Measuring the pace of civil litigation

by Joel B. Grossman, Herbert M. Kritzer, Kristin Bumiller, and Stephen

Using techniques such as survival analysis, we can compare the rate at which of litigation for different kinds of cases and different courts, and see which:

"Delay breeds cynicism about justice," Maurice Rosenberg has written, echoing the lament of Shakespeare's Hamlet, the words of Roscoe Pound, and the indelible image of Charles Dickens' Bleak House. The modernization of courts and court procedures and the constant infusion of new judges may have alleviated the worst abuses. Yet court congestion still exists and eliminating delay remains a priority for reformers.

The intractability of "delay" and its resistance to reform can be interpreted in two ways.

It may only be that courts have applied too little effort and inadequate resources to solve a problem constantly compounded by rising litigation rates. But it is also possible that the problem is more rhetorical than real—or really significant. And if delay is truly a problem, it is not self-evident what kind of problem it is, for whom it is a problem, or what its consequences may be.

We recognize the negative consequences of some time lapses in the litigation process—the erosion of evidence before trial, the hardships in waiting for fair compensation, and the in

Data reported in this paper were collected by the Civil Litigation Research Project, a joint venture of the University of Wisconsin Disputes Processing Research Program and the University of Southern California Program of Disputes Processing Research. Research was funded under Contract No. JAO1A-79-C-0040 with the Federal Justice Research Program, U.S. Department of Justice, with additional assistance provided by the Law School and the Graduate School of the University of Wisconsin, Madison.

The authors wish to thank Judith Hansen, Laura Goy and Richard Miller for their help in collecting and processing the data and David Trubek, William Felstiner, Austin Sarat, Terence Dungworth, Cheryl Martorana, John P. Frank, Jon Newman, Maurice Rosenberg, Tom Church, and Mae Kuykendall, for reading and commenting upon the manuscript. An earlier version was presented at the Rand Corporation’s Conference on The Pace of Litigation, May 13-15, 1981, Santa Monica, California.

1 federal and state trial courts

Dougal

ourts terminate cases, identify the pace

zes of the litigation process contribute most to what is often called 'delay.'

creased costs, to name just a few. A litigant whose rights are undercut or who must pay excessive costs because of delay has suffered unnecessary harm. But delay, defined by Church as 'excessive case processing time,' is a pejorative term which should not be regarded as synonymous with lack of speed. It may not always be desirable for courts to operate with speed and efficiency. Indeed, we believe it is impossible to say, without qualification, that the 'speedy resolution of civil cases is an important social goal.'

Church and others whose research we will summarize later have tried to explain the causes of court delay. Our effort, while also theoretical, is not intended to produce a theory of delay. Indeed, we would discard the term delay as vague, inherently subjective, and hopelessly weighted down by speculative normative assumptions. Our focus, alternatively, is on the pace of litigation, a term we will define with more precision later.

We are interested in what causes some cases to be processed faster than others. But we are also interested in the impact of time and timing on litigation interests and strategies, outcomes, and on the behavioral organization of courts. We see the manipulation of time or pace as a key variable in the litigation process.

Theory building has its skeptics, and current "theories" of court delay have attracted more than their share. We share in some of this skep-

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4. Church, supra n. 2, at 1.

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ticism, particularly when it reflects a lack of conceptual and definitional clarity. But there is also skepticism about the efficacy of data-based approaches.

Steven Flanders has recently suggested that the uniqueness and "irregular nature" of case processing makes it a poor subject for certain kinds of mathematical modelling techniques. There are, indeed, great difficulties in transforming court records information into meaningful statistics and comparing those statistics across 51 court systems. The error factor is likely to be high, and the difficulty of translating the results of such research into meaningful reforms is well known. Yet the risks of eschewing such research and relying primarily on strategies derived from purely managerial or bureaucratic premises are at least as great.

Before looking at our data, it might be useful to examine briefly the "problem," and then, in more detail, the literature on delay. Doing so will provide a useful perspective on the discussion that follows.

No uniform standards
There are no objective measures of delay or of its impact. The effects of slow or irregular case processing on lawyers' and litigants' interests and satisfactions are not uniform (and certainly not uniformly bad). The same can be said of the interests of justice itself. Without such measures, the case for allocating scarce resources to reducing or eliminating "delay" is weak. The failure of past efforts to bring about uniform reductions of delay merely underscores the ambiguity of reform based on normative expectations of how the adversary process ought to work rather than on demonstrated needs.

Different participants in the system have competing interests which may be satisfied by either slower or speedier resolution of cases. Court administrators and judges are concerned with efficient case processing and with the burdens of heavy caseloads—and thus with reducing delay. Lawyers and litigants, however, may have a different perspective. Lawyers—not alone among professionals in taking more business than they can expeditiously handle—may sometimes have to postpone one client's case in order to complete necessary and timely work on another's. Not every case moves—or needs to move—at the same pace. Not every client ex-

There is no a priori reason to assume that the present patterns of litigation are the cause of serious dissatisfaction.

pects immediate and continuous service.

For lawyers, time is money in the obvious sense of hours billed. But time is also money in a different way—lawyers (in non-contingency fee cases) can maximize profits by "keeping busy" and avoiding the costs of "dead time." What is important to the self-interest of lawyers is a controlled pace of activity and a relatively predictable flow of new business. The desirability of speedy case resolution to them is, at best, a relative matter.6

The interests of clients may also favor deliberation instead of speed. The manipulation of time is often a factor in the settlement process; continuances, postponements, excessive demands for discovery, motions for removal to another court and amended pleadings all consume time but do not necessarily cause client dissatisfaction. Manipulating the pace of case processing is often a deliberate strategy, common to both plaintiff and defendant to shift the balance in their favor. Litigant satisfaction appears to depend mostly upon the outcome of

5. Flanders, Modeling Court Delay, 2 Law and Pol'y Q. 305 (1980). For an insightful analysis of theories of case processing time, see Luskin, supra n. 3.
Table 1
Views about the efficiency of courts

Respondents answered this question: "Here is a list of social problems that people are talking about today.... Please tell me how serious is the problem of the efficiency of courts?"

<table>
<thead>
<tr>
<th></th>
<th>&quot;No problem at all&quot;</th>
<th>&quot;Small problem&quot;</th>
<th>&quot;Moderate problem&quot;</th>
<th>&quot;Serious problem&quot;</th>
<th>&quot;Very serious problem&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawyers (N=486)</td>
<td>1.4%</td>
<td>15.5%</td>
<td>46.9%</td>
<td>26.1%</td>
<td>10.0%</td>
</tr>
<tr>
<td>Judges (N=332)</td>
<td>4.2</td>
<td>19.3</td>
<td>48.8</td>
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</tr>
<tr>
<td>Community leaders (N=377)</td>
<td>0.3</td>
<td>7.4</td>
<td>33.7</td>
<td>34.7</td>
<td>23.9</td>
</tr>
<tr>
<td>General public (N=1,868)</td>
<td>3.0</td>
<td>8.4</td>
<td>28.6</td>
<td>30.3</td>
<td>29.5</td>
</tr>
</tbody>
</table>


There is no a priori reason to assume that present patterns of litigation are the cause of serious dissatisfaction. Indeed, Church’s study of delay in 21 courts concluded that participants in “slow courts”—those where delay seems endemic—“simply do not regard the existing pace of litigation to be a significant problem; if they address it at all, the response is typically a short term burst of energy followed by a return to business as usual.” The duration of case processing may be perceived as a problem (i.e., “delay”) only where there are significant departures from local norms.

The public viewpoint.

While there is little systematic evidence of litigant views toward the speed and duration of case processing, there is some ambiguous evidence of participant and public views. A 1977 survey asked four groups of respondents—lawyers, judges, community leaders, and the general public—their views on the importance to American society of “efficiency in the courts” (Table 1). About two-thirds of the lawyers and judges believed that court efficiency was a “moderate” or “serious” problem; relatively few regarded it as “very serious.” Among community leaders and the general public, who have little contact with the courts, more than 25 per cent believed court efficiency to be a “very serious problem.”

A second question asked whether it would be helpful to spend tax dollars to try to “make the courts handle their cases faster.” The response pattern was strikingly similar (Table 2). Community leaders and the general public—the non-participants—are substantially more sanguine about the acceleration of case processing than lawyers and judges, about 25 per cent of whom respond that such expenditures would be “not at all helpful” or only “slightly helpful.” About half the lawyers and judges would appear to favor allocating resources for this purpose.

These data are difficult to interpret because the questions are vague. What does “efficiency in the courts” mean? What is the baseline from which to measure whether courts should “handle their cases faster?” Faster than what? Moreover, the questions do not distinguish between civil and criminal cases.

Although Church and others argue that similar cultural and structural attributes cause delay in both civil and criminal courts,4 delay in criminal courts is widely regarded as less tolerable. But we do not know from this data whether respondents thought the questions referred to both civil and criminal cases, or primarily to the latter. Lawyers and judges are about evenly divided; some regard accelerated case processing as desirable, others do not. The stronger favorable views of non-participants means no more than that they believe, ceteris paribus, that fast and efficient case disposition is a good thing. In short, we have no evidence here which demonstrates the need—or lack of need—for civil case processing reform.

7. Church, supra n. 2, at 85.
8. Id.
A single-minded dedication to reducing delay may undermine other important reform goals.

The ambiguity of delay reform ideology is further revealed when we consider the perspective of the entire system, and not merely that of individual participants. As Engel and Steele have recently observed, ours is a complex civil justice system of interdependent parts. It cannot be merely a question of "reducing delay." What are the marginal costs of processing cases more quickly? What kinds of new cases will be drawn into the system (as inevitably they will) to replace those resolved more rapidly? How many will there be? What will be the effect on disposition patterns?

A single-minded dedication to reducing delay may undermine other, perhaps more important, reform goals such as improving the quality of justice or increasing access to justice by creating alternative dispute processing mechanisms. Scare resources channeled into the fight against delay may be counter-productive or at best yield results of only marginal utility.\(^\text{10}\)

The literature on delay

Contemporary social science investigations of court delay flow from the pioneering work of Hans Zeisel and his associates.\(^\text{11}\) Zeisel's study conceptualized delay as "a problem of supply and demand."\(^\text{12}\) Delay occurred when the parties were ready to take a case to trial, but were "prevented from doing so solely by the unavailability of the court."\(^\text{13}\)

Since the causes of delay were presumed to be bad management practices, the focus was on examining those aspects of the litigation process that might be manipulated to reduce delay. "Supply" might be reduced by use of pretrial conferences, providing more judge time, or reducing trial time; "demand" might be manipulated by measures designed to induce early settlements.\(^\text{14}\)

<table>
<thead>
<tr>
<th>Table 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Views about faster case processing</td>
</tr>
<tr>
<td>Respondents answered this question: &quot;Please tell me how useful it would be to have your tax dollars spent on...trying to make the courts handle their cases faster.&quot;</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>&quot;Not at all helpful&quot;</th>
<th>&quot;Slightly helpful&quot;</th>
<th>&quot;Somewhat helpful&quot;</th>
<th>&quot;Very helpful&quot;</th>
<th>&quot;Extremely helpful&quot;</th>
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<tbody>
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<td>14.0%</td>
<td>23.1%</td>
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<td>19.7%</td>
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<td>10.6%</td>
<td>13.3%</td>
<td>34.7%</td>
<td>37.9%</td>
</tr>
<tr>
<td>General public (N=1,900)</td>
<td>7.7%</td>
<td>8.6%</td>
<td>19.2%</td>
<td>31.3%</td>
<td>33.2%</td>
</tr>
</tbody>
</table>


\(^{10}\) Id. See also Rosenberg, supra n. 1, and Engel, Legal Pluralism in an American Community: Perspectives on a Civil Trial Court, 1980 Am. Bar Foundation Research J. 425 (1980).
\(^{11}\) Zeisel, Kalven and Buchholz, Delay in the Court (Westport: Greenwood Press, 1959).
\(^{12}\) Id. at 3.
\(^{13}\) Id. at 43.
Emphasis on the structural characteristics of courts as the major cause of delay has been the dominant theme of research. Rosenberg, examining cases that proceeded to trial, looked at some case-specific characteristics such as amount requested in remedy and the presence of outside attorneys. His recognition in a subsequent study that delay might be caused by attorneys’ ‘own unreadiness to proceed’ as much as by court management structures or practices provided a needed corrective, but most of his proposed solutions to the problem fell within Zeisel’s supply-and-demand framework: decreasing demand and enlarging available judicial resources.

The same theme pervades current studies, which stress that delay stems from poor court management rather than from the way in which courts are used by the litigants. France, in his 1973 study of Ohio courts, stressed various rule changes concerning pretrial activities and a fixed trial date as two means of handling backlogs. He did chide court reformers for ‘excessive reliance on structural and administrative changes in the courts as ‘cure alls,’ ” but he seemed to attribute those largely to ‘insufficient attention to methods of operation.’”

Likewise, Gillespie’s economic analysis of court production attempted little more than a measurement of court behavior in structural terms. He noted that a ‘court’s performance… depends significantly upon the characteristics of the private bar and the U.S. attorney practicing in the district,” but made no attempt to include some measure of these factors in his analysis.

Flanders’ study for the Federal Judicial Center is certainly the most comprehensive effort to focus on court management techniques. Utilizing the concepts of “court management” and “case management” to examine differences in court productivity, he concludes that “the differences [in court productivity] lie in the relative effectiveness of alternative forms of case management.” Judge personality is discounted; the pace of litigation is seen as a direct consequence of management techniques such as calendaring, scheduling of trials, use of magistrates, greater reliance on clerks, and levels of judge involvement prior to conclusion of discovery procedures.

The key is management control:

The districts that have an effective administrative structure, effective case management, and adequate internal communication have a resilience and an ability to handle new problems that are sadly lacking elsewhere.

Control means essentially the presence of automatic procedures for monitoring the stages of development in each case to minimize the involvement of the judge until the completion of discovery. A strong governance structure, Flanders argues, can regularize and quicken the pace of litigation: “there is nothing unavoidable about delay. Delay can be controlled and eliminated even by courts suffering from heavy caseloads.”

Other perspectives

A second perspective on the causes of delay comes from studies viewing courts as organizations and employing the analytic tools of organization theory. A prime example is Eisenstein and Jacob’s study of “courtroom workgroups” in three cities. A workgroup was viewed as a social system of interactive behavior among the judge, counsel, and clerk. Each “player” has a stake in the smooth operation of the workgroup, although each has different interests in the substantive outcome of each case. But they all operate within a framework of shared values and goals which serve to make behavior predictable.

Implicit in this approach is a bargaining model; it is the interaction among the workgroup members, more than the formal rules of procedure, which determines the outcome. Potential reforms, Eisenstein and Jacob conclude, must confront the organizational reali-
Potential reforms, researchers have concluded, must confront the organizational realities of a court. Reforms which do not alter the organizationally induced incentives will not result in real reform, but merely in compensating adjustment by workgroup members.

In a variation on this theme, Nardulli argued that court productivity was primarily the result of "the interests of the court's dominant coalition." Like Eisenstein and Jacob, Nardulli was writing about criminal cases, and like other recent scholars, he was concerned with the effects of caseload pressures on the tendency of courts to conclude cases by administrative dispositions. What is important for our purposes is his observation that increases in caseload pressures resulted in corresponding increases in the severity of application of sanctions against those members of the "courtroom elite" who violated existing norms of procedure.

A third perspective has come from increased interest in trial courts as political institutions and consequent efforts to understand and explain the linkages between courts and the local environment in which they operate. The studies by Dolbeare, Glick and Vines, Richardson and Vines, and Gibson suggest that courts respond to local environmental pressures.\textsuperscript{24}

Richardson and Vines, for example, coined the term "legal subculture" in attempting to demonstrate the linkages between judicial recruitment and local political cultures. Levin's study of the sentencing practices of criminal courts in Pittsburgh and Minneapolis suggested a cultural explanation for the differences which he found in those cities.\textsuperscript{25} Balbus provided a vivid demonstration of how different local courts reacted to the urban ghetto riots of the late 1960s.\textsuperscript{26}

None of these studies was directed to the problem of delay, and only Dolbeare's dealt at all with the processing of civil cases. Yet as a group they pointed the way to the probable existence of linkages between courts and political cultures. Jacob's study of bankruptcy and garnishment cases in four Wisconsin cities was the first to postulate and actually test a possible relationship between political culture and the disposition of court cases.\textsuperscript{27} But his interest was in who used the courts and in outcomes, not the modes of processing cases. Grossman and Sarat had little success in using the political culture concept to explain propensities to litigate in the federal courts.\textsuperscript{28} Use of political culture to explain patterns of case processing and disposition in the court-records data collected by the Civil Litigation Research Project was not notably more successful.\textsuperscript{29}

Applying the political culture concept to understanding the organization and operation of urban courts was first suggested by Glick and Vines,\textsuperscript{30} and a variant of it was employed in Church's study of delay in trial courts.\textsuperscript{31} Church found no clear association between patterns of litigation delay and sundry structural variables such as settlement procedures, inci-

\textsuperscript{25} Nardulli, The Caseload Controversy and the Study of Criminal Courts, 70 J. CRIME, LAW AND CRIMINOLOGY 98 (1979).
\textsuperscript{28} Jacob, Debtors in Court: The Consumption of Government Services (Chicago: Rand McNally, 1969).
\textsuperscript{31} Church, supra n. 2.
dence of trials, and calendaring systems. What he did find was a relative lack of case management concern and techniques that relegated "control" to attorneys.

Church also observed a similarity of delay propensities in state and federal courts within the same district. Combination of these two findings led to his conclusion that comparative delay patterns were the result of "local legal cultures," which he defined as the "established expectations, practices, and informal rules of behavior of judges and attorneys." Interviews with lawyers and judges seemed to support this explanation, although the few interview statements actually presented in the book do not lead inescapably to this conclusion.

The local legal culture

Culture is an elusive concept, and Church is not alone in treating it as an error factor in explanation of political and legal phenomena. One need only recall invocation of the concept of "claims consciousness" by Zeisel and associates to explain geographic differences in levels of personal injury litigation to recognize the attractiveness of this kind of residual explanation. But the fact of the matter is that "local legal culture" can only "explain" delay at a very high level of abstraction.

If local legal culture is nothing more than "the established practices and informal roles of behavior of judges and attorneys, then it comes close to being a tautology." At the very least we would have to determine if local practitioners actually held these norms and were guided by them. Zeisel also had no evidence that lit-

giants in different locales had differing attitudes toward litigation which resulted in higher litigation rates. And Church's interviews demonstrate the subjectiveness of the concept of local legal culture and of attitudes toward it. In both slow and fast courts, he found complaints about delay as well as expressed satisfaction with the pace of litigation.

Despite these difficulties, Church's local legal culture hypothesis has some intuitive appeal. It nicely complements Flanders' work. Where Flanders emphasized "the normative assertion that judges have a positive responsibility to manage dockets," Church concluded that "the most important, and the most difficult, change a court should make is in the long-term expectations and practices of civil attorneys practicing in the court." Taken together, the two studies underscore Nimmer's observation that judicial reform efforts "are typically...the product of...conscious behavioral choices made both individually and as a group by professionals within the system." In other words, successful reform efforts must be based, in substantial part, on creating different kinds of incentives for the main actors in the system. This conclusion is not at all inconsistent, we might add, with the findings of the organizational theory studies.

Role theory

A fourth perspective utilizes role theory and offers some chance to attain theoretical unity among approaches to the problem of delay. Role theory has only recently been employed in understanding patterns of delay. Carter used the idea in discussing the effect of active versus passive judges on the pace of litigation. Glick and Vines devoted an entire chapter to "self-conceptualization" of role among state court judges.

Central to our concerns is an article by Keith Boyum. Expanding upon Church's idea of local legal culture, Boyum argues that delay is really an "unintended consequence" of institutional activity which can be understood best by "setting goals and motivations in the context of organized groups." Role theory is particularly sensitive to the interaction between the perceptions of officials and institutionalized expectations of how they will fulfill their roles.

32. Id. at 54.
33. For example, there is no mention in any of his quotations of comparisons between federal and state courts; many of the questions refer specifically either to the Miami and Detroit state courts. There are clear differences between those two courts, but no responses suggest directly the existence of a legal culture common to both federal and state courts in either city.
34. Zeisel, et al., supra n. 11, at 234.
35. Church, supra n. 2, at 54.
36. Flanders, supra n. 19 at 77.
37. Church, supra n. 2, at 192.
40. Glick and Vines, supra n. 24, chapter 4.
Using data from a mail questionnaire and aggregate measures of litigation pace, Boyum was able to show a considerable relationship between the self-defined role of judges concerning "the importance of fulfilling administrative or management related functions of their positions" and the general pace of litigation in their courts. Cases moved quicker in those courts where judges saw their function as facilitating case management. Without formal controls, it is impossible to be certain that positive role perceptions toward strong case management are as strongly related to fast pace as Boyum suggests. Yet his findings are in accord with those of Flanders and certainly not contradictory to Church's conclusions.

The evidence we have reviewed, when taken as a whole, certainly supports the conclusion that "delay in the courts" is a subjective concept not easily amenable to precise and objective measurement. Nevertheless, it is widely regarded as a leading "problem" of the court system requiring the primary attention of court reformers. Clearly, unlocking the secret of delay requires a more comprehensive and theoretical approach.

42. Thus, Boyum concludes, "that courts do what they do primarily because of what the people in them think they ought to do. That means that what we have characterized as elements of structure and procedure within courts are distinctly secondary." Id. at 182.

43. Further details about CLRP can be found in Trubek, Understanding Courts in Context: An Introduction to the Civil Litigation Research Project, 15 Law & Soc'y Rev. (forthcoming, 1981) and other articles in that special issue on dispute processing and civil litigation.

44. For purposes of this project, we have defined a "dispute" as a social relationship between two or more persons and/or organizations. But in order to define a "dispute," one must first define a "grievance." A grievance is a belief that one has an entitlement or a right to some resource which someone else could grant or deny. A "dispute" is a social relationship involving two or more persons and/or organizations which meets the following conditions:
(a) an individual has a grievance with another individual or organization;
(b) the first party makes that grievance known to the second party by making a claim (e.g., requesting that the second party take action to rectify the grievance);
(c) the second party rejects the claim, in whole or in part. A grievance which is subject to civil, legal remedies, when transformed into a dispute, is referred to as a "civil legal dispute." Needless to say, not all grievances become disputes. The aggrieved party may "jump it" or the second party may accept the claim and rectify the grievance without challenge or delay.


2 Measuring the pace of litigation
The data that the Civil Litigation Research Project (CLRP) collected and analyzed included samples of "middle range" disputes which were settled bilaterally, disputes which were brought to various non-judicial dispute processing institutions, and disputes which resulted in litigation.

The data used here are drawn exclusively from the records of 1,649 cases in state and federal courts in five federal judicial districts. In each district, samples totaling between 298 and 370 cases were drawn from among cases terminated in calendar 1978 in the federal district court and a neighboring state trial court of general jurisdiction (and in two of the districts, an outlying "rural" state trial court). Our sampling strategy, which is described in greater detail on page 97 ("How the project chose and coded its case sample"), was designed to maximize the comparability of federal and state court samples.

The findings reported in this article should

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be treated with caution for two reasons. First, our case samples were not designed for a study of court delay, but as the basis for an in-depth survey of lawyers and litigants focusing on costs of litigation. Thus, our sample of “middle range” cases excludes many other types, e.g., uncontested collections cases, probate cases, and most domestic relations cases, which are important components of most state court dockets.

Since the pace of litigation is almost certainly related to docket composition, some allowance must be made for the cases we have excluded—both as to number and as to type. Generally the cases systematically excluded were simple, pro forma cases. If they had been included in our sample and statistical measures, those measures would show a faster overall disposition rate. We thus make no claim that ours is a sample generalizable to all civil cases.

The findings must also be treated with caution for a second reason. Our experience is that case records are translucent at best; they often yield a partial view of the litigation process and fail to capture the richness and complexity of disputes which result in the filing of a lawsuit. With those two cautions, we begin the exploration of our data.

Table 3a

<table>
<thead>
<tr>
<th>Survival life table (selected intervals) for total disposition times in federal courts</th>
<th>Cumulative proportion of cases surviving to end of interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interval start time</td>
<td>Milwaukee</td>
</tr>
<tr>
<td>6 months</td>
<td>63.4%</td>
</tr>
<tr>
<td>12 months</td>
<td>49.1</td>
</tr>
<tr>
<td>18 months</td>
<td>32.7</td>
</tr>
<tr>
<td>24 months</td>
<td>23.1</td>
</tr>
<tr>
<td>30 months</td>
<td>11.6</td>
</tr>
<tr>
<td>10% of cases remaining (in months)</td>
<td>32</td>
</tr>
<tr>
<td>Last case terminated (number of months)</td>
<td>69</td>
</tr>
<tr>
<td>Median survival time (in months)</td>
<td>13.14</td>
</tr>
<tr>
<td>N=</td>
<td>147</td>
</tr>
</tbody>
</table>

*actually the second to last case for New Mexico

Patterns of case processing time

The term “pace of litigation” has been used by Church and others as nearly synonymous with delay. We will use it to mean patterns of case processing time, since our focus is not on the normative aspect of “delay” but on understanding the causes and effects of modes of case termination. Thus, we will describe “pace” statistically by the cumulative distribution of case terminations for our sample of cases.

The slope of the distribution measures a court’s rate of disposition activity: the shape of the distributions provide a convenient and accurate means of comparison among courts. Other commonly used measures of court delay, such as medians and measures of dispersion, are less informative. The great variations among cases between case filing and termination often distorts the picture which they draw. Standard deviation, a commonly used measure of dispersion, is only meaningful if one can assume a normal distribution. But as our graphs make abundantly clear, the distribution of terminations is highly skewed.

Our analysis of the pace of litigation utilizes an approach called “survival analysis,” a mathematical modeling technique used primarily to study the survival of patients with severe illnesses. The survival approach can be generalized to the study of any phenomenon which can be unambiguously characterized by a starting date and an ending date. Survival analysis examines the time interval separating the two events of a given sample and provides for statistical comparisons of the distributions of survival times for two or more independently drawn
Table 3b
Survival life table (selected intervals) for total disposition times in state courts

<table>
<thead>
<tr>
<th>Interval start time</th>
<th>Cumulative proportion of cases surviving to end of interval</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Milwaukee</td>
</tr>
<tr>
<td>6 months</td>
<td>81.1%</td>
</tr>
<tr>
<td>12 months</td>
<td>35.9%</td>
</tr>
<tr>
<td>18 months</td>
<td>18.3%</td>
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<tr>
<td>24 months</td>
<td>10.7%</td>
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<tr>
<td>30 months</td>
<td>6.1%</td>
</tr>
<tr>
<td>10% of cases remaining (in months)</td>
<td>25</td>
</tr>
<tr>
<td>Last case terminated (number of months)</td>
<td>62</td>
</tr>
<tr>
<td>Median survival time (in months)</td>
<td>10.21</td>
</tr>
<tr>
<td>N=</td>
<td>131</td>
</tr>
</tbody>
</table>

samples or subsamples.49 (See “How survival rates are computed” on page 100.)

The date on which the case is filed is defined as the starting date, and the date on which the case is officially closed is defined as the termination. (Again, see “How the project chose and coded its case sample” on page 97.) We examined the overall survival distributions for each of our 10 courts at one-month intervals over a time span of 70 months.50 Figures 1-5 plot the distributions for both the state and federal court in a single district. Overall survival rates, by courts, are presented in tabular form in Tables 3a and 3b.

Survival patterns
Several preliminary observations can be made about the general pattern of case terminations. In all courts in the sample (except the Philadelphia state court), a large percentage of the cases are terminated within one year. Correspondingly, a very small group of cases linger undisposed long after the bulk of the cases has been terminated.51 The slope of the survival curve, which can be interpreted as the rate of termination activity, is gradual during the middle range of one to three years.

These survival patterns give a clearer picture of “delay” than measures of median or mean


50. Since the Philadelphia Court of Common Pleas did not then require attorneys to notify the court when a case had been settled, the “survival” time of its cases is no doubt overstated. Nevertheless there is other evidence to confirm that civil case processing in this court was slower than the norm. We include the Court of Common Pleas in the presentation of our data for the sake of completeness.

51. These findings are roughly equivalent to those reported in Zeisel, et al., supra n. 11, at 92, and Rosenberg and Sovern, supra n. 15 at 1121. Zeisel et al. reported 64 percent disposed “quickly”; Rosenberg and Sovern reported two-thirds of the cases in their sample were disposed within one year and four-fifths within two years.

96 Judicature Volume 65, Number 2 August, 1981
How the project chose and coded its case samples

Our contract with the Department of Justice specified a sample of about 800 cases, half federal court and half state court cases, in each of five federal judicial districts. We selected Eastern Wisconsin (Milwaukee), Eastern Pennsylvania (Philadelphia), Central California (Los Angeles, South Carolina, and New Mexico. Our state cases came from the Milwaukee County Circuit Court, the Philadelphia Court of Common Pleas, the Los Angeles County Superior Court (Downtown Branch), the Richland County Court of Common Pleas (Columbia, South Carolina), and the District Court from the Second Judicial District (Albuquerque, New Mexico). 1

Our choice of courts was guided by several considerations. First, we wanted variation among the districts so that our sample would be as "representative" as possible. We considered a probability sample of federal judicial districts, but the need for efficient access to court records forced us to concentrate our limited resources in a small number of locations.

With a sample design such as ours, the greatest threat to generalizability arises with data analyses focusing on univariate estimates of population parameters; fewer problems will occur if the analysis is to focus on bivariate or multivariate relationships. Nevertheless, we attempted to guard against making unwarranted inferences from our limited sampling areas by varying the sites selected on the following characteristics: geographic location, demographic makeup of the district, economic characteristics of the district, court structure, caseload, procedural rules, and (for other aspects of the project) the availability of alternative (nontourt) dispute processing institutions.

Some of the criteria used in selecting our research sites are obviously interrelated. To choose only five districts required giving priority to some characteristics over others. Two large urban districts, two smaller urban districts, and one predominantly rural district were selected. No two districts were selected from the same region of the country. The table suggests the range of variation among the five districts.

Which cases should be studied?

Our goal was to collect data on approximately 800 cases in each district. But which cases? A number of rules were devised to produce a sample of cases which best fit the overall scale of the project.

• First, we decided to focus exclusively on cases terminated in calendar 1978, the last full year before the study began. The reason was essentially practical: the more recent the year, the greater the likelihood that court records would have substantial and accurate recall of the cases and the disputes underlying them. We expected, and found, that a significant number of the cases terminated in 1978 had actually begun as much as six to seven years earlier, and we were mindful of the serious self-reporting and recall problems of the crime victimization studies.

• Second, we sought cases which conformed to our conception of "middle range disputes," and which afforded some basis of comparison both between state and federal courts and between courts and "alternative" dispute processing institutions. We sought cases which could potentially be litigated in the federal district courts or in state trial courts of general jurisdiction. Some states have jurisdictional minima, while in others there are either legal or practical distinctions between small claims cases and others (e.g. Milwaukee, Los Angeles, and Albuquerque all have small claims courts). Some types of small claims can be litigated in the federal courts (e.g. under the federal Tort Claims Act), but such cases make up a small part of the caseload of the federal courts (except, of course, for routine, nonadversarial government collections cases).

Consequently, we excluded from the study all cases involving only a monetary issue in which the amount in dispute was less than $1,000. Failure to eliminate "small cases" would have undermined efforts at comparison; by sheer weight of their numbers they would overwhelm middle-range cases. Any dollar cutoff risks the loss of variation of income in dispute resolution strategies. Some lower-income claimants might be underrepresented. However, we believe that the $1,000 cutoff was sufficiently low so as to have minimized this effect.

Very large cases were eliminated because they would have swamped our research capability. Our best efforts to define such cases failed, but the reason for eliminating them suggested a workable field procedure. Thirty-seven cases with voluminous case files and many thousands of hours of attorney time were identified and excluded by our case coding supervisors in the field.

Within these parameters of size, we saw two possible strategies by which we could guide our selection of cases—-inclusion and exclusion. A strategy of inclusion would require us to select certain types of cases (e.g. torts, contracts, property disputes, etc.), but exclude all others. This was rejected as too limiting, and because it was not clear to us how a relevant

1. To provide additional demographic balance we collected additional data from two outlying state trial courts: Dodge County, Wisconsin, and Chester County, Pennsylvania.
typology of case types could be contructed for sampling purposes. A strategy of exclusion was chosen instead, because it provided a broader representation of civil court dockets, and because it would yield greater variance for analysis. Thus, we limited domestic relations cases to no more than 20 per cent of the sample of cases in any state court. Without this limitation, such cases would have dominated our sample and significantly reduced our capability to compare state and federal courts.2

Also excluded were: (a) collections cases in which no response from the defendant was found in the file and which resulted in a judgment (e.g. no "party participation"); (b) probate cases, unless inspection of the file indicated that the dispute was adversarial; (c) bankruptcy cases; (d) cases in which one unit of government was suing another—excluded as sui generis; (e) cases of judicial review of administrative decisions where the review was of an appellate nature and did not involve a trial de novo (with the exception of federal court reviews under the Administrative Procedure Act); (f) prisoner petitions, deportations, and NARA, Title II cases; and (g) labor laws cases if they arose out of grievance procedures normally covered by collective bargaining agreements (e.g., appeals from the decisions of arbitrators).

An ‘aging profile’

Samples of approximately 150 cases were drawn from each court (counting Milwaukee County and Dodge County, and Philadelphia Common Pleas and Chester County, as single units). Two basic sampling procedures were utilized, depending on the nature of the information available to us on the filing systems of the respective courts. For the five federal courts, and the state courts in Wisconsin, New Mexico and South Carolina, it was possible to obtain (or construct ourselves from the docket-books) a list of cases terminated during calendar 1978. A random sample of cases from these lists was easily generated. For the state courts in Pennsylvania and Los Angeles, no such lists existed or could be constructed. We sought to construct a sample of cases that approximated the filing pattern of the universe of cases terminated in 1978 (e.g., equalize the probability that a case in the sample or in the population had been filed in 1975).

To achieve this goal, we constructed an aging profile. A sample was drawn of cases filed in each year between 1970 and 1978 (specifically a sample of five volumes of docket entries for the years 1970 through 1977, and a sample of 12 volumes from 1978, one from each month). After running the cases from each year that were terminated in 1978, we constructed a sample using the aging profile to estimate the probability that a case terminated in 1978 had been filed in each of the years between 1973 and 1978.

Individual cases were selected by randomly selecting a docket volume (the probability of selection based upon the aging profile) and then randomly generating a "search start" point in the volume. From that point we looked for the first case terminated in 1978. To expedite the sampling process, five start points were generated for each volume selected. This resulted in a cluster sample, which, we believe, closely approximates a simple random sample.3

Collection of data from court records was carried out by teams of law students (and some lawyers and paralegals as well) supervised by two members of the project staff. Coding began in Milwaukee in June 1979, in Los Angeles and Philadelphia in September 1979, and in Columbia, South Carolina and Albuquerque, New Mexico in January 1980. Our coding instrument consisted of a General Information Form (GIF), and a series of "Events" schedules on which court events—such as motions, depositions, judgements and the like—were coded.

Our coding experience was more difficult, expensive, and complex than anyone envisioned. Problems of training law students and obtaining adequate work space in often crowded courthouses need only be mentioned for the record. But the real problem was case record comparability. Our supervisors found significant differences in local practice among the federal courts, and great disparities in state procedures and jurisdictional rules. They resolved difficulties by coding consistent with the nomenclature of the documents found in a case file, keeping extensive records of odd coding problems, and then, when the coding process had ended, resolving discrepancies in Madison and recoding where necessary.

Coding the cases

The beginning of a case was coded as the date of the document formally initiating the action in the court. In most of the cases sampled, this was the date of the complaint (or like document, such as a petition for judicial review, petition for a writ of mandate, etc.). There were two general exceptions:

(1) Federal court cases removed from state court: here the beginning of the case was coded as the date of the petition for removal.

(2) South Carolina state court cases: it appeared that a case could begin with service of a summons, followed sometime later by filing of a complaint.

2. Domestic relations cases in the Philadelphia Court of Common Pleas are handled on a separate docket within that court, and the records are sealed. Domestic relations cases were therefore totally excluded from our Philadelphia sample.

3. This belief is based on the assumption that, with the exception of length of processing time, the clusters are extremely heterogeneous. We have found nothing that would lead us to believe otherwise.
Where this occurred in a case that was otherwise codable, the beginning date was coded as the date of the summons. There were fewer than 10 such cases.

The termination of a case was generally coded from the date of the document formally disposing of the legal issues raised in the pleadings. This was typically the date of the last court order or judgment on the causes of action, but it could also include a voluntary note of dismissal. Where a case was substantively reopened (either on the motion of a party or a remand from an appellate court) and the issues were substantively redetermined, termination was coded from the date of the final determination of the legal issue. Here, too, there were very few such cases.

Several state courts had local rules and procedures for administratively terminating cases:

(1) Where parties informally informed the court and/or clerk that the matter was settled: here the clerk or judge could issue some terminating document of idiosyncratic title and sometimes multiple function.

(2) Where the case file had been inactive for some set period of time: here, too, the clerk or judge could issue a terminating document. Time lengths varied among jurisdictions and at least one jurisdiction had no formal rules or guidelines for the use of such terminating instruments.

Coding rules were developed at each research site where such terminating documents were present in the case files. Coding of termination dates proceeded apace with little difficulty, although later data analysis may be hampered by the administrative peculiarities of the various courts examined.

J. B. G., H. M. K., K. B., and S. M.

### A profile of the five districts

<table>
<thead>
<tr>
<th>General characteristics</th>
<th>National average</th>
<th>Central California</th>
<th>New Mexico</th>
<th>Eastern Penn.</th>
<th>South Carolina</th>
<th>Eastern Wisc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population, 1975 (in thousands)</td>
<td>2,367</td>
<td>10,759</td>
<td>1,144</td>
<td>5,092</td>
<td>2,816</td>
<td>2,831</td>
</tr>
<tr>
<td>Population change, 1970–1975</td>
<td>6.4%</td>
<td>3.9%</td>
<td>12.5%</td>
<td>-0.5%</td>
<td>8.7%</td>
<td>2.3%</td>
</tr>
<tr>
<td>Urban population, 1970 (in thousands)</td>
<td>1,652</td>
<td>9,990</td>
<td>711</td>
<td>4,287</td>
<td>1,232</td>
<td>2,128</td>
</tr>
<tr>
<td>Percentage of land area in farms</td>
<td>45.4%</td>
<td>25.1%</td>
<td>60.2%</td>
<td>42.0%</td>
<td>36.1%</td>
<td>53.6%</td>
</tr>
<tr>
<td>Black population, 1970 (in thousands)</td>
<td>246</td>
<td>838</td>
<td>18</td>
<td>767</td>
<td>788</td>
<td>119</td>
</tr>
<tr>
<td>Median household income, 1970</td>
<td>$7,945</td>
<td>$10,283</td>
<td>$6,790</td>
<td>$10,506</td>
<td>$6,909</td>
<td>$9,194</td>
</tr>
<tr>
<td>Percent of labor force in blue collar occupations</td>
<td>44.7%</td>
<td>43.9%</td>
<td>27.4%</td>
<td>53.1%</td>
<td>58.8%</td>
<td>54.3%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Court characteristics</th>
<th>National average</th>
<th>Central California</th>
<th>New Mexico</th>
<th>Eastern Penn.</th>
<th>South Carolina</th>
<th>Eastern Wisc.</th>
</tr>
</thead>
<tbody>
<tr>
<td>State court organization</td>
<td>—</td>
<td>Multi-tiered</td>
<td>Unified</td>
<td>Overlapping</td>
<td>Multi-tiered</td>
<td>Unified</td>
</tr>
<tr>
<td>State court use of Fed. Rules of Civ. Pro.</td>
<td>—</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>Compulsory arbitration in state court</td>
<td>—</td>
<td>no (thru 1978)</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>Number of federal judges, 1975</td>
<td>—</td>
<td>16</td>
<td>3</td>
<td>19</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Federal caseload/ judge, weighted 1975 total</td>
<td>400</td>
<td>414</td>
<td>385</td>
<td>242</td>
<td>520</td>
<td>383</td>
</tr>
<tr>
<td>Civil only</td>
<td>293</td>
<td>270</td>
<td>264</td>
<td>193</td>
<td>402</td>
<td>282</td>
</tr>
<tr>
<td>Fed. court efficiency, median disposition time, 1978 civil cases (in months)</td>
<td>10</td>
<td>6</td>
<td>7</td>
<td>9</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>With no court action</td>
<td>6</td>
<td>6</td>
<td>4</td>
<td>5</td>
<td>5</td>
<td>7</td>
</tr>
</tbody>
</table>
How survival rates are computed

The estimation of survival functions is a method for analyzing the time interval between two events. It is used primarily in the evaluation of clinical trials on cancer patients and in actuarial studies. Survival analysis can be applied to the study of other time-based data provided that there is a starting event and only one terminal event per case.

The traditional approach to examining the pace of litigation is to report measures of central tendency and dispersion across courts. But this approach may provide a distorted picture of the variations in termination time and masks potentially important but subtle variations in the pace of litigation. Survival data is analyzed in “life tables,” which display termination rates for given time intervals. The distribution of survival times can also be characterized by three types of probability functions.

The three functions used to analyze survival data—the cumulative survival, probability density, and the hazard function—are fully described elsewhere. The figures we present in this article show the cumulative survival function—the probability that a case will survive longer than a given time period t, and is estimated by the proportion of cases in the sample surviving at least until time period t. The major assumption behind the estimation of the survival.

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4. Id.
the next section, we will control for such factors as the type of case and the high or low incidence of discovery activity. But even without introducing such controls, we find a distinctive survival distribution which characterized the slower of the two courts in each pair. The overall survival rate appears to depend upon the timing of the period of most rapid termination activity. The faster courts have a higher probability density (see “How survival rates are computed” on page 100) of termination within fewer months after a case has been filed. It is the lag at this stage that increases the overall survival time for the slower courts.

Inspection of survival patterns also indicates that the most substantial differences between state and federal courts were found in the three large urban centers; Los Angeles, Philadelph-
found evidence for this explanation in the high correlation between median disposition time for tort cases in state courts and all civil cases in federal courts.\textsuperscript{52}

Our data invites further skepticism of the local legal culture hypothesis. The survival comparisons indicate that the differences between state and federal courts within a district are greater than the differences between groups of state courts or federal courts. Church is most likely correct in assuming that informal, non-structural variables are an important influence on patterns of case termination. But it seems unlikely that the range of informal influences, the characteristics unique to particular courts, and the motivations of court personnel and

\textbf{Skepticism about 'local legal culture'}

We have already noted that Church, finding that patterns of delay in 21 trial courts could not be accounted for by court structure variables, attributed the differences he observed to informal expectations of local attorneys which he called the “local legal culture.” Church attorneys can be lumped together into a single residual category dubbed “local legal culture.”

Our preliminary survival analysis indicates that the divergence between state and federal courts was greatest in the urban areas. Thus,

\textsuperscript{52} The differences between our findings and Church’s may be due to random variations in the respective samples. One difference that may be significant is the sample of cases. Church compared median disposition times for tort cases in state courts (which he studied directly) with median disposition times for all civil cases for the federal courts (using Administrative Office data for a comparable year, 1976). In contrast, our comparison is between samples of civil cases cutting across subject matter categories.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure6.png}
\caption{A comparison of survival rates for the five state courts}
\end{figure}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure7.png}
\caption{A comparison of survival rates for the five federal district courts}
\end{figure}
there may not be a common legal culture that encompasses both state and federal courts in areas where there is a large and diverse bar. If one exists, it is simply not manifest in these data. We suspect, however, that in such areas the overlap between attorneys practicing in state courts and those practicing in the federal court is very small. On the other hand, there is every reason to believe the reverse is true in less urbanized areas; there one is more likely to find the same attorneys practicing in both state and federal courts, just as one is more likely to find less specialization in the bar as a whole. 53

### 3 Four key characteristics

Once we had examined overall survival distributions by courts, location, and groups of courts, we decided to control for four key characteristics of civil cases: area of law (type of case); diversity of citizenship jurisdiction; mode of termination; and the volume of discovery. With these four variables as controls, we can identify significant differences in the pace of litigation which may, in turn, affect the strategic choices made by litigants.

#### Area of law

The overall pace of dispositions is often attributed to the predominance of either time-consuming or especially rapid types of cases. Flanders, however, in his study of six federal district courts, found that differences in disposition times were not associated with a concentration of fast or slow cases. 54 Our analysis, like Flanders', produced no observable linkage between the overall disposition rates of different courts and the configuration of case types (Figure 8).

We also did not find characteristically fast or slow types of cases in our sample. Table 4, for example, reports the median survival times (in months) for each case type. Inspection of the columns for contracts and torts, the two most numerous categories of cases, reveals no identifiable patterns of disposition. Tort cases were faster in some courts, contract cases in others.

Table 5, which reports the results of a comparison of survival times between contract and tort cases in each of our sample pairs of courts, substantially confirms this finding. In all but the Philadelphia courts, contract and tort cases have similar survival patterns. Only the Philadelphia courts report statistically significant differences in survival patterns.

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53. Our intuition is that the larger the local bar, the more likely there are differences in training and qualifications, cohesiveness, and subcultures of practice. Such stratification is likely to be associated with diverse legal cultures within a geographical area; a breakdown along federal court-state court lines is quite plausible. See Heinz and Laumann, The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies, 76 Mich. L. Rev. 1111 (1978), and Laumann and Heinz, Specialization and Prestige in the Legal Profession: The Structure of deference, 1977 Am. Bar Foundation Research J. 155.

54. Flanders, supra n. 19, at 18.

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### Table 4

<table>
<thead>
<tr>
<th>Federal Courts</th>
<th>Property</th>
<th>Contract</th>
<th>Tort</th>
<th>Business</th>
<th>Public Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milwaukee</td>
<td>16.25(5)</td>
<td>17.00(40)</td>
<td>12.50(19)</td>
<td>11.75(31)</td>
<td>11.87(51)</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>14.00(2)</td>
<td>7.00(38)</td>
<td>11.17(25)</td>
<td>8.67(46)</td>
<td>8.00(40)</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>45.50(3)</td>
<td>7.50(38)</td>
<td>12.26(68)</td>
<td>4.00(20)</td>
<td>11.50(19)</td>
</tr>
<tr>
<td>So. Carolina</td>
<td>14.00(12)</td>
<td>10.00(52)</td>
<td>10.87(57)</td>
<td>9.50(9)</td>
<td>14.67(24)</td>
</tr>
<tr>
<td>New Mexico</td>
<td>11.50(9)</td>
<td>8.75(56)</td>
<td>8.50(42)</td>
<td>9.50(16)</td>
<td>7.75(45)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>State Courts</th>
<th>Property</th>
<th>Contract</th>
<th>Tort</th>
<th>Business</th>
<th>Public Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milwaukee</td>
<td>8.50(19)</td>
<td>10.33(34)</td>
<td>10.25(76)</td>
<td>—</td>
<td>17.00(2)</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>15.75(11)</td>
<td>12.00(28)</td>
<td>11.75(80)</td>
<td>3.50(1)</td>
<td>16.50(3)</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>26.00(6)</td>
<td>9.25(33)</td>
<td>19.00(104)</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>So. Carolina</td>
<td>9.00(30)</td>
<td>5.00(20)</td>
<td>14.17(77)</td>
<td>15.00(4)</td>
<td>16.00(6)</td>
</tr>
<tr>
<td>New Mexico</td>
<td>6.25(15)</td>
<td>5.37(79)</td>
<td>7.31(55)</td>
<td>2.00(5)</td>
<td>—</td>
</tr>
</tbody>
</table>
The conclusion that the slowness or fastness of the courts in our sample is not determined by case mix is based upon our one broad indicator of case type. But legal subject matter of a case is only one way of classifying cases; other potentially relevant classifications might be made with such attributes as case complexity, number of events, types and configuration of parties, and difficulties of the issues involved.55

<table>
<thead>
<tr>
<th>Federal courts</th>
<th>Lee-Desu statistic overall comparison</th>
<th>Contract with tort comparison</th>
</tr>
</thead>
<tbody>
<tr>
<td>Milwaukee</td>
<td>2.858</td>
<td>.085</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>2.253</td>
<td>1.110</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>10.665*</td>
<td>4.362*</td>
</tr>
<tr>
<td>So. Carolina</td>
<td>6.576</td>
<td>.028</td>
</tr>
<tr>
<td>New Mexico</td>
<td>3.753</td>
<td>.025</td>
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<tr>
<td>State courts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Milwaukee</td>
<td>1.750</td>
<td>.544</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>4.386</td>
<td>.075</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>9.285*</td>
<td>6.233*</td>
</tr>
<tr>
<td>So. Carolina</td>
<td>3.962</td>
<td>.473</td>
</tr>
<tr>
<td>New Mexico</td>
<td>3.662</td>
<td>3.181</td>
</tr>
</tbody>
</table>

*Significant at .05 level

Diversity of citizenship jurisdiction

Elimination or retention of diversity of citizenship jurisdiction in the federal courts is a debate which recently stimulated considerable controversy. One component of that debate is the question whether the decision to elect diversity jurisdiction in the federal courts is influenced by the motivation of attorneys to expedite or delay disposition of a case. Bumiller’s recently completed survey of attorneys’ reasons for choosing federal or state court on diversity-eligible cases in four of the five districts in our study (Eastern Wisconsin, Eastern Pennsylvania, South Carolina, Central California) reported that perceived relative speed and efficiency of the courts was a predominant consideration in choosing a federal or state forum.56 Our analysis of court records, however, suggests that actual processing time differences between state and federal courts in diversity and “diversity-like” cases are substantial in two states, Wisconsin and California, but quite insubstantial in New Mexico and South Carolina.

Using survival analysis techniques, we com-

55. Our analysis of the area of law classification is an example of how reporting median figures may distort the comparison of termination rates. A table constructed to show the median disposition times of case types (such as we have constructed) shows seemingly large disparities. But when both the sample sizes and overall patterns are taken into account, the apparent differences among case types turn out to be insignificant. See Rosenberg and Sovern, supra n. 15, for an early recognition of this problem.

56. Bumiller, supra n. 55.
pared the pace of litigation between diversity cases in our federal court sample and state court cases which met the $10,000 jurisdictional minimum for diversity eligibility. We were unable to determine, from court records alone, whether the parties in these state cases also met the residency requirements for diversity jurisdiction, but we think that such cases provide an adequate surrogate for testing purposes.

Figures 9-12 display the survival distributions for diversity and “diversity-like” cases in each of four districts (Philadelphia was excluded because the number of cases was too small for analysis), along with the overall survival patterns for those courts. The difference in disposition patterns for federal and state diversity cases is essentially the same as the differences for all cases in those courts. There are essentially no differences in South Carolina and New Mexico between the disposition rates for all cases in federal or state courts; and there are no differences in the rates for diversity and diversity-like cases in the federal and state courts respectively.

In contrast, we find substantial differences when we compare federal diversity cases to diversity-like state cases in Wisconsin and California. In Wisconsin, the federal court is slower than the state court (which is what we found when we looked at all cases in Wisconsin), while in California the state court is slower than the federal court (which again...
Few cases are filed with the intention of actually having the dispute resolved in court.

parallels our findings for all cases in the two courts). Another interesting point is that in Los Angeles, diversity and diversity-like cases tend to move more quickly than do all cases, while in Wisconsin the diversity and diversity-like cases move more slowly.

Overall, these findings appear to corroborate Bumiller’s in two of the three states common to both studies. Bumiller found that attorneys in Los Angeles favored the federal court because it was faster and more efficient; our results confirm that the Los Angeles federal court is substantially faster than the state court, and that it disposes of diversity cases faster than the overall norm. Milwaukee attorneys, however, did not identify “faster and more efficient disposition” as a prime reason for choosing the federal court in diversity or diversity-like cases; our results confirm that the Milwaukee federal court is substantially slower than the state court, and diversity cases take even more time than the overall court average.

The one minor discrepancy occurs in South Carolina. Bumiller’s attorney-sample ranked the speed and efficiency of the federal court moderately high (sixth of 17 factors), and the speed of the Richmond County Court as the second highest reason for choosing the state court over the federal court. In fact, our figures reveal almost no difference in speed between the two courts in disposing of diversity or diversity-like cases.

Modes of case termination

It is well understood that litigation is one part of a strategy of dispute settlement; few cases are filed with the hope or intention of actually having the dispute resolved by a judge or jury. Filing a case may merely indicate that serious but relatively routinized bargaining is about to begin. Or it may mean, in a few jurisdictions, that serious bargaining is largely completed and a court is being asked to ratify the outcome of that bargaining.

Needless to say, the rituals of negotiation and settlement vary with the type of case and with the culture of adversariness which marks the behavior of different courts. Some courts are likely to emphasize formal procedures; others, negotiation. Some judges are likely to play an active role in the settlement process; others regard judge activism as wholly improper. Some courts are likely to push cases to completion quickly and efficiently; others may leave substantial control over the pace of litigation to the attorneys.57


<table>
<thead>
<tr>
<th>Table 6</th>
<th>Modes of disposition of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Federal courts</td>
</tr>
<tr>
<td>N=</td>
<td>142</td>
</tr>
<tr>
<td>Dismissals* (settlements)</td>
<td>69.7%</td>
</tr>
<tr>
<td>Motions* (judgments)</td>
<td>24.6%</td>
</tr>
<tr>
<td>Trials</td>
<td>5.6</td>
</tr>
</tbody>
</table>

*These are collapsed categories. We consider dismissals to be a rough index of settlements and "motions" to be a rough index of judgement by the court.

**Includes court ordered arbitration awards (25.5 per cent of total).

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Any theory about the role of pace in litigation strategy must consider the interaction between case outcomes and the relative speed of case disposition. Table 6 provides some indication of the variation in court settlement practices in both state and federal courts in our five districts. We find some variation among the state courts, virtually none among the federal courts, and interesting differences between the state and federal courts.

Quite clearly, most cases are settled by the parties—somewhat more frequently in the state than in the federal courts except for New Mexico. Reciprocally, cases are more often terminated by court judgments in the federal courts, with New Mexico again the exception. This suggests a less activist role by federal judges in promoting settlements, but a more interventionist role in granting motions for judgment.

Trials are more frequent in all the federal courts than in the corresponding state court, except for South Carolina. The frequency of trials in the federal court in New Mexico and the state court in South Carolina is so much higher than the other courts that a different set of expectations on the part of participants is probably in operation.

We expected to find some relationship between the mode of disposition and overall processing time. In fact, no clear pattern emerges. We found significant differences (not shown) among the three dispositions for the federal courts in Los Angeles, South Carolina, and New Mexico. But even among these courts, which do show some differentiation, there are confounding inconsistencies. Settled cases terminate most rapidly in the federal court in South Carolina and the state court in New Mexico, while cases ended by judgments terminate most rapidly in the state court in Wisconsin and the federal courts in Los Angeles and New Mexico.58

A common assumption in the literature on settlement behavior and choice of alternative dispute processing fora is that the relative length of time to outcome is an important determinant of forum choice. For example, it is believed that when litigants perceive a lengthy wait for trial they may reappraise the benefits of settlement.59 If so, then we would expect to find that survival times for trials, motions and settlement would have a direct relationship with the frequency of termination modes.

In fact, our data do not reveal any consistent relationship between the frequency of trials and comparatively faster disposition times for cases going to trial. For example, in one of the two courts with a high frequency of trials, the South Carolina state court, the differences in survival time by mode of disposition are insignificant; in the other, the federal court in New Mexico, the time to trial is significantly greater.

The time element in the disposition process is both interactive and complex. Time is only one factor which encourages settlement or trial, and the data available to us here cannot take into account the effects of perceived stakes, uncertainty and differential resources on case outcomes. And causality works in both directions—a long time to trial or judgment may encourage settlements while more settlements may reduce the time to trial.

We lack sufficient theoretical understanding to further explore the role of time in the settlement process with the data at hand. But the very complexity—indeed, inscrutability—of some of this data merely underscores the inadequacy of drawing conclusions from data responsive only to theories of “delay.”

Discovery

Discovery activity is an important and often critical component of both the disposition process and pace at which a case is disposed. Two theoretical relationships between discovery activity and the probability of settlement have been suggested.60 First, discovery increases the amount of information available to the parties, making it more likely that they will value a claim similarly (not, of course, that they will place a similar value on it) and thus be better able to agree on settlement. Second, it is assumed that litigation cost is proportional to litigation time, and that high discovery use may promote settlement by increasing the cost of taking a case to trial.

58. Id.; Connolly, Holleman and Kuhlman, Judicial Controls and the Civil Litigation Process: Discovery 33 (Washington D.C. Federal Judicial Center, 1978); but cf. Church, supra n. 2, at 76; and Flanders, supra n. 19, at 57-58.
59. Kaufman, Decongestion through Calendar Controls, 328 THE ANNALS 84 (1960).
However, discovery may also be used to bring about, or may result in, delays in settlement. Some parties may have more to gain from delay than from advancing a case to trial or settlement. Furthermore, not all discovery activity is the same; it may range from routine requests for information to aggressive and contentious harassment.

Liberal discovery provisions were originally adopted in the federal courts and some state courts on the assumption that discovery would contribute to timely, even speedy, settlements. The literature on discovery reform concludes that there is "over-discovery" in a substantial number of cases motivated, as we said above, by the attorney's desire to delay resolution of cases or force the other party to settle. Recently, both federal and state courts have adopted rules prescribing time limitations on discovery, discouraging court intervention in discovery, and limiting the number of briefs or interrogatories filed. Some commentators have suggested that the focus of discovery reform should be on a limited group of cases based upon the size of the case and the issue involved.

How much discovery takes place? We have defined a "discovery event" as the presence in our case coding file of evidence of a deposition, interrogatory, discovery motion or similar document—whatever the technical name given to it in local practice. We cannot, of course, estimate the range, frequency, or intensity of discovery activity which takes place by exchange of information not recorded in the court files.

In our sample (Table 7), discovery incidence

Table 7
Frequency of discovery

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Per cent of cases with at least one discovery event</td>
<td>38.6%</td>
<td>50.0%</td>
<td>66.0%</td>
<td>42.7%</td>
<td>44.6%</td>
</tr>
<tr>
<td>Mean discovery score</td>
<td>1.379</td>
<td>2.633</td>
<td>3.524</td>
<td>1.867</td>
<td>3.758</td>
</tr>
<tr>
<td>Total number of discovery events</td>
<td>182</td>
<td>377</td>
<td>518</td>
<td>267</td>
<td>590</td>
</tr>
<tr>
<td>Maximum number of discovery events in a single case</td>
<td>14</td>
<td>26</td>
<td>19</td>
<td>22</td>
<td>55</td>
</tr>
<tr>
<td>Number of discovery cases</td>
<td>51</td>
<td>64</td>
<td>97</td>
<td>61</td>
<td>70</td>
</tr>
<tr>
<td>Number of discovery motions with supporting briefs</td>
<td>3</td>
<td>13</td>
<td>45</td>
<td>9</td>
<td>59</td>
</tr>
<tr>
<td>Per cent of cases with at least one discovery event</td>
<td>46.7%</td>
<td>39.1%</td>
<td>60.9%</td>
<td>54.8%</td>
<td>54.7%</td>
</tr>
<tr>
<td>Mean discovery score</td>
<td>3.513</td>
<td>4.231</td>
<td>4.113</td>
<td>3.665</td>
<td>4.430</td>
</tr>
<tr>
<td>Total number of discovery events</td>
<td>534</td>
<td>660</td>
<td>621</td>
<td>568</td>
<td>762</td>
</tr>
<tr>
<td>Maximum number of discovery events in a single case</td>
<td>42</td>
<td>86</td>
<td>47</td>
<td>28</td>
<td>36</td>
</tr>
<tr>
<td>Number of discovery cases</td>
<td>71</td>
<td>61</td>
<td>92</td>
<td>85</td>
<td>94</td>
</tr>
<tr>
<td>Number of discovery motions with supporting briefs</td>
<td>16</td>
<td>20</td>
<td>35</td>
<td>23</td>
<td>32</td>
</tr>
</tbody>
</table>

61. See Brazil. Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 AM. BAR FOUNDATION RESEARCH J. 129.
65. An "event" was a development in the litigation process that (a) was legally meaningful; (b) was theoretically significant to a sociological study of dispute processing in the civil courts; and (c) would be evident from some documentary source either on file with or generated by the court. Therefore, the coding of discovery events was seen as recording the documentary artifacts of the interactive process between counsel (and sometimes the court) concerning discovery-like activity.

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is somewhat more prevalent in the federal courts; in those cases in which it is used, discovery in the federal courts is likely to be more frequently employed and, as measured by the maximum number of recorded events per case, considerably more intense.

We have not fully analyzed the relationship between discovery incidence and the type of case or the nature of the parties. We did such an analysis on six of the 10 courts and found substantial variation when controlling for the number, type or configuration of the parties. Tort cases had a relatively high level of discovery activity, for example. Connolly reported similar findings: a strong association between the volume of discovery and subject matter areas of jurisdiction in a sample of federal court cases. We anticipate that full analysis of our data will confirm our initial conclusion that characteristics of the cases explain more of the variance in discovery use than whether the case came from the state or federal court.

What is the effect of volume of discovery on overall survival time? Figures 13 and 14 show the survival distributions for all federal and all state courts respectively, controlling for three arbitrarily selected categories of discovery volume. The graphs indicate quite clearly that the higher the volume of discovery activity, the more gradual (slower) the rate of termination activity in a particular court.

This seems especially true for the federal courts, where the gap between the "high" and "low" discovery volume cases is especially large during the 16-to-32 month interval, and where the high volume discovery cases are the longest lasting cases. There is less difference between the high and low volume discovery cases in the state courts. Certainly the "high volume" cases there are not uniquely long lasting. This may reflect the fact, shown in Table 7, that the range of discovery volume is much greater in the federal than in the state courts. The federal court pattern is not inconsistent with the practice of "over-discovery"—but it is not, without more, evidence for it.

The relationship between volume of discovery activity and disposition time is extremely complex. The confounding influence of case characteristics must be taken into account. Cases with high discovery activity may involve especially complex litigation issues that require longer disposition time regardless of the extent of discovery activity. Indeed, in such cases, high discovery activity might actually shorten disposition time but appear on our survival
graphs to contribute to its elongation instead.

One control for complexity is the level of monetary demands. We found that in three of our 10 courts, in those cases in which large monetary awards (defined as over $10,000) are sought, the volume of discovery has a pronounced effect on survival rates.70

4 ‘Stages’ in the litigation process

Measuring the pace of litigation only by computing the time between the date of initial filing and the recorded date of termination does not give a complete picture.71 First, the time interval is too short. The span between filing and termination does not take into account the often considerable time that has elapsed between the dispute and the date of filing a lawsuit.

Court records generally provide little direct information about this earliest stage of a dispute.72 Occasional inferences from such data are possible, however. Thus, in the state court in New Mexico we found numerous cases filed and settled on the same day, indicating, in our judgment, that the court was being used to ratify settlements already arrived at privately. Our data do not permit us to determine systematically the prevalence of this practice. And we cannot in any case estimate the time from the origin of a dispute to its emergence as a lawsuit.

Second, the interval from filing to termination is also too long. Distinctions need to be made between “dead” time and actual waiting time for the parties73 or between “filed” versus “significant postponement” time.74 A partial solution is to identify analytically distinguishable “stages” in the litigation process, keeping in mind that the stages may overlap and they may not occur successively in all cases.75 Our interest in this report, however, is directed more toward a preliminary understanding of the comparative patterns of interstage distributions and toward accounting for the primary sources of speed or tardiness in overall processing patterns.

Our starting point is the identification in the literature of two analytically distinct sources of litigation pace: delay attributed to attorneys and delay attributed to courts.76 Attorney delay results from litigation strategy decisions and the interaction between the parties; court delay is a function of court rules and structure, case management practices, local rules and procedures, number of judges and subsidiary personnel and their attitudes toward court efficiency.

We can hypothesize that various stages of litigation are primarily associated with either court or attorney delay factors, recognizing, of course, that these factors are not mutually exclusive.77 The pace of pleading and the pace of discovery are examples of phases of litigation likely to be most responsive to attorney delay. The response time of judges to motions is a possible measure of court delay, while the pretrial or post-discovery phase of litigation may be related to the scarcity of judicial resources (e.g., the likelihood of trial).78

Pleadings and discovery time

The duration of the pleading and discovery stages provides one possible indicator of the effect of attorney delay on total processing time. Pleading time is defined operationally as the interval between the filing of a complaint and filing of the final pleading document. Our survival analysis of pleading times over a 38-month period, by one month intervals, shows that the general pattern for all courts is a rapid termination of pleadings in about 80 per cent of the cases and a slow drop-off rate for the remaining 20 per cent (Figures 15 and 16). Nearly 80 per cent of the cases reach completion of pleading within four months, but some pleadings extend past 30 months. Our interpretation of these figures is that pleading time

70. Cf. Rosenberg and Sovern, supra n. 15 at 1139, 1146.
71. Posner, supra n. 60.
72. Felstiner, Abel and Sarat, supra n. 44; Mather and Yngvesson, Language, Audience and the Transformation of Disputes, 15 Law & Soc'y Rev. (forthcoming, 1981); Miller and Sarat, supra n. 44.
73. Posner, supra n. 60.
75. Flanders, supra n. 5 and Flanders, supra n. 19.
76. Rosenberg, supra n. 1.
77. See, e.g., Flanders, supra n. 19, at 70-71; Eisenstein and Jacob, supra n. 22, at chap. 20; and Connolly et al., supra n. 58, at 76.
78. Aldisert, A Metropolitan Court Conquers Its Backlog, Part II: From Pure Pre-Trial to Compulsory Settlement Conferences, 50 Judicature 247 (1968). We recognize, of course, the likelihood of multiple sources of delay for any given stage of litigation activity. For example, the time given to discovery procedures is influenced both by attorney decisions and by court-imposed time limitations and volume restrictions.
accounts for little of the variation in overall processing time in most cases.\footnote{79. But cf., Flanders, supra n. 19, at 21-13.}

When the analysis is run by district controlling for type of court, we find small differences in the pleading survival rate between federal and state courts (not shown); the difference between the New Mexico state and federal courts is the only exception. When the analysis is run

by type of court, controlling for district, we find no differences among the federal courts but significant differences among the state courts. The faster pleading times are recorded in the Wisconsin and New Mexico state courts, which are also, overall, the two fastest state courts.

The discovery "stage" is defined operationally by the time interval between the filing of the first discovery event recorded in the case record and the last such event. The interstage discovery survivals (Figures 17 and 18) follow a gradual pattern that more closely approximates an overall survival curve. As with pleading time, we find small differences in discovery time between federal and state courts except in Wisconsin. When the analysis is run by type of court, controlling for district, we find no differences among federal courts but significant differences among state courts. When we control for the volume of discovery
in which the final disposition of a case is held up by a long trial queue. In fact, it appears that many cases reach a trial without enduring an overly long case life; few incur long waiting periods until trial. An examination of certificates of readiness (or other similar indicators of readiness for trial), or of the time between the last discovery event or the last pretrial conference and the trial, would throw additional light on the slow pace of those few cases. The small number of such cases in our sample makes this difficult to do.

5 Conclusion

Data of the kind we have presented can address a host of questions about the pace of civil litigation. The limits of our sample require that our findings be interpreted with appropriate caution. Nevertheless, they do offer a number of guideposts.

First, there is no single national problem of “delay in the courts.” Different courts process cases at different speeds; there appears to be a wide variation in norms about what pace is appropriate. Federal courts differ from state courts and from each other. But the differences appear to be less patterned than idiosyncratic; they are in any case extremely difficult to explain.

Second, “local legal culture” is not an explanation as much as it is a convenient restatement of the problem. It merely applies a label to what is generally accepted: that the practices and attitudes toward court processing of attorneys and court personnel play a significant role in determining the pace of litigation in a particular court. On some dimensions (but not others) there is greater similarity among the federal courts in our sample than among the state courts or between each state court-federal court pair. We have attributed this in part to the commonality of rules and procedures in all federal courts. It may also be that state courts in the same state exhibit similar pace characteristics, but we know of no study which systematically compares the pace of litigation in a number of courts from one state.

80. The small number of cases precludes a breakdown by location. It also appears that we undersampled very slow cases in Los Angeles. If these were disproportionately tried cases, our time to trial estimates will have been understated.
Third, more work is required to identify those cases, or case characteristics, which systematically affect the speed of disposition. It may well be that there is not one "pace" of litigation for a particular court, but a complex of patterns which describe the way in which particular kinds of cases are processed. Our data do not directly support this, but do not render it inconceivable.

Our "area of law" categories, for example, were not refined; more precise categorization might well yield stronger associations than we obtained. We did find that certain types of cases were disposed at the same speed regardless of the type of court (state or federal). A more sophisticated breakdown of courts might be especially fruitful in explaining speed of disposition, but this would require a much larger sample of courts.

Fourth, there is probably strong interdependency between the pace of civil and criminal cases where they are handled by the same court. Criminal cases generally are expedited, either by rule or statute. But the disposition pace of criminal cases will have a varying effect on civil cases in different courts.

Particular attention should be paid to the federal courts where criminal cases, which have increased at a more rapid rate than civil cases, must be expedited under provisions of the Speedy Trial Act. But federal courts differ in the number of criminal cases, the ratio of these cases to civil cases, and in the modes of disposing criminal cases; plea bargaining rates may vary, with consequent fluctuations in judge-time available for civil cases.

Fifth, we have just begun to understand the relationship of time to case outcomes. One example is the relationship between levels of discovery activity and the likelihood of settlement. Posner proposed that discovery increases the probability of settlement. Our data did not permit us to test this proposition directly, but they are not inconsistent with it. Nor can we yet say whether other variables—such as uncertainty about case outcome, differential resources among the parties, or the stakes involved—may be more or less important than time in promoting or retarding settlement.

Finally, further research is required to understand the relationship of litigation "stages" to each other and to overall case processing times. Our brief treatment of case stages in part 4 suggests that pleading reforms, whatever other virtues they may have, probably won't do much to systematically reduce case processing times. On the other hand, we were surprised by, and not entirely able to explain, the finding that most trial activity occurs relatively early in the litigation process. Long queues awaiting trial are not the norm; long waits for trial do not account for much of the elapsed time in processing civil cases, at least not in our sample. Horror stories of interminable and costly delays are not hard to find, of course.

This report does not provide definitive answers. But we hope it moves us along in the process of thinking theoretically about the pace of litigation in civil cases. Our goal has been to identify the obvious and the not-so-obvious pitfalls of this kind of research. There is a lot more to be done.

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81. Posner, supra n. 60.
82. This finding is contrary to Rosenberg, supra n. 1, at 37.