularly noticeable with respect to the reporting of motions pending more than six months or civil cases pending more than three years in federal district courts. *See* CIVIL CASE PROCESSING, *supra* note 2, at 78–79 & tbl.31 (finding that disproportionately high percentages of civil motions

reliable and accepted metrics for accuracy and procedural fairness should similarly encourage courts to perform well by those metrics. While courts surely should not be slaves to metrics at the cost of individualized justice, standardized productivity measurements will serve as useful reminders to district courts that efficiency, accuracy, and procedural fairness must be balanced and jointly prioritized in every case.[115]

We are aware of the challenges of measurement. The number and complexity of the relevant variables make data-driven assessments of efficiency, accuracy, and procedural fairness a formidable task. Efficiency metrics, for example, have been the most commonly used, but they typically have been limited to three closely-related subcategories: delay (as measured by the elapsed time from case filing to disposition), throughput (as measured by the ratio of filings to dispositions), and docket control (as measured by the number of cases or motions that linger on the court's docket past a prescribed time). Another component of adjudicative efficiency, cost-effectiveness, has, despite its importance, not been the subject of generally accepted metrics, in part because of the difficulty of separating the role of the court in cost and cost-prevention from that of the parties.[116] Similarly, although accuracy is recognized as a core value of adjudication and a key measure of its quality, scholars and court watchers are thus far unable to agree upon a reliable and consistent method to measure the accuracy of district court decisions.[117]

were ruled on in the two weeks prior to a reporting deadline); John Lande, *How Much Justice Can We Afford? Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 244–45 (discussing survey of district court clerks, which indicated that "collecting and publishing statistics was particularly effective" at speeding up the handling of cases).

115. Note that equal balance of these values is not necessarily required, and the proper mix of efficiency, accuracy, and procedural justice protections may vary depending of the needs of the case, the desires of the parties, and public policy. As high-skill knowledge workers, federal district judges are in the best position to determine the right balance for each of their cases. At the same time, the presence of robust and balanced productivity metrics should send an appropriate message to district judges not to privilege efficiency over adjudicative quality as a matter of course.

116. *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 259 & nn.243–46 (1987) (noting the general costs of adjudication borne by the parties and the public); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 78–79 (1983) ("The simple fact that taxpayers rather than litigants pay the cost of operating the courts shows why calculations of social and private costs must diverge.").

117. *See, e.g.*, Jay P. Kesan & Gwendolyn P. Ball, *Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court*, 24 HARV. J.L. & TECH. 393, 430 (2011) (noting that "[t]here is no easy way to quantitatively evaluate the outcome of a trial based on correctness of the application of the law, reflections of truth, or positive impact on society").

For some cases or case types, the problem may be a lack of agreement on what constitutes an accurate outcome; for others, it may be that a range of possible outcomes may all be fairly deemed accurate.

But challenging does not mean impossible, and we should not let the perfect be the proverbial enemy of the good. Even incremental steps toward a more complete productivity measure would add significant value to our understanding of the courts. And indeed, some have recently proposed at least initial steps toward measuring the first quality component, adjudicative accuracy. One set of scholars, for example, has suggested comparing district court-level outcomes in patent cases to the decisions of the Federal Circuit, taking advantage of the fact that there is essentially a single intermediate appellate court for patent law issues.[118] Another set of scholars, working in the context of civil *Gideon*, proposed approximating outcome accuracy in summary eviction proceedings by looking at cases in which both parties are represented by competent counsel, the idea being that full-fledged use of the adversarial process is more likely to result in accurate outcomes than a process in which one or both parties is self-represented.[119] Yet another commentator has proposed post-outcome review of a case's historical facts and the decisionmaker's understanding of those facts in a manner akin to investigations in the evidence-based medicine movement.[120] A fourth model might look to the whether attorneys *perceive* the application of facts to law to be accurate in cases occupying their field of substantive expertise; this model recognizes that even if accuracy cannot be cleanly measured as an objective matter, subjective perception might be an acceptable substitute. Even though these proposals are limited to various degrees in scope or practicality, they offer the possibility of better accuracy measurements in the future—or, at minimum, a better ability to separate a range of acceptably accurate outcomes from those that are plainly inaccurate.

The ability to measure procedural fairness in adjudication is even more promising. As with accuracy, it will be necessary to convert the values and dimensions of procedural fairness into measurable units, all the while preserving its fundamental character. It is also incumbent that any metric for procedural fairness at the district court level be closely tied to the court's constitutional and traditional roles. Still, the development of a workable metric for procedural fairness would

118. *See id*. at 440–43.

119. *See* D. James Greiner, Cassandra Wolos Pattanyak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013).

120. Mark Spottswood, *Evidence-Based Litigation Reform*, 51 U. LOUISVILLE L. REV. 25, 81–95 (2013).

represent a compelling advance toward a fuller measure of district court productivity. We begin that development process below with a metric we call bench presence.

## IV. DEFINING AND MEASURING BENCH PRESENCE

Like accuracy, procedural fairness in adjudication initially defies easy quantification and direct measurement. A proxy is needed. Finding the right proxy requires an understanding of the dimensions of procedural fairness, and why they matter. In this Part, we examine the values that influence procedural fairness determinations, and show how those values, at least at the district court level, are inextricably linked to the availability and conduct of open court proceedings. From these observations we develop and explain bench presence, a measure of the time district judges spend in open court.

### *A. The Dimensions of Procedural Fairness*

What makes a process fair—or more accurately, perceived as fair? Social science has identified four characteristics of legal procedures that primarily contribute to judgments about their fairness: (1) opportunities for participation and voice; (2) the neutrality of the forum; (3) the trustworthiness of legal authorities; and (4) the degree to which people are treated with dignity and respect.[121] We consider each in turn.

*Participation/voice*. Psychological studies have consistently shown that "perceptions about control over a process are an important determinant of whether people feel that procedural justice has occurred."[122] One's control over a dispute resolution process is typically measured by the level of participation that one is afforded during that process—that is, the degree to which one experiences the opportunity to be heard by the decisionmaker.[123] The opportunity to tell one's story almost certainly contributes to the perceived legitimacy of the final outcome;[124] some have argued that it also contributes to the actual

121. Tyler, *Social Justice*, *supra* note 92, at 121.

122. Hollander-Blumoff, *supra* note 90, at 135.

123. *Id.*; *see also* Michael S. King, *The Therapeutic Dimension of Judging: The Example of Sentencing*, 16 J. JUD. ADMIN. 92, 95 (2006) (discussing the elements of voice ("providing an environment where a person can present their case to an attentive tribunal"), validation ("acknowledgement by the tribunal that the case has been heard and taken into account"), and respect ("whether the judicial officer takes time to listen to the party")).

124. *See* Hollander-Blumoff, *supra* note 90, at 135.

legitimacy of the outcome.[125] Moreover, apart from its effect on the final outcome, participation is valued for its own sake because it gives individuals a chance to make their own litigation choices.[126] Indeed, a variety of studies have shown that people value the opportunity to speak in adjudicative settings even when they believe that doing so will have no influence on the final decision.[127] In short, the positive effects of participation are very strong.[128]

*Neutrality*. Neutrality "involves making decisions based upon consistently applied legal principles,"[129] in contrast to making decisions inconsistently, arbitrarily, or with the expectation of personal or pecuniary gain.[130] A judge's outward display of neutrality has been equated to "providing reassurance that she is unbiased, honest, and principled."[131] Neutrality is also closely related to participation and voice: commentators have noted the psychological benefits that accrue from being "able to tell [one's] story fully before a decisionmaker who is perceived as neutral, honest, and attentive."[132] Moreover, neutrality connects directly to the legitimacy of the courts. As one scholar has noted, "impartiality is a crucial component of perceived fairness. . . . [W]hen people assess the procedural fairness of institutions, they are

125. *See* Solum, *supra* note 69, at 280–81 (arguing that participating in an adjudicative proceeding confers "authorship" on the participant, in that the final outcome is necessarily influenced by the particular arguments that the litigant puts forward).

126. *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 619–20 (1993) [hereinafter Bone, *Statistical Adjudication*]; *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 196 (1992) [hereinafter Bone, *Rethinking*] (arguing that "[t]he 'day in court' is often invoked in talismanic fashion").

127. *See* Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 11 (2007); Tyler, *Psychological Consequences*, *supra* note 95, at 441; Tyler, *Social Justice*, *supra* note 92, at 121.

128. Tyler, *Social Justice*, *supra* note 92, at 121 (citing studies).

129. Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007).

130. *See, e.g.*, Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191, 219–20 (2002).

131. Michael M. O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 754 (2009) (citations omitted) (internal quotation marks omitted).

132. Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177, 2208–09 (1998) (quoting Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, *in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 13, 21 (Naomi Roht-Arriaza ed., 1995)).

especially influenced by evidence of even-handedness, factuality, and the lack of bias or favoritism (neutrality)—in short, by impartiality."[133]

*Trustworthiness*. Many parties do not appear before a judge by choice. When they are brought into court, however, they want to believe that the judge is someone whom they *would* choose to decide their case, all things being equal.[134] In other words, people want to believe that interactions with a judge are not in themselves inherently risky, and that the judge can be counted on to act in a predictable way.[135] To trust a judge is to say, "We have an implicit agreement that you will treat my case no differently than you would treat any other similarly situated case." Unsurprisingly, trust in the court also bears heavily on the judiciary's institutional legitimacy.[136] Simply put, if people trust the motives of judicial authorities, they are more willing to participate in the adjudicative process[137] and more willing to accept judicial decisions.[138]

Confidence in the predictability of a judge's actions has been termed instrumental trust. A second form of trust, called motive-based trust, suggests that a judge is trustworthy when people can predict that his or her actions "will be motivated by a concern for [their] personal welfare."[139] That is, a judge earns motive-based trust when a party believes that the judge will make a good-faith effort to help (or at least not harm) her through the exercise of judicial authority.[140]

Both instrumental and motive-based trust are fostered by openness and transparency. Courts that are transparent in their decisionmaking process,[141] and in the reasons given for the decisions,[142] are more likely to cultivate public trust. As Tom Tyler has explained:

133. James L. Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 60 (2008) (citations omitted).

134. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 59–60 (2002).

135. *Id.* at 59–61.

136. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11 (2003) (noting that "judicial authority might best be reconceived as a relationship of trust that courts forge with the American people"); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 387 & tbl.5 (2001) (discussing survey data suggesting that "generalization to overall legitimacy judgments does occur and is shaped primarily by assessments of trustworthiness").

137. John M. Greacen, *Social Science Research on "Procedural Justice": What Are the Implications for Judges and Courts?*, 47 JUDGES' J. 41, 42 (2008).

138. TYLER & HUO, *supra* note 134, at 74.

139. *Id.* at 64.

140. *Id.* at 62.

141. *See* Hon. Jonathan Lippman, *William H. Rehnquist Award for Judicial Excellence Address*, 47 FAM. CT. REV. 199, 203 (2009).

> How can authorities communicate that they are trying to be fair? A key antecedent of trust is justification. When authorities are presenting their decisions to the people influenced by them, they need to make clear that they have listened to and considered the arguments made. They can do so by accounting for their decisions. Such accounts should clearly state the arguments made by the various parties to the dispute. They should also explain how those arguments have been considered and why they have been accepted or rejected.[143]

Transparency manifests itself constitutionally in guarantees for criminal defendants (the Sixth Amendment right to confront witnesses)[144] and the public (the First Amendment right to an open and public trial).[145] Moreover, the sociological expectations of transparency in adjudication are closely tied to other elements of procedural fairness. For litigants, requiring the judge to give reasons for a decision on the record (whether oral or written) promotes confidence that the judge's decisions are neutral, trustworthy, non-arbitrary, and well-reasoned.[146] For the public at large, the ability to see adjudication in action just by walking into a courtroom builds confidence in the judiciary as an institution.[147] And for the legal community, clear explanations and justifications for judicial decisions provide guidance for future behavior and increase the chances that like cases will be treated alike.[148]

*Dignity*. The final contributor to perceptions of procedural fairness is the degree to which every person in the courtroom is treated with dignity and respect.[149] Dignified treatment enhances the court's legitimacy by showing that every participant to an adjudicatory proceeding is afforded the basic respect worthy of all human beings.[150] Indeed, the government's treatment of its citizens has an important role in defining their views about their value in society, by shaping their

142. *See, e.g.*, Judge Kevin Burke, *Understanding the International Rule of Law as a Commitment to Procedural Fairness*, 18 MINN. J. INT'L L. 357, 366, 368 (2009).

143. Tyler, *Social Justice*, *supra* note 92, at 122.

144. U.S. CONST. amend. VI.

145. *Id.* amend. I.

146. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1336–39 (2008).

147. *See* Note, *The Constitutional Right to a Public Trial*, 20 HARV. L. REV. 489, 489 (1907).

148. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 535 (1997).

149. *See* Higgenbotham, *supra* note 100, at 59–60.

150. *See* Bone, *Statistical Adjudication*, *supra* note 126, at 619–20; *see also* Bone, *Rethinking*, *supra* note 126, at 202; Hollander-Blumoff, *supra* note 90, at 139; Solum, *supra* note 69, at 262–63.

feelings of security and self-respect.[151] Furthermore, in adjudications where individuals are singled out and individual liberty or property is at risk (as in many criminal or administrative matters), litigant participation and litigant dignity are closely intertwined.[152] It is therefore no surprise that respect for those in the courtroom is enshrined both in court rulings[153] and the Code of Conduct for United States Judges.[154] Individual dignity and respect have also been found to be implicit in the various protections embodied in the Fifth, Sixth, and Fourteenth Amendments.[155]

Collectively, these four values of adjudication reflect Americans' commitment to a fair, transparent, and accountable judicial process. Some have suggested that these values are effectively "rights" possessed by the parties,[156] others that they are merely strongly held expectations about the responsibilities of decisionmakers.[157] For purposes of productivity measurement, the classification of these expectations is less important than their practical effect. As Judith Resnik has aptly summarized:

> Adjudication is far from perfect. But what it offers is decisionmaking by government-empowered individuals who have some accountability both to the immediate recipients of the decisions and to the public at large. . . . Judges must work within reach of the public; some of the processes occur literally within view of the public, and most decisions made in private are reported to the public.[158]

151. Tyler, *Psychological Consequences*, *supra* note 95, at 441.

152. *See* King, *supra* note 123, at 95; *see also* Bone, *Statistical Adjudication*, *supra* note 126, at 619.

153. *See, e.g.*, Iliev v. Immigration and Naturalization Serv., 127 F.3d 638, 643 (7th Cir. 1997) ("It is a hallmark of the American system of justice that anyone who appears as a litigant in an American courtroom is treated with dignity and respect.").

154. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(A)(3) (2009).

155. *E.g.*, Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 902 (noting the values of dignity and respect inherent in the Fifth and Sixth Amendments, with particular focus on the Sixth Amendment's Confrontation Clause); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) (discussing a "dignitary approach" to administrative due process in light of the Fourteenth Amendment's Due Process Clause and Supreme Court cases interpreting that clause).

156. *See generally* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010) (evaluating rights-based arguments).

157. *See, e.g.*, Robert Folger & Robert J. Bies, *Managerial Responsibilities and Procedural Justice*, 2 EMP. RESPONSIBILITIES & RTS. J. 79 (1989) (making this argument in the context of managerial decisionmaking).

158. Resnik, *Failing Faith*, *supra* note 61, at 545.

The public and private accountability that comes with participation, neutrality, trustworthiness, and dignity colors the perception of justice in every case. Procedural fairness is therefore a necessary component of productivity from the perspective of constitutional and sociological expectations. To say that a court is "productive" without taking into account the fairness perceptions of those it serves is to say nothing at all.

### *B. The Relationship Between Procedural Fairness and the District Court's Traditional Role*

At first cut, the constituent dimensions of procedural fairness may seem as resistant to concrete measurement as procedural fairness itself. In a federal district court, however, these dimensions of fairness are experienced in a very specific context: the courtroom. Indeed, many of the values that animate procedural fairness determinations can only reach their full expression in the public setting that the open courtroom provides. Take, for example, the dimension of participation and voice. The communication between litigant and judge allows "access to those who are aggrieved," permitting the court to "better understand the interests and concerns of . . . those who may be affected by the judicial action."[159] Similarly, the participation of the general public is dramatically heightened when issues are resolved in open court. Reflecting on the civil jury trial, Judge Patrick Higgenbotham has concluded that:

> Although some education results from the jury's participation in the judicial system, in my view it is the public's sense of participation in administering justice that has much greater significance. This sense of participation is felt not only by the jurors who actually participate in a particular trial, but also extends to the members of the public whom the jurors represent. I believe that the maintenance of public participation in the judicial process is essential to continued popular acceptance of judicial decisions.[160]

In the same vein, two commentators have argued that open courtrooms "fulfill a vital function by . . . enhancing the quality and safeguarding the integrity of the fact-finding process, by fostering an appearance of fairness, by heightening public respect for the judicial

159. Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination, and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 2002 (1997).

160. Higgenbotham, *supra* note 100, at 59.

process and by permitting the public to participate in and serve as a check upon the judicial process."[161]

Neutrality and trustworthiness are also greatly enhanced by a judge's appearance in open court to a degree that cannot be met by closed-door judicial tasks and activities. Most obviously, proceedings in open court are transparent affairs, allowing both litigants and members of the public to observe and decide for themselves whether the procedures and outcomes in any given adjudication are fair, neutral, and legitimate.[162] In this manner, the open courtroom invites the exercise of American democracy in its most fundamental sense.[163] Observers of proceedings in open court directly engage in democratic self-governance, by viewing (and later debating, reacting to, and sharing with others) the behavior and integrity of their public servants who comprise the judiciary.

Open court proceedings further enhance neutrality and trustworthiness by positioning the judge to lessen the impact of distributional inequalities among the parties. The self-represented criminal defendant or civil litigant is publicly afforded the same opportunity to make his case as the defendant or litigant with vastly greater resources, and the judge may supplement the arguments and presentations with her own questions.[164]

Such proceedings also strengthen transparency (and by association, neutrality and trustworthiness) by promoting dialogue about legal reasoning between the judge and others in the courtroom.[165] Jeremy Bentham argued that in open proceedings, it would be natural for judges to fall into "the habit of giving reasons from the bench," in part because of the desire for those in the courtroom to understand their actions.[166]

161. Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 293 (2003).

162. *See* David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 J. APP. PRAC. & PROCESS 119, 139 (2012).

163. *See* Resnik, *Compared to What?*, *supra* note 82, at 694.

164. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1077 (1984); *see also* YOUNG, REFLECTIONS, *supra* note 7, at 275.

165. *See* Hon. James E. Gritzner, *In Defense of the Jury Trial: ADR Has Its Place, but It Is Not the Only Place*, 60 DRAKE L. REV. 349, 362 (2012) ("Resolving disputes in open court proceedings brings sunshine in on the process. The people can openly observe the system's strengths and frailties, as we are by nature a careful and suspect people. The application and growth of the law can be openly observed and recorded to serve as precedent.").

166. *See* Resnik, *Compared to What?*, *supra* note 82, at 692 (quoting Jeremy Bentham, *An Introductory View of the Rationale of Evidence*, *in* 6 THE WORKS OF JEREMY BENTHAM 1, 357 (John Bowring ed., 1843)); *see also* Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002) (noting that "[d]emocracies die behind closed doors").

More than a century later, the U.S. Sentencing Commission required each district judge to "state in open court the reason for [his or her] imposition of the particular sentence" as a means of promoting transparency and trustworthiness in criminal sentencing.[167] By contrast, judicial activity outside of the courtroom, no matter how serious and how sincere, risks sending a confusing and incomplete message to the public: "dark courtrooms by definition defy the objective of openness in government."[168]

Finally, open court proceedings offer the most direct way for the judiciary to demonstrate its respect for the dignity of litigants, jurors, the bar, and the general public. Consider criminal sentencing. The practice of allocution, in which the convicted defendant has the right to speak directly to the court before he or she is sentenced, "forces the judge to acknowledge the personhood of the defendant and hear whatever that individual wishes to say."[169] Indeed, one significant basis for opposition to the federal sentencing guidelines was the concern that the constraints posed by the guidelines deprived criminal defendants of voice and dignity, in that the defendant may not even feel "acknowledged by the institution directly responsible for depriving him of his liberty."[170] Even where the outcome (for example, some form of criminal punishment or civil commitment) is certain, the mere opportunity to have one final say in open court resonates strongly with those who will be affected by that outcome.[171]

Dignity is further enhanced by the formality of open court proceedings. A recent study by Professors Oscar Chase and Jonathan Thong found a "positive and strongly significant" correlation between the "room dignity" of a legal setting and the perception that the presiding judges were "more attentive, understanding, knowledgeable, respectful,

167. Sherod Thaxton, *Determining "Reasonableness" Without a Reason? Federal Appellate Review Post*-Rita v. United States, 75 U. CHI. L. REV. 1885, 1905 n.148 (2008).

168. Patrick E. Higginbotham, *The Present Plight of the U.S. District Courts*, 60 DUKE L.J. 745, 748 (2010); *see also* Keith J. Bybee, *Judging in Place: Architecture, Design, and the Operation of Courts*, 37 LAW & SOC. INQUIRY 1014, 1024 (2012) (noting that "courthouse architecture is explicitly committed to conveying to the public notions of transparency and accountability. Yet modern court design obscures more than it displays.").

169. *See* Resnik, *Bring Back Bentham*, *supra* note 108, at 62.

170. Adam Lamparello, *Incorporating the Procedural Justice Model into Federal Sentencing Jurisprudence in the Aftermath of* United States v. Booker*: Establishing United States Sentencing Courts*, 4 N.Y.U. J.L. & LIBERTY 112, 128–29 (2009). Treating a defendant respectfully during sentencing is also thought to be associated with the defendant's "successful adaptation to prison life and eventual rehabilitation." Michael M. O'Hear, *Explaining Sentences*, 36 F.S.U. L. REV. 458, 479 (2009).

171. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 S.M.U. L. REV. 433, 440 (1992).

and just."[172] More specifically, judges were perceived to be more dignified, and more knowledgeable, when they wore judicial robes rather than ordinary business attire,[173] and when the argument took place in a courtroom rather than a conference room.[174] While Professors Chase and Thong cautioned about generalizing too broadly from one study, they concluded that "our results strongly suggest that judicial costume and setting do account for differences in perceptions of procedural fairness."[175]

In short, proceedings in open court contribute heavily to several dimensions of procedural fairness by the simple virtue of the judge being in the public view. Every hour that a courtroom is in use is an hour of transparency and an hour of litigant participation (whether directly or through an attorney). Every hour of jury trial is an hour in which the federal district judge is anchored to the central wellspring of his moral authority, the American jury.[176] Every hour of trial is also an hour in which the neutrality and trustworthiness of the entire justice system are on display for the litigants, jurors, members of the legal profession, and the public at large.[177] Every hour of courtroom activity is an hour in which parties—civil or criminal—are treated as equals.[178] In light of the interrelationship between procedural justice, transparency, and the resolution of issues in open court, it is not surprising that facilitating open, public adjudication has been recognized as an essential role of the federal district judge since the founding.[179]

172. Oscar G. Chase & Jonathan Thong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J.L. & HUMAN. 221, 232 (2012).

173. *Id*. at 233.

174. *Id*. at 234.

175. *Id*. at 240.

176. Young, *Vanishing Trials*, *supra* note 7, at 81.

177. One might even go so far as to say that courtroom proceedings have vitality even without a special contribution from the judge. The public, sometimes theatrical, nature of open court serves to redirect party aggression, encourage impartiality, and "provide an image of a legitimate society. In this sense, it is importantly an end in itself." MILNER S. BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL VIEW OF THE LEGAL PROCESS 62 (1981).

178. *See* Resnik, *Courts*, *supra* note 103, at 807.

179. *See* Jack B. Weinstein, *Warning: Alternative Dispute Resolution May Be Dangerous to Your Health*, 12 LITIG. 6, 48 (1986) (noting the importance of a public right of access to facts developed, and judicial reasoning employed, in private litigation); *see also* Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 257 n.181 (1995) (citing a speech by Judge Weinstein on the "'American tradition' of rights to trial").

### *C. Measuring Courtroom Hours*

Given the close connection between the courtroom experience and perceptions of procedural fairness, we believe the most meaningful and practical proxy currently available for procedural fairness at the district court level is the total number of hours that a district judge spends in the courtroom, conducting trials or otherwise presiding over an open proceeding. We call this metric bench presence. Any task that involves the judge's presence in the courtroom in furtherance of an adjudicative purpose qualifies for the bench presence measure. Trials, evidentiary hearings, motion hearings, arraignments, sentencing, and even status and scheduling conferences are included. The hallmark of each of these events is an open courtroom that encourages or requires the participation of the parties, their counsel, and the public. By contrast, bench presence does not include time spent drafting opinions and orders, presiding over mediation or settlement conferences, attending to administrative matters, or performing other judicial tasks wholly out of the public view.

Open court proceedings represent the strong form of bench presence. There is also a weak form, which arises when judges hear motions or otherwise adjudicate issues between the parties in chambers or via telephone or videoconference. These events embrace several of the core dimensions of procedural fairness—such as participation, dignity, and trustworthiness. At the same time, they lack the transparency and public dimension of procedural fairness found in open court hearings. Because the weak form of bench presence shares more aspects of procedural fairness with open court proceedings than it does with other judicial tasks, we include it in our general measure—with the acknowledgement that it is considerably more limited than trial or other open court hearings.

In addition to capturing opportunities for the exercise of procedural fairness, bench presence directly embraces the unique sociological and constitutional role of the federal district courts as trial courts. In recent years, the decline both in the rate and absolute number of trials has led some commentators to shift focus away from the bench and toward the judge's desk.[180] And in light of the district judge's ever-expanding set of behind-the-scenes tasks, it is indeed tempting to conclude that all judicial work is roughly the same—that an hour spent drafting an order on a motion to dismiss is no more or less important than an hour of trial. Hard work is, after all, hard work, and there is no question that most district judges—indeed, most judges in any court, at any level—work

180. *See, e.g.*, D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 468 (2007).

extremely hard.[181] But the reality is that not all judicial work is the same. Courtroom adjudication has a special place both in the constitutional structure and the public imagination.

In making this argument, we are not suggesting that for district judges, *only* time in the courtroom is time well-spent. Some matters (i.e., those involving national security, juveniles, etc.) are not necessarily appropriate for open court. Some largely ministerial motions do not need a hearing. And where parties would have to travel long distances to the courthouse, the savings in cost and time may rightly counsel in favor of a telephone or videoconference. But the default setting for a trial judge should be the courtroom. Without diminishing the important research, writing, management, administrative tasks, and other activities attendant upon a district judge, the bench presence metric properly returns the focus to the district court's essential role: open court adjudication. It reminds courts and judges that district courts must fulfill public needs and expectations as well as private ones.

Bench presence has another virtue. Not only is it capable of being measured, it *already is* measured in the federal court system. The Administrative Office of the U.S. Courts (AO) requires each district judge to complete a monthly report—formerly the paper-based JS-10, now an automated form generated by the courts' J-Net system[182]—which tracks the number of trials for each judge, as well as each hour that the judge has spent in trial or attending to other matters in open court.[183] For trials, each judge's chambers reports both the number of separate trial days and the total number of trial hours, as well as the type of case and type of trial.[184] All other proceedings "which require the presence of the judge and the parties" are tracked separately, with the court noting the type of proceeding (arraignment, sentencing, probation hearing, motion hearing, pretrial conference, etc.) and the number of total procedural hours spent for each day of the month.[185] Aggregate statistics are compiled and made available for internal use.[186]

Although the data are self-reported by each district judge's chambers, they bear important indicia of reliability. Courtroom hours are reported not by the district judge himself, but by the courtroom deputy

181. *See* Young, *Lament*, *supra* note 7, at 315.

182. The automated program replaced a paper form in use since the 1940s. *See* United States v. Barnett, 398 F.3d 516, 533 (6th Cir. 2005) (Gwin, J., concurring).

183. *See* FEDERAL JUDICIAL CENTER, CIVIL LITIGATION MANAGEMENT MANUAL 167 (2d ed. 2010); FORM JS-10, MONTHLY REPORT OF TRIALS AND OTHER COURT ACTIVITY [hereinafter FORM JS-10].

184. *See* FORM JS-10.

185. *See id.*

186. *See* United States v. Massachusetts, 781 F. Supp. 2d 1, 25 (D. Mass. 2011).

clerk contemporaneous with the judge's sitting. The AO trains clerks how to keep the requested data and stresses the importance of accurate data-keeping. Moreover, the reporting process is common throughout the system and applies to active district judges, senior judges, and visitors alike. Professionalism among the judiciary keeps the risk of over-reporting to a minimum; to pad one's hours on a JS-10 would be universally considered gauche. Finally, the AO itself relies on the data and uses it in a way that indicates official approval. Among other things, the data appear periodically in Federal Judicial Center publications, particularly those studies related to judicial workload[187] and courtroom use,[188] and are occasionally made available to other researchers under special conditions.[189]

The JS-10 form is far from perfect, and some of its underlying assumptions about the nature of courtroom activity are suspect. The form defines a trial as any "contested proceeding before a court of jury in which evidence is introduced,"[190] heavily diluting the term's traditional meaning.[191] This linguistic sleight of hand leads to a significant overcount of actual trials held in the federal district courts—perhaps by as much as one-third.[192] The JS-10 form also potentially inflates the number of non-trial hours spent in the open courtroom, by commanding judges to report any case activity that requires the presence of the judge and the parties, "whether held in the courtroom or in chambers."[193]

Nevertheless, we should not be quick to discount the data. If one assumes (reasonably, in our experience) that the majority of hours tracked through the JS-10 form and its modern electronic equivalent are indeed spent in the courtroom, the data offer a valuable glimpse into the level of bench presence in each of the 94 district courts. And hours spent in chamber at least reflect the weak form of bench presence in that they

187. *See* FEDERAL JUDICIAL CENTER, 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY (2005).

188. FEDERAL JUDICIAL CENTER, THE USE OF COURTROOMS IN U.S. DISTRICT COURTS (2008).

189. *See, e.g.*, Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1317 (1994) (sharing data from the RAND Corporation's exclusive study of the CJRA pilot program); Jake D. Pugh, Another Nail in the [Trial Model] Coffin? Whether Federal District Court Vacancies Push Adjudication Toward an Administrative Model (2012) (unpublished manuscript) (on file with authors).

190. FORM JS-10.

191. Under this definition, "trial" includes any disputed evidentiary hearing, including a *Daubert* hearing, *Markman* hearing, hearing on a motion to suppress, sentencing hearing, preliminary injunction hearing, or separate damages hearing. *See* Young, *Lament*, *supra* note 7, at 317.

192. Young, *Vanishing Trials*, *supra* note 7, at 88.

193. FORM JS-10.

track the time a judge spends adjudicating disputes in the presence of parties and/or counsel. Moreover, even though the definition of "trial" on the JS-10 form is overbroad, the separation of courtroom time into trial hours and procedural hours gives a useful sense of the nature of courtroom activity in each district.

We fully recognize that the JS-10 data are not a perfect proxy for procedural fairness or procedural justice. The data are admittedly over- and under-inclusive, at least in some instances. Merely sitting on the bench does not guarantee that a judge will act neutrally or treat everyone in the courtroom with dignity. Nor is it true that activities outside of the courtroom lack procedural fairness. Even as a relatively rough measure, however, time spent in open court proceedings has much to recommend it. Simply put, the open court activities that define bench presence are special. They create the conditions in which the essential elements of procedural fairness can flourish, in a way that no set of behind-the-scenes judicial tasks can accomplish.

Moreover, there are several ways in which the current JS-10 data might be expanded and refined to lessen the over- and under-inclusiveness problem. The primary under-inclusiveness objection is that most judges strive to be procedurally fair in *all* dimensions of adjudication, not just courtroom proceedings, so that a focus purely on bench presence shortchanges other, less visible, commitments to procedural justice. A related objection is that some litigants may not desire (or even need) hearings to assure satisfactory levels of fair process, preferring instead that the judge spend the time at her desk reviewing complex briefs or documents.

These concerns can be addressed in significant part by improving the scope and depth of data collection to allow for more detailed analysis of the ways district judges spend their time in the courtroom. With the cooperation of the AO and the district courts themselves, collection of JS-10 data might be enhanced to separate out actual trials from other hearings where evidence is introduced, and to report procedural hours by case type, civil/criminal designation, and actual procedural activity undertaken (rather than simply reporting a daily total). These additional details would permit more refined analysis of the case types and hearing types that currently occupy more courtroom time.

More detailed data collection would also permit researchers to identify whether certain case types or litigants benefit disproportionately from direct exposure to the judge. For example, we might hypothesize that individual litigants are more attuned to bench presence than are corporate or organizational litigants, or that parties in Section 1983 cases are more likely to base their procedural fairness determinations on courtroom time than parties in Lanham Act cases. A more refined data

collection process (in conjunction with one or more additional procedural fairness studies described below) might allow researchers to test these hypotheses, leading to more informed recommendations about the allocation of courtroom time to various cases on a court's docket.

In this same vein, the JS-10 procedural data might be separated between hearings in chambers (or by videoconference) and hearings that actually take place in open court. While the former technically satisfy our definition of bench presence, they deny the opportunity of public observation. It may well be that for some types of proceedings, general public access is of limited concern; the public's need to view the procedural guarantees attendant to a civil scheduling conference, for example, may be less pressing than the public's need to view those guarantees attendant to a murder trial. Parsing out the data on such questions would at least allow courts to formulate thoughtful approaches.

In short, refining the JS-10 data collection process would give a fuller and more complete sense of the work that federal district courts actually undertake in the courtroom. It would also allow courts to gauge more precisely how courtroom activity relates to case processing time, litigant satisfaction, and public interest in the courts. Indeed, providing more refined data to district judges respects and supports their position as highly skilled knowledge workers, allowing them to use the information to optimize their time and resources in light of their individual dockets. Collecting more detailed JS-10 data would therefore represent substantial progress toward addressing the under-inclusiveness problem, and a significant advance toward the practical application of the procedural fairness prong of our proposed productivity model.

It is important to note that even without these proposed refinements, we should not delay in exploring the existing JS-10 data to help foster a better understanding of bench presence and federal district court productivity. Even a raw count of courtroom hours offers useful insight into the state of bench presence in the federal courts today. In a companion piece we begin this process,[194] with the hope and expectation that our preliminary work will set the stage for more advanced analysis in the future.

194. *See* Jordan M. Singer & Hon. William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008–2012*, 118 PENN ST. L. REV. __ (forthcoming Dec. 2013) (on file with authors).

### *D. Beyond Bench Presence: Using Courtroom Hours to Inform Other Procedural Fairness Inquiries*

Thus far, we have attempted to demonstrate the value of bench presence as a proxy for the court's commitment to, and capability to provide, the classic trappings of procedural fairness in civil and criminal adjudication. We believe most under-inclusiveness objections can be overcome by better data collection and analysis. But bench presence still faces an over-inclusiveness objection. Simply stated, a mere count of courtroom hours says nothing about the quality of procedural justice dispensed in the courtroom. Put more sharply, open proceedings will not enhance perceptions of procedural fairness if judges appear during these proceedings to be biased, disinterested, or rude.[195]

Even though there is some force to this objection, ultimately it presents an argument in *favor* of measuring bench presence, not against it. A proper emphasis on courtroom activity can contribute to a virtuous circle of procedural fairness: as judges understand the procedural justice advantages associated with open proceedings, they are incentivized to appear fully focused during such proceedings, and to monitor their own verbal and non-verbal cues while on the bench.[196] In other words, explicitly connecting courtroom activity to procedural fairness may well raise judicial awareness of the very behaviors and social cues that promote perceptions of a fair process.

Bench presence also provides a foundational context for more detailed evaluations of judicial behavior in the courtroom. Many state judicial systems already use tools such as courtroom observation, private feedback from communications experts, and surveys of litigants and attorneys to track and improve the quality of procedural justice in their courts. The combined use of bench presence with any or all of these evaluation formats may enhance the courts' understanding of procedural fairness, and with it, their ability to improve the quality of adjudication and their overall productivity.

Formal courtroom observation by disinterested correspondents has been implemented in several state courts, with the goal of identifying judicial practices and behaviors that promote or detract from perceptions of procedural fairness.[197] Utah's program is the most recent and most comprehensive. Each trial judge is observed over a specified period by

195. *See* LEBEN, *supra* note 57, at 6–8 (discussing verbal and non-verbal cues judges send in the courtroom).

196. *See id*. at 7–8.

197. *See* Nicholas H. Woolf & Jennifer MJ Yim, *The Courtroom-Observation Program of the Utah Judicial Performance Evaluation Commission*, 47 CT. REV. 84, 85 (2011).

at least four trained lay observers, who "write detailed, contextually specific narratives" setting out the judicial behaviors they observed and their personal reaction to those behaviors.[198] The narratives are subjected to content analysis consistent with the four procedural fairness principles of voice, neutrality, trustworthiness, and dignity.[199] The feedback is then provided to the judge. The use of lay observers offers judges a candid perspective on perceptions of procedural fairness that they otherwise would not receive; attorneys and litigants may be loath to critique (or praise) judicial behavior, but disinterested observers feel less constrained in doing so.[200]

Similar to courtroom observation, but far less formalized, is the occasional videotaping of proceedings with the judge's consent, followed by confidential, individualized feedback to the judge from an expert in social and interpersonal communications.[201] As with many professionals whose job involves some public role, judges may benefit from actually seeing themselves at work. Viewing a videotape may allow judges to identify innocuous or unknown behaviors and activities that send unintended massages to observers about the court's attitude toward participation, dignity, and impartiality. Indeed, in one such training session in New Hampshire, state trial judges honestly and openly reflected on potentially problematic signals they sent unintentionally to parties during proceedings. These judges resolved (among other things) to try to create a more welcoming environment, make eye contact with litigants when they are speaking, explain legal terms to self-represented parties, and be aware of nodding excessively while a party was talking.[202] The resulting self-awareness may enhance litigant and attorney perceptions of procedural fairness in these courts going forward.

A final, and more fine-tuned, approach to measuring perceptions of procedural fairness is surveying litigants and attorneys about their courtroom experience. This approach was undertaken at the federal level as part of a voluntary, one-time pilot project in the Central District of

198. *Id.* at 87.

199. *Id.*

200. *Id.* at 89; *see also* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, THE BENCH SPEAKS ON JUDICIAL PERFORMANCE EVALUATION: A SURVEY OF COLORADO JUDGES 20 (2008) (noting that 88 percent of trial judges surveyed indicated that formal courtroom observation was "very useful" or "somewhat useful").

201. LEBEN, *supra* note 57, at 20. *See also* CENTER FOR COURT INNOVATION, PROCEDURAL FAIRNESS IN CALIFORNIA 7 (2011) (describing a videotaping program in the Superior Court of Santa Clara County).

202. LEBEN, *supra* note 57, at 30–32.

Illinois in 1991.[203] Much more extensive survey work has taken place at the state level, including a wide range of "Fairness Studies" conducted in Minnesota's Fourth Judicial District from 2002 to 2007.[204] The court surveyed attorneys who had appeared in each judge's courtroom during the previous year, as well as litigants in certain types of specialized civil and criminal courts. Survey questions probed a variety of procedural fairness issues, including whether the litigants perceived that the court was listening to them, and whether they perceived the court as being fair to them.[205] The California state court system has adopted a related approach, recommending that its courts provide opportunities for court users to comment on their experiences with comment boxes at each courthouse and on local court websites.[206]

Each of these more detailed approaches to procedural justice measurement is reliant on and enhanced by the bench presence metric. Most obviously, each described approach depends on actual, observable courtroom activity to be effective. But it is more than that. The time that district judges spend in the courtroom provides a lens for understanding survey or observational data. A judge who listens carefully and communicates effectively in open court, but who spends little of his time in court, may not be maximizing his skills in promoting procedural fairness. A judge who is committed to spending considerable time in the courtroom, but who unknowingly sends non-verbal cues suggesting lack of interest in the proceedings, should work all the harder to self-monitor such behavior. Understanding how much time judges spend in the courtroom, as well as the nature of the proceedings before them, may allow courts to refine and target internal approaches to increasing procedural fairness and adjudicative quality.

We anticipate one final objection to bench presence: that emphasizing courtroom hours will create a perverse incentive for district judges to increase their time in the courtroom at the expense of equally important considerations. It is true that the current focus on efficiency has skewed judicial activity in demonstrable ways, for example by vastly inflating the number of pending motions decided in the two weeks prior to semi-annual CJRA reporting deadlines.[207] Human nature suggests that

203. *See* DARLENE R. DAVIS, JUDICIAL EVALUATION PILOT PROJECT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE JUDICIAL BRANCH (1991); Kourlis & Singer, *Performance Evaluation*, *supra* note 7, at 18–19.

204. For details on the studies, see *Fairness Studies*, MINNESOTA JUDICIAL BRANCH, FOURTH DISTRICT, http://bit.ly/18I5oce (last visited Aug. 11, 2013).

205. FOURTH JUDICIAL DISTRICT OF MINNESOTA, PERFORMANCE MEASURES FOR CUSTOMERS (Sept. 6, 2005), *available at* http://www.mncourts.gov/Documents/4/Public/Research/Fairness_Studies_Summary_(2005).pdf.

206. CENTER FOR COURT INNOVATION, *supra* note 201, at 13.

207. *See, e.g.*, CIVIL CASE PROCESSING, *supra* note 2, at 78–79 & tbl.31.

formal measurement of bench presence would similarly spur district judges to increase their courtroom hours. But, of course, that is precisely the goal. Formally measuring bench presence within the context of a broad and comprehensive productivity assessment sends the message that courts should pay more attention to time on the bench, and balance that responsibility with the need to promote accuracy and efficiency. To make it plain: bench presence is not about elevating courtroom time over equally important considerations of accuracy and efficiency. It is about restoring the proper balance between all of these values, so as to maximize the overall productivity of the courts.

None of this should come as a surprise to courts and court observers. Federal district judges are already acutely aware of the importance of procedural fairness in adjudication, and strive to resolve their cases in a fair, dignified, and unbiased manner. But since at least the 1970s, concerns about adjudicative quality and the district court's traditional role as a trial court have wrestled with concerns about efficient case resolution, and too frequently the latter concerns seem to have clouded the former. Bench presence aims to restore adjudicative quality, courtroom time, and procedural fairness to their proper position in the conversation by providing a workable and measurable proxy for procedural fairness at the district court level. Causing courts to think more explicitly about bench presence and robust productivity measures promises to have positive cascade effects, with judges more conscious of litigant perceptions of procedural fairness on a daily basis and willing to use their highly skilled knowledge base to carefully balance efficiency, accuracy, and fairness concerns.

## V. CONCLUSION

Productive federal district courts, like other productive public- and private-sector entities, must be defined by their ability to provide services that are both efficient and effective. For nearly half a century, judges and scholars have developed and refined metrics for measuring court efficiency. It is time to do the same for effectiveness, by developing consistent and reliable metrics for the accuracy of court decisions and each court's commitment to, and ability to provide, procedural fairness. We begin that process here by introducing bench presence—the total hours each judge spends in the open courtroom or a similar adjudicative setting—as a foundational metric for procedural fairness.

We acknowledge that bench presence is not a perfect proxy for procedural fairness. It is somewhat under-inclusive in that district courts obviously can (and do) work to ensure a fair process even outside the

courtroom. Nor does the existence of an open proceeding absolutely guarantee that the parties and their counsel will be afforded the participation, neutrality, transparency, and dignified treatment that they desire. It is also true that procedural fairness might be measured by other methods, from formal courtroom observers to litigant and juror "customer satisfaction" surveys.

But these critiques only make more apparent the significant value of bench presence as a foundational measure of procedural fairness in the federal district courts. Indeed, bench presence has several distinct advantages. It is deeply intertwined with the district court's fundamental role of providing a public forum for the adjudication and resolution of disputes. It captures the scenario in which the largest number of procedural justice values can be expressed at their highest level: adjudication in an open courtroom. Further, it relies on a simple metric that is consistent across all federal district courts, and that is already in place.

Bench presence is only the beginning of what we hope will be a much larger conversation on the improvement of court productivity measures and the restoration of the district judge to the open courtroom. Over time, the bench presence metric may be further refined and supplemented, and combined with improved measures of court efficiency and accuracy to give a fuller measure of district court productivity. In any event, let the conversation begin.