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Private Justice and the Federal Bench

LAUREN K. ROBEL

INTRODUCTION

The political branches have recently taken a new and intense interest in what federal judges do. Surprisingly, this interest has been focused not on the outcomes of cases—traditionally the source of antagonism between the political and the judicial branches—but on the procedures federal judges employ to decide cases. The executive branch, under the guidance of former Vice President Dan Quayle, issued a fifty-point Agenda for Civil Justice Reform that attacks the current discovery system and promotes the use of alternative dispute resolution (ADR). And the Congress recently provoked strong criticism from federal judges when it enacted the Civil Justice Reform Act of 1990 to tell federal judges in detail how they should manage their cases and to cast its vote for ADR.

Although observers may doubt the sincerity of the complaints that drive such efforts, or the basis for the claims that the federal court system is in need of help, these complaints and claims should be analyzed in context.
The courts face a burgeoning industry in alternative dispute resolution, including private judging, that threatens to siphon off many civil cases, including those of litigants wealthy enough to afford it and who find the possibility of avoiding public regulation or scrutiny attractive. In the public policy world of the 1990s, adjudication in public courts for the resolution of disputes is passe; the focus is on its alternatives.

The attention of the political branches to the possibilities of providing private alternatives to public courts is probably long overdue. "Privatization," the transfer of the provision of services from the public to the private sector, was a favorite policy of both the Reagan and Bush administrations. For administrations committed ideologically, or at least rhetorically, to reducing the size of government, privatization is an attractive choice because it promises to bring the discipline and efficiency of the market to the provision of government services. However, the decision to move a service traditionally performed by the government to a private provider is a complex one that requires, among other things, balancing the needs of public accountability and cost efficiency.

As public policy, the movement of services from the public to the private sector is often offered as a solution to the perceived inefficiencies of government services. Because government services are not offered to individuals at their true cost, the argument goes, individuals consume too much of them. The lack of market competition in the provision of services, and the resulting inflated demand by consumers, leads to negative results, among which are delay and excessive cost in the provision of the services. In theory, moving government services into the private market will increase efficiency and reduce overall cost by enhancing competition.


8. DONAHUE, supra note 7, at 11.

Recent years have seen a renewal of the claim that the federal courts are in a caseload crisis. During the 1980s, a period of serious federal interest in privatization, the claim of caseload crisis has typified most of the significant discussions surrounding the problems of the federal courts.

If we compare the public policy reasons typically advanced for privatization with the problems that are typically advanced as symptomatic of the federal court caseload crisis, we can note some striking similarities. As the argument runs, the problem with the courts is that they are overwhelmed by cases, far beyond the capacity of the system to provide timely justice to individual litigants. At least one federal appellate judge has suggested that the reason for this crisis is that judicial services in those courts are offered to consumers at far below their true cost; consumers (litigants) therefore consume too much of these services. The result has been delay and excessive cost.

Given the similarities in the discourses and the popularity of privatization policies, one might expect privatization of judicial services to be offered as a solution to the federal caseload crisis and, in fact, there is a growing industry in such services. To the extent that the "dispute-resolving" functions of government have been transferred to private providers, the movement has been prompted, until recently, by consumers' demands for alternatives, not by government initiatives. However, as noted above, this consumer-driven privatization has recently been augmented by an increased governmental


14. See, e.g., Gary Spencer, New York Lawyers Gather for Annual Meeting, Nat'L L. J., Feb. 10, 1992, at 11 ("[T]here seemed to be a dawning awareness that the judicial system could not be counted on to handle the civil caseload in either the short or long run. A number of programs and speeches were devoted to the question: 'What next?' The most common answer was, 'Private justice.'"); see also Garth, supra note 5.

The governmental response to ADR, at least on the federal level, has been until recently quite cautious. In 1988, Congress authorized 20 federal district courts to experiment with "court-annexed" arbitration in particular kinds of cases. 28 U.S.C. §§ 651-58 (1988). This statute limits the kinds of cases that may be referred to arbitration without the consent of the parties. 28 U.S.C. § 652(b) (permitting referral of civil cases where only money damages are sought and damages are not in excess of $100,000). For a description of some of these programs, see E. Allan Lind & John Shapard, Evaluation of Court-Annexed Arbitration in Three Federal District Courts (Federal Judicial Ctr. ed., 1983); Robel, supra note 6, at 24-25.
interest in providing alternatives to litigation in the public court system.\textsuperscript{15} Thus, it might be thought that we are poised at the edge of serious privatization efforts in the federal courts. Yet, an observer focused on the traditional indicia of privatization will miss an important trend already occurring in the federal courts, and one to which the term "privatization" might apply.

This Essay sketches several arguments. It argues that, with respect to courts, privatization may be viewed as a continuum, a series of points between purely private dispute resolution on the one hand and public adjudication on the other. To the extent that courts abandon procedures that provide public access and general accountability, they come to resemble their private alternatives.

Under the definition of privatization developed below, federal courts are already substantially "privatized." Moreover, the push for privatization has come from within the courts themselves, prompted by caseload pressures that the judges view as in conflict with their professional standards. To the extent that judges believe that an increased caseload creates a tension between professional roles that value craft and skill and public roles that favor visibility of process, these judges appear to be choosing strategies for resolving that tension in favor of their professional roles.

Moreover, alternatives to public courts—notably private judges and the proliferation of alternative dispute resolution providers—are threatening public judges' place in dispute resolution. Judges' previous reactions to caseload pressures suggest that they will respond to this threat by decreasing the availability of public processes even further in order to compete effectively for the cases that define their professional roles. To talk about this trend in terms of "privatized process" is not simply to seize a convenient metaphor for diminished accountability; rather, it is to recognize the synergistic relationship between the burgeoning market of private justice providers and the existence of public procedures in the courts.\textsuperscript{16}

Today's federal judge may well wonder what her job will look like in the future. In addition to the exhortations of the political branches, there are pressures from a variety of directions that promise to change the mix of cases, the working conditions, and perhaps the very nature of federal judges' jobs.

Judges' incentive structures need to be understood by those concerned with public policy. What do federal judges cherish about their jobs? How will these

\textsuperscript{15} In addition to the examples at the beginning of this Essay, one can trace the interest in federal ADR to members of Congress by the legislation they introduced through the 1980s. For an interesting collection, see ABA STANDING COMMITTEE ON DISPUTE RESOLUTION, FEDERAL LEGISLATION ON DISPUTE RESOLUTION (1988).

\textsuperscript{16} To this extent, then, I disagree with Paul Starr that the reallocation of resources within a public agency cannot be called "privatization." Starr, supra note 9, at 14.
changes affect the men and women who sit on the federal bench? How do they perceive their roles? What satisfactions do judges receive from their jobs, and how will these changes affect those satisfactions? How will judges attempt to protect the things they cherish from encroachment?

This Essay will attempt to show that these questions are worth consideration as we embark upon serious privatization efforts in the courts. In beginning to sketch some answers, I focus on the ways in which judges are like other professions in the nonmonetary rewards they get from their work. In doing so, it is not my intention to disparage the commitment with which federal judges approach public service, or the dedication they show to their work under often difficult circumstances. I have the highest regard for both. Rather, my hope is to emphasize how little we have thought about the central actors as we discuss major revisions in their role.

I. THE PRIVATIZATION CONTINUUM

Discussions of the privatization movement's implications for courts might see courts and private dispute resolution providers as sharply distinguished: courts exist for "public" resolution of disputes, in contrast to the myriad "private" ways in which disputes are resolved. However, the designations "private" or "public" can represent a series of attributes associated with kinds of dispute resolution, rather than the location of dispute resolution in either state-operated courts or the offices of private providers. What attributes make the resolution of a dispute "public"? The most obvious is the presence of the coercive power of the state. But the list might include other things: hearings open to the public, impartial and unbiased decision makers, rationalized decision making, and accountability of decision makers enhanced through the visibility of the decision-making process and the public announcement of the decision. In fact, many people define "courts" as those institutions, and only those institutions, that involve all of these attributes: (1) the coercive power of state, (2) applied definitively to issue judgment, (3) in visible, unbiased, accountable, rationalized ways. Thus, under some understandings of the function of courts, their very purpose is the dissemination of public values, a purpose to which private market alternatives seem intuitively ill-suited.

The list of attributes mentioned above figures largely in discussions of the legitimacy of the exercise of state power. These attributes are themselves definitional: they traditionally define judges roles. Courts are public in another

definitional sense: they are instruments of government power. Speaking of "privatized" courts, then, may appear incoherent, for how can an arm of government exercise anything but public power?

If one begins to define the content of "public" or "private" as it relates to dispute resolution, it becomes apparent that it is possible to talk about privatization not as a dichotomy but as a continuum. Courts move towards privatization when their work becomes less visible, less accountable, less rationalized, or when the work of judges ends, not in the issuance of the state's judgment, but in the agreement of the parties to withdraw the lawsuit or to submit to private ordering of the dispute.

As a description of the federal courts, the list of "public" attributes fails: federal courts are involved in a variety of practices that do not include all (or even any) of the attributes of public decision making listed above. Trial judges seek to remove disputes from the public sphere by actively encouraging settlements and by diverting cases to court-annexed arbitration, mediation, and "early neutral evaluation." Public appellate process is available for only a small percentage of appellate litigants. Public hearings, rationalized decision making, and public accountability through the publication of opinions are becoming less frequent.

II. PRIVATIZATION POLICY AND JUDGES' ROLES

Serious efforts to divert cases from traditional adjudicative processes have thus far centered on the trial courts, rather than the appellate courts. As public policy favoring alternatives to dispute resolution develops, it must account for the effects such efforts will have on the public court system. Most policy discussion has focused on what appear to be obvious benefits to a system of decreased reliance on adjudicative processes: the claimed reductions


19. For instance, Starr describes the public sphere as "the open and visible" in contrast to the private sphere that is "more closed, more shielded from contact and view." Starr, supra note 9, at 8 (private sphere), 9 (public sphere). The public sphere "also may be conceived of as that which applies to the whole people," as a judgment belongs to the "whole people" rather than to the parties only. Id. at 9.

20. Robel, supra note 6, at 37-57 (describing the variety of practices).


22. Robel, supra note 6, at 37-57.

in consumer cost and delay, reduced public cost, and an easing of caseload pressures. However, I would like to focus this discussion elsewhere. Particularly, I would like to ask what we know about how public judges will adapt to changes in their environment that threaten their abilities to perform their professional roles.

Before engaging in this exercise, however, I would like to argue its necessity. Failure to account for public judges’ reactions to shifts in their workload will result in one of at least two anticipated reactions. First, to the extent that judges can reallocate cases within the judicial bureaucracy to parajudicial personnel such as clerks or magistrates, they have the ability and the incentive to shift work to others in order to concentrate on (and compete for) the kinds of cases they find professionally rewarding. This kind of allocation has occurred at the appellate level in response to the caseload crisis. While such shifts may or may not be benign, they raise a number of policy questions in their own right. For instance, we may be concerned about the quality or quantity of judicial attention cases receive. Second, as federal judges no longer have the ability to fulfill their professional aspirations on the bench, there is an obvious danger that they will leave in pursuit of more rewarding work. As a society, we may not care. We may believe that large numbers of qualified people will always find the prestige of the federal judiciary attractive enough to insure that society’s need for federal judges is met; or we may not be in sympathy with the current professional aspirations of federal judges, and wish to encourage a bench with different aspirations. My point, however, is that the relationship between increased privatization and the public courts is necessarily synergistic. The public bench will not simply continue to do what it has always done if the environment surrounding it is significantly altered.

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24. For typical arguments with respect to cost and delay, see THE BROOKINGS INSTITUTION, supra note 13. I have argued elsewhere that empirical claims for reliance on ADR are largely unsubstantiated. See Robel, supra note 6, at 28-34. Proponents of ADR have also argued that consumers are more satisfied with less adversarial resolutions of disputes. For a study on this point, see E. ALLAN LIND & ROBERT J. MACCOUN, THE PERCEPTION OF JUSTICE: TORT LITIGANTS’ VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES (Rand Inst. for Civil Justice ed., 1989).

25. See Mark Thompson, RENTED JUSTICE, CAL. LAW., Mar. 1988, at 42 (noting that over 150 California judges had “gone private,” lured by the growing demand and good pay).
A. The Appellate Analogy

1. Appellate Privatization

Appellate decision making is publicly accessible through oral arguments in open court and the publicly distributed written decisions of appellate judges. To the extent federal appellate courts decide cases without argument, written and disseminated opinions, and judge involvement, they move towards a less visible and accountable process—a privatized process.

In federal appellate courts, the practice of privatization is well advanced. The number of oral arguments heard in federal appellate court is alarmingly low. Fewer than half the circuits hear argument in even half the cases they decide on the merits. Similarly, the publication rates are decreasing yearly, with only a minority of federal circuits publishing even half of their decisions. Moreover, in survey responses to the Federal Courts Study Committee, judges admitted that they relied on their clerks and staff attorneys to do things that they believed they should do themselves, particularly opinion drafting.

26. Oral argument serves many functions. Most obviously, it provides a way for judges to become informed about the issues raised on appeal. Judges also rely on oral argument to demonstrate to the parties that the members of a panel have attended to the issues raised on appeal, to permit interaction with members of the bar, to provide a forum for the presentation of issues of public concern, to acknowledge the court's responsibility for resolving such disputes, and to provide an opportunity for the judges to confer and hear each other's views.


28. Commentators have called this process bureaucratization, a characterization with which I have no disagreement. See, e.g., Wade H. McCree, Jr., Bureaucratic Justice: An Early Warning, 129 U. PA. L. REV. 777 (1981); see also POSNER, supra note 10, at 115-19. Privatization is a politically loaded term, and in the appellate context, as opposed to the trial context, I find its helpfulness largely metaphorical.

29. Robel, supra note 6, at 48. Not only is argument less frequent today than previously, it is shorter when it occurs: some courts routinely allow cases only ten or fifteen minutes of argument per side. PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 16-17 (1976).

30. Robel, supra note 6, at 49-50. As of 1986, only three federal appellate courts published half of their decisions on the merits. Id. at app. table 4.

31. Id. at 44-47.
Why have courts moved to less public and arguably less accountable forms of decision making? Caseload pressures are the engine for court privatization in the sense just described. However, in most discussions of increased caseload in the federal courts, not all cases are created equal. In order to understand why, one must look more closely at both the content of and the participants in the caseload crisis debates.

2. Privatization and Prestige

The major participants in caseload crisis discussions with respect to the federal courts are federal judges and elite practitioners. As a group, they are involved most heavily in legal work which is ordinarily business oriented and is viewed generally by the bar as constituting the most prestigious areas of practice. Given what we know about how lawyers view the prestige of various kinds of legal work, we could predict fairly easily that these caseload critics would have strong views about the causes of the caseload crisis. Particularly, we could predict that high-prestige cases, which congregate in the area of business disputes, would not be identified as a caseload “problem” whereas low-prestige cases, which congregate in the area of disputes involving individual litigants, would be viewed as problematic.

In fact, these critics do not view “caseload” as an undifferentiated pile of cases, all of which contribute equally to the crisis. Rather, they blame the crisis on the proliferation of cases involving individual litigants attempting to enforce public norms. Judge Posner writes, for instance, that the causes of the caseload crisis include the increase in federal rights. He cites several examples: “the increased number of federal rights that a federal prisoner can assert in a post-conviction proceeding”; the “greater number of federal rights that state prisoners, whether challenging their convictions in habeas corpus proceedings or challenging the conditions of their confinement in civil rights proceedings”; the “great increase in civil rights cases [that] must also

32. Id. at 38-56.
33. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 90-115 (1982) (discussing lawyers’ allocation of prestige among different kinds of legal work). The Heinz and Laumann study noted that consistent understandings of the prestige of various kinds of legal work correlated strongly with the wealth of the client. The most prestigious kinds of work were securities, tax, antitrust, patent, banking, public utilities, general corporate, probate, and municipal law. Work ranked least prestigious included civil rights, criminal (prosecution), general family, criminal (defense), consumer (creditor), personal injury, consumer (debtor), condemnation, landlord-tenant, divorce, and poverty law. Id. at 91.
34. POSNER, supra note 10, at 81-82.
35. Id. at 82-83.
be a product in large part of new law”;36 and the “tremendous increase in the number of cases under the social security laws.”37 At the same time, cases by individual litigants asserting these federal rights are often cited as evidence of the “trivialization” of the federal courts.38

Given the professional standing of the participants in the debate, it is hardly surprising that they do not view the (increasingly) large number of cases generated by business disputes as problematic,39 but rather decry the presence of large numbers of low-prestige, low-stakes cases involving individual litigants.40

At least at the appellate level, the cases that are being diverted to privatized processes are overwhelmingly those that were identified above as the “causes” of the crisis. Reductions in oral argument are not randomly distributed across case types, but concentrate in cases involving individual, rather than business, litigants. In 1986, for instance, while argument occurred in 77% of cases involving antitrust or securities, and 69% of the contract actions, it occurred in only 54% of the civil rights cases, 40% of social security claims, and 33% of prisoner petitions.41

Nonpublication is similarly concentrated in those cases that involve individual litigants. In 1984, for example, 56% of employment civil rights cases, 78% of social security cases, 63% of habeas corpus cases, and 78% of prisoner civil rights cases were decided without published opinion. Only 26% of antitrust cases, by comparison, were decided without published opinion.42 Moreover, in six circuits, a quarter of all cases are decided with neither oral argument nor a published opinion.43 These cases again cluster in areas involving individual litigants: 55% of immigration cases, 48% of social

36. Id. at 83.
37. Id. While I use Judge Posner as my example, others abound. See also Marc Galanter, The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days, 1988 Wis. L. Rev. 921 (noting the growth of business disputes); Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 CORNELL L. REV. 719 (1988) (noting that there are fewer constitutional tort cases than portrayed in public discussion).
38. Galanter notes then-Judge Scalia’s lament that in the old days, the federal courts were the site of “big, exotic, significant cases” and now are overrun with trivial ones. Galanter, supra note 37, at 921-22.
39. For example, the area of contracts “has not only escaped condemnation, but has rarely if ever been mentioned as the source of burgeoning caseloads. Yet upon inspection, it may be the most spectacular area of growth in federal cases.” Id. at 942.
40. The cases listed by Judge Posner, for instance, fall almost entirely at the bottom of Heinz and Laumann’s professional prestige rankings. HEINZ & LAUMANN, supra note 33, at 91.
41. Robel, supra note 6, at app. table 2.
42. Id. at app. table 5.
43. Id. at app. table 3.
security cases, and 68% of prisoner civil rights cases were decided in this manner. By comparison, only 7% of antitrust claims and 14% of securities cases were decided with neither argument nor published decision.

Finally, it appears that judges’ involvement in these non-argued, nonpublished cases is marginal. Senior staff attorneys in seven of the circuits estimated that, in addition to motions, prisoners’ petitions, and other pro se litigation, their offices processed more than 75% of the fully counseled, non-argued cases that were decided on the merits in their circuits. In ten of the circuits, staff attorneys present the cases to judges with memoranda or proposed opinions, or both, attached. In only two of the circuits do the judges regularly meet with staff attorneys to discuss the cases. Thus, central staff attorneys have significant responsibility in a very large number of these appellate cases.

Along with whatever gains in efficiency are produced by privatization at the appellate level, it additionally serves the function of allowing appellate judges to cabin their energies for the high-stakes, prestigious cases through which judicial reputations are made. Like most of us, judges are likely to resist developments that threaten to undermine their professional standing.

3. The Craft of Judging

While appellate judges strongly support public processes in theory, their survey responses indicate that they overwhelmingly support the current procedural arrangements in their courts—including low argument and publication rates and high staff involvement. Social scientists have long been interested in judges’ conceptions of their roles as a way of understanding

44. Id. at app. table 5.
45. Id.
47. STIENSTRA & CECIL, supra note 46, at I-2.
48. For instance, in response to the surveys, most of the judges (87%) agreed that oral argument was usually or often helpful; and most agreed that further reducing opinion publication would be undesirable as a response to increased caseload. Robel, supra note 6, at 54-55.
49. Despite low argument rates, few judges believe that they forego argument in cases that could benefit from it. Robel, supra note 6, at 54 n.214. Over 90% believed that oral argument times in their courts were either about right or too long. Id. at 54 n.213. While less sure about publication than argument, a majority of the judges believe that they publish as often as necessary and spend appropriate amounts of time on opinion writing. Id. at 55 nn.215-16.
how judges reach decisions in discrete cases. But judges’ conceptions of their roles may also help explain why judges seem to support privatized process in such numbers.

Woodford Howard’s study of the federal appellate courts, for instance, found that judges’ role orientations were strongly professional, much more professional, in fact, than political. Because judges’ primary reference groups are professional—party litigants and members of the bar—and because judges take quite seriously the opinions of other judges, Howard notes that judges consider each other their “severest critics.” Additionally, he found it striking that “the immediate participants in adjudication—colleagues, counsel, clerks, litigants—were viewed as more influential touchstones and targets of judging than the external interests emphasized in political or realist theories of judicial decision.”

Judges’ professional standing is based in large part on craft notions: “Judicial prestige turn[s] less on institutional than on individual reputations for sound judgment and craftsmanship.” Reputations for sound judgment and craftsmanship, in turn, rest on careful pre-argument preparation and the production of thoughtful and intellectually satisfying opinions.

While judges have visions of their roles that are strongly tied to traditional notions of craft and professional competence, there are other vantage points for describing the role of the judge. In the United States, formal and informal descriptions of judicial roles are tied to public definitions of the courts. Judges exercise public power that is described by statute, by codes of ethics, and by common understanding. Moreover, these descriptions of the role of the judge have no “private” component: judges are, in some senses, such public beings that even their private activities are extensively regulated in the interest of maintaining the appearance of the integrity of their public role.

Judges’ notions of the legitimacy of their exercise of power might be tied to understandings of their public role. Thus, to the extent there is deviation in practice from the “public” role, judges might be engaged in activities for which there is a definitional problem that raises questions of legitimacy for the judges. Moreover, these two aspects of the judicial role, the “pure”

51. Id. at 150.
52. Id. at 151.
53. Id. at 144.
54. For instance, the Model Code of Judicial Conduct, Canon 4, requires judges to regulate “extra-judicial activities as to minimize the risk of conflict with [their] judicial obligations,” and Canon 2 states that judges “should avoid impropriety and the appearance of impropriety in all [their] activities.” Model Code of Judicial Conduct (1990).
professional and the public, might be expected to collide if caseload pressures are significant, as appellate judges report they are.\textsuperscript{55}

Appellate judges' responses to open-ended survey questions about the effect of caseload on their lives indicate that judges view caseload pressures as a significant threat to the professional values of their craft.\textsuperscript{56} Over half of the judges responding to this question\textsuperscript{57} mentioned concerns about the deterioration of professional standards, and the loss of time for careful opinion crafting, reflection on intellectual issues, or preparation for argument. Threats to the more public aspects of their work, such as accountability and visibility, were mentioned only eleven times, while the personal effects of increased caseload, such as stress, anxiety, and increased working hours, were mentioned forty times.\textsuperscript{58} The legitimacy of judges' exercise of power under conditions of reduced visibility and accountability surfaced in some of the judges' comments.\textsuperscript{59} Rarely, however, did such concerns appear divorced from concerns over the decline in professional standards.\textsuperscript{60}

\textsuperscript{55} In fact, most of the survey respondents (81\%) report that the workload is "overwhelming" or "heavy." Robel, \textit{supra} note 6, at 38.

\textsuperscript{56} The question was, "Please provide any additional information concerning the effects—if any—of caseload pressures on how you do your work. Are there areas not mentioned [in the survey] that are affected by caseload? Has collegiality on your court been affected? Have your work habits or working hours changed? If so, how?" Survey of the United States Circuit Judges, Question 7, at 4 (Sept. 1989), in \textit{2 WORKING PAPERS AND SUBCOMMITTEE REPORTS} (Federal Courts Study Comm. ed., 1990). Half of the judges (84) took this opportunity to write narratives. Survey Responses, Survey of the United States Circuit Judges (Sept. 1989) (unpublished survey responses on file with author) (The author was a consultant to the Federal Courts Study Committee and participated in constructing this survey).

\textsuperscript{57} Forty-seven of the judges surveyed mentioned these concerns. Survey Responses, \textit{supra} note 56.

\textsuperscript{58} Answers were coded as "professional" if they mentioned the quality of opinion or oral argument preparation, lack of time for reading opinions of other panels, other reading in the law, other "law development" activities (such as commenting on the opinions of other judges), or lack of "thinking and reflecting" time. Answers were coded as "public" if they mentioned the necessity of delegating judicial work to clerks or central staff, reduction of oral argument, or the reduction of publication or opinion writing. Answers were coded as "personal" if they mentioned increased hours, anxiety, stress, effects on family, or lack of time for nonjudicial activities, like vacations or nonprofessional reading. Individual responses could be coded in more than one category. Id.

\textsuperscript{59} Id.

\textsuperscript{60} This comment from the Sixth Circuit was typical:

Caseload increase has caused: (1) greatly increased bureaucracy, (2) decline in responsibility of judge for decision in the case and delegation of that responsibility to others—clerks and staff, (3) decline in conferences with other judges about case because of press of time, (4) decline in collegiality because of increase in numbers and press of time, (5) increase in sloppy and ill-considered opinions and intracircuit conflict because of press of time.

\textit{Id.} A different judge expressed a similar dissatisfaction with the overwhelming caseload:

I am often left with the nagging feeling that we are merely processing cases rather than deciding them on the basis of collective thought after an adequate opportunity to consider them. I sometimes feel that we are becoming captives of our staff—that we are being
One of the hallmarks of professionalization is the extent to which the “financial rewards of a job play second fiddle to psychic satisfactions.” The Federal Courts Study Committee’s survey was conducted during a time when Congress had been waffling on pay for federal judges, and many of the judges who responded expressed some bitterness over their treatment on this issue. Responses to the appellate survey clearly demonstrate that judges feel overworked and underpaid. Their sense of job satisfaction comes mainly from the professional satisfaction and prestige they garner from their positions. To the extent that judges believe that caseload creates a tension between professional roles that value craft and skill, and thus enhance their prestige, and public roles that favor visibility of process, these judges appear to be choosing strategies for resolving that tension in favor of professional roles. Statistics on the allocation of judicial appellate resources suggest that judges have done so by choosing to protect professional values of craft in the cases on which professional reputations are made, reserving public process for the high-status cases involving elite litigants.

Howard notes that “the sway of traditional professional ideologies of the judicial function seems unaffected by contrary experience,” and suggests that disjunctions between theory and practice in appellate courts may represent “role lag”—that is, resistance in theory to changing appellate functions in practice. While Howard was speaking of attitudes towards decision making, his comment seems applicable to judges’ acceptance of privatized process as the price for maintaining a sense of professional satisfaction. In the face of societal decisions to expand federal rights, judges hold fast to craft notions of quality—but only for those few elite cases.

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subsumed as functionaries in the appellate process, rather than performing as decision makers and as originators of opinions.

Id.

61. Howard, supra note 50, at 118.
62. This comment was typical:
You didn’t ask but the biggest problem we have is salary. The top lawyers simply have no interest in our jobs. You cannot educate your children, take any meaningful trips or pay normal living expenses. Congress has taken away most of our prestige by making us “the laughing stock” of the legal community. Our country will ultimately “pay” a heavy price. I work all the time. Read briefs on airplanes, in the car or on trips, and during vacations. Never get to read for pleasure and find it extremely difficult to engage in any recreation.

Survey Results, supra note 56.

63. Howard, supra note 50, at 153.
64. Id.
65. I want to be clear that I am not passing judgment on this choice, nor am I arguing that all judges have made it. Appellate judges are no more monolithic a group than the rest of us.
B. Lessons for the Trial Courts

I want to speculate about what we might learn from the appellate experience in the context of trial courts. First, it is clear that if the policies favoring increased privatization within and without the trial courts succeed, the result will be a dramatic change in the kinds of work federal trial judges do. Whether these policies are instigated by elite litigants with the money to buy the services of private judges, or by the Congress in setting up ADR attached in some way to the federal courthouse, the point is to divert cases away from adjudicative processes, and especially from judges. Further, at least for now, the kinds of cases that are being diverted are all civil. Federal judges in the busiest federal districts complain that they are unable to try anything but criminal cases. This suggests that a wholly criminal docket would be unacceptable for most current judges.

If the appellate experience teaches anything, it is that if the environment in which judges work begins to seriously threaten things that judges view as central to their role, or to erode the prestige of their position, judges will resist by changing their behavior. Further, the appellate experience gives examples of ways in which judges might do this. In order to preserve their ability to compete for the cases that they find intellectually and professionally satisfying, judges may divert cases to others within the judicial bureaucracy (most likely the magistrate judges).

The work of federal trial courts is much more complex than that of appellate courts. But if we confine our inquiry for the moment to issues of prestige and professional satisfaction, we can begin to develop some concerns. As members of a bar with a fairly unified vision of the prestige of various kinds of legal work, federal trial judges are not likely to vary significantly

66. Court-annexed arbitration is a good example of ADR attached to the courthouse. See, e.g., PATRICIA A. EBENER & DONNA R. BETANCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (1985).

67. See Robel, supra note 6, at 34-36 (commenting on the magistrates' role). Wolf Heydebrand and Carroll Seron note that the effect of judges is not the only, or even the main factor, in an explanation of terminations of cases. To be sure, an Article III judge is ultimately responsible for the written order that will expedite or terminate a particular case. But the "support staff" of modern judicial personnel plays an important part in this process: nonjudicial personnel are interdependent with judicial personnel and in some instances directly affect decisions and outcomes. In civil dispositions the number of magistrates plays an important role, especially in more "marginal" types of cases (for example, prisoner petitions). WOLF HEYDEBRAND & CARROLL SERON, RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS 186 (1990).

68. HEINZ & LAUMANN, supra note 33, at 92 (noting the "overwhelming tendency" of lawyers at all prestige levels to "concur on the general prestige rank order of the fields" of practice).
from appellate judges in the kinds of cases they view as prestigious. We could predict that they too will develop similar strategies for protecting the prestige of their positions by assuring their ability to compete for prestigious work. For instance, to the extent that the political branches are suggesting court-connected alternatives to litigation, such as court-annexed arbitration or mediation, or early neutral evaluation, judges may be able to control the course of low-prestige cases by diverting them to these alternatives in order to compete more effectively for higher-status business disputes.

We know far less, however, about the kinds of professional satisfactions trial judges receive from their work. Unlike appellate judges, most trial judges' reputations do not come from the scholarliness of their opinions. While some judges become known for their ability to get a settlement, most trial judges make their reputations in trials. It is difficult to imagine what trial substitute will make for a satisfying career. Moreover, it is difficult to imagine what we want our judges to do instead.

CONCLUSION

By focusing this discussion on privatization's effect on judges, I do not mean to suggest that we should not be concerned with privatization's other effects on the public court system. Particularly, I am concerned about the question of which litigants are being sent to what type of ADR, and what type of public courts are implicitly imagined by public policy discourse about court alternatives. I do not think we can begin to explore these questions, however, without imagining first how the central actors in the public courts, the judges, will respond to conflicting pulls of professional ideology, duty, and competition for cases with private and court-annexed alternatives.

69. And, similarly, there is evidence that they have shifted front-line responsibility for low prestige cases within the judicial bureaucracy to magistrates and pro se law clerks. See, e.g., CARROLL SERON, THE ROLES OF MAGISTRATES: NINE CASE STUDIES (Federal Judicial Ctr. ed., 1985); Robel, supra note 6, at 34-36.

70. The little data we have suggests that trial judges, like appellate judges, find the approval and respect of their peers to be the most important reference groups. Nancy L. Alpert, The Judicial Career: Patterns of Socialization on the Bench 108 (1981) (unpublished Ph.D. dissertation, Northwestern University).