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Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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REPLY ESSAYS

CIVIL JUSTICE DELAY AND EMPIRICAL DATA: A RESPONSE TO PROFESSOR HEISE

Carl Tobias[†]

One decade ago, Congress undertook an ambitious, controversial effort to reduce expense and delay in the federal civil justice system. The Civil Justice Reform Act ("CJRA") of 1990 instituted unprecedented nationwide experimentation by requiring that all ninety-four federal district courts scrutinize their civil and criminal dockets and then promulgate and apply numerous procedures which district judges believed would save cost and time in civil litigation.¹ Congress also prescribed rigorous assessment of the six principles, guidelines, and techniques of litigation management and expense and delay reduction that federal districts in fact adopted and enforced. Lawmakers provided for an expert, independent evaluator that was to collect, analyze, and synthesize systematically relevant empirical data on certain aspects of the testing.² Moreover, legislators requested that the Judicial Conference of the United States, the policymaking arm for the federal courts, study additional features of experimentation, which principally implicated differentiated case management ("DCM") and various forms of alternative dispute resolution ("ADR"). Congress asked that the Judicial Conference submit a report and recommenda-

[†] Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. I wish to thank Michael Higdon and Peggy Sanner for valuable suggestions, Angeline Garbett for processing this piece, and Jim Rogers for generous, continuing support. I am a member of the Civil Justice Reform Act Advisory Group for the U.S. District Court for the District of Montana; however, the views expressed here and errors that remain are mine.

¹ See 28 U.S.C. §§ 471-82 (1994). See generally Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994) (analyzing the CJRA and arguing that it neither compels nor authorizes district courts to adopt procedural rules inconsistent with existing law); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994) (analyzing the conflicting objectives of CJRA and its predecessor, the Judicial Improvements and Access to Justice Act of 1988).

² See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5097-98 (1990) (codified as amended at 28 U.S.C. §§ 471-82 (1994)) (requiring submission of a report to Congress assessing the extent to which costs and delays were reduced as a result of a pilot program). The RAND Corporation Institute for Civil Justice assessed the measures that ten pilot districts applied. See 28 U.S.C. § 473(a) (defining the six principles, guidelines, and techniques of litigation management and cost and delay reduction).

tions to lawmakers and the president on both dimensions of the testing which the federal districts had conducted.³

Congress mandated implementation of this national experiment, which it intended to conserve fiscal and temporal resources, even though minimal empirical data demonstrated that the federal district courts actually experienced serious delay when resolving civil disputes. A thorough study released during 1990, for example, found considerably less delay in terms of time to disposition than many federal courts observers had contended, thereby seeming to confirm the proposition that resolution times in the federal districts had remained comparatively constant over the preceding twenty years.⁴ Insofar as delay did exist, the periods needed for concluding civil lawsuits appeared to vary significantly across the districts.⁵ Delay is a relative concept.⁶ For instance, it seems inappropriate to characterize as delay the time that resource-poor litigants consume in developing the factual information those parties need to prove their cases.⁷ Precisely how slow is too slow remains unclear. Furthermore, Congress prescribed effectuation of this expansive, costly experiment with measures for decreasing expense and delay in civil litigation, even though similar efforts in numerous states and in a significant number of federal districts suggested that the courts had exhausted practically all of the advantages that they could derive from procedural reforms.⁸

³ See Civil Justice Reform Act § 104 (calling for a report on the results of the demonstration program that experiments with DCM and ADR systems). The Judicial Conference assessed the measures that five demonstration districts applied. See *id.* See also 28 U.S.C. § 331 (1994) (authorizing the Judicial Conference as the policymaking arm for the federal courts).

⁴ See WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* (1990). See also TERENCE DUNGWORTH & NICHOLAS M. PACE, *RAND CORPORATION, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS 25* (1990) (contending that no evidence substantiated the assertion that time to disposition had increased).

⁵ See, e.g., Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, *LAW & CONTEMP. PROBS.*, Summer 1991, at 99, 101 (observing that, while variations exist among the districts, no study has described why some do well in moving cases and others do poorly). See also Lauren Robel, *The Politics of Crisis in the Federal Courts*, 7 *OHIO ST. J. ON DISP. RESOL.* 115, 122 (1991) (same).

⁶ See, e.g., Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833, 849-51 (1994) (discussing problems created by a lack of common understanding of delay); Robel, *supra* note 5, at 117-23 (observing the need to rethink the definition of the delay problem).

⁷ See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 *ARIZ. ST. L.J.* 1393, 1423 (1992) (arguing that "individuals who lack resources and information need greater, rather than less, discovery"). See also Robel, *supra* note 5, at 121 n.37 (noting that public interest litigants cited delay most frequently when asked their greatest criticism of the litigation process).

⁸ See JUDICIAL CONFERENCE OF THE U.S., *THE CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT: ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY ASSESSMENT OF PRINCIPLES, GUIDELINES & TECHNIQUES* (1997), reprinted in 175 *F.R.D.* 62 (1997) [hereinafter *JUDICIAL CONFERENCE REPORT*]. See generally Carl Tobias, *Civil Justice Reform Sunset*, 1998 *U. ILL. L. REV.* 547, 599.

It should not have been surprising, therefore, that the comprehensive evaluation, which the Institute for Civil Justice of the RAND Corporation performed at the instruction of Congress, ascertained that the judicial case management mechanisms prescribed and implemented by districts pursuant to CJRA may have saved some time but only minimally reduced cost in civil cases.⁹ Moreover, the Judicial Conference rejected extension of the six statutorily-enumerated principles, guidelines, and techniques of litigation management and expense and delay reduction beyond the ten pilot federal district courts that experimented with these approaches. The Judicial Conference correspondingly suggested an alternative program to conserve economic and temporal resources.¹⁰

During 1996, the Judicial Conference Advisory Committee on the Civil Rules appointed a Discovery Subcommittee to explore whether those provisions of the Federal Rules of Civil Procedure that govern discovery required amendment.¹¹ The Discovery Subcommittee astutely commissioned studies by the RAND Corporation Institute for Civil Justice, which had recently concluded a thoroughgoing assessment of the principles, guidelines, and techniques for decreasing cost and delay applied by pilot districts under CJRA, and by the Federal Judicial Center, the principal research arm of the federal courts, which had primary responsibility for preparing the analyses of the measures enforced by the CJRA demonstration districts.¹² The new evaluations, which expanded on the empirical data that RAND and the Federal Judicial Center had assembled, assessed and synthesized in the CJRA effort, found that discovery functioned comparatively well as a general matter and created the greatest difficulty in a

⁹ See James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 18, 41 (1997) (finding that the pilot program had little impact on litigation cost savings and time to disposition). See also *infra* note 24 and accompanying text.

¹⁰ See JUDICIAL CONFERENCE REPORT, *supra* note 8, at 89-90 ("Because this pilot project, as a package, did not have a great impact on reducing cost and delay, the Judicial Conference does not recommend that it be applied nationally."). See generally Carl Tobias, *The Judicial Conference Report and the Conclusion of Federal Civil Justice Reform*, 175 F.R.D. 351 (1998) (assessing the *Judicial Conference Report* and suggesting prompt resolution, preferably by Congress, of the question of whether CJRA has expired).

¹¹ See Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Alicemarie H. Stotler, Chair, Comm. on Rules of Practice and Procedure, 181 F.R.D. 24, 25 (1998). See also Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 521 (1998) (describing appointment and activities of subcommittee).

¹² See James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613 (1998) (reporting the results of the follow-up RAND study); 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 (1998) (reporting results of the FJC study). See also Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure, 192 F.R.D. 354, 357-58 (2000) (discussing the subcommittee's response to the results of the studies); *supra* notes 2-3, 9-10 and accompanying text.

rather small percentage of relatively complex cases.¹³ Notwithstanding these instructive findings, the Judicial Conference substantially modified several significant features of pretrial discovery, a process which is essential to modern civil litigation. The Conference instituted important changes for all civil lawsuits in the scope of discovery and in the strictures that cover mandatory prediscovery disclosure.¹⁴

These two vignettes of contemporary public policymaking in the areas of federal civil justice reform and federal civil procedure resist easy understanding and might even appear to be somewhat counter-intuitive. Nevertheless, a recent law review article,¹⁵ authored by Professor Michael Heise, illuminates those stories and informs our understanding of the federal and state civil justice systems more broadly.

All of the propositions above mean that Professor Heise's valuable contribution deserves a response. This essay undertakes that effort. The initial section of the paper provides a comparatively brief descriptive assessment of *Justice Delayed?*. The second part of this Response considers how Professor Heise enhances our appreciation of the two initiatives examined above and of civil justice reform generally. The third part offers a number of recommendations for future treatment of the federal and state civil justice processes.

I. DESCRIPTIVE ANALYSIS

Justice Delayed? significantly advances understanding of the federal and state civil justice systems. Professor Heise first places the issue of civil justice delay in its broader historical context and examines earlier attempts to collect empirical data on the question. The author finds that undue delay has persisted as a complication that frustrates the administration of civil justice, "despite well-intentioned reform efforts to reduce" case disposition time.¹⁶ The difficulty has received minimal assessment, primarily because informative data are

¹³ See Kakalik et al., *supra* note 12, at 682 ("The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases, and the evidence indicates that discovery costs can be very high in some cases."); Willging et al., *supra* note 12, at 534-35 (same). A National Center for State Courts study of discovery in five states reached somewhat similar conclusions. See Susan Keilitz et al., *Is Civil Discovery in State Trial Courts Out of Control?*, STATE CT. J., Spring 1993, at 8, 14 (finding that discovery is conducted less frequently than presumed). But see John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 506-09 (2000) (demonstrating empirically that discovery disputes occur in significantly greater numbers now than in the past).

¹⁴ See Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 344-46 (U.S. 2000). See generally Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 79-84 (2000) (critically assessing the amendments and evaluating their potential effects).

¹⁵ Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000).

¹⁶ See *id.* at 818. See generally *supra* notes 1-10 and accompanying text.

somewhat scarce and numerous intrinsic complexities attend the research issue.¹⁷ The problem of undue delay, or at least its perception, has prompted serious, successive attempts to expedite case resolution since the mid-twentieth century.¹⁸ Nonetheless, initiatives that have closely evaluated the impacts of the various reforms instituted on disposition time have generally detected minimal direct, systematic effect.¹⁹

Professor Heise determines that ambivalence characterizes the relationship between empirical research and the attempts of public policymakers to improve the civil justice system.²⁰ He ascertains that "little comprehensive data exist that inform many civil justice reform efforts."²¹ He also describes "one recent and notable exception" to this dearth of assessments—the evaluation conducted by the RAND Corporation's Institute for Civil Justice of the pilot program effectuated under CJRA. This analysis, according to Professor Heise, "represents the most recent large-scale empirical study of this country's civil justice system."²²

¹⁷ See Heise, *supra* note 15, at 818 ("The problem remains understudied principally due to the relative scarcity of helpful data as well as the research question's inherent complexities."). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 419-21 (1982) (arguing that judicial management of civil litigation is difficult to evaluate because data collection at the trial court level is a recent phenomenon, current empirical research techniques are inaccurate, and valid comparisons between districts are not always possible); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1149 (1992) (arguing that existing empirical research is inadequate for drawing reliable conclusions about the litigation process).

¹⁸ See Heise, *supra* note 15, at 818. See also HANS ZEISEL ET AL., DELAY IN THE COURT 71-81 (1959) (discussing one method for reducing delay by shifting jury trials to shorter bench trials). See generally George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527 (1989) (arguing that little understanding of litigation delay exists despite it being the focus of intense studies and reform efforts since the 1950s).

¹⁹ See Heise, *supra* note 15, at 818. See generally THOMAS W. CHURCH, JR. ET AL., PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY 45 (1978) ("Attempts to reduce delay through special programs, conferencing devices, diversion and other procedural tinkering have seldom proved themselves in practice."); BARRY MAHONEY ET AL., CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS 193 (1988) (finding that the use of alternative dispute resolution programs is not correlated with faster processing of cases).

²⁰ See Heise, *supra* note 15, at 818-19. See generally Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 103 (1997) (arguing that the results of empirical research regarding litigation reform are misunderstood and suggesting use of a different type of research better suited to reform efforts).

²¹ Heise, *supra* note 15, at 819. See generally Deborah J. Merritt & Kathryn A. Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999) (offering the first comprehensive investigation of product liability and medical malpractice verdicts—two of the more controversial areas of recovery in the tort reform movement—that permits complex statistical analyses of tort verdicts); *supra* note 17 and accompanying text.

²² Heise, *supra* note 15, at 819-20. See generally Kakalik et al., *supra* note 9 (describing the implementation of the CJRA program and summarizing the results of the RAND study on the effects of the CJRA's case management policies); A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN'S L. REV.

Professor Heise observes that the RAND assessment, which clearly concluded that the CJRA's "efficacy is mixed, at best," has already provoked considerable lively debate in the academic literature.²³ The RAND Corporation researchers determined that, on the whole, the "pilot program, as the package was implemented, had little effect on time to disposition," although the investigators associated particular case management practices with "significantly reduced time to disposition."²⁴ He ascertains that the RAND results are limited by specific considerations that implicate the research design employed²⁵ and by a number of problems that accompany any effort when evaluators have not yet established common metrics.²⁶ Despite any technical questions that might restrict the validity of the RAND conclusions, Professor Heise remarks that this entity's overall finding that the "CJRA program did not systematically reduce case disposition time comports with the weight of prior research."²⁷

After setting the issue of civil justice delay in context, the writer explores the need for better comprehension of the civil justice system by analyzing potential determinants of time to disposition for civil disputes that culminate in a jury trial. Professor Heise invokes empirical data that the National Center for State Courts ("NCSC") and the United States Department of Justice Bureau of Justice Statistics ("BJS") recently collected, evaluated, and synthesized during a study which explored one year of outcomes in civil lawsuits that reached jury trials in forty-five of the seventy-five heaviest-populated counties in the United States.²⁸ He considers geographic locale, party compo-

877, 900-05 (1993) (arguing that the research provided for by CJRA will not yield adequate information for developing new policy).

²³ See Heise, *supra* note 15, at 820. See generally John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551 (1999) (critically evaluating the CJRA as a failure in most respects); Symposium, *Evaluation of the Civil Justice Reform Act*, 49 ALA. L. REV. 1 (1997).

²⁴ Kakalik et al., *supra* note 9, at 18, 41. See also Heise, *supra* note 15, at 820; Tobias, *supra* note 8, at 593 (describing some of the case management practices adopted by specific districts).

²⁵ See Heise, *supra* note 15, at 820. See generally McArthur, *supra* note 23, at 633-34 (arguing for a more carefully constructed experimental design than that used by CJRA).

²⁶ See Heise, *supra* note 15, at 820. Professor Heise identifies four specific problems: (1) the pilot program's small sample size, (2) potential selection bias involving the pilot and control courts, (3) treatment effect issues, and (4) the limited aspect of the Civil Justice Reform Act program assessed. See *id.* at 821-22. See generally Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 239-40 (1997) (arguing that a systematic body of knowledge in this area is needed because, in the past, assertions regarding civil procedure reform have been based upon hunches or theories); Jeffrey J. Connaughton, *Judicial Accountability and the CJRA*, 49 ALA. L. REV. 251, 253 (1997) (arguing that judicial resistance to change was a primary reason why CJRA resulted in no measurable effect on litigation delay).

²⁷ Heise, *supra* note 15, at 822. See generally Priest, *supra* note 18, at 537 (describing how the interaction between court congestion and volume of litigation explains why litigation delay studies fail to demonstrate a systematic effect of reduced delay).

²⁸ See Heise, *supra* note 15, at 822.

sition, and party type, as well as certain case types, results, and character to be important variables.²⁹ Professor Heise believes that an empirically grounded understanding of the attributes of case resolution time will help facilitate public policymaking and reforms that attempt to secure more expeditious, economical, and equitable civil justice.³⁰ Professor Heise ascertains that the evaluation performed on the country's largest counties seriously challenges the effectiveness of recent civil justice reform endeavors, which emphasizes factors that do not affect case disposition time and which neglect additional factors that do significantly influence the civil justice system.³¹ For example, the Civil Justice Reform Act prescribed, almost exclusively, process-oriented principles, guidelines, and techniques, as well as a number of related mechanisms, principally involving DCM and ADR, even though many state trial courts and numerous federal district courts had previously realized virtually all of the benefits to be extracted from these measures.³² Moreover, Congress apparently ignored additional considerations, such as substantial criminal dockets and the prolonged periods required to fill judicial vacancies, which can slow civil case resolution.³³

Professor Heise concludes by summarizing and elaborating upon a number of the concepts examined above. He emphasizes that alternative approaches may warrant exploration when empirical data, as well as practical experience, demonstrate a particular course of action's inefficacy. He carefully admonishes that assessors must undertake greater empirical research before it will be possible to posit definitive determinations, especially if empirical "data rather than impressions or anecdotes are to inform public policy and reform ef-

²⁹ See *id.* at 824-27. See generally *infra* note 65 and accompanying text.

³⁰ See Heise, *supra* note 15, at 817. See generally FED. R. CIV. P. 1 (requiring that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action"); Patrick Johnston, *Problems in Raising Prayers to the Level of Rule: The Example of Federal Rule of Civil Procedure 1*, 75 B.U. L. REV. 1325 (1995) (examining the problem presented by a rule, such as Rule 1, that attempts to provide direction on the basis of overarching values); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 CORNELL L. REV. 1264, 1286 n.90 (1996) (assessing the ideals of Rule 1 and suggesting that they should apply equally to appellate courts).

³¹ See Heise, *supra* note 15, at 817-18, 848. See generally McArthur, *supra* note 23, at 633-38 (suggesting randomly assigned pilots to control for selection bias in the CJRA project).

³² See *supra* note 8 and accompanying text.

³³ See, e.g., U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, ADVISORY GROUP REPORT pt. II (1991) (discussing the impact of the criminal docket on trial delay); U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ADVISORY GROUP REPORT AND RECOMMENDED PLAN 57-58 (1992) (assessing impact of criminal docket, new legislation, and executive action on litigation delay); JAMES S. KAKALIK ET AL., IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 21-22 (1996). *But cf.* 28 U.S.C. § 472(c)(1) (1994) (requiring districts to analyze criminal dockets as a part of civil justice reform).

forts in the future.”³⁴ Professor Heise specifically calls for the systematic collection, examination, and synthesis of cross-sectional data, of increased data from additional federal and state jurisdictions over larger time periods, and of data on parties’ settlement activity.³⁵ He asserts that information such as this will appreciably enhance comprehension of the civil justice system and help reformers who attempt to improve the process by decreasing resolution time for civil cases.³⁶

II. HOW *JUSTICE DELAYED?* INCREASES OUR UNDERSTANDING OF RECENT REFORMS

Professor Heise’s recent article contributes substantially to appreciation of the contemporary federal and state civil justice systems in the United States. *Justice Delayed?* correspondingly increases our understanding of modern civil justice reform efforts, and in particular of the two procedural public policy initiatives instituted by Congress and the federal rule revision entities during the 1990s.

A. *Civil Justice Reform Act of 1990*

Justice Delayed? demonstrates that the explicit congressional purpose in passing the Civil Justice Reform Act of 1990 was to restrict expense and delay in civil lawsuits through the application of numerous procedural measures. The legislation was passed, even though it was unclear that cost or delay was sufficiently problematic to deserve remediation or that process-oriented change was the best solution. A substantial number of the six principles, guidelines, and techniques as well as additional measures that Congress prescribed (particularly DCM and ADR) had already received application in many states and quite a few districts, and much of this experimentation demonstrated the limitations inherent in those procedures’ application. The previous testing in the state and federal courts indicated

³⁴ Heise, *supra* note 15, at 848. Accord Herbert Kritzer et al., *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269 (1992) (finding that assertions regarding the effects of amended Rule 11 of the Federal Rules of Civil Procedure have been biased by anecdotes of large, unrepresentative federal cases); Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986) (arguing that the impact of any method of judicial resolution be verifiable by accepted empirical research techniques).

³⁵ See Heise, *supra* note 15, at 848-49. See generally CAROL J. DEFRANCES & MARIKA F. X. LITRAS, BUREAU JUST. STAT., CIVIL JUSTICE SURVEY OF STATE COURTS, 1996: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996 (1999) (providing preliminary findings from a study expanding the 1992 Civil Justice Survey of State Courts); Burbank, *supra* note 26, at 240 (calling for research into the rate and timing of settlement).

³⁶ See Heise, *supra* note 15, at 849. See generally A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1584 (1991) (arguing that local rule promulgation with collection of empirical data in specific districts is the most cost-effective method of experimentation); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67 (same).

and the CJRA undertaking apparently reaffirms that the state and federal judiciaries have achieved practically all of the expense and delay reduction that can be achieved with process-based reforms. Indeed, non-procedural approaches—including augmentation of the federal judiciary's resources, alteration of court structure or court administration, such as the individual calendaring system, or change in the present American adversarial system—would more efficaciously secure additional, meaningful fiscal and temporal economies.³⁷

Professor Heise confirms the suggestions of other federal court observers that Congress neglected or underestimated several important factors that are responsible for, or could decrease, cost and delay in civil disputes. For instance, some individuals, namely federal district judges and certain entities participating in the CJRA endeavor, remarked that criminal prosecutions are a substantial source of expense and delay, a factor that Congress effectively ignored,³⁸ while other people and institutions indicated that more expeditious confirmation of nominees for judicial vacancies on the district courts would save significant financial and temporal resources.³⁹

The ideas in the two paragraphs above illustrate that there may be insufficient communications, both among individuals and entities responsible for civil justice reform in the branches of the federal government and between those people and institutions and their counterparts in state governments. If Congress, for example, had been more attentive to the perspectives of numerous federal judges or had considered more fully procedural experimentation that many states and a number of federal districts had conducted, lawmakers might have relied less substantially on process-oriented reforms, which proved rather ineffective, and perhaps prescribed other, comparatively effective measures.

Justice Delayed? also demonstrates that after public policymakers commission empirical data, they must carefully consult and thoroughly employ this information when implementing decisions about

³⁷ See Tobias, *supra* note 8, at 599. See generally JUDICIAL CONFERENCE REPORT, *supra* note 8, at 67 (finding that “the cost of litigation [i]s driven by factors other than judicial case management procedures”); McArthur, *supra* note-23, at 633-40 (arguing for the introduction of a more structured program).

³⁸ See *supra* note 33 and accompanying text.

³⁹ See, e.g., U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP pt. III(C)(2)(a) (1991) (“These problems will recur, however, if future judicial vacancies are not promptly filled . . .”); U.S. DISTRICT COURT FOR THE DISTRICT OF KANSAS, REPORT AND RECOMMENDATIONS OF THE CIVIL JUSTICE REFORM ADVISORY GROUP pt. II(B)(1-2) (1991) (noting that expense and delay has been caused by failure to fill promptly judicial vacancies as they arise). See generally Kim Dayton, *Judicial Vacancies and Delay in the Federal Courts: An Empirical Evaluation*, 67 ST. JOHN'S L. REV. 757 (1993); Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 EMORY L.J. 527 (1998) (offering suggestions for implementation of alternatives to alleviate the problem).

procedural change. For instance, Congress authorized several comprehensive assessments of the CJRA experimentation, but seemingly failed to consider and capitalize on the results derived from the analyses undertaken. Even Senator Joseph R. Biden, Jr. (D-Del.), the enactment's foremost proponent and the member of Congress for whom the legislation was named,⁴⁰ apparently could muster so little interest in the statute by the conclusion of its application that he sponsored a provision which continued only CJRA's case reporting requirements.⁴¹ It even remains unclear whether the legislation that lawmakers ostensibly scheduled to expire seven years after its 1990 passage has actually reached "sunset."⁴² Indeed, during 1995, Republican House members introduced a number of proposals as part of the Contract With America before the legislative branch had received any evaluations of the 1990 enactment that Congress had commissioned.⁴³ Several provisions of the legal reforms included in the Contract would have imposed substantive and procedural changes that eclipsed certain features of CJRA.

B. *The 2000 Federal Rule Revisions*

Justice Delayed? similarly increases comprehension of the recent rule revision proceeding culminating in the Supreme Court's promulgation of the 2000 amendments related to civil discovery. Professor Heise illustrates the compelling need for public policymakers to commission expert, independent evaluations that systematically gather, analyze, and synthesize dependable empirical data, as well as the need to examine closely and deploy carefully the material collected as a predicate for procedural decision-making. For example, when the empirical data requested by the Discovery Subcommittee of the Advisory Committee suggested that discovery was generally working well and presenting substantial difficulties in rather few

⁴⁰ See Tobias, *supra* note 1, at 1599-1602. See generally Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285 (1994).

⁴¹ See Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997). See generally Edward Cavanagh, *Congress's Failed Attempt to Spur Efficiency: The Legacy of the Civil Justice Reform Act*, LEGAL TIMES, Nov. 25, 1996, at 28. In fairness, Congress did pass the Alternative Dispute Resolution Act of 1998, which lawmakers apparently intended to institutionalize certain facets of CJRA experimentation. See 28 U.S.C. §§ 651-58 (Supp. 1998).

⁴² See Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887 (1998) (arguing that Congress should proclaim that the act has expired, ending the uncertainty). See also Patrick Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 655-56 (1997) (stating that once the national implications are clear, Congress should require districts to stop using individualized plans).

⁴³ See H.R. 10, 104th Cong. (1995) (introducing a bill to reform the federal civil justice system). See generally Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 721-34 (1995) (setting forth an analysis of the proposals contained in the Common Sense Legal Reforms Act).

comparatively complicated cases,⁴⁴ the rule revision entities should have consulted several alternative means of proceeding. The revisors might have considered more seriously the prospects of postponing amendment or rejecting change altogether. At the least, the revisors should have entertained the possibility of tailoring procedural modification to the problems created by the relatively limited number of complex lawsuits, rather than adopting alterations that applied to every case.⁴⁵ It is also important to realize that even the assessments that evaluators performed examined the operation of the existing discovery requirements, such as the 1993 provision that imposed mandatory prediscovery disclosure, *instead of* experimenting with the measures that the Supreme Court eventually prescribed during 2000, to understand how they would function in practice.⁴⁶

C. General Ideas

Both the experiences of Congress in passing CJRA and of the federal rule revisors when promulgating the 2000 civil procedure amendments demonstrate that relevant public policymakers appropriately commissioned empirical assessments, albeit at different time periods. In fairness, Congress had the benefit of an evaluation undertaken by the Foundation For Change and of additional analyses, but it is unclear how systematically those conducting the assessments collected, evaluated, and synthesized applicable empirical data, and how substantially Congress relied on the analyses in drafting CJRA.⁴⁷ Moreover, Congress properly commissioned empirical assessments of the experimentation that districts implemented pursuant to CJRA.

⁴⁴ See *supra* note 13 and accompanying text.

⁴⁵ See MANUAL FOR COMPLEX LITIGATION § 21.4 (3d. ed. 1995) (tailoring procedures by case types). See generally Levin, *supra* note 22, at 898-99 (recognizing that some types of cases need "specialized treatment"); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994) (arguing that discovery rules should be drafted to meet the unique needs of different types of cases).

⁴⁶ For suggestions on how the federal rule revisors might conduct such experimentation, see Levin, *supra* note 36. See also Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking*, 64 LAW & CONTEMP. PROBS. No. 2 (forthcoming Spring 2001); Walker, *supra* note 36 (arguing that the processes guiding development of the Federal Rules of Civil Procedure in the past are no longer appropriate). See generally Tobias, *supra* note 14, at 85-90 (offering specific suggestions for future remedies through legislation).

⁴⁷ See, e.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN L. REV. 1393, 1410-21 (1994) (asserting that such studies were based on "soft social science methodologies," and thus inadequate); Tobias, *supra* note 1, at 1601-02 (stating that many judges were concerned that there had been insufficient consultation with the judiciary in preparing the reports and assessing the efforts of the Foundation For Change). See generally SENATE COMM. ON THE JUDICIARY, S. REP. NO. 416, 101st Cong. 13-14 (1990) (praising the reports, stating that "[t]he committee is indebted to the members of the task force for the comprehensive nature of their recommendations").

However, Congress essentially ignored the results of the evaluations that the RAND Corporation and the Judicial Conference completed.⁴⁸

The federal rule revision entities also aptly undertook assessments of the procedural provisions that they contemplated altering *before* proposing modification.⁴⁹ Perhaps those responsible for studying the rules and formulating recommendations for improvement recognized that the 1983 amendment in Rule 11 became the most controversial change over the six-decade history of the Federal Rules of Civil Procedure partly because the revision entities had gathered no empirical data on the provision's operation prior to altering the 1938 version.⁵⁰ The rule revisors may have similarly appreciated that the substantial controversy surrounding the 1993 amendment of Rule 26 requiring mandatory prediscovery disclosure was attributable to limited understanding about how that procedure would actually work.⁵¹ Thus, although decision-makers in Congress and in the Judicial Conference rule revision committees correctly called for studies, they should then have seriously considered and used the findings of the evaluations when developing public policy in the procedure field.⁵²

III. SUGGESTIONS FOR THE FUTURE

The analysis above shows the important need for additional studies of the type that Professor Heise has conducted, as well as for assessments like those commissioned by Congress under CJRA and

⁴⁸ See *supra* notes 33, 38 and accompanying text.

⁴⁹ See *supra* notes 11-13 and accompanying text. Even those studies analyzed how the existing federal civil rules operated, not how the revisions the Court eventually prescribed would work in practice by experimenting with the proposed amendments first. See *supra* note 46 and accompanying text.

⁵⁰ See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930 (1989) (finding that Rule 11 was controversial partly because "there is a conflict between or among circuits on practically every important question of interpretation and policy under the Rule"); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 455-59 (1993) (stating that the Advisory Committee's note explaining the change does not make any reference to empirical research). See generally Tobias, *supra* note 1, at 1606-17 (noting that the 1983 revision to Rule 11 was sharply criticized, despite a comprehensive analysis by the Advisory Committee).

⁵¹ See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 28-32 (1992) (asserting that many lawyers felt the amendment would actually increase costs and delay); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 820-21 (1991) (finding that many research issues regarding the revision are unresolved). See generally Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1434 (1999) (arguing that the revision was problematic because the revisors had minimal empirical data and little experience with the practical application of the procedure).

⁵² Developments implicating time to disposition and potential reform, which resemble those involving the federal district courts, have occurred in federal appeals courts. Professor Heise, however, minimally mentions appellate court resolution times or possible reform, and those phenomena are beyond the scope of this response, even though *Justice Delayed?* does enhance appreciation of the developments. For exposition of some relevant ideas related to the appellate courts, see *infra* notes 55-57 and accompanying text.

the Advisory Committee pursuant to its rule revision authority. Those with responsibility for reform of procedure must commission expert, independent evaluators that systematically assemble, analyze, and synthesize empirical data relevant to procedural decision-making, while policymakers should consult and apply these studies and base reforms on the assessments' results. The CJRA experimentation and the rule amendment proceeding that underlay the 2000 federal rule revisions, as well as state civil justice reform efforts and endeavors similar to the NCSC-BJS study on which Professor Heise relied, have generated a substantial quantity of informative empirical data. Decision-makers must capitalize on this material in formulating procedures for civil litigation in the twenty-first century.⁵³

It bears reiteration that even the finest empirical data alone will not foster improvement, unless procedural policymakers consider and employ the information that evaluators have collected. Illustrative are developments in the 1990s involving CJRA, the 2000 federal rules amendments discussed above,⁵⁴ and experiences implicating the federal appellate courts. With regard to the appeals courts, numerous observers holding quite diverse perspectives have found, and considerable empirical data have shown, that the tribunals have lacked resources to treat caseload increases.⁵⁵ Notwithstanding information indicating that the courts have delivered less appellate justice, Congress has evinced reluctance to reduce appeals by limiting jurisdiction.⁵⁶ Congress has also been reluctant to address docket growth by expanding relevant resources, such as the authorization of additional judgeships or court administrative staff.⁵⁷ Lawmakers should reex-

⁵³ They must also capitalize on a recent study that collected much valuable empirical data on the appellate system. See COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT (1998) [hereinafter COMMISSION REPORT].

⁵⁴ See *supra* notes 1-14, 37-46 and accompanying text.

⁵⁵ See, e.g., THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994); CHRISTOPHER BANKS, JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT 126-29 (1999) (stating that strategies employed by the appellate courts have been insufficient to treat the caseload crisis); REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (1990) (finding that inevitable changes must be made in the appellate courts to deal with the increasing volume of cases). But see CHARLES E. GRASSLEY, CHAIRMAN'S REPORT ON THE APPROPRIATE ALLOCATION OF JUDGESHIPS IN THE UNITED STATES COURTS OF APPEALS (1999) (asserting that the appellate courts do not need additional judges to handle appeals).

⁵⁶ See, e.g., Stephen G. Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK U. L. REV. 29, 34-37 (1990) (stating that such proposals are controversial and unlikely); Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L. J. 177, 181 (1999) (arguing that changes must be made in the opinion output of courts because Congress will not limit jurisdiction). See generally COMMISSION REPORT, *supra* note 53, at 77-84 (addressing the appropriate jurisdiction of the federal courts).

⁵⁷ See, e.g., BAKER, *supra* note 55, at 1-30 (evaluating the history of the courts of appeals and their state today); BANKS, *supra* note 55, at 126-29 (arguing that the better solution is to increase the capacity of the appellate courts). These and other federal courts observers attribute legislative reluctance partly to political considerations.

amine this important situation and prescribe measures to rectify or ameliorate the circumstances.

Several ideas already enumerated suggest the need for greater and better communications among officials with responsibility for decision-making about procedure in various entities of the state and federal governments. For instance, Congress should have more closely consulted the procedural experimentation in numerous states and federal districts before prescribing certain civil justice reform measures during 1990.⁵⁸ The federal rule revisors in proposing, and the Supreme Court in promulgating, the 1983, 1993, and 2000 amendments should similarly have commissioned and considered additional relevant data, particularly on the operations of the procedures that the Court ultimately adopted, before effectuating change.⁵⁹ These actions could have led to the implementation of new provisions that were more efficacious and less controversial. State officials and institutions should correspondingly examine experimentation that the federal courts and other states conduct. For example, states in the South and West, which have encountered rapid population growth and escalating caseloads, might review the efforts to treat mounting dockets with few resources instituted by the larger federal appeal courts and the large counties scrutinized in *Justice Delayed?*⁶⁰

Public policymakers at the federal and state levels as well as evaluators and scholars may also want to elaborate upon the findings, assertions and raw data which Professor Heise has offered. For instance, comparing the large counties in the state systems with federal districts in the same locale could prove productive. More specifically, Professor Heise's determination that Fairfax County, Virginia compiled the fastest civil case disposition time of the seventy-five counties at the state level⁶¹ correlates with Fairfax's location in one of the most expeditious federal districts, the Eastern District of Vir-

⁵⁸ See *supra* notes 8, 32-33, 38-39 and accompanying text. Indeed, one reason for the CJRA's passage may have been insufficient communication between lawmakers and federal judges who comprise a majority on most Judicial Conference rule revision committees. See, e.g., Linda S. Mullinax, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 386, 407-09 (1992); Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 114-16. See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 902-07 (1999) (criticizing the current rulemaking process); Tobias, *supra* note 8, at 622-25 (explaining tensions that arise during rule revision).

⁵⁹ See *supra* note 46 and accompanying text.

⁶⁰ See COMMISSION REPORT, *supra* note 53, at 30-32 (describing caseload problems in the Ninth Circuit); Heise, *supra* note 15, at 836-38 (evaluating data for case disposition time based on locale). See generally Procter Hug, Jr. & Carl Tobias, *A Preferable Approach for the Ninth Circuit*, 88 CAL L. REV. 1657 (2000) (proposing a less disruptive approach than circuit-splitting for treating docket growth with few resources).

⁶¹ See Heise, *supra* note 15, at 836-38.

ginia.⁶² Not surprisingly, Fairfield County, Connecticut, the county that recorded the second slowest resolution time,⁶³ is situated in the District of Connecticut, one of the federal trial courts that requires the greatest period to conclude civil lawsuits.⁶⁴ These findings seem to reinforce the local legal culture hypothesis that phenomena, such as judicial practices, lawyers' ethics, and litigant strategic behavior in a specific geographic area, can usefully explain the pace of civil cases.⁶⁵

CONCLUSION

Justice Delayed? contributes substantially to our understanding of the contemporary federal and state civil justice systems. Professor Heise affords instructive insights on the importance of having procedural policymakers commission expert, independent evaluators to collect, analyze, and synthesize empirical data. He further denotes the importance of insuring that decisionmakers closely consult and carefully apply the material assembled when reforming civil justice. The author also aptly contends that there must be considerable, additional rigorous assessment of the civil justice systems before it will be possible to reach definitive conclusions about precisely how they operate and might be improved.

⁶² See ADMINISTRATIVE OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999, at 166 tbl. C-5 (1999). See generally Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445 (1992); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 205-07 (1992) (presenting the Eastern District of Virginia as a model of success for expediting resolution).

⁶³ See Heise, *supra* note 15, at 837 tbl.5.

⁶⁴ See ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 62, at 166 tbl. C-5 (1999). See generally U.S. DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP (1993).

⁶⁵ See, e.g., THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 54 (1978) (suggesting that speed and backlog may be a result of expectations, practices, and informal rules of behavior of both judges and lawyers within the local culture); MAHONEY ET AL., *supra* note 19, at 87-89 (examining the affects of practitioner attitudes and expectations on court delay); Paul D. Carrington, *A New Confederacy Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 944-47 (1996) (describing differences caused by "procedural localism"); Robel, *supra* note 1, at 1483-85 (arguing for a more cautious approach to local decision making). See also Heise, *supra* note 15, at 826-27, 836-37 (describing the effects of locale on variations in case disposition time). But see Herbert Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC'Y REV. 535 (1993) (arguing that variation among districts is a result of structural and situational differences rather than local legal culture).