QUOTAS

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INTRODUCTION

Debtors in the U.S. have a right to file for a discharge once in an 8 year period.[1] California's 3-strikes provision essentially allows to commit two criminal acts without being punished disproportionally.[2] In several jurisdictions any person is given a limited right to change his or her name—e.g., once every 7 years.[3] This pattern also exists in procedural settings. Litigants can depose 10 witnesses without leave of court.[4] Attorneys can

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[1] 11 U.S. Code § 727(a)(8).

[2] CAL. PENAL CODE § 1170.12(c)(2)(A) ("[I]f a defendant has two or more prior serious and/or violent felony convictions . . . the term for the current felony conviction shall be an indeterminate term of life imprisonment . . .").

[3] Israel Names Law, 1956, § 20.

[4] FED. R. CIV. P. 30(a). A parallel rule limits the number written interrogatories a party may serve on other parties to 25. FED. R. CIV. P. 33(a).

disqualify a certain number of potential jurors—e.g., 3—without stating a reason.[5] In California any litigant can—1 time per case—remove the judge assigned to hear the case without showing that the judge is actually biased.[6] Res judicata rules can be viewed as allowing litigants 1 attempt to vindicate their right.[7] Inmates are allowed to bring up to 3 frivolous suits in a lifetime without paying filing fees.[8] In England, litigants can make 2 "applications which are totally without merit" before the judge can issue an order that blocks further motions by that party.[9] In Israel, individuals can file 5 lawsuits in a small claims court per year.[10] A similar phenomenon exists in other, non-legal settings as well, especially in sports. Tennis players, for instance, are entitled to challenge referee decisions three times per set.[11]

These are sporadic examples of the use of quotas—quantity mechanism—to regulate behavior. As these examples show, the use of quotas is not foreign to policymakers. Quotas form a unique policy tool that can be valuable in various settings. They beg a comprehensive discussion, which to date has not been made.[12]

This Article undertakes this task, advocating a broader use of quotas, particularly in the context of public services provision and in legal procedure. Part I provides a background for the use of price and quantity mechanisms to restrict beneficial behavior which also entails harm to others. Quotas, like prices, can discourage over-use and induce their beneficiaries to prioritize and invoke their rights only in the most appropriate instances. Part II discusses where quotas can in particular be useful—mostly, quotas are an effective regulatory tool when individual determinations are problematic; policymakers are reluctant to impose a

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[5] The number of these so called "peremptory challenges" varies according to the subject matter (*e.g.*, 20 in capital cases, 3 in misdemeanor cases and civil cases, etc.; FED. R. CRIM. P. 24, 28 U.S. Code §1870).

[6] CAL. CIV. PROC. CODE, § 170.6

[7] *Cf.*, Saul Levmore and Ariel Porat, *Bargaining with Double Jeopardy*, 40 J. LEGAL STUD. 273 (2011).

[8] 28 U.S.C. § 1915(g). For further analysis of this provision and prisoners' litigation more generally see *infra* note 173 and Part III.C.2.b.

[9] Practice Direction 3C, section 2.

[10] Israel Courts Act, 1984, section 60(b). Beyond this limit the small claims court has discretion to hear the case.

[11] *Infra* note 36. For other sports examples see *infra* note 39.

[12] As will be discussed in Part I, voluminous literature has compared the use of quantity and price regulation, but the discussion typically concentrates on environmental issues. The context of discrimination also implicates the use of quotas, but in this context the discussion centers on the proper and constitutionally permissible ways to implement affirmative action programs. *E.g.*, Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (to implement affirmative action programs, "universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks"). There has been no attempt, then, to treat quotas as a unique policy tool, in broader settings.

price; and prices are hard to calculate. Notably, the provision of public services comprises a domain suitable for the use of quotas. Part III demonstrates that legal procedure also fits this pattern, and can benefit from employing quotas. Litigation is beneficial but it can also be abusive; case-by-case determinations have drawbacks; and courts and policymakers have been reluctant to impose a price on the use of the legal system. More generally, litigation is deemed as a public service, which the government has to provide. Part III then focuses on several concrete instances in which quotas can restrict litigation behavior better than other regulatory mechanisms—examples include quantity limits on interlocutory appeals and filings. The last Part concludes. Quotas may constitute a second-best option, but they do broaden the range of regulatory alternatives.

I. PRICE AND QUANTITY REGULATION

Typical human behaviors—driving, litigating, emitting pollutants, drug manufacturing, etc.—often entail benefits to those who engage in the activity together with negative externalities, i.e., harms to others. Driving and polluting endanger other participants and the environment; litigating burdens courts and rival litigants; drugs have various fatal side-effects. From a policymaking perspective there are several alternatives to regulate such activities, which the following paragraphs roughly sketch.

At one extreme we can ban the relevant behavior altogether or substantively curtail its scope—e.g., forbid driving during certain hours.[13] By doing so, however, we lose some beneficial acts. At the other end, we can allow the relevant behavior, imposing no restrictions (or minor ones).[14] This option, though, will typically result in too many committed acts and negative externalities—as those who engage in the behavior, drivers for instance, do not take into account its deleterious repercussions. One may turn, then, to intermediate options, aiming at regulating the behavior such that harmful acts are discouraged and beneficial acts are encouraged.

Regulating harmful behavior can take many forms,[15] but for the

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[13] This does not mean that the banned behavior is always completely eliminated. One needs to enforce the ban and enforcement costs will often result in some unwanted acts. *Cf.*, Gary. S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[14] Even without legal intervention, market forces, informal sanctions, and reputational effects can constrain the relevant behavior. *Cf.*, A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010) (stressing that in the context of liability for widely sold products legal intervention is often redundant).

[15] Regulation can take place, for example, through courts after the harm materializes (*e.g.*, tort litigation); or by agencies, based on the committed act and regardless of the harm. *See, e.g.*, Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J. L & ECON. 255

purposes of this Article it is useful to distinguish between a case-by-case and a more general, rule-like intervention. The former approach scrutinizes each and every single act, sanctioning (or banning) only the specific acts that are determined to be socially detrimental. One example is licensing, in advance, only acts that are perceived as socially beneficial;[16] drug manufacturers, for example, cannot sell a given product without the Food and Drug Administration's approval.[17] However, such case-by-case determinations may be complex, expensive, and ineffective, as they require policymakers to acquire information regarding each and every single act.[18] Instead, one can employ a more general constrain on the relevant activity, letting the wrongdoers operate under this restriction as they see fit. To illustrate, corrective taxes, often referred to as Pigouvian taxes, essentially put a price on the relevant activity. If properly set, they optimally encourage the wrongdoer to take socially valuable acts and avoid disadvantageous ones. In principle, such pricing requires no case-by-case determinations. With environment taxes per pollution unit, for instance, plants can be driven to pollute only when doing so justifies the price they pay.[19] These are the very basics of the economic analysis of law.

The use of quantity regulation—quotas—expands the foregoing common alternatives. In principle, quotas can achieve the same goal as pricing. Take the polluting factory example. Instead of charging a price per unit of pollution—which leads the plant to an optimal level of production—one can set the desired level of pollution, i.e., maximal units of pollution allowed. Presumably, if the pollution quota is properly set the wrongdoer will use its given limit to produce only up to the socially worthy level.

(1993). Generally, a harm-based, after-the-fact intervention can be cheaper to administer—it kicks in only when harms materialize, and it often relies on the incentives of the injured to vindicate their rights. Act-based intervention, on the other hand, can be more effective when ex-post enforcement is difficult, for example, where the wrongdoer has little means and is unlikely to be deterred by a large sanction. *Id.*

[16] *See, e.g.*, Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. CHI. L. REV. 481 (2014). Another example of case-by-case determinations, in the post-harm context, is negligence litigation—which penalizes only faulty acts upon determination by a court.

[17] *Id.*, at 483–84.

[18] *E.g.*, Ian Ayres & Gideon Parchomovsky, *Tradable Patent Rights*, 60 STAN. L. REV. 863, 877 (2007) (proposing, in the context of patents, a more general regime "instead of relying on the judgments of patent examiners ex ante or judges ex post . . . "). *See also infra* notes 131–134 and accompanying text and *infra* note 140 for the criticism of individual determinations of judges regarding abusive litigation.

[19] Strict liability regimes, which are triggered after the harm materializes, play a similar role, *i.e.*, forcing the wrongdoer to pay the costs of its activity whether it is justified or not. Strict liability for drugs, for example, can force manufacturers to "internalize" the future harm they create and produce only socially valuable products.

Similarly, one can extend the quotas idea to other fields—to restrict driving, drivers can be allocated a certain amount of miles such that they have to prioritize their driving behavior to the most important rides. In this sense prices and quantities are interchangeable. They do not require policymakers to decide whether to ban, sanction, or allow each specific behavior. Rather, they delegate this decision to the wrongdoer. To the extent policy-makers can optimally set the relevant price/quantity, wrongdoers internalize the harm they create, reaching socially optimal decisions.

The economic literature has extensively discussed, especially in the context of environmental harms, the choice between price and quantity regulation. This Article does not purport to exhaust this debate. Nonetheless, several themes are worth highlighting. First, as aforementioned, in principle both price and quantity regulation can induce optimal behavior, and in this sense they are interchangeable. Second, to set the price or quantity precisely policymakers need non-trivial information. Basically, one should know the optimum point, at which more activity—driving, polluting, litigating, etc.—is not cost effective, setting the price or quantity according to this very optimum point.[20] Third, the choice between price and quantity regulation is context dependent. Uncertainty can induce policymakers to prefer one tool over the other—if we care more about having the right quantity it makes sense to fix quantities rather than prices; and vice versa.[21] Similarly, from a political economy perspective prices—in essence, taxes—may be preferable as they create public revenue while quantity regulation does not.[22] Likewise, depending on the context and the available technology, charging the price may be more or less costly than allocating (and enforcing) a limited quantity.[23]

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[20] *E.g.*, Louis Kaplow and Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 AM. L. ECON. REV. 1, 5-6 (2002). More precisely, the optimum should be set where the marginal benefit equals the marginal harm. *Id.*, at 3–4.

[21] More precisely, what matters is the marginal change in the benefit of the activity versus the marginal change in the harm it brings. *E.g.*, Cameron Hepburn, *Regulation by Prices, Quantities, or Both: A Review of Instrument Choice*, 22 OXFORD REV. ECON. POL'Y 226, 231–33 (2006). Hepburn illustrates this idea of choosing between prices and quantities under uncertainty through the following example, in which the relevant good is the provision of prompt medical treatment. "[I]f the marginal benefit of rapid treatment falls very quickly (perhaps because after a threshold delay . . . the patient will die), then [a] hospital should face a quantity instrument in the form of 'no patient shall face a delay of more than [*x*] days'"; otherwise, price regulation is preferable. *Id.*, at 231. For simple and illustrative explanations see Ayres & Parchomovsky, *supra* note 18, at 883–90; Jonathan B. Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 727–30 (1999). For the original version of this argument see Martin L. Weitzman, *Prices vs. Quantities*, 41 REV. ECON. STUD. 477 (1974).

[22] *E.g.*, Hepburn, *supra* note 21, at 236; Wiener, *supra* note 21, at 730–31.

[23] *E.g.*, Edward L. Glaeser & Andrei Shleifer, *A Reason for Quantity Regulation*, 91

Fourth, hybrid price-quantity models are considered superior. A regime which instead of a fixed price per unit taxes the relevant activity according to the aggregate quantity can be preferable to both simple price and quantity mechanisms.[24] This preference stems from informational reasons—because in theory such a regime only requires policymakers to know the aggregate harm from the activity.[25] However, such a sophisticated pricing regime entails several conceptual difficulties,[26] and, from a practical standpoint is notoriously hard to implement.[27] In real world scenarios, the only feasible

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AM. ECON. REV. 431 (2001) (highlighting the advantage of quantity regulation in this respect).

[24] *See* the influential work of Kaplow and Shavell, *supra* note 20. Under this so-called non-linear pricing regime, a polluting plant pays according to the marginal harm it creates—policymakers, for example, should charge more for the 100th unit of pollution emitted than the first unit. *Id.*, at 3. For the consensus among economists regarding the superiority of non-linear pricing see, *e.g.*, Wiener, *supra* note 21, at 682; Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 495-96 (2009).

[25] While simple price and quantity mechanisms require policymakers to figure the optimum—based on the benefit of the activity to the wrongdoer and its costs to others—the more complex, non-linear pricing schedule only uses information regarding the harm to others, at each possible quantity. Kaplow & Shavell, *supra* note 20, at 2.

[26] The non-linear pricing schedule takes into account the externality, harm to others. However, the pricing schedule is oblivious to the capacity of others, the victims, to avoid the harm more cheaply than the wrongdoers. When potential victims are considered, non-linear pricing mechanisms appear to posit no informational advantage over quantity mechanisms. Jacob Nussim, *Information Costs of Externality Control Instruments* (on file with author). *See also* Sandra Rousseau and Kjetil Telle, *On the Existence of the Optimal Fine for Environmental Crime*, 30 INT'L REV. L. & ECON. 329, 329 (2010). Practically, one can overcome this problem through the acquisition of more information regarding potential victims' behavior over time. Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837 (2014). These practical adjustments, though, do not compromise the thrust of the theoretical argument against non-linear pricing—that in real-world situations such non-linear pricing schedules have no a-priori advantage over quantity instruments.

[27] Non-linear pricing raises serious practical problems where there are multiple regulated entities. In that case, the non-linear price schedule depends on the aggregate level of pollution; hence, individual firms cannot know the price they have to pay because the aggregate level "will depend on the decisions of all the other firms." Kaplow & Shaevell, *supra* note 20, at 10-11. Kaplow and Shavell do propose several practical solutions to cope with this problem—for example, starting from a linear, uniform tax, and adjusting it in each period according to the aggregate quantity. *Id.* These adjustments may entail their own practical problems. Firms, especially with market power, may change their behavior to affect future adjustments; similarly, later adjustment can conflict with the need to sink costs in advance. For the difficulties of such adjustments see, *e.g.*, Hepburn, *supra* note 21, at 233; Rousseau and Telle, *supra* note 26, at 335. More generally, real-world settings implicate "complex interactions" including "threshold effects" and "chaotic" and "completely unpredictable" societal harm. *Id.*, at 329, 330. Hence, calculating the proper non-linear price schedule may be "an insurmountable task," such that the non-linear schedule simply "does not exist" in real-world settings. *Id.*, at 332.

options are typically quantity or simple prices.[28] In that case, quantities may again be superior, depending on the context. Another hybrid is tradable quantities—if each factory, for example, is allowed to create *x* units of pollution, wrongdoers can trade these permits with each other; in environmental contexts this approach is often referred to as cap-and-trade regulation.[29] This cap-and-trade approach has notable advantages. When there are several polluting plants, it allows policymakers to achieve an optimal allocation within the group of regulated entities, given that the aggregate quantity is optimally set. Unproductive plants, for example, would be induced to sell their permits to more productive manufacturers.[30] In addition to this benefit of trading, a cap-and-trade regime generates a market price, informing policymakers, for example, regarding the price for one unit of pollution.[31]

Finally, whatever mechanism is chosen, policymakers can improve it by dynamic adjustments and modifications. In the context of quantitative limitations, for example, policymakers can make these caps tradable. Once the permits have a market price, the government can compare the price to the marginal harm inflicted. Too low a price, compared to the societal harm, means that firms pay too little for their harm and the limited quantity should be further reduced; and vice versa—too high a price should induce the government to allow a more generous quota.[32] Against this theoretical backdrop I argue that quantitative regulation—quotas—is an unappreciated policy tool, particularly fitting certain circumstances.

II. QUOTAS AS A REGULATORY TOOL

Part I illustrated that economists have extensively debated the issue of

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[28] Fleischer, *supra* note 24, at 495–96; Ian Ayres & Joshua Mitts, *Three Proposals for Regulating the Distribution of Home Equity*, 31 YALE J. ON REG. 77, 127 (2014). *Cf.*, Thomas Merrill & David M. Schizer, *Energy Policy for an Economic Downturn: A Proposed Petroleum Fuel Price Stabilization Plan*, 27 YALE J. ON REG. 1, 15–16 (2010) (suggesting that real-world corrective taxes cannot be based on "any quantitative estimate of social costs" and have to be set in a cruder way).

[29] For actual examples see *infra* note 34.

[30] *E.g.*, Kaplow & Shavell, *supra* note 20, at 12-13; Wiener, *supra* note 21, at 710. In the absence of such trade, policymakers would need to set for each plant its appropriate quantity; however, information regarding the productivity of each manufacturer is not readily available to policymakers.

[31] *E.g.*, Kaplow & Shavell, *supra* note 20, at 13.

[32] In this way, as Kaplow and Shavell explain, "conventional permit schemes may be modified to simulate nonlinear corrective taxes." Kaplow & Shavell, *supra* note 20, at 14. *See also* Galle, *supra* note 26, at 860–64, for the ways to constantly improve information regarding the optimal price or quantity. As aforementioned, *supra* note 27, adjustments of course entail practical difficulties.

regulating behavior through quotas (and prices), especially in the context of air pollution. While there are real-world instances of the use of quotas as a regulatory tool,[33] and several suggestions to extend the use of cap-and-trade regimes beyond environmental law,[34] these are sporadic examples. To my knowledge, there has been no attempt to conceptualize quotas as a general policy tool outside the environmental law realm. The remainder of this Article attempts to integrate the foregoing insights from economics with the actual examples of the use of quotas in order to suggest a more comprehensive understanding of their real-life use. Building on these theoretical themes, the Article then advocates a greater use of quotas as a regulatory tool. It argues that in several domains quotas open up new, valuable regulatory opportunities. The context of public services provision can particularly benefit from the use of quantitative limitations; and quotas can also be a valuable tool in procedural settings.

To begin, the relevant situations are those in which a certain, beneficial behavior imposes costs on others—hence we look for a balance between allowing and forbidding this behavior. Quotas (and prices) induce claimants

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[33] *Supra* notes 1-11 and accompanying text.

[34] Examples of cap-and-trade proposals and their implementation in the more traditional settings include commercial fishing and SO_2 emissions. *See*, *e.g.*, Ayres & Parchomovsky, *supra* note 18, at 881–82; Ayres & Mitts, *supra* note 28, at 128 n.171; Wiener, *supra* note 21, at 709–13. Notable examples of more exotic contexts include Ayres & Mitts, *supra*, at 122 (proposing "a thought experiment" regarding the problem of home equity mortgages, "a system of tradable leverage licenses [that] would cap the number of high leverage loans [that lenders can offer] at quantities pre-specified by regulators." *Id.*, at 122); Ayres & Parchomovsky, *supra* note 18 (suggesting a regime of tradable patent rights); Christian Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking, Calling on Citizens to Combat Climate Change*, 37 FORDHAM URB. L.J. 889 (2010) (extending the environmental cap-and-trade permits to road congestion); ORG. FOR ECON. CO-OPERATION AND DEV., PUTTING MARKETS TO WORK: THE DESIGN AND USE OF MARKETABLE PERMITS AND OBLIGATIONS (1997) [hereinafter OECD REPORT] (surveying several uses of tradable permits programs such as electromagnetic spectrum permits, right to land a commercial airline at busy airports, and trading minimum affordable housing obligations among municipalities; AUSTRALIAN BROADCASTING AUTHORITY, TRADING THE REGULATORY OBLIGATIONS OF BROADCASTERS (2003), *available at* http://www.acma.gov.au/webwr/aba/newspubs/radio_tv/investigations/documents/general/trading_oblig.pdf [hereinafter AUSTRALIAN BROADCASTING REPORT] (suggesting permitting networks to trade their mandatory programming obligations); Michael Klausner, *Market Failure and Community Investment: A Market-Oriented Alternative to the Community Reinvestment Act*, 143 U. PA. L. REV. 1561 (1995) (raising the alternative of tradable obligations to intervene in low-income community credit markets); Richard Steinberg, *Economic Perspectives on Regulation of Charitable Solicitation*, 39 CASE W. RES. L. REV. 775 (discussing the option of tradable permits for charity fundraising); Peter H. Schuck, *Refugee Burden-Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243 (1997) (suggesting to allocate to countries responsibilities to host refugees through tradable quotas).

to prioritize, discourage over-use, and obviate individual inquiries into the merits of each act. Therefore, quotas (and prices) may be valuable where particular determinations and substantive restrictions are too complex or costly.[35] Once policymakers turn to the use of broader mechanisms—quotas or prices, rather than particular decision-making or substantive restrictions—in certain circumstances quotas have notable advantages over prices. This Part discusses these advantages of quotas. It demonstrates that quotas have notable benefits where policymakers are reluctant to use prices, and/or prices are too complex to set. This Part further addresses possible limitations of quotas—setting the right number; applying a similar quota to divergent participants, with heterogeneous preferences; and the capacity of participants to plan ahead, i.e., manage their assigned quota.

A. Reluctance to Use Money

While prices and quotas are, in general, interchangeable, quotas may have distinct advantages over prices. The first notable advantage of quotas is that they simply obviate the use of money. Instead of incurring sanctions or fees, claimants "pay" with their pre-allocated limited rights. Though money is not involved, the fact that the entitlement is limited in quantity forces its beneficiaries to prioritize and use it only in the most important circumstances, to put their "money" where their mouth is, so to speak. In principle, if the quota is optimally computed claimants will behave optimally.

Indeed, the use of quotas is pervasive in sports, where money has little meaning. Tennis provides an apt example—each player is allowed to (unsuccessfully) challenge referee decisions three times per set.[36] This quota serves a regulatory function, similarly to the textbook examples of polluting factories. Providing a limited entitlement to each player guarantees that they will ration their challenges to the most appropriate cases, from their perspective. Moreover, the quota option appears as the best regulatory tool under the circumstances. We would ideally prefer broader "rights" to challenge the referee, as they promote accuracy. But such challenges are costly. They delay the game and can be used strategically.[37] Hence, we

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[35] This does not mean that where individual discretion is available quotas should play no role. As will be shown below, there may be circumstances in which an integrated approach—quotas in addition to individual discretion—is worthwhile. *See*, for example, *infra* note 84 and accompanying text.

[36] *Hawk-Eye Challenge Rules Unified*, BBC NEWS (March 19, 2008), *available at* http://news.bbc.co.uk/sport2/hi/tennis/7305404.stm. For the implementation of the challenges system see Ran Abramitzky et al., *On the Optimality of Line Call Challenges in Professional Tennis*, 53 INT'L ECON. REV. 939, 941 (2012).

[37] For example, "it takes 20–30 seconds for the computerized path . . . to be calculated

prefer to balance the use of challenges, rather than ban or freely allow them.[38] We could have made an individualized decision, i.e., whether to allow each challenge or not; but this option seems too convoluted to implement. Finally, there may be a pricing alternative. But making tennis players pay for the entitlement to challenge the referee seems awkward in this context. Along these lines, numerous other sports-quotas exist.[39]

As the tennis example illustrates, policymakers may want to obviate the use of money when other values are at stake. Apparently, money directly violates the rules of the game, and we may not want to commodify the area. The rules that allow litigants a quantitatively-limited right to disqualify judges and jurors[40] seem to fit a similar rationale—presumably, we do want a qualified entitlement, but pricing is inadequate.

Money may not be a desirable regulatory option due to additional reasons. In the tennis example, the use of pricing allows inequality in settings in which we deem it important that claimants, especially rival claimants, stand on an equal footing.[41] More generally, pricing means that the poor cannot buy the entitlement even when they highly value it. "What resource-allocation purpose is served by exclusionary insistence upon a fee from a person who simply cannot afford to pay it?"[42] If policymakers deem the entitlement important they should therefore provide it in-kind and limit over-use through a quota, rather than a price.

Consider here the bankruptcy rule, which allows filing for a discharge once in an 8 year period.[43] Similarly to the aforementioned examples, fresh

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and shown to the umpire, players, and the crowd . . . " Abramitzky et al, *supra* note 36, at 941.

[38] Another option is partial restrictions on the right to challenge the referee—but in this context, such restrictions seem difficult to achieve. *Cf.*, *infra* note 147 (parallel partial restrictions in the context of appeals).

[39] In football, similarly to tennis, each team can challenge the referee two times per game, where two successful challenges authorizes a third. *E.g.*, John Clayton, NFL Still Tinkering under Hood, ESPN—NFL (March 30, 2014), *available at* http://espn.go.com/nfl/story/_/id/10698781/mailbag-nfl-tinkering-replay-rules. In basketball, for example, the number of timeouts each team can call is capped, and players are similarly assigned a "quota" of fouls. In soccer each team has a limited number of substitutes, and players are assigned a quota of harsh fouls before being removed from the game.

[40] *Supra* notes 5 and 6.

[41] Note that the previous, commodification argument can exist regardless of possible inequalities—we may think that decisions made by tennis referees and judges should not be "colored" with money, even if litigants and players have equal resources.

[42] Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 564. Michelman, however, fails to consider the quotas option. *See also* Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 105 (2011) (voting rights example).

[43] *Supra* note 1.

start of debtors appears as a valuable right; but it simultaneously invites overuse. Individual determinations with regard to discharge rights may be difficult, time-consuming, and arbitrary. The one-in-8-year quota aims therefore at achieving a more balanced outcome, eliminating at least some meritless filings.[44] More importantly—pricing the right is not a suitable option. The *raison d'être* behind bankruptcy laws is providing a fresh start for debtors who have no financial means; requiring these debtors to pay a price for their bankruptcy rights is self-defeating. A similar logic may fit other actual quotas. Consider the restriction on small claims lawsuits[45]—similarly to bankruptcy laws, the main idea behind small claims court is enabling access to justice to those who cannot afford it. Pricing access to small claims courts to deter excessive use is thus contradictory to their very justifications. Instead, the quota restriction better achieves this task.[46] The quantitative restriction on changing names[47] can be viewed from a similar perspective—an entitlement capped through a quota, allowing the poor to enjoy it as well as the rich, albeit to a limit.[48] More generally, then, pricing mechanisms, which value entitlements based on claimants' willingness to pay, may fare worse where there are income gaps.[49]

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[44] Illustrative is President Bush's explanation for enacting a more limited bankruptcy right: "the new law will . . . make it more difficult for serial filers to abuse . . . bankruptcy protections. Debtors seeking to erase all debts will now have to wait eight years from their last bankruptcy before they can file again." Press Release, White House, *President Signs Bankruptcy Abuse Prevention, Consumer Protection Law* (April 20, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/04/20050420-5.html.

[45] *Supra* note 10.

[46] As before, individual "licenses" seem cumbersome—as they mean that each litigant will have to ask for a permit to file any small claim lawsuit. Partial restrictions on the right to file in small claims courts, *e.g.*, allowing only consumer cases, are possible but seem to be highly crude.

[47] *Supra* note 3.

[48] If policymakers desire to provide the poor with certain entitlements—such as the right to file for bankruptcy, the right to sue in small claims court, or the right to change one's name—the reader may wonder whether a direct money transfer, which enables the poor to purchase the entitlement if they want to is not a better alternative. There has been an extensive debate in the literature about the choice between in-kind entitlements and money transfers, which may pertain to the current context. *Cf.*, Wiener, *supra* note 21, at 734 (discussing quotas, taxes, and the difficulties in money transfers in this context). For the purposes of this Article it suffices to note that in-kind transfers, as opposed to money transfers, urge their beneficiaries to use the specific entitlement; hence they may be driven by some kind of paternalistic motivations or positive externalities that the entitlement entails. Accordingly, for example, providing debtors with financial assistance, hoping that they will purchase bankruptcy rights seems futile.

[49] *See* Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1090 (2000) ("willingness to pay is imperfectly correlated with utility . . . Poor people are willing to pay less than wealthy . . . In the face of disparities in wealth, willingness to pay should not be identified with expected utility or with the value actually

In certain circumstances, then, policymakers are reluctant to use money. Instead, quotas provide an immediate alternative regulatory mechanism. As the foregoing demonstrates, policymakers may be averse to the use of money due to fears of commodification, notions of fairness and equality, and income gaps which inhibit the poor from purchasing the relevant entitlement.[50]

B. Quantification rather than Monetization

A second reason to use quotas rather than prices relates to the difficulties in monetizing costs and benefits. Calculating the optimal price may be a daunting task. At the very least, policymakers should calculate the social harm from each relevant behavior.[51] But this is an extremely difficult task in complicated real-world situations; policymakers, thus, often have to use cruder mechanisms.[52] Oftentimes, setting the optimal price may be particularly difficult due to complicating factors. First, the behavior in question may well implicate both harms and benefits to others—negative and positive externalities. In that case, one needs to calculate—and price—both the harms and benefits from each act.[53] Moreover, some of the relevant costs and benefits refer to abstract values, which are much harder to compute—the right to change one's name, for example, presumably enhances human dignity.[54]

Where policymakers engage in rough cost-benefit calculations in any case, setting quantities rather than prices may be easier. Quotas do require quantification, but they eliminate the need to monetize, i.e., to put a price tag. The very same distinction is endorsed by the Office of Management

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placed on the good in question . . ."). *Cf.*, Wiener, *supra* note 21, *passim* (quotas are fairer than prices, hence at the international level, where one needs to secure the assent of individual participants, quotas may be superior).

[50] Interestingly, similar motivations may drive policymakers to use quotas-like instruments to take liberties—e.g., mandatory jury and military conscription—with no "buying-out" option. For a general discussion on the wisdom of mandatory conscription see, *e.g.*, Michael Sabin, *Conscription Tax*, *available at*

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024906.

[51] This is under the non-linear pricing schedule, which allegedly requires less information from policymakers. *Supra* notes 24–28 and accompanying text.

[52] *E.g.*, *supra* notes 26–28 and accompanying text.

[53] *Cf.*, Ezra Friedman & Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Legal System's Ability to Induce Efficient Behavior*, 61 SMU L. REV. 1355, 1375 n.81 (2008) (Discussing the regulation of settlements, which entail both costs and benefits and hence do not fit the corrective taxes scheme).

[54] On the difficulties of putting a price tag on dignity see, for example, Rachel Bayefsky, Note, *Dignity as a Value in Agency Cost-Benefit Analysis*, 123 YALE L.J. 1735 (2014).

and Budget (OMB) as part of its guidance on cost-benefit analysis.[55] The OMB guides agencies to conduct a cost-benefit analysis, recognizing that such an analysis may be difficult for certain goods that "are not traded in markets."[56] In that case, "[i]f monetization is not possible" the OMB guides agencies to quantify.[57] To illustrate, "an agency may be able to quantify, but not to monetize increases in water quality and fish populations resulting from water quality regulation. If so, the agency should attempt to describe benefits in terms of (for example) stream miles of improved water quality."[58]

This lesson can be translated to other settings. It may be hard to assign a price to dignity or privacy, but it is easier to quantify the number of beneficiaries.[59] It may be hard to value deaths, but easier to target and compare, say, a 5% reduction in fatalities. The link to quotas is straightforward. Even if we are willing to price a certain entitlement, putting the right price requires complex and expensive costs and benefits calculations; the attempt to price may be a futile exercise. Quotas save the need to translate interests, which can be quantified, to monetary terms. Likewise, we are sometimes more confident with agreeing on and fixing in advance a quantitative target—a limited number of entitlements that we are willing to allocate—than setting a price and hoping to achieve the optimal quantity.[60] Indeed, similar, rough pre-determined quantitative limitations play a similar role in various daily settings.[61] These considerations apply all

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[55] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY IMPACT ANALYSIS: A PRIMER 15 (Aug. 15, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf [hereinafter CIRCULAR A-4] (delineating "three mutually exclusive and exhaustive categories [of benefits and costs]: (1) quantified and monetized; (2) quantified but not monetized; and (3) neither quantified nor monetized"). *See also* Cass R. Sunstein, *Nonquantifiable*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2259279.

[56] CIRCULAR A-4, *supra* note 54, at 9.

[57] *Id.*, at 12.

[58] *Id.*, at 12.

[59] *Id.*, at 12.

[60] All one needs is setting "the total quantum," and "the minimum . . . requirement would be maintained." AUSTRALIAN BROADCASTING REPORT, *supra* note 34, at 12. *Cf.*, the classic argument in favor of quantity over price regulation under uncertainty, *supra* note 21, which shares somehow similar characteristics; Rousseau and Telle, *supra* note 26, at 334 ("[W]hen fines cannot be optimally designed, the most ambitious goal a regulator might have is to avoid really harmful situations [through quotas]."); Iaione, *supra* note 34, at 907 (Under uncertainty "the main disadvantage of [corrective] taxes [compared to quotas] is that the outcome . . . is not guaranteed.").

[61] To illustrate how quotas work in this respect in more general situations, consider a typical law review submissions process. Each law review often has a certain, but fixed, number of articles per volume, *e.g.*, 15. This means that the law review is willing to publish

the more to policymakers, who may be particularly "more comfortable" with quotas, rather than prices.[62]

To stress: using quotas does not mean that policymakers do not have to value the expected costs and benefits; rather, quotas avoid the need to translate the competing interests to monetary terms. Instead, quantities are pitted against quantities. While this more "attenuated way" to balance costs and benefits is perhaps less accurate than comparing moneys,[63] this "second best" approach can well be a more effective one, especially when uncertainty and measurement problems plague attempts to put a price tag.[64]

Quotas, then, may be a useful tool when prices are hard to calculate, and policymakers can more easily define a plausible quantitative limit. The 10-depositions rule,[65] can be viewed from this perspective. Each deposition creates benefits, in particular, more accurate decision-making; but it also imposes expenses on the rival litigant and the presiding judge, say, several additional hours of work. We could have calculated the monetary values of these benefits and costs; instead, policymakers chose to remain at the level of quantification (rather than monetization). We presumably believe that, in general, the marginal benefit from the 11th witness does not justify these costs.[66]

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the best 15 articles it can get each year, even if the "objective" quality of these articles varies. Likewise, each year the Supreme Court "cull[s] perhaps 80 worthy cases from the thousands of appeals," apparently, regardless of the quality of the general pool of appeals which may vary across years. Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The 'Cert. Pool,'* N.Y. TIMES, Sep. 25, 2008, *available at* http://www.nytimes.com/2008/09/26/washington/26memo.html?ex=1380168000&en=d58acbfb583fd4f2&ei=5124&partner=permalink&exprod=permalink&_r=0. Similarly, some legal academics prefer to write a fixed number of words each day. Jessie Hill, *Anyone Else Find 'Writing Quotas' Depressing?*, PRAWFSBLAWG (January 10, 2012, 1:45 PM), http://prawfsblawg.blogs.com/prawfsblawg/2012/01/anyone-else-find-writing-quotas-depressing.html. Quotas fill the same role—we agree to burden ourselves with a fixed amount of a certain entitlement.

[62] Nathaniel O. Keohane, Richard L. Revesz, and Robert N. Stavins, *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313, 364 (1998); Richard L. Revesz, *Minimizing Opposition to Markets for Pollution Control*, 11 ECOL. L. QUART. 451, 460–61 (1984). This notion also appears in the seminal work of Weitzman on prices and quantities—"typical non-economist leans toward [quantity rather than price regulation, as she] think[s] primarily in terms of direct control . . ." Weitzman, *supra* note 21, at 477.

[63] Revesz, *supra* note 62, at 461.

[64] For an elaborated argument along these lines, in the context of environmental law, see *id.*. *See also* Iaione, *supra* note 34, at 910 (given the problems with pricing, "quantity instruments seem to be the most cost-effective tools [when] the socially acceptable 'how much' has been selected."). For the "second best" nature of the problem see also Weitzman, *supra* note 21, at 481.

[65] *Supra* note 4.

[66] The limitations on jurors disqualifications, *supra* note 5, can also be explained by

C. Possible Limitations

The Article has thus far identified quotas as a valuable regulatory tool and suggested the reasons to choose quotas rather than other alternatives—where case-by-case determinations are problematic, policymakers are reluctant to use money, and monetization is complex and expensive, quotas have distinct advantages. Of course, the use of quotas is not free of difficulties. The following paragraphs discuss salient possible limitations: inaccuracies in setting the quota, heterogeneity among claimants, and foreseeability, i.e., the capacity of claimants to plan ahead.

1. Setting the quantitative limit

It may appear that the use of a figure to limit certain entitlements is arbitrary. Can policymakers really set numerical limitations in a reasoned manner? I argue that, similarly to prices, the capacity of policymakers to set the relevant figure is not an insurmountable obstacle to the use of quotas.

First, the chosen number can be based on serious quantitative or qualitative research—akin to regular cost-benefit analysis conducted by agencies. For depositions, for example, judges and practitioners can simply be surveyed regarding the optimal number of depositions in a typical case.[67] Indeed, the 10-depositions rule seems reasonable.[68] Furthermore, quotas, like prices, need not be static—over time, adjustments can be made to these calculations. This is straightforward where the entitlements are tradable and the market price becomes clear. Adjustments are also available regardless of the alienability of the entitlements, through a simple trial-and-error process. In the depositions example, judges and practitioners could again be surveyed, after the new policy has been implemented.[69] Another factor that mitigates the problem of inaccuracies in the relevant quota is the possibility

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this logic.

[67] The 10-depositions rule, for instance, builds on the experience accumulated in "a substantial majority of the federal. judicial districts . . . through their Local Rules," which implemented various numerical limits. Gerald G. MacDonald, *Hesiod, Agesilaus and Rule 26: A Proposal for a More Effective Mandatory Initial Disclosure Procedure, Gerald G. MacDonald*, 28 WAKE FOREST L. REV. 819, 827 (1993)

[68] Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 538 (1998) ("75% of [surveyed] attorneys [in the relevant sample] . . . said seven or fewer individuals were deposed, well within the . . . presumptive limit of ten depositions. Only 4% of attorneys reported that too many depositions were conducted in their case . . .").

[69] In any case, under a cap-and-trade regime inaccuracies are less bothersome—even if the overall quota is set imprecisely, the internal allocation between the beneficiaries should be optimal. *See generally* the discussion on tradability, *infra* Part II.C.2.

of a combined use of quotas and individual discretion—e.g., allowing the first 10 depositions without leave of court, and beyond that per judicial approval.[70] Finally, and perhaps most importantly, quotas are rough approximations. Their appeal stems from the inability to easily provide price tags. In this sense quotas may be a second best, which outperforms any feasible alternative.[71] Indeed, the law pervasively uses rough approximations of similar sorts—a well-known example is our policy concerning innovations, which centers on the seemingly arbitrary 20 year figure.[72]

2. Tradability and heterogeneity among claimants

Claimants may be heterogeneous. Some prefer to change their names quite often; others do not. Some would like to have broader bankruptcy rights than others. At first blush, quotas appear to employ a one-size-fits-all approach, allocating identical rights to each and every claimant. The more diverse the claimants and their preferences, the greater the loss from such an approach. To the extent the beneficiaries of the quotas indeed diverge, this drawback has several simple solutions. First, as discussed above, quotas can be combined with individual decision-making to allow for deviations from the initial assignment. Second, policymakers can allocate the relevant entitlements based on more fine-grained quotas—different claimants can receive different quotas. A notable example can be subsidizing the poor through larger quotas.[73] Third, policymakers can allow trading the quotas. Such market transactions can ensure that entitlements will flow from those who find little need in them to those who value them the most, to their mutual welfare. True, tradability does not fit well quotas that are driven by the desire to avoid the use of money—the same considerations that hinder policymakers from charging a price may well indicate that trade is not desirable.[74] Indeed, the actual examples of quotas of this ilk—bankruptcy

[70] This is, in principle, the current policy. FED. R. CIV. P. 30(a)(2)(A)(i). Of course, the injection of particular discretion narrows some of the appeal of quotas.

[71] *Cf.*, Revesz, *supra* note 62.

[72] Intellectual property rules, which fix a 20-year term for innovators to profit from their products, were indeed criticized in this respect. *E.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 153–54 (2004). As aforementioned, there is no reason not to adjust this figure, which has an historical origin, *id.*, to changing circumstances.

[73] Real-world examples include providing more landing slots to struggling airlines (OECD REPORT, *supra* note 34, at 40); and more generous allowances to pollute for poorer countries (Wiener, *supra* note 21, at 765–66).

[74] In addition to the reluctance to commodity certain domains, to the extent quotas are in-kind entitlements to the poor, *supra* notes 48–49 and accompanying text, tradability may harm social welfare. To illustrate, suppose that a name-change is associated with a marginal societal harm of 100 (costs of changing registries, confusing other citizens and

rights, suing in small-claims court, and changing one's name—are inalienable. While such inalienability appears to reduce some welfare, policymakers who use inalienable quotas presumably believe that their advantages outweigh the weaknesses.

Along these lines, quotas that are not based on the desire to avoid the use of money need not be inalienable and permits can flow to those who value them the most.[75] Even quotas that reflect values that cannot be calculated, such as dignity, can be tradable—calculation difficulties do not mean that these values cannot be traded.[76] To illustrate consider the 10-deponents rule. Although the use of the legal system implicates abstract values one can imagine a regime in which this quota is transferable, akin to a cap and trade program, albeit in a less familiar environment. Under such a system, policymakers would determine the desired quantity of deponents in the entire system, say, 10 per litigant per case. From this benchmark, litigants will be able to sell and buy deposition rights from other litigants, unrelated to their cases.[77] Such cap-and-trade regime, in the context of depositions or elsewhere, would be fruitful as it enables a more efficient allocation of resources[78] and informing policymakers regarding the market price of the entitlements. Of course, this basic scheme can be modified to make it more palatable, for example, through partial restrictions on the tradability of depositions.[79]

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service providers, etc.). A poor claimant who highly values his entitlement may be tempted due to his financial situation to sell his entitlement to the rich for an amount lower than 100. In that case, the rich is allowed to inflict a societal harm of 100 while paying less than this sum.

[75] Alienability, though, is not binary, and there is a whole range of legal techniques that enable partial alienability, depending on the underlying considerations. For an elaborate discussion see Dagan & Fisher, *supra* note 42. One can think of such softer forms of alienability to implement quotas that reflect aversion to the use of money. For partial tradability see also *infra* note 83 and accompanying text.

[76] *Cf.*, Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CAL. L. REV. 323, 383–90 (2008) (coping with similar issues in the context of monetization of abstract values, and arguing "that there is no necessary link between monetization and commodification." *Id.*, at 385). *See also* Wiener, *supra* note 21, at 723–24 (arguing for market in permits, issues of commodification notwithstanding); Dagan & Fisher, *supra* note 42.

[77] In a very limited sense, this mechanism exists now—as rival litigants facing each other can stipulate to "buy" deposition rights.

[78] In the context of depositions a market in quotas means, in essence, that those with the bigger and more complex cases would purchase entitlements from those who have little need in them.

[79] For example, one can mandate an upper limit on the rights that each litigant can buy, *i.e.*, the number of depositions in each case. See also *infra* note 83 for real-world examples of partial tradability.

3. Planning ahead

In several settings quotas provide a limited entitlement which stretches over a certain period of time. There is one opportunity to file for bankruptcy within an eight-year period; likewise, tennis players are entitled to challenge the referee thrice within a set; the right to litigate in small-claims courts 5 times in a given year is another illustration. In these settings beneficiaries have to temporarily ration their quotas. The more beneficiaries can plan ahead the better quotas are; for we want entitlement holders to invoke their rights only in the most important instances.[80]

Whether beneficiaries can actually plan ahead is a context-specific, empirical question. It seems that in many settings—tennis challenges provide a good example[81]—they are reasonably able to do so. Where quota holders lack foreseeability quantity limitations are less appealing. In this case, we may again supplement quotas with individual decision-making, in order to allow those who exhausted their allocation to re-invoke their rights, at least in unique circumstances. One example may be discharge rights—debtors who recently filed for a discharge but soon thereafter went again bankrupt may be entitled to an exceptional right to start afresh, per the discretion of the court. Foreseeability issues, then, should not preclude the use of quotas. Moreover, in many settings this temporal problem is virtually absent as beneficiaries are not required to plan ahead—in the context of depositions, for example, litigants typically submit a list of all the witnesses they wish to depose at the very start of the proceedings.[82]

D. Summarizing: Typical Contexts and the Provision of Public Services

Quotas are not a panacea. But they do open up new avenues for regulating harmful behavior, especially when case-by-case determinations are difficult such that policymakers turn to broader regulatory mechanisms; and where quotas have notable advantages over prices, as when policymakers refrain from using money and/or calculating costs and benefits is a particularly complex task. Quotas are a flexible policy tool. According to the motivation behind them they can be tailored to the relevant context. Quotas, for example, can be tradable; as shown above,

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[80] In fact, the potential harm from misusing the quota is twofold—as beneficiaries employ their right where the societal harm from doing so may not justify the benefit; and miss the opportunity to invoke the right where it is needed the most.

[81] *See* the empirical findings in Abramitzky et al., *supra* note 36; *infra* note 146 and accompanying text.

[82] Another example is quotas for polluting emissions—typically, plants do not have to defer the decision whether to pollute or not.

such tradability improves their efficacy but potentially raises other concerns. Alternatively, quotas can be partly tradable; indeed, in several instances policymakers implemented partial tradability by setting a cap on selling or buying entitlements.[83] Quotas can also be inalienable. Similarly, quotas can be intermingled with case-by-case determinations. One can provide, for example, case-by-case discretion to deviate from the quota when the quantitative limit was exhausted; and not to deduct from the quota in specific instances.[84] Likewise, quotas and prices can be combined, through the payment of an additional fee after exhausting the quota.[85] Moreover, nothing precludes policymakers from fine-tuning quotas, i.e., setting different quantitative limitations to different beneficiaries—for example, providing larger quotas to the poor.[86] Their efficacy and flexibility notwithstanding, quotas are not commonly perceived as a regulatory mechanism and seem to be under-used.

Based on the foregoing discussion, there are several domains in which we can expect quotas to be particularly effective. Providing a comprehensive list of such contexts is a daunting task which exceeds the scope of this Article. Instead, the following attempts to generalize the typical contexts for the use of quotas, focusing on provision of public services.

The context of public services embodies a particularly strong case for using quotas. It features a major advantage of the use of quotas—services that are deemed essential should be allocated to the poor as well as the rich, as in-kind entitlements. Pre-defined numerical ceilings offer an effective way to limit the use of such entitlements without employing money. Several of the foregoing real-world examples of quotas fit this context—numerical limitations on bankruptcy and name-change entitlements can be viewed as essential in-kind entitlements, capped by a quota. One can extend this logic to other public services whose provision is deemed essential. Part III suggests that concerns regarding over-use of the legal system—which many think is an essential public service—should lead to implementing quotas in legal procedure. And a similar logic applies more generally to other public

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[83] For real-world examples and suggestions see OECD REPORT, *supra* note 34, at 36–39 (townships in New Jersey "can reduce by up to 50 per cent [their] local requirement to make low- and moderate-income housing available." *Id.*, at 37); AUSTRALIAN BROADCASTING REPORT, *supra* note 34, at 17 (a similar minimum mandatory quota suggestion). *See also* OECD REPORT, *supra* note 34, at 43 (limiting the class of traders through a minimum purchase of fishing rights in New Zealand). *Cf.*, *supra* note 79 (suggesting a limited tradability for depositions).

[84] For a concrete suggestion of integrating particular decision-making with quotas see *infra* notes 149–151 (quotas in interlocutory appeals).

[85] The inmate litigation quota is an actual illustration. *Infra* note 173.

[86] For real-world examples see *supra* note 73.

services—simply put, where one cares about overuse, and charging fees is not an option, quotas are almost inevitable.

Take, for instance, the case of emergency 911 calls. On one hand, we would presumably want each and every citizen to have the option to call 911.[87] For similar reasons, wide discretion to dispatchers—whether to treat the call as an emergency or not—seems problematic.[88] On the other hand, a free 911 "right" invites abuse—i.e., calling in non-emergency situations. It thus "makes a lot of sense" that "[t]here's a fair amount of overuses of 911."[89] Costs soar.[90] Quotas can achieve both ends—providing essential service for free and restricting its use. While the use of a simple numerical cap on 911 calls appears extreme—the importance of the relevant right, emergency treatment, may trump the desire to restrict over-use—one can think of mitigating factors. The quota can be sufficiently generous, to accommodate the needs of most people. Larger quotas can be given to those who need them the most. And discretion can be integrated into such scheme—to deduct from the quota only calls that turned out to be non-emergency and allow deviations from the quota in exceptional cases. Finally, the quota can be combined with a pricing scheme—such that those who exhausted their allocation will be able to purchase the right at its appropriate price. Indeed, several communities in the U.S. that face the difficulties of non-emergency calls have opted for a quota-style solution, combined with case-by-case determinations. Under these programs "frequent users," i.e., those who overuse their rights, beyond a certain quota, are identified and individually addressed.[91]

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[87] Accordingly, in case of ambulance rides, paramedics may not ask the patient if she has insurance before transporting her to the hospital, even though such patients may well avoid payment after the fact. *E.g.*, Rod Brouhard, *The Hidden Cost of Healthcare: 911 Overuse*, ABOUT.COM (August 24, 2009), *available at* http://firstaid.about.com/b/2009/08/24/the-hidden-cost-of-healthcare-911-overuse.htm.

[88] *Cf.*, Karen Auge, *911 Non-Emergencies a Growing Problem Nationwide*, THE DENVER POST (December 19, 2009), *available at* http://www.denverpost.com/ci_14084125 ("emergency systems have a duty to respond . . . If you're a system that responds to 911 calls, you must respond to every call.") (internal quotation marks omitted). Furthermore, such a procedure will lack sufficient information—that will be gathered only after arriving to the scene. *Cf.*, the parallel arguments in the context of pleading standards, *infra* notes 131–134 and accompanying text.

[89] Gary Emerling, *Medics to Treat Overuse of 911*, THE WASHINGTON TIMES (March 27, 2008), *available at* http://www.washingtontimes.com/news/2008/mar/27/medics-to-treat-overuse-of-911/?page=all (quoting D.C. Council member Phil Mendelson). "Estimates [of non-emergency 911 ambulance rides] range from 10–40%." Brouhard, *supra* note 87. For estimates in the same range see Auge, *supra* note 88.

[90] Non-emergency 911 ambulance calls allegedly create "enormous cost to health systems [and] taxpayers." Auge, *supra* note 88.

[91] These excessive users typically suffer from minor, chronic—but non-emergency—health problem. The idea, in a nutshell, is to funnel them to a different, non-emergency

The 911 example illustrates the idea of limiting public services through pre-defined quantity allocations. This point can be generalized to other public services. And more generally, with a more pervasive use of quotas in public services, governments can also distribute public service "credit points," akin to food-stamps. This public service credit can be valid for various government services, to be used by its beneficiaries as they see fit. However, as the context of provision of public services relates to the reluctance to use pricing, it makes little sense to allow beneficiaries to freely trade their quantitative allocations. Hence, quotas of this type should not be completely tradable.

Public services, then, present a good case for the use of quotas. Sports—an area in which quotas abound—can be viewed as a sub-category of public services. As the tennis example illustrates, one would like to provide each and every player with the "entitlements" that are deemed essential for the game; but over-use concerns and the reluctance to use pricing make quotas an attractive option.

While public services are an attractive domain for the use of quotas, one can also expect quotas in complex, value-laden contexts. In such areas it may be easier for policymakers to agree on a quota, rather than a price, to restrict over-use; to quantify, rather than monetize. Moreover, as these contexts typically require intricate and informed determinations, delegating discretion to lower-echelon, on-site decision-makers becomes more problematic. Hence, allocating the entitlements on a case-by-case basis may not be a favorable option. Cap and trade policies in environmental contexts and international treaties—rather than prices or more individual supervision—can perhaps be explained by these considerations.[92] Cap and trade programs with regard to broadcasting and low-income housing obligations can also serve as examples of such quotas.[93] In principle, quotas of this ilk need not be inalienable—as other cap and trade regimes, once policymakers agree on the total amount of entitlements, beneficiaries can

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channel, without burdening the emergency system. For the attempts to provide a comprehensive solution to these frequent users, in D.C. and Denver, see Emerling, *supra* note 89; Auge, *supra* note 88.

[92] *Cf.*, Merrill & Schizer, *supra* note 28 (stating that "[t]he degree to which prices should be raised to constrain [social] costs [in the context of fuel prices] is a matter of judgment, and must ultimately be determined politically," and explaining that the relevant social costs, "the emission of greenhouse gases contributing to climate change, and the national security effects of dependency on imported oil," entail insurmountable conceptual and practical measurement difficulties. *Id.*, at 15–16); Keohane, Revesz, and Stavins, *supra* note 62, at 364 (summarizing the reasons that, in environmental contexts, "command-and-control standards are likely to be supplied more cheaply by legislators," and why they "make majority coalitions easier to assemble.").

[93] *Supra* notes 34 and 83.

allocate the rights among them as they see fit.

This section attempted to generalize the domains in which quotas can be a valuable regulatory tool. The next Part focuses on the context of legal procedure, explaining how quotas can be particularly effective in regulating litigants' behavior and suggesting specific ways of achieving this goal.

III. PROCEDURAL QUOTAS

The litigation setting, I argue, is particularly amenable to the use of quotas. Litigation is beneficial, but also costly; we would like to allow only some of it and discourage over-use. Moreover, as will be discussed below, alternative avenues to regulate litigation behavior have fallen short of success. It is extremely difficult to put a price tag on uses of the legal system; and even if it were possible, policymakers tend to view the legal system as an essential public service, unwilling to charge a real price. Furthermore, case-by-case determinations have their own difficulties. They may block access to justice with no sufficient basis to do so and consume precious judicial time. Quotas, then, can enrich the available array of mechanisms to regulate litigation behavior. Indeed, we already use quotas in some distinct procedural enclaves.[94] There is no reason not to extend their use. This Part advocates procedural quotas and provides concrete examples of their implementation.

A. Pricing Litigation Behavior

The federal courts are under immense workload pressure. "Courts are underfunded, dockets are crowded, and litigation is slow."[95] Not only does it lead to costly delays, excessive workload also harms the very capacity of courts to administer justice.[96] This excess has been linked to meritless filings that overburden the judiciary.[97] No wonder that "[t]he Supreme

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[94] *Infra* notes 4–10 and accompanying text.

[95] Stephen J. Ware, *Is Adjudication a Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 899 (2013).

[96] *E.g.*, Bruce L. Hay, Christopher Rendall-Jackson, and David Rosenberg, *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919, 1932–39 (2011) (discussing the various costs of delay, including increased litigation costs and reduced deterrence); Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011) (empirically showing that workload distorts judicial decision making).

[97] This is, at least, the prevailing perception. For this notion of abusive litigation and the measures taken in response see, *e.g.*, Arthur Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013). *See also infra* note 100.

Court increasingly has voiced concern about abuse of the litigation process."[98]

How should policy-makers respond to this problem? The straightforward response is to charge litigants "user-fees," i.e., to force them to pay the actual costs they inflict on the legal system (as well as other litigants). Such user fees—pricing—can be implemented through tariffs on filing suits and interim motions, and/or sanctions on inappropriate litigation behavior. However, all seem to agree that the current charges—modest, at best[99]—fail to reflect the actual costs of litigation. Litigants, then, are induced to overuse the legal system.[100]

Against this backdrop, numerous policy-makers and commentators have

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[98] Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 443 (1986) (referring to meritless suits). While these claims were asserted in the 1980s, the recent Supreme Court pleading standards precedents, *infra* note 126, evince the persistence of these problems.

[99] Relevant charges in the federal system are filing fees and sanctions on inappropriate litigation behavior. For civil complaints, the federal government charges filing fees of $350. 28 U.S.C. § 1914. By and large, then, "[f]ederal courts are subsidized dispute-resolvers [as] filing fees defray only a small portion of the costs." Judge Easterbrook in Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002). Sanctions on abusive litigation can be levied through Rule 11 of the Federal Rules of Civil Procedure. Rule 11 sanctions, though, are not the norm, and they are imposed only in cases of clear abuse. *See infra* note 119. In addition to filing fees and sanctions, loser-pays rules can also enhance the costs of abusive litigation, as they force the loser to pay a higher price—the winner's legal expenses. Loser pays rules, however, are not the norm in the U.S. *E.g.*, Theodore Eisenberg, Talia Fisher, and Issi Rosen-Zvi, *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452, 1460–61 (2013).

Illustrative are the comparable fees in England, which "increased dramatically beginning in the 1990s"—"[f]iling fees alone can exceed £1000, and then each step in the process—such as . . . filing motions . . . also requires . . . a fee." Elizabeth G. Thornburg, Book Review, *Saving Civil Justice: Judging Civil Justice*, 85 TUL. L. REV. 247, 253, 259 (2010). Furthermore, the English system famously employs the English fee-shifting rule, i.e., a loser-pays rule. Israel can serve as another common-law benchmark for comparison. Access fees in Israel are generally set at 2.5 percent of the value of the claim. Eisenberg, Fisher, and Rosen-Zvi, *supra*, at 1463. Like other countries, but not the U.S., Israel adheres in principle to the loser-pays rule. *Id.*, at 1458–61.

[100] *E.g.*, Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527, 1529–30 (2010) ("The only requirement is a modest . . . filing fee . . . The current legal system . . . is [therefore] highly likely to result in the overconsumption of judicial resources."). Ware, *supra* note 95, at 899 ("[Litigation] is heavily subsidized by tax dollars, as only a portion of courts' costs are covered by fees paid by litigants. This public subsidy, basic economics suggests, causes demand for this service to exceed supply . . ."). For a general discussion on the excessive private incentives to use the legal system see generally Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997).

proposed, in various forms, "a radical increase" in court fees.[101] Alas, by and large, the price on the use of the legal system has remained low, and litigants need not pay all the costs they impose on the judiciary as well as their rivals. How can one explain the general absence of meaningful fees?

There seem to be two explanations. First, deciphering the price for adjudication seems as an insurmountable task. While one can theoretically calculate the direct costs the legal system suffers—e.g., judges' time[102]—any litigation behavior entails additional, broader social costs, such as the detrimental effect of the resulting delay on deterrence.[103] In addition to costs, more litigation possibly begets benefits to others. Liberal litigation rules presumably enhance the accuracy of the legal system and provide more deterrence.[104] Similarly, broad access to courts allegedly promotes

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[101] Martin D. Beier, Comment, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PA. L. REV. 1175, 1181 (1990). Prominent examples include Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267 (1985) (the then-Solicitor General asserting that "the costs of courtroom services should be borne by those who use them." *Id.*, at 272); RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 195-204 (1985) (discussing the overcrowding problem and suggesting a user fee with limited exceptions); Hay, Rendall-Jackson, and Rosenberg, *supra* note 96 (suggesting, with limited exceptions, mandatory user-fees in commercial contract disputes); Maher, *supra* note 100, at 1528 (In principle, "each litigant would bear responsibility for one half of court usage costs, collectible at the conclusion of the case") Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 OR. L. REV. 909 (1995) (advocating payment of jury fees); Ware, *supra* note 95 (suggesting "a fee high enough to reimburse the court for its costs of adjudication . . . [such that] litigation [would] look more like arbitration." *Id.*, at 900). As aforementioned, *supra* note 99, in addition to filing fees, one can force litigants to pay the actual costs they impose on others through case-by-case sanctions or even loser-pays rules. Literature advocating similar measures includes Beier, *supra*, at 1204 (broader sanctions on abusive litigants); Gideon Parchomovsky and Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1362–66 (2012) (encouraging loser pays rules); Maher, *supra*, at 1554–56 (suggesting a partial loser pays rule); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 933–34 (2009) (proposing a fee-shifting approach coupled with limited pre-dismissal discovery). Interestingly, as can be observed from this footnote, user-fees proposals are often lodged by "[e]conomic and policy-oriented legal commentators." Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1926.

[102] Or more generally, judicial overhead expenses. Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1941. *Cf.*, Maher, *supra* note 100, at 1543 ("Cost-minute tracking [can be] a powerful practical and theoretical tool that permits measurement of the cost of the subsidy in a transparent and easily disaggregable way.").

[103] *E.g.*, Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1941–42. Likewise, delay pushes meritorious claims to alternative dispute resolution providers. Judith Resnik, Childress Lecture, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism*, 56 ST. LOUIS U. L.J. 917, 978 (2012).

[104] Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1942–48. Maher, *supra* note 100, at 1536–39. *Cf.*, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL. STUD. 307 (1994).

courts' legitimacy and democratic values, including human dignity.[105] One needs to account for these positive externalities. But addressing these issues "entails enormously complicated and costly assessments."[106] At the current state of affairs, then, these calculations appear too complex to undertake.[107] Apparently, any price tag would be arbitrary.[108]

The second, and seemingly more important reason not to price litigation is the notion that the legal system is a public service that should be open to all. User fees that reflect actual costs—at the very least, the substantive expenses of judges, clerks, and legal staff—would presumably be relatively high. Therefore, putting a real price tag on litigation means excluding the poor from litigating their claims. The right to litigate, though, seems as a fundamental entitlement,[109] perhaps even akin to voting.[110] "Every person, regardless of means, is entitled to their day in court."[111] Effective pricing—

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[105] *E.g.*, Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 720 (2010) ("[A] legal regime that does not guarantee to all individual that their claims . . . will be heard . . . yields a loss of legitimacy for the entire civil justice system . . ."); Beier, *supra* note 101, at 1200 ("the legitimacy of society's institutions is premised upon fair and adequate dispute resolution"). For the broad values related to litigation see also Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172–77; *infra* note 111.

[106] Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1938.

[107] *E.g.*, Resnik, *supra* note 103, at 990; Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 649 (2013). While there have been several econometric attempts to monetize the values associated with litigation, Resnik, *supra*, at 990 n.291, these assessments seem highly crude.

[108] *Cf.*, Eastway Const. Corp. v. City of New York, 821 F.2d 121 (2d Cir. 1987) (J. Pratt, dissenting) (agreeing with the majority "that the district court erred in determining that 'a reasonable attorney's fee' in this case is only $1,000" and that "such a determination was arbitrary," but contending that "the $10,000 figure selected by the majority . . . is . . . no less arbitrary in principle than the amount selected by the district court.").

[109] *Cf.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (prohibiting charging access fees from indigents who seek dissolution of their marriages, and stating that "no characteristic of an organized and cohesive society is [perhaps] more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to . . . settle their differences in an orderly, predictable manner." *Id.*, at 374).

[110] Frank Michelman is known for drawing the parallels between effective access to courts and voting. Michelman, *supra* note 42. "Access to courts and access to legislatures are claims that merge into one another . . . You cannot . . . call a person a citizen and at the same time sanction the exclusion of that person from that process." *Id.*, at 539–40. *See also* Resnik, *supra* note 103, at 989 ("Litigating and voting are both personal rights and structural necessities . . .").

[111] Resnik, *supra* note 103, at 978. Indeed, a strong notion connects access to court to democratic values, such that it should be provided to all citizens (or even persons). *See also* Resnik, *supra* note 103, at 922 ("Social movements succeeded in many countries in transforming adjudication into a democratic practice to which *all persons* . . . have access to open and public courts . . ."") (emphasis added); Maher, *supra* note 100, at 1534 ("[P]ublic adjudication is part and parcel of the healthy operation of pluralistic,

which would preclude the provision of this fundamental right from the poor—directly conflicts with these widely-shared views.[112]

Of course, one can impose high user fees and simultaneously subsidize the poor.[113] But this is a limited solution, for several reasons. Firstly, subsidizing the poor does not eliminate the problem of abusive litigation by the subsidized—as they do not pay for the service they consume and are free to externalize costs on others. The more one subsidizes litigants the greater the problem.[114] While several commentators proposed to curb excessive litigation through higher user fees, with exceptions for the poor, those commentators appear to neglect the problem of over-use by the poor.[115] Secondly, any subsidy for the poor has to be coupled with

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constitutional democracies . . . [It] encourages and promotes civic engagement [and] richer public life . . . Permitting *all citizens* to participate in the expression of values that occurs in public legal proceedings enhances the dignity of the individual and strengthens the communal bounds . . .") (emphasis added).

[112] Interestingly, even a noteworthy utilitarian such as "Bentham opposed filing fees as 'a tax upon distress,' and [] proposed subsidies for litigation." Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PENN. L. REV. (forthcoming) (citing JEREMY BENTHAM, A PROTEST AGAINST LAW-TAXES, SHOWING THE PECULIAR MISCHIEVOUSNESS OF ALL SUCH IMPOSITIONS AS ADD TO THE EXPENSE OF APPEAL TO JUSTICE (1793), *reprinted in* 2 THE WORKS OF JEREMY BENTHAM 573, 582 (1843) (John Bowring ed., 1843).

One may wonder why indigent litigants who have good claims cannot loan the required sum to bring those claims (or use them as collateral). While this claim is theoretically appealing the market falls short of fully addressing the problem. First, not all claims have monetary values. Litigants with claims that will not yield any financial gain—prisoners attempting to improve their conditions are illustrative—cannot utilize the market to bring meritorious lawsuits. Furthermore, the market does not seem to fully facilitate the justified lawsuits of those with little means. *Cf.*, Ronen Avraham and Abraham Wickelgren, *Third Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233 (2014) (describing the flaws of the litigation funding market and proposing a mechanism to improve its workings). In addition to liquidity constraints and risk aversion, *e.g.*, Maher, *supra* note 100, at 1548–50, often there is genuine uncertainty regarding the value of the claim as in many cases the relevant information resides with the rival party, at least before trial (*infra* Part III.C.2.a.). Hence, even in a hypothetical user-fee regime, there are good reasons to exempt the indigent from fully paying for litigation. For similar reasons, a fee-shifting rule that obliges the loser to pay the winner's legal costs will not address these problems. *E.g.*, *id.*, at 1554 ("in such a regime, financially weak players may have a meritorious claim . . . but be afraid to pursue it because they would be financially devastated if the other side prevailed").

[113] Courts are indeed authorized to waive court fees. 28 U.S.C. § 1915(a)(1). These fee waivers are discretionary, and courts appear to implement their discretion narrowly. CHARLES ALAN WRIGHT ET AL., 10 FEDERAL PRACTICE & PROCEDURE § 2673 (3d ed.) (*available at Westlaw*). *Cf.*, Resnik, *supra* note 103, at 973.

[114] The inmate litigation example, *infra* Part III.C.2.b., demonstrates this problem of overuse of subsidized litigation by the poor.

[115] *E.g.*, the subsidies proposal in Maher, *supra* note 100. The quotas regime that I

substantive user fees for the remainder of the litigants, contrary to the current practice. Thirdly and relatedly, in a high-fee-large-subsidy regime, those not entitled to fee-waivers would use the legal system only when their cases are sufficiently large to justify the high fee. As many average-size cases will be pushed out of the legal system, such a regime would lose the advantages of diversity.[116]

Regardless of the wisdom of these proposals it seems clear that there is too strong an opposition to charging litigants the real price for their behavior. "[T]here is likely a deep-seated, intuitive conviction among Americans that to charge user fees of any type for court access is 'unjust.'"[117] No wonder, then, that the numerous proposals to dramatically raise filing fees failed to materialize;[118] amendments that attempted to raise sanctions on abusive litigation have likewise withered.[119] Apparently, any

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propose does address this issue.

[116] Beier, *supra* note 101, at 1195, explains:

> Because each case, regardless of size, carries within it the potential for generating allocative rules of general applicability, a fee system that skews the system toward greater homogeneity of cases will delay, if not completely prevent, the creation of allocative rules by eliminating . . . cases with the requisite facts.

Resnik, *supra* note 103, at 975, provides another perspective: "democratic values . . . recognize the contribution of and need for diverse voices and participants." *See also* Resnik, *supra* note 112, at 1830 (discussing the concerns that "the federal courts would become places for poor people and criminal defendants, rather than attract . . . a diverse set of litigants.").

[117] Maher, *supra* note 100, at 1545 (referring to Edward Brunet, *Measuring the Costs of Civil Justice*, 83 MICH. L. REV. 916, 930–31 (1985)). *See also id.*, at 1546 (discussing the perception that "it is fundamentally 'wrong' to charge for court usage costs because it conflicts with fundamental notions about fairness, human nature, or the ideal operation of a democratic society"); Bone, *supra* note 101, at 925.

[118] Consider the explicit proposal to escalate access fees, raised by the Long Range Plan for the federal courts as approved in 1995 by the Judicial Conference of the U.S. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995). The change was rejected on familiar grounds. Mainly, "litigants should not be so burdened with fees as to effectively eliminate the access of some low and moderate income users to our federal forum." *Id.*, at 96.

[119] In 1983 Rule 11 of the Federal Rules of Civil Procedure, which authorizes courts to levy monetary sanctions on litigants and their representatives, was amended to reflect "the widely shared perception" that the federal courts were "being abused, or at least overused". CHARLES ALAN WRIGHT ET AL., 5A FEDERAL PRACTICE & PROCEDURE § 1331 (3d ed.) (*available at Westlaw*). In essence, the amendments constituted a pricing mechanisms—they "intended to provide a means of deterring frivolous litigation" through a higher fine on unworthy litigation. *Id.*, at § 1332. Indeed, the 1983 reform apparently had "a dramatic effect," reducing abusive litigation. *Id.*, at § 1331, § 1332 & n.77. Nonetheless, amendments in 1993 reinstated a diluted version of Rule 11. There were several reasons for this retreat—notable ones relate to fears that the stronger version of the rule deprives

such proposal to substantially raise courts' user fees seems to be doomed to fail.[120]

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The message is clear. Meaningful pricing is currently not an available option to regulate litigation behavior. Given this aversion to actual user fees one has to think of alternatives to police frivolous litigation. While the federal system did turn to other routes, which will be discussed below, these options seem unsatisfactory. Instead, quotas stand out as a new and potentially useful mechanism. Quotas push litigants to prioritize. To stay under their limit litigants should choose to advance their very best cases; quotas on interlocutory appeals, for example, force litigants to file their very best interim appeals. Quotas do not deny the poor access to justice. Rather, they restrict frivolous litigation among all claimants, regardless of their class. Hence quotas resolve the deep opposition to pricing. Moreover, pricing—access fees and sanctions—seem to have no advantage over quotas in the context of litigation. Due to the numerous complexities, side effects, and the positive and negative externalities, any price tag on litigation would seem arbitrary at best. Procedural quotas, instead, are easier to set; while they may also be arbitrary they do reflect a judgment call regarding the amount of litigation we are willing to contain. Finally, quotas have additional benefits in this context. They are a flexible regulatory mechanism. They can easily be adjusted to meet the exigencies of the time; policymakers, for example, can occasionally reconsider the numerical limit. And as discussed above, quotas can be used in various forms—they can be inalienable, tradable, or partly tradable; and they are capable of integrating with other mechanisms, e.g., judicial discretion to allow deviations from the assigned quota in specific cases.[121]

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litigants of their due process rights and overly deters them; concerns over incoherent and unpredictable implementation in specific cases; and "satellite" litigation over the application of Rule 11 sanctions in each case. *Id.*, at § 1332. The more powerful pricing rule was never restored. Indeed, it is hard to argue that the current sanctions rule play a significant role in deterring frivolous litigation. *Id.*, at § 1336.1 (sanctions are imposed only in cases of clear abuse). *See also* M. Todd Henderson & William H.J. Hubbard, *Do Judges Follow the Law? An Empirical Test of Congressional Control Over Judicial Behavior*, (Coase-Sandor Institute for Law and Economics Working Paper No. 671, January 2014), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377351 (judges do not employ Rule 11, even in securities cases where they have to affirmatively consider such sanctions).

[120] Given the recent financial distress fee-raising proposals seem to proliferate in the last years. *E.g.*, Maher, *supra* note 100; Hay, Rendall-Jackson, and Rosenberg, *supra* note 96; Ware, *supra* note 95.

[121] *See supra* notes 83–85 and accompanying text for the ways to accordingly modify

B. Alternative Options for Regulating Litigation Behavior

Given the apparent reluctance to use pricing, and without quotas, this section briefly illustrates the alternative reactions of courts and judges to the need to regulate litigation behavior—outright restrictions on the relevant right or its scope; and case-by-case determinations.

One way to cope with the over-use of the legal system is outright restrictions, which eliminate the relevant right or curtail its substantive scope. One example is the recent line of decisions concerning mandatory arbitration provisions in standard form contracts—namely, *A.T.&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*.[122] Due to these precedents "a good many conflicts that would otherwise have been eligible for courts are now, by law, outsourced."[123] Unlike quotas and pricing, substantive limitations on litigation rights do not enable the parties to prioritize, undertaking only their very best moves. More generally, while fine-grained substantive restrictions are not necessarily inefficient, outright limitations are often crude, constituting a problematic response to the workload problem and overkilling litigation activity. Indeed, the recent arbitration provisions decisions, which effectively restricted access to justice by "a bare majority of the United State Supreme Court," are considered by many as "fundamentally wrong."[124]

A more nuanced approach would attempt to balance the advantages and disadvantages of a relevant litigation behavior, on a case-by-case basis.[125]

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quotas.

[122] 131 S. Ct. 1740 (2011); 133 S. Ct. 2304 (2013), respectively. These cases basically allow prospective defendants to eliminate class litigation through standard form contract.

[123] Resnik, *supra* note 103, at 932. Another example of this kind is the recent restrictions on class litigation. *Cf.*, *id.*, at 973: "In the same term [of *Concepcion*, the Court also decided *Wal-Mart v. Dukes*, in both] the Court limited the ability to rely on lawyers providing services to a group . . . ".

[124] Resnik, *supra* note 103, at 995, 997. For a survey of critiques from various stakeholders see Shay Lavie, *The Malleability of Collective Litigation*, 88 NOTRE DAME L. REV. 697 n.96 (2012).

[125] Another way to regulate litigation behavior is doing nothing, thereby increasing delay and reducing judicial attention. In essence, this is an implicit price on litigation—delay means that good claims are worth less. While letting litigants queue up is another way, albeit indirect, to regulate litigation behavior, willingness to wait is often correlated with financial strength, i.e., wealth. Hence, delay, which "exert[s] downward pressure on the plaintiff's settlement position", Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1935, typically harms the poor. Moreover, as a regulatory tool, such queueing is a "blindly and crudely screen." *Id.*, at 1939. Policymakers can do a better job at regulating litigation behavior through a more transparent, rational, and thoughtful mechanisms.

One example of this approach are the new Supreme Court precedents that raised pleading standards—courts are directed to dismiss, at the outset of litigation, cases that do not present at that stage "enough facts to state a claim to relief that is plausible on its face."[126] This doctrinal move is motivated by the desire to urge judges to screen out, on a case-by-case basis, the unmeritorious claims, such that they do not proceed to discovery and unnecessarily consume precious judicial resources. This recent case law, however, has generated vigorous discussion and fierce criticism.[127] For the current purposes it suffices to briefly mention two related lines of opposition—dismissing claims before the merits are known and granting wide discretion to trial court judges.[128]

The more demanding pleading standards screen out cases without probing into the merits. This pre-merits screening can bring to unfortunate results where the plaintiff is uninformed regarding the merits of her case but this information resides with the defendant. Medical malpractice and civil rights cases may serve as typical examples.[129] In such cases, uninformed plaintiffs with good claims cannot present sufficient information to proceed to discovery.[130] While pre-merits disposition can be an acceptable solution, in this context it is coupled with relatively unfettered judicial discretion. The heightened pleading standards require judges to decide merits questions early on, with little evidentiary background, inviting them to dismiss cases "on instinct," according to their subjective beliefs.[131] Moreover, as "any

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[126] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). *See also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[127] "[C]ommentators soon declared the . . . demise of the 'liberal ethos' of the Federal Rules." William H.J. Hubbard, *A Theory of Pleading, Litigation, and Settlement*, at *2 & n.4–5 (Coase-Sandor Institute for Law and Economics Working Paper No. 663, January 2014), *available* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2360723. *See also id.*, at 7 n.22 for literature opposing the new standards.

[128] The higher pleading standards also trigger opposition from other directions, some of which overlap with the foregoing discussion. More demanding pleading standards, for example, raise the price for bringing a claim, as plaintiffs that are uninformed regarding the value of their claims will have to expend resources on investigating the case prior to filing. *E.g.*, Bone, *supra* note 101, at 925–26. Likewise, robust pleading requirements may effectively block access to justice, at least in certain categories, as such pre-filing investigation may simply not justify its costs.

[129] For civil rights cases in this context see, *e.g.*, Hubbard, *supra* note 127, at *8; for medical malpractice cases see, *e.g.*, Bone, *supra* note 101, at 926 n.219.

[130] *E.g.*, Hubbard, *supra* note 127, at *9; Bone, *supra* note 101, at 925–26.

[131] Marcus, *supra* note 98, at 482. *See also* Bone, *supra* note 101, at 889 ("[C]ritics fear that [the new rule] gives too much latitude to district judges, who are eager to screen cases . . . This fear is not unfounded."). For similar reasons, the new regime may "feed[] the overconfidence and [cognitive] vulnerabilities that judges have when making intuitive misjudgments." Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413 (2011).

strict pleading rule must rely heavily on trial judge discretion" the new standards "mak[e] it difficult for lawyers to predict the outcome in advance and thus weaken[] the rule's beneficial effect in discouraging meritless filings".[132] Furthermore, dismissing cases at the outset implicates no substantive record, leaving trial judges to act free of meaningful supervision by higher courts.[133] In short, critics allege that it is "neither efficient nor politically honest to allow ad hoc decisions about what process is due."[134]

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Some commentators believe that the responses to the crisis of volume in the federal courts have gone too far, constituting a "backlash" reaction.[135] This Article, however, is not intended to convince the reader that the existing approaches to regulating litigation behavior are perforce wrong. Rather, the goal is to point to a tradeoff, a choice between imperfect alternatives. The less we trust judges' individual, unfettered discretion, the more we should seek alternatives to case-by-case determinations; likewise, the less we believe in pricing litigation, the more we will need to restrict access to justice in other ways. Quotas broaden the range of regulatory alternatives. In their absence, the basic choice is between prices, substantive restrictions on litigation, and case-by-case screening. Indeed, those who oppose the recent restrictions on access to justice sometimes explicitly invoke the idea of pricing as an alternative regulatory choice.[136] But given

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[132] Bone, *supra* note 101, at 928. *See also* Marcus, *supra* note 98, at 482–83 ("increased discretion to judges" stresses "attitudinal differences" among them and "encourage[s] judge shopping.").

[133] *E.g.*, Marcus, *supra* note 98, at 444–47 (describing how in this pleading standards context lower courts, time and again, fail to comply with the promulgated rules of decision, engaging in "something bordering on a revolt" at one point in time, *id.*, at 445, and in a possible "judicial sabotage" during another era, *id.*, at 438) (internal quotation marks omitted). *See also* Thornburg, *supra* note 99, at 267 (like other case management techniques, with heightened pleading requirements "neither the individual judge nor the court system is required to publicly articulate the reasons that certain cases or types of cases deserve more resources than others.").

[134] Thornburg, *supra* note 99, at 267.

[135] *E.g.*, Miller, *supra* note 97 (describing the recent "manifestations of the backlash [against plaintiffs that] have been given traction by the Supreme Court . . . [and] impaired both access to the federal courts for many citizens and the enforcement of various national policies." *Id.*, at 304).

[136] In the *Twombly* decision, which raised the pleading standards, the minority asserted among other things that instead more demanding pleading "the district court has at its call . . . a wide array of Rule 11 sanctions" to curb abusive litigation. Bell Atl. Corp v. Twombly, 550 U.S. 544, 595 n.13 (2007). *See also* Bone, *supra* note 101, at 876. ("It makes no sense . . . to strengthen pleading requirements if the same result can be achieved much better by bolstering Rule 11 sanctions . . . "). Similarly, at one point in time the Advisory Committee

the aversion to pricing, with the traditional range of regulatory alternatives drastic restrictions on litigation behavior seem almost inevitable.[137]

Such reactions are not inevitable if new regulatory approaches are taken up. Quotas present a fresh approach—alleviating the pressure on the judiciary and decreasing the number of unmeritorious issues that reach courts by allowing claimants themselves to choose the most appropriate cases for judicial intervention. Of course, quotas are not a panacea. The proper regulatory choice—pricing, outright restrictions, individual screening, quotas, or a combination thereof[138]—should be context dependent. As a rough generalization, quotas present a valuable option where we think that prices are inappropriate and unguided and individual decision-making is problematic. The use of prices is disliked;[139] and many mistrust unfettered judicial screening.[140] Accordingly, legal procedure, as other public services and value-laden domains, present a promising ground for the use of quotas. The next Part discusses concrete applications.

C. Applications

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preferred to respond to a perceived crisis of abusive litigation through strengthening the capacity to levy monetary sanctions, rather than "tighten[ing] up the liberal federal rule pleading structure." WRIGHT ET AL, *supra* note 119, at § 1331 (referring to the 1983 Amendments to the Federal Rules of Civil Procedure).

[137] Indeed, the new Court precedents that heightened pleading standards are, in some sense, "a recognition of what was already going [on] out there in the trenches." Hubbard, *supra* note 127, at *36 (internal quotation marks omitted). *See also* Marcus, *supra* note 98.

[138] *Cf.*, Bone, *supra* note 101, at 933–34 (proposing a combination of monetary penalties with strict pleading standards and limited pre-dismissal discovery.).

[139] *See* the discussion in *supra* Part III.A.

[140] Interestingly, the majority in Bell Atl. Corp v. Twombly, 550 U.S. 544, 559 (2007), reasoned the heightened pleading standards by the doubts it had regarding the ability of judges to "weed[] out" individual meritless cases "early in the discovery process through careful case management"—"given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *See also supra* notes 131–134 and accompanying text (critiques of individual discretion with respect to heightened pleading standards); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–26 (1982) (lamenting that too much power is generally given to judges to dispose cases without due and complete process); Beier, *supra* note 101, at 1196 ("in the absence of Congressional guidance . . . some suggest that the courts themselves fashion guides. This suggestion is problematic, because judges are often ill-equipped to perform this appraisal.") (internal quotation marks omitted); Hay, Rendall-Jackson, and Rosenberg, *supra* note 96, at 1938 ("hav[ing] courts screen cases for their relative deterrence value" "seems [as the] most relevantly appropriate" solution though it "is entirely impractical."); Justice Scalia's concerns with regard to providing more discretion to judges to implement Rule 11 sanctions, Amendments to the Federal Rules of Civil Procedure, 1993, 146 F.R.D. 401, 507 (Scalia, J., dissenting). *Cf.*, *supra* note 18 (distrust in individual judicial determinations regarding patents).

This Part demonstrates how quotas can be integrated into the current litigation system. It discusses two contexts—quotas on adjudication behavior; and quotas on filing behavior.

1. Quotas and adjudication behavior

Quotas can be used to improve litigants' choices when litigation is underway—incentivizing them to prioritize and undertake only their very best moves.

a. Interlocutory review

One example is the use of interlocutory appeals. The federal system is notorious for its strict adherence to the "final judgment rule": appeals are allowed only from "final decisions of the district courts of the United States."[141] This rule has obvious drawbacks. Particularly, it prevents appellate courts from effectively reviewing and guiding lower courts, especially with regard to orders that are not likely to be reviewed within final appeals (e.g., discovery rules).[142] However, a liberal right to interlocutory appeals entails other problems—it invites tactical delays through frequent petitions for review, and unnecessarily wastes the appellate court's resources.[143] Every legal system strikes a balance between these competing considerations. While the federal system strictly constrains interim appeals,[144] other legal systems, most notably the state of New York,[145] take a highly liberal approach to interlocutory review. Both approaches are imperfect.

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[141] 28 U.S.C. § 1291. This rule does not mean that interlocutory appeals are completely blocked—*e.g.*, 28 U.S.C. § 1291(b) (district courts can certify an interlocutory order for appellate review, and the appellate court "may . . . in its discretion, permit an appeal"); Shay Lavie, *Are Judges Tied to the Past? Evidence from Jurisdiction Cases*, HOFSTRA LAW REVIEW, *21 & n.88 (forthcoming 2015) (listing the relevant statutory and judge-made exceptions to the final judgment rule).

[142] *Cf.*, Maher, *supra* note 100, at 1552–53 (suggesting raising fees on filings but subsidizing appeals, due to the social importance of effective appellate decision-making).

[143] For a survey of this debate regarding the final judgment rule see Lavie, *supra* note 141, at *19–*22. In this prior work I suggested that in addition to the existing for-and-against arguments the final judgment rule pushes appellate courts to affirm the trial court's decision, and provided empirical evidence for this proposition.

[144] "Without doubt, the federal courts are among the most strict in adhering to the finality requirement." JACK H. FRIEDENTHAL, MARY KAY KANE, ARTHUR R. MILLER, CIVIL PROCEDURE 622 (4th ed. 2005).

[145] *See* N.Y. Civ. Prac. L. & R. 5701 (a)(2). Other notable states that share a similar procedural policy include Wisconsin, Arizona, California, and New Jersey. *See* FRIEDENTHAL, KANE, AND MILLER, *supra* note 144, at 620(18), 621(22).

Quotas offer a new and perhaps better balance. Presumably, the majority of interim decisions do not justify interlocutory review; but we would like at least some interim orders to receive such review. In principle, then, and along the lines of the tennis example, each litigant can have a right to, for instance, a single interlocutory appeal throughout the life of a case. This proposal does not overly burden appellate courts. And it simultaneously guarantees that litigants will carefully ration their interlocutory review rights and use them only in their very best cases, enhancing the goals of effective review and law development. Moreover, as tennis players, litigants are presumably able to plan ahead and reasonably pick their best opportunities to challenge the district court's interlocutory orders.[146]

Before turning to possible variations to this quota it is important to note the range of relevant policy choices. The immediate choices are the two extremes—outright restrictions on interlocutory appeals and free appeals from the district court's orders, *à la* the federal final judgment rule and the liberal approach in New York, respectively. These options have obvious flaws.[147] Pricing is another tool—either as a sufficiently high fee for appeals or a substantial monetary sanction on the losing appellant/appellee. The drawbacks of these alternatives are clear. A less straightforward mechanism in this context is individual judicial decision-making. Such a regime can work along the following lines—litigants that desire to appeal would file a petition to the appellate court. If the petition seems important, the appellate court would accept it and proceed to a full-fledged (interim) appeal; otherwise, it would deny the petition.[148] Such a regime, though, also has

[146] The empirical findings in Abramitzky et al., *supra* note 36, regarding the optimality of challenges in tennis, are illustrative. While tennis players underuse a little their ability to challenge, their behavior is very close to optimal—"97% of what could be attained by optimal behavior." *Id.*, at 940. There is no reason to think that litigants and their lawyers are considerably less sophisticated than tennis players. *Cf.*, litigants' capacity to use the 10-depositions rule, *supra* note 68 and accompanying text.

[147] One can also, of course, curtail the scope of the right to appeal—*e.g.*, by guiding appellate courts to closely inspect the trial court's legal determinations, but not its factual findings. *See* FED. R. CIV. P. 52(a)(6) (the reviewing court "must not . . . set aside [findings of fact] unless clearly erroneous . . . "). As the foregoing discusses, *supra* text accompanying notes 122–124, such substantive limitations present a viable regulatory option, but they require thoughtful consideration and tend to be crude; moreover, they do not force litigants to prioritize their appeals, eliminating the benefits of quotas and prices.

[148] To a limited extent this is also the current federal regime, as aggrieved litigants can seek interlocutory appeals through one of the exceptions to the final judgment rule. *Supra* note 141. Interestingly, an example of a system that relies on individual appellate decision-making to screen interlocutory appeals is Israel—Israel Courts Act, 1984, section 41(b), 52(b). Likewise, the U.S. Supreme Court selects cases for review through a similar, discretionary process.

apparent inefficiencies. If it aims at providing an effective opportunity to challenge the district court's orders, this regime requires the appellate court to make a preliminary decision in each interlocutory petition in order to decide whether to take the case or not. But such determinations are costly and time-consuming.[149] It is easy to see how quotas can fare better. Quotas balance between the two extreme approaches; and instead of relying on individual, open-ended, and complex judicial determinations, quantity limits exploit the information litigants already possess to entertain only the most important interlocutory appeals.[150]

Of course, one can combine these tools. Quotas can be supplemented with individual decision-making in the following ways. First, the quota can be defined as losing interlocutory appeals—appellants who won their interlocutory appeals would still be able to use their initial allocation.[151] A second variation is providing discretionary interlocutory appeals to litigants who already used up their quota. While this modification reduces some of the benefits of quotas, it is more forgiving toward those who failed to plan ahead. Likewise, these regimes can be combined with pricing. A heavier fee can be levied, for example, on those who wish to deviate from their interlocutory appeals quota.

Based on this rudimentary proposal, many other modifications are of course possible. The limited quantity should be based on our judgment regarding the amount of interlocutory appeals we are willing to tolerate. Moreover, there is no reason not to adjust the quota over time, higher or lower,[152] throughout continuous feedback from relevant stakeholders.[153] In

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[149] For this very reason Israel has been restricting individual appellate decision-making, moving toward the final judgment rule. Eisenberg et al., *supra* note 99, at 1466–67& n.78. Another alternative, demonstrated by the Supreme Court's certiorari process, is perfunctory preliminary appellate determinations, *i.e.*, whether to accept the petition for appeal or not. This option, however, does not guarantee an effective appellate review. Yet another alternative is delegating to district courts this authority to grant appeals—but one can imagine that judges will not hasten to call appellate review.

[150] *Cf.*, Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review versus Direct Appeal*, 39 J. LEGAL STUD. 63 (2010) (suggesting an incentive-based mechanism, a choice between direct and discretionary appeals, to induce litigants to bring successful cases).

[151] This variation is similar to the current rules in tennis. Abramitzky et al., *supra* note 36, at 941. It somehow resembles a loser-pays program, as the "payment," here, deduction from the assigned quota, depends upon losing the claim.

[152] One may wonder how to set the quota lower than 1. One option is to allocate the rights to interlocutory appeals through a random process, *e.g.*, one per 10 litigants. This process achieves the same goal—ensuring a steady, albeit thin, stream of quality interlocutory appeals. *Cf.*, Shay Lavie, *Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011) (surveying the use of randomization in legal settings, and proposing to employ it in class actions).

[153] *See* the discussion regarding depositions, *supra* text accompanying note 69.

a similar vein, the proposed interlocutory appeals quota can be tradable, inalienable, or partly tradable.[154] There can be other tweaks. To the extent policymakers believe that it is important to subsidize the poor, more quotas can be allocated to those who lack financial means. Likewise, the initial allocation can be more fine-grained—in areas of law that policymakers deem more worthy of close appellate review, more interlocutory appeals can be allocated.

b. Amendments to pleadings

Another example of the possible use of procedural quotas to curb abusive litigation behavior is the rule governing amendments to pleadings. The federal rules endorse a liberal pleading policy—notwithstanding rival litigants' opposition "[t]he court should freely give leave [to amend] . . ."[155] In the context of affirmative defenses, for example, courts freely permit the addition of late claims as long as the delay has not been deliberate and the plaintiff has suffered no undue harm.[156] This permissive approach definitely has merits as it assigns greater weight to fairness and accurate decision making. However, it imposes unnecessary costs on rival litigants; moreover, it seems to conflict with the recent policy that requires higher pleading standards.[157]

The way out may be a qualified right in the form of a limited entitlement, such as once or twice per case, to automatically amend one's pleadings. As the interlocutory appeals example demonstrates, there may be several useful modifications to this quota regime; in particular, integrating judicial discretion into the quota rule seems as a natural variation.

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[154] *See supra* note 78 and accompanying text regarding the benefits of tradability. Tradability, though, retrieves the problems associated with prices. To the extent we deem these difficulties insurmountable, inalienability or partial-tradability is a better option. *See supra* note 83 and accompanying text regarding partial tradability, which in this context can mean limiting the ability of litigants to sell and buy interlocutory appeals rights.

[155] FED. R. CIV. P. 15(a)(2).

[156] In the words of the Supreme Court: "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962).

[157] Both lax pleading standards and liberal amendment rules stem from the same "liberal ethos" that undergirds the federal rules of civil procedure. Marcus, *supra* note 98, at 440. If lax pleading standards are no longer appropriate, liberal amendment rules may follow the same faith.

Quotas, then, can be used to regulate the behavior of litigants when litigation is underway. One can think of similar uses of quotas in close domains—e.g., limiting depositions[158] or other checks on discovery, and curbing the capacity of parties to postpone hearings. The following paragraphs show that the same mechanism—quotas—can be used to limit the very filing of meritless cases.

2. Quotas and filing behavior

More radical proposals can aim at restraining the filing of meritless suits, rather than controlling litigation behavior once a case was filed.

a. Pleading standards

Quotas can be used in the context of heightened pleading standards. As previously discussed, the new, higher standards require more pre-filing work from plaintiffs; however, heightened pleadings are not necessarily an inferior policy tool, as more demanding pleading requirements prevent frivolous suits and the burden they inflict on defendants. What seems most troubling about heightened pleading standards, though, is the case of misinformed plaintiffs. As aforementioned, in these situations—typical examples are civil rights and medical malpractice cases—the defendant, but not the plaintiff, is well acquainted with the evidence, knowing whether there is a good cause for action. As a result, the heightened standards may screen out, before discovery, plaintiffs who have good cases but lack evidence. Heightened pleading standards, then, may be too drastic a tool, as they eliminate from courts good claims in important areas. Permissive standards,[159] on the other hand, trigger frivolous suits and pressure defendants with good defenses to settle—hence the shift in the Court's jurisprudence in this respect. As previously discussed, pricing, and individual screening by trial judges appear problematic.[160]

Quotas can provide an intermediate, balanced solution. By allocating to potential plaintiffs, essentially any citizen, a limited right to bring a case without the need to provide more information upfront one can ensure that at least some important cases will reach courts. As before, one can think of

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[158] *See supra* notes 69–70, 76–79 and accompanying text.

[159] See Conley v. Gibson, 355 U.S. 41, 45 (1957) for the previous permissive, notice pleading rule.

[160] For the general opposition to pricing, through filing fees or loser-pays rules, see *supra* Part III.A.; for the criticism of individualized decision-making in the context of pre-discovery screening see *supra* notes 131–134, 140 and accompanying text.

modifications to this basic proposal. The relevant figure—i.e., the number of times a person will be able to bring a case under the lax standards—should be determined.[161] One may think that asymmetric information situations, for which the heightened pleading standards present the major difficulty, are relatively rare. Usually, injured persons can reasonably present evidence regarding their case. Presumably, then, several opportunities in a lifetime to bring a case under the permissive standards should suffice. And adjustment could be made over time. Other variations relate to the integration of case-by-case judicial decision-making. Similarly to the interlocutory appeals example, one can let claimants deviate from their quota subject to the court's discretion; and deduct from their quotas only the very cases in which they eventually lost. Likewise, one can subsidize the poor through larger quotas, or assign different quotas to different types of claims.[162]

Admittedly, this suggestion substantially departs from existing practices. But it does attempt to directly tackle the core problems of access to justice by exploiting the private information litigants have. In many cases litigants know whether their claim is completely frivolous or not, and quotas urge them to prioritize. While there are alternative avenues to do this screening, these options may be costly and problematic. Along these lines, quantitative restrictions on filing behavior can be useful in other contexts. The gist of the problem of forum shopping, for instance, is the legal authorization to file in several forums.[163] Plaintiffs, hence, may file where they think they will face more favorable judges and juries.[164] The plaintiff may have genuine reasons to file outside of her natural forum, such as

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[161] *Cf.*, David Rosenberg and Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721 (2005) (proposing to adjudicate only a portion—*e.g.*, half—of the cases in the system, and to terminate the remaining ones).

[162] As this proposal essentially creates individual litigation rights, its extension to the collective litigation arena is possible, though by no means straightforward. *Cf.*, Shay Lavie, *The Malleability of Collective Litigation*, 88 NOTRE DAME L. REV. 697, 748–51 (2012) (surveying mechanisms to turn individual entitlements to collective redress). Be that as it may, it is highly difficult, doctrinally, to certify class actions in areas such as medical malpractice and civil rights. *Cf.*, *id.*, at 713–24 (discussing the problem of individualized claims, typical to these domains). These are also the legal areas that suffer from the heightened pleading requirements. *Supra* note 129 and accompanying text.

[163] *E.g.*, "where the accident occurred [and] the plaintiff's residence." Martha A. Field, *Removal Reform: A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation*, 88 IND. L.J. 611, 645 (2013). Another factor that enhances forum-shopping is "courts' tendencies . . . to employ forum law." William H.J. Hubbard, *An Empirical Study of* Shady Grove v. Allstate *on Forum-Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151, 152 (2013).

[164] *See, e.g.*, Julie Cresell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sep. 24, 2006 (describing how a small town in Texas became attractive to patent suits, apparently because its courts lean toward plaintiffs in these issues).

shorter queue of cases in the other forum. But verifying the plaintiff's true intentions in each and every case is a highly complicated task.[165] A possible move is to restrict apparent attempts to forum-shop through quotas. And one can similarly conceive of other implementations of quotas in the context of filing behavior. The following example extends this logic to inmate litigation.

b. Inmate litigation

The case of prisoner litigation embodies the core concerns that render the choice between the regulatory alternatives thorny. On one hand, prisoners are typically poor; enabling them access to courts to challenge their convictions and incarceration conditions seems to be a basic "fundamental principle" that any legal system should provide.[166] Hence, it makes no sense to charge substantial fees for these claims.[167] On the other hand, without a substantial price tag, curbing prisoner litigation is difficult to achieve. Indeed, "[p]risoner petitions . . . clearly constitute[d] the largest class of actions subject to the label of 'frivolous.'"[168] Of course, trial judges

[165] In a very limited sense this is the role of the Forum Non Conveniens doctrine. "A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available . . . " RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971). Indeed, the doctrine "depends largely upon the facts of the particular case and . . . the sound discretion of the trial judge." *Id.*, cmt. b. However, perhaps due to the complications that particular judicial decision-making implicates, the Restatement does not attempt to effectively restrict forum-shopping. The plaintiff's "choice of a forum should not be disturbed except for weighty reasons." *Id.*, cmt. c.

[166] *E.g.*, Antonieta Pimienta, Note, *Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the 'Object Intelligibly' Standard*, 114 COLUM. L. REV. 1209, 1220 (2014). In addition to financial means, prisoners suffer from various other obstacles to litigation, including "literacy and language deficits" and difficulties in "collect[ing] evidence." *Id.*, at 1221–22.

[167] *Cf.*, Marcus, *supra* note 98, at 478 ("The Supreme Court has repeatedly emphasized the need to take a liberal view of pro se pleadings . . . ").

[168] Beier, *supra* note 101, at 1204 n.150. *See also* Eugene J. Kuzinski, *The End of the Prison Law Firm? Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 362 (1998) ("[As of 1995 inmate lawsuis] represent[ed] more than 25% of all civil lawsuits filed in federal court . . ."); Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting from Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 930 (2009) ("[T]he federal courts have been inundated with mostly frivolous prisoner lawsuits."); Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996) ("[T]he vast majority [of prisoner lawsuits] are dismissed as frivolous."). *See also* Judge Posner's observation in Lumbert v. Illinois Dept. of Corrections, 827 F.2d 257, 259 (1987) ("The problem [of over-use of the legal system] is even more acute when the indigent plaintiff is a prison inmate, because the costs of a prisoner's time are very low").

can screen the claims that prisoners file on a case-by-case basis; but this option liberates unguided judicial discretion and wastes scarce resources.[169] These conflicting considerations beg the use of quotas, a regulatory tool that incentivizes prisoners to file only their very best cases, "paying" with their pre-allocated assignments of rights.[170] As before, quotas in this context can have numerous variations.[171]

Inmate litigation call for quotas—and quantitative limitations were indeed introduced to this field. Interestingly, after decades of apparent crisis a reform in 1996 implemented a series of mechanisms to deter frivolous prisoners' litigation,[172] including a "frequent filer" limitation which is essentially a mild use of quota.[173] Apparently, this reform succeeded; the volume of inmate litigation has significantly decreased.[174] While the whole issue of prisoners' litigation and the responding reform is highly

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[169] *Cf.*, Judge Posner opinion in *Lumbert*, 827 F.2d at 259 (stressing the need to find ways to incentivize inmates not to bring frivolous claims).

[170] *Cf.*, *Lumbert*, 827 F.2d 257. In this case the court confirmed a partial filing fee in the amount of $7.20, asserting that "[i[t is proper that prisoners be made to think twice—by [limited] monetary exactions . . . about bringing lawsuits that have no significant prospect of obtaining any worthwhile relief . . ." *Id.*, at 259–60. While it is hard to argue against that logic, one may suspect why the price was set at $7.20; and whether that limit sufficiently achieves its goal. Indeed, the petitioner in *Lumbert* "has filed more than thirty lawsuits, all as an inmate" in several years. *Id.*, at 259.

[171] The number of allowed filings should be set according to policymakers' willingness to accommodate inmate litigation; and other regulatory tools—notably, modest pricing and individual decision-making, can be incorporated into the use of quotas.

[172] "The [Prison Litigation Reform Act (PLRA)] was part of a broad movement to restrict prisoner litigation [in Congress and by the Supreme Court]." Alexander Volokh, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287, 314 (2013). *See also* Pimienta, *supra* note 166, at 1214–15; Miller, *supra* note 168, at 941.

[173] The provision combines quotas, particular decision-making, and pricing—it effectively allows bringing three frivolous inmate suits in a lifetime without paying filing fees. "In no event shall a prisoner bring a civil action . . . under this section [*i.e.*, *in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated . . . brought an action . . . that was dismissed on the grounds that it is frivolous . . ." 28 U.S.C. § 1915(g). *See also* Note, *The Indeterminacy of Inmate Litigation: A Response to Professor Schlanger*, 117 HARV. L. REV. 1661, 1674–75 (2004). Interestingly, this provision was motivated, at least to some extent, by mistrust in judges. Pimienta, *supra* note 166, at 1214 n.26 (quoting the statement of Sen. Robert Dole, explaining that the PLRA would "restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems").

[174] *E.g.*, Volokh, *supra* note 172, at 313 ("[The PLRA] has been responsible for a massive decrease in federal prisoner litigation since its adoption in 1996."); Miller, *supra* note 168, at 942 ("[I]nmate suits filed in 2005 numbered eleven per thousand inmates, compared with the twenty-six suits per thousand inmates in 1995, immediately preceding the passage of the PLRA.").

contested,[175] the use of quotas can further be augmented. Stricter quotas can substitute for other, divisive restrictions on inmate litigation.[176] Moreover, the numerical limitation should better be examined and adjusted over time. The apparent reduction in inmate litigation since the reform calls for such reassessment. Also, one may think of a more sophisticated quota. The frequent filer provision, for example, might harm the repeat victims among the prisoners—as repeat victims are more likely to file more frivolous suits.[177] Policymakers can, though, tailor the quota tool to respond to this concern. One way to overcome this difficulty is setting a ratio-quota, i.e., letting inmates have a certain portion, say 25%, of frivolous claims in their "portfolio" of suits.

This limited experience with quotas can be extended to other settings that involve high-volume of frivolous suits, especially where fees are not meaningful or effective. Pro se litigation, and more generally, provision of public services to the indigent, can be suitable places to consider the use of quotas.

CONCLUSION

Quotas can be a beneficial regulatory tool, which appears to be under-used. They induce their beneficiaries to prioritize and discourage over-use without charging fees or employing costly case-by-case determinations. This Article suggests a broader use of quotas, delineating the appropriate settings to do so. A notable context for implementing quotas is the provision of essential public services, where policymakers are reluctant to charge

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[175] *E.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (detailing the various difficulties with the PLRA reform, including the frequent filer provision).

[176] In addition to the frequent filer provision the 1996 reform implements various other tools to restrict access to justice including a requirement to exhaust administrative remedies before filing; reduction in attorneys' fees for successful lawsuits; restricting causes of action for mental or emotional harm; narrower remedies; pre-filing screening; filing fees; and in-kind sanctions—revoking release credits—for litigants who file malicious claims. Pimienta, *supra* note 166, at 1215. Volokh, *supra*, at 312–14.

Of these tools, the administrative exhaustion requirement seems to be the most troubling. Pimienta, *supra* note 166 (criticizing the implementation of the exhaustion requirement—some "penal institution[s] . . . [have] not established a clear grievance procedure . . . [thereby enjoying] nonexhaustion as grounds for dismissal." *Id.*, at 1217–18). Miller, *supra* note 168, at 942 ("Most onerously [is the] provision [that] requires a prisoner wishing to bring suit . . . to exhaust the administrative remedies available in his prison before filing suit."); Schlanger, *supra* note 175, at 1654 ("courts dismiss [meritorious] cases for failure to exhaust."). Presumably, then, stricter quotas can substitute for a laxer requirement of exhaustion.

[177] Schlanger, *supra* note 175, at 1648–49.

beneficiaries.

Litigation settings can similarly benefit from using quotas. Courts strive to police litigation behavior, but policymakers are reluctant to utilize pricing mechanisms. While they are not free of difficulties, quotas are a rough policy tool that presents an interim option, shedding the risks of abusive litigation without scuttling important values such as access to courts. They may constitute a second-best option, but given the aversion to prices, quotas can substitute for more drastic, substantive restrictions on litigation. Alternatively put, the introduction of quotas enriches the array of mechanisms to set a tradeoff between the underlying, conflicting considerations. Be it as it may, the discussion on quotas provokes further thinking regarding the appropriate tools to regulate litigation behavior. As governments have recently been under financial crises, and courts continue to suffer from drained resources, it is all the more important and timely to experiment with new approaches.[178]

[178] Indeed, given the "[i]ncreasingly tight state budgets," "state courts have begun to experiment with raising fees . . . " (Thornburg, *supra* note 99, at 262). *See also* Resnik, *supra* note 103, at 976–77, 969–70 (surveying budget cuts in state courts and the measures taken to overcome financial difficulties); Burbank et al., *supra* note 107, at 650 (given the "numerous" "funding emergencies" of the recent decades, "the country's commitment to adequate funding of courts may reasonably be questioned."); Ware, *supra* note 95 (submitting that "[t]he economic downturn of the last few years required . . . state court systems [to reduce their spending]," and providing references for this proposition. *Id.*, at 900–01).