

## The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions

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*For the past three decades, common wisdom in the legal profession has maintained that the cost of trials, and the trial process itself, are too time-consuming and too expensive to maintain. In May 2010, elite lawyers, federal judges, and prominent legal scholars gathered at Duke Law School to discuss these issues and the future of civil process in the federal courts. Most participants agreed that the focus of federal rules reform should be reigning in the high costs and delay*

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\* Acting Assistant Professor, New York University School of Law. J.D., Harvard Law School; M.St. University of Oxford. I would like to thank Arthur Miller for helpful conversations while developing this project. I am grateful for the superb research assistance provided by Cléa Liquard. I would also like to thank Nicholas Frayn, David Han, Gabriel Arkles, Betsey Nevins-Saunders, Mila Sohoni, Adam Zimmerman, and participants in the NYU Lawyering Scholarship Colloquium for their comments on earlier versions of this Article. The author served on the federal courts committee of the New York City Bar Association from 2007 to 2011. The opinions expressed in this Article reflect those of the author and not those of the committee or association.

*of civil litigation. In a world of electronic discovery and electronically stored information, the costs of litigation were undoubtedly skyrocketing. If discovery had always been ripe for abuse, the ubiquity of electronically stored information made it all the more so.*

*Yet empirical data presented at the conference told a different story. The Federal Judicial Center (FJC) reported that in its study of federal cases that had closed in the 2008 calendar year, the median cost of litigation for defendants was \$20,000, including attorneys' fees. For plaintiffs, the median cost was even less, at \$15,000, with some reporting costs of less than \$1600. Rather than out-of-control discovery costs emerging from the electronic discovery era, the FJC found median discovery costs represented 3.3% of the amount at stake in litigation.*

*The results were surprising to those in attendance, but they shouldn't have been. The FJC's 2009 data were consistent with a line of similar studies conducted every few years and dating back to the late 1960s. Empirical work has simply never provided support for the widespread belief that the system takes too long, costs too much, and is in desperate need of repair.*

*There exists a significant discrepancy between the common sense understanding of the civil justice system, driven by what I call the "cost-and-delay narrative," and the picture that develops from the empirical studies. This Article seeks to understand the resilience of the cost-and-delay narrative in the face of empirical data that would seem to undermine it. To do so, this Article carefully analyzes the latest data on federal civil process showing that, even with the substantial changes in practice over the last decade, there is remarkable continuity in the findings of empirical studies. Equally consistent, this Article explains, is the cost-and-delay narrative itself, which has thrived for decades. The longevity of the cost-and-delay narrative should raise alarm bells, because it provides support for efforts to foreclose access to civil courts. Building on the work of scholars, including Arthur Miller, who have long sought to bring this discrepancy to light, this Article contextualizes the cost-and-delay narrative, and the reforms for which it is used to advocate, as part of a political struggle over the nature of the regulatory state and the proper role of courts.*

## INTRODUCTION

In May 2010, elite lawyers, federal judges, and prominent legal scholars gathered at Duke Law School to discuss the future of civil process in the federal courts. They were invited by the U.S. Judicial Conference Advisory Committee on Civil Rules (Advisory Committee), and their mission was clear: to consider and propose solutions to the problems of cost and delay in the civil system. In a world of electronic discovery and electronically stored information, the costs of litigation were undoubtedly skyrocketing. If discovery had always been ripe for abuse, the ubiquity of electronic documents made it all the more so. Conference participants arrived armed with proposals for reform—everything from presumptive limits on discovery to new forms of dispositive motions.

Citing the mandate of the *Federal Rules of Civil Procedure*, “to secure the just, speedy, and inexpensive determination of every action,”<sup>1</sup> one conference paper warned that it “may now be an empty promise.”<sup>2</sup> The paper continued, “Civil litigation has become too cumbersome, expensive and time consuming, and the exponential growth of electronically stored information . . . over the past decade has simply added strains to an already overburdened system.”<sup>3</sup>

The American College of Trial Lawyers (ACTL) concluded that the civil justice system “is in serious need of repair. In many jurisdictions, today’s system takes too long and costs too much.”<sup>4</sup> Indeed, the ACTL report claims this is apparent even to those outside the legal profession: “From the outside, the system is often perceived

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<sup>1</sup> FED. R. CIV. P. 1.

<sup>2</sup> FED. COURTS COMM., THE ASSOC. OF THE BAR OF THE CITY OF N.Y., PROPOSALS FOR THE 2010 DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE 2 (2010), [http://www.abcnyc.org/pdf/report/uploads/20071920-NYCBAR ProposalsforDuke Conference.pdf](http://www.abcnyc.org/pdf/report/uploads/20071920-NYCBAR%20ProposalsforDuke%20Conference.pdf).

<sup>3</sup> *Id.* Similar concerns were echoed by other participants. The American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) collaborated on a project “conceived as an outgrowth of increasing concerns that problems in the civil justice system, especially those relating to discovery, have resulted in unacceptable delays and prohibitive expense.” THE AM. COLL. OF TRIAL LAWYERS ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT 1 (2009) [hereinafter ACTL & IAALS], available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>. However, several conference participants dissented from this view.

<sup>4</sup> ACTL & IAALS, *supra* note 3, at 2.

as cumbersome and inefficient. The emergence of various forms of alternative dispute resolution emphasizes the point.”<sup>5</sup>

The Duke Civil Litigation Conference opened with a panel presenting the empirical data that had been compiled expressly to shed light on the conference’s concerns with electronic discovery, cost, and delay. Yet when the researchers from the Federal Judicial Center (FJC) took their seats that morning, their findings were not as expected. To the disbelief of many at this venerable gathering, the FJC reported that the median cost of litigation for defendants was \$20,000, including attorneys’ fees.<sup>6</sup> For plaintiffs, the median cost was even less, at \$15,000, with some reporting costs of less than \$1600.<sup>7</sup> Only at the ninety-fifth percentile did reported costs reach \$280,000 for plaintiffs and \$300,000 for defendants.<sup>8</sup> The median estimate of stakes in the litigation for plaintiffs was \$160,000, with estimates ranging from \$15,000 at the tenth percentile to almost \$4 million at the ninety-fifth percentile.<sup>9</sup> The median estimate of the stakes by defendants’ attorneys was \$200,000, with estimates ranging from \$15,000 at the tenth percentile to \$5 million at the ninety-fifth percentile.<sup>10</sup> Furthermore, the discovery costs that animated the Duke Conference organizers and participants did not appear to be, in the vast majority of cases, significant or disproportionate. The FJC study found that the median percentage of litigation costs incurred in

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<sup>5</sup> *Id.*

<sup>6</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). The study conducted by the FJC undertook a survey of discovery costs and time to resolution of a large cross section of cases closed in 2008 in the federal system. *Id.* at 77. Certain features of the closed-case study make the data particularly worthwhile in illuminating the true nature of cost, delay, and discovery in the federal system. Because the study was designed with discovery-related issues in mind, cases in which discovery and discovery-related issues would be unlikely to occur were filtered out from the pool. *Id.* Thus, excluded from the data set were prisoner civil rights and habeas cases, social security cases, bankruptcy appeals, student loan collection actions, land condemnation cases, forfeiture actions, and asbestos products liability cases. *Id.* Out of the remaining case pool, any cases terminating in less than sixty days were deleted. *Id.* Finally, of the remaining pool, any case that either terminated by trial or had been pending four years or longer when it terminated was included in the sample. *Id.* Thus the sample was carefully groomed to provide data on discovery, erring on the side of overestimating rather than underestimating the extent of discovery itself and overall cost and time to disposition.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

discovery was twenty percent for plaintiffs and twenty-seven percent for defendants.<sup>11</sup> Perhaps most surprising was the finding that, at the median, the reported costs of discovery, including attorneys' fees, constituted 1.6% of the reported stakes for plaintiffs and 3.3% of the reported stakes for defendants.<sup>12</sup> The 2009 FJC study rang false.<sup>13</sup> It did not support anything that attorneys knew about the civil justice system.<sup>14</sup> And the findings did not appear to resemble the practices of the audience assembled.

But in fact, the findings of the 2009 FJC study were not an anomaly. Decades of empirical work have reached similar conclusions, supporting the view that the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost is proportional to the amount at stake. As early as 1971, a study undertaken by Columbia Law School to investigate early criticisms of discovery concluded that “[t]he costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation.”<sup>15</sup> Since 1971, numerous studies have made findings consistent with this statement.<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Panelists and conference participants seemed unable to make sense of the FJC findings. Justice Rebecca Kourlis, introducing another study that surveyed in-house counsel at Fortune 200 companies, described the FJC data as a subset of the federal docket *different from* the Fortune 200's cases. Similarly, Lorna Schofield, presenting on behalf of the ABA's Section on Litigation, described the discrepancies between the ABA survey results and the FJC survey results as “two different populations with two different kinds of cases.” Yet the 2009 FJC study was not a “subset” or a “different population.” On the contrary, it reflected a broad cross section of federal cases, and the sample was carefully groomed to ensure that the largest cases would be represented. Author's Notes from the 2010 Civil Litigation Conference at the Duke University School of Law (May 10–11, 2010) (on file with author).

<sup>14</sup> Presenting on the empirical data panel along with the FJC were representatives of both the ABA Section on Litigation who reported the results of a survey of its members and the Senior Counsel of Litigation and Legal Policy for General Electric, who shared the findings of a survey of Fortune 200 in-house counsel. Unlike the 2009 FJC study, the ABA and the Fortune 200 surveys found significantly higher costs in general, and discovery-related costs specifically. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2–3 (2010). For example, the Fortune 200 survey found that costs had increased for survey respondents by seventy-eight percent since 2000. *Id.* at 3.

<sup>15</sup> FED. R. CIV. P. TITLE V advisory committee's note (discussing the 1970 amendments to the discovery rules).

<sup>16</sup> For a detailed discussion of these studies, see *infra* Parts I and II.

There exists a significant discrepancy between the common-sense understanding of the civil justice system, captured by what I call the “cost-and-delay narrative,” and the picture that develops from the empirical studies. This Article seeks to understand the resilience of the cost-and-delay narrative in the face of empirical data that would seem to undermine it. The longevity of the cost-and-delay narrative should raise alarm bells because it provides support for efforts to foreclose access to civil courts and to shift the focus of procedural lawmaking away from the facilitation of legal claims and the remedying of legal wrongs to limiting the resources expended in investigating and vindicating such wrongs.

Scholars have produced a fascinating and insightful literature on this strange discrepancy. Much of the attention, however, has understandably focused on highlighting the lack of empirical foundation for cost-and-delay concerns. This can only take us so far. Given the narrative’s continued persuasiveness over a span of decades, in the face of empirical work that appears to contradict its premises, we can safely say that resilience of the cost-and-delay narrative does not depend on its accuracy in reflecting the state of civil litigation. What is now required is to understand the social forces that produce the narrative and sustain its power. While scholars have made preliminary efforts to explain these social forces, the literature has yet to address the issue systematically. Accordingly, this Article takes account of and assesses these explanations, laying a foundation for future investigation.

The next two Parts of this Article provide a description of the cost-and-delay narrative, as well as an account of the discrepancy between the picture it paints of the civil justice system and that revealed through empirical inquiry. Part I describes the contours of the cost-and-delay narrative, the ideas it conveys, in what venues it is promulgated, and what reforms of civil process have, in part, relied on it. Part II then examines empirical data from the last forty years, beginning with a detailed analysis of the findings presented at the Duke Conference.

In Part III, the analysis turns to the scholarly literature analyzing the cost-and-delay narrative. This Part examines the various ways that commentators have explained the resilience of the narrative. In order to understand and evaluate the explanatory power of these accounts, this Article identifies three loose categories of explanation. The first category explains the resilience of the cost-and-delay narrative as a product of certain cultural and psychological factors.

The second category, comprising what I describe as sociological factors, identifies the structure of the legal profession and financial interests of routine corporate defendants as the dominant forces driving the cost-and-delay narrative. Finally, I turn to the third category, the political–historical factors, consisting of explanations that seek to understand the cost-and-delay narrative as part of a broader political discussion not limited to the context of procedural reform. Specifically, these analyses contextualize the narrative, and the reforms it is used to advocate, as part of a political struggle over the nature of the regulatory state and the proper role of courts within that structure. By systematically examining the causalities suggested by literature on the cost-and-delay narrative, this Article finds that the political–historical explanations offer us the richest avenues for further investigation of this phenomenon while also providing opportunities for reinvigorating a defense of access to civil justice.

## I

### THE CONTOURS OF THE COST-AND-DELAY NARRATIVE

The cost-and-delay narrative in its contemporary form may be traced back to the 1970s.<sup>17</sup> An early articulation of the narrative can be found in then-Chief Justice Warren Burger’s civil reform efforts.<sup>18</sup> In 1976, Chief Justice Burger sponsored the Pound Conference, which was entitled “Causes of Popular Dissatisfaction with the Administration of Justice.”<sup>19</sup> Though the title of the conference gives the impression of a very broad inquiry, it was instead focused on only two topics, themselves interrelated. The first concern was overburdened courts.<sup>20</sup> Here, the conference sought to tackle “the problem of the overcrowding of the courts, and the attendant issues of

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<sup>17</sup> Concerns about the relationship between discovery and cost were, however, already apparent. In the early 1960s, the Advisory Committee commissioned social science research to examine costs and concerns associated with discovery, in what later became known as the Columbia Project. WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 41–43 (1968). The findings of that study led the Advisory Committee to conclude there was no problem of cost and delay. *See supra* note 15.

<sup>18</sup> This is not meant to imply that the Chief Justice was the originator of civil justice’s preoccupation with cost and delay. Rather, his efforts provide a useful example of the themes represented in the cost-and-delay narrative, presented in a high-profile forum comprising members of the legal establishment.

<sup>19</sup> *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 5–6 (A. Leo Levin & Russell R. Wheeler eds., 1979).

<sup>20</sup> *Id.* at 270–71.

the costs of litigation.”<sup>21</sup> The second topic identified by the Chief Justice was, “how can we serve the interests of justice with processes more speedy and less expensive?”<sup>22</sup> Thus the conference concentrated on the costs and delays facing the system and its users. Chief Justice Burger’s explanation of the second topic is particularly illuminating. What the Chief Justice’s question does is transform the Federal Rules’ interest in just determination of claims into a quest for speedy and inexpensive resolutions. That is, justice *becomes* speed and inexpense.

This peculiar arrangement is actually quite common to the cost-and-delay narrative. The narrative gains its moral force from the sustaining assumption that the present functioning of the courts is *unfair*. The injustice of the system is related to the openness of the civil courts. The cry of the reform movement to resolve the undue cost and delay in the civil system gains traction as it promises to curb the abuses of unethical, selfish lawyers and greedy claimants and to rescue the defendants that may fall victim to them. The narrative asserts that crippling cost and delay are enemies of access because high costs can bar worthy parties from filing suit, or may force them to take a low settlement to avoid the higher costs of litigating. Because cost and delay are at the root of procedural injustice, mechanisms that would maximize efficiency are applauded and those that carry with them costs and require time—for example, discovery, access to appeals, and formality of process—are disfavored.

To address these concerns of the cost-and-delay narrative, Chief Justice Burger sought to establish a reform agenda for the final quarter of the twentieth century, focusing squarely on securing a more just system by driving costs down and limiting delays.<sup>23</sup> His

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<sup>21</sup> *Id.* at 273 (quoting the Attorney General of the United States, The Honorable Edward H. Levi). As three past presidents of the ABA explained in their foreword to the conference proceedings, “The plain and unavoidable fact is that our judicial system, state and federal, is a vessel filled to the brim and overflowing. Nothing more can be added without taking something out.” *Id.* at 11–12. Moreover, “[w]ays and means must be found for more efficient and expeditious disposition of litigated controversies . . . .” *Id.* at 11–12.

<sup>22</sup> *Id.* at 6.

<sup>23</sup> Chief Justice Burger foresaw that his agenda for the Pound Conference would be viewed as aiming to limit access to the courts. He denied that this was the objective, invoking instead a desire to identify the “speediest and the least expensive means of meeting the” dispute resolution needs of the public. *Id.* at 32. The thoughtful observer may wonder how cost and delay can function as a single narrative, propelling the courts toward a less accessible future. Certainly concerns over delay might appear to weigh on the side of access to justice, as delaying tactics or merely inefficient processes lengthen the



proposed solutions portrayed a single-minded focus on efficiency.<sup>24</sup> He suggested that the system find new ways to provide resolution in small claims that would be “economically feasible,” suggesting de-professionalized mechanisms with no appeal right.<sup>25</sup> The Chief Justice hailed Japan for having far fewer lawyers “due to a long history of informal ‘community’ and private processes for resolving disputes without litigation and, hence, without lawyers, judges and the attendant expense and delays.”<sup>26</sup> In this formulation, litigation itself is a negative process, best avoided (or diverted). As such, lawyers whose job it is to engage in litigation are also a negative, and their presence in large numbers in society is troubling. In line with this pejorative view of civil claiming, Chief Justice Burger advocated for increased use of arbitration, supported by his projection that “delays and costs will rise.”<sup>27</sup>

Chief Justice Burger’s project of reorganizing procedural reform around cost-and-delay concerns was warmly received in rule-reform circles. This approach has guided procedural transformation for the ensuing three decades. The impact of cost-and-delay concerns on the rulemaking process and congressional legislation throughout the 1980s and 1990s has been carefully documented by other scholars.<sup>28</sup>

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time before a plaintiff gets her day in court, or may very well foreclose the courtroom altogether. Yet, as the sources in this Part make clear, delay is most often coupled with cost in discussion of civil justice reform. In conversations about procedural reform, proposed solutions tend to advocate limiting access. In fact, delay is understood from the perspective of a defendant who is left at the mercy of plaintiff’s litigation indefinitely. On a related note, to the extent that delay is a result of the heavy influx of cases to the court system, limiting access helps to resolve issues of delay. Thus, limiting suits helps to resolve not only cost but also delay concerns. For examples of how delay concerns might be articulated from a plaintiff’s perspective, see the attorney comments cited *infra* note 100 (quoting comments from the 2009 FJC study reflecting frustrations of plaintiffs’ attorneys with the assumptions of the survey instrument).

<sup>24</sup> THE POUND CONFERENCE, *supra* note 19, at 32–33.

<sup>25</sup> *Id.* at 33.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* “I submit a reappraisal of the values of the arbitration process is in order, to determine whether, like the Administrative Procedure Act, arbitration can divert litigation to other channels.” *Id.*

<sup>28</sup> E.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994) [hereinafter Mullenix, *Discovery in Disarray*]; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992) [hereinafter Mullenix, *The Counter-Reformation in Procedural Justice*]; Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

In the aftermath of the Pound Conference, the American Bar Association (ABA) convened a follow-up task force that issued a report calling for a revision of the discovery rules, given the allegation that they are open to abuse and serve to “escalate the cost of litigation, to delay adjudication unduly and to coerce unfair settlements.”<sup>29</sup> The task force also called for revision of the rules governing sanctions in order to combat situations in which “inadequate and improper pleadings give evidence of contributing to delay and increased expense of litigation.”<sup>30</sup> These revisions and others were taken up by the Judicial Conference and Congress as civil justice reform became synonymous with decreasing cost and delay.<sup>31</sup>

Although spanning over thirty years, the cost-and-delay narrative evinces a consistency in its language and concerns over time. In that period, there have been repeated revisions to the Federal Rules and to procedural doctrine, yet the narrative remains largely intact. The early 1990s ushered in significant procedural changes on two fronts, through congressional legislation in the Civil Justice Reform Act (CJRA) and through the 1993 amendments to the Rules. Both of these initiatives gained support in significant part because they aimed to address rising cost and delay in civil litigation. The passage of the CJRA in particular took place in the context of a national discussion focused on a conception of the court system as exorbitantly expensive, slow, and, accordingly, the site of rampant abuse of justice.

The cost-and-delay themes articulated at the Pound Conference were visible once again in both the structure and the legislative

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<sup>29</sup> AM. BAR ASS'N, REPORT OF THE POUND CONFERENCE FOLLOW-UP TASK FORCE (1996), *reprinted in* 74 F.R.D. 159, 191 (1976).

<sup>30</sup> *Id.* at 193. Notably, empirical data published prior to the Burger conference had already questioned the connection between discovery and excessive costs or abusive practices. These are discussed at greater length *infra* Part II. In 1983 the Federal Rules were amended to reflect changes in line with both of these recommendations. To address discovery concerns and in hopes of limiting costs and encouraging early settlement, Rule 16 was amended to foster early judicial intervention, which was expected to reduce cost and delay resulting when parties were left to manage pretrial proceedings independently. FED. R. CIV. P. 16 advisory committee's note (discussing the 1983 amendment). The rules were further amended to address the specter of pleadings filed in bad faith to impose cost and delay on an adversary. The Rule 11 amendment sought to “streamline the litigation process by lessening frivolous claims or defenses.” FED. R. CIV. P. 11 advisory committee's note (discussing the 1983 amendment).

<sup>31</sup> This phenomenon has different articulations, focusing in turn on cost to parties, cost to the court system (expenditure of court resources), systemic delay from too many cases, and case-based delay from inappropriate practice techniques.

history of the CJRA. The legislative history identified two related crises facing the courts: high cost and delays (which further raise costs) and a scarcity of federal judges (which also increases costs and delays).<sup>32</sup> Chief Justice Burger's equation of justice with speed and cost also reemerged. The legislative history of the CJRA applauds the goal set forth in Rule 1 of the *Federal Rules of Civil Procedure* to ensure the

just, speedy, and inexpensive resolution of civil disputes in our Nation's Federal courts. High costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled. By improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers.<sup>33</sup>

As Linda Mullenix notes,

Although Congress, in the legislative history, identified three fundamental values [justice, speed, affordability], the Civil Justice Reform Act itself focuses exclusively on two: cost and delay. The independent value of justice is absent from the statutory mandate, and by inference, it must be assumed that Congress equated reducing cost and delay with achieving justice.<sup>34</sup>

Notably, Congress made no findings concerning the existence, nature, or extent of cost-and-delay problems in the courts. The CJRA followed the common model of assuming a cost-and-delay problem and devising solutions to address it, without seeking evidence of the excessive costs or delay.<sup>35</sup>

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<sup>32</sup> S. REP. NO. 101-416, at 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804-05.

<sup>33</sup> *Id.*

<sup>34</sup> Mullenix, *The Counter-Reformation in Procedural Justice*, *supra* note 28, at 390 n.46.

<sup>35</sup> *See* Civil Justice Reform Act, 28 U.S.C. § 471 (Supp. II 1990) (congressional statement of findings). The Act mandated each federal district to develop a civil justice expense and delay reduction plan and presented six findings, each of which assumed a problem of cost and delay in civil litigation requiring urgent action.

(1) The *problems of cost and delay* in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, *share responsibility for cost and delay in civil litigation and its impact* on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

That same year, Vice President Dan Quayle gave a much-publicized speech to the ABA criticizing the civil justice system as the main impediment to the competitiveness of the American economy and advocating reform.<sup>36</sup> The reform agenda focused significantly on discovery and relied upon the familiar assertions that “discovery is 80 percent of the problem”; that it “too often becomes an instrument of delay and even harassment”; and that unnecessary discovery “can disrupt or put on hold a company’s entire research and development program.”<sup>37</sup> Quayle asked, “Is it right that people with disputes come up against staggering expense and delay?”<sup>38</sup> Quayle’s speech, though taking aim specifically at discovery, also reiterated the general concern of the Pound Conference: the injustice of subjecting defendants to the expenditure of resources that arises when a party is sued. With litigation itself a suspect activity, the impositions of a lawsuit become a grave injustice, diverting defendants from the legitimate and beneficial activities to which they would otherwise be attending.<sup>39</sup>

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(3) The solutions to *problems of cost and delay* must include significant contributions by the courts, the litigants, the litigants’ attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing *solutions to problems of cost and delay* in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants’ attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and *cost and delay reduction program* should incorporate several interrelated principles. . . .

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and *cost and delay reduction* principles and techniques.

*Id.* (emphasis added).

<sup>36</sup> Vice President Dan Quayle, Address to the Annual Meeting of the American Bar Association (Aug. 13, 1991). Mullenix provides a cogent analysis of the relationship between the Vice President’s speech and the media treatment of the civil justice reform issue in *Discovery in Disarray*, *supra* note 28, at 1400–02.

<sup>37</sup> Vice President Dan Quayle, *supra* note 36.

<sup>38</sup> *Id.*

<sup>39</sup> A significant theme of the early 1990s’ cost-and-delay narrative was the deleterious impact of litigation cost and delay on U.S. economic competitors.

Although both legislation and amendments to the *Federal Rules of Civil Procedure* in the early nineties took aim at cost and delay in the civil system, the Advisory Committee on Civil Rules was once again focused on the issue just a few years later. As Jeffrey Stempel has carefully documented,<sup>40</sup> the Advisory Committee convened a conference in 1997 to explore the need for reform of the discovery rules.<sup>41</sup> In selecting discovery as a target for reform, the Committee posited that “[i]f any aspect of the rules is broken, discovery is it.”<sup>42</sup> At its October 1996 meeting, it appointed a discovery subcommittee to investigate discovery issues and possible rule reform.<sup>43</sup> While the impetus for the appointment was the “opt-out” provision of the 1993 amendment concerning initial disclosure,<sup>44</sup> the function was nonetheless understood to be the reduction of cost and delay.

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<sup>40</sup> Stempel, *supra* note 28.

<sup>41</sup> Chair of the Advisory Committee, Paul Niemeyer, explained the focus thus:

[A]s chair of the Civil Rules Advisory Committee, I initiated a fundamental reexamination of the discovery rules in the fall of 1996 to find out if the procedure in place for providing full disclosure is too expensive to justify its contribution to civil process and whether amendments can be adopted to make discovery more efficient and satisfying to parties to litigation.

Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. REV. 517, 520–21 (1998).

<sup>42</sup> Stempel, *supra* note 28, at 554 n.141 (quoting CIVIL RULES ADVISORY COMM., MINUTES FROM THE OCTOBER 6–7, 1996, MEETING). The Committee’s concern with discovery was fundamentally bound up with a concern about cost and delay: “The Civil Justice Reform Act manifests concern with the costs and delays associated with discovery, and may justify further study.” CIVIL RULES ADVISORY COMM., MINUTES FROM THE OCTOBER 6–7, 1996, MEETING. In his introductory piece to the *Boston College Law Review*’s Symposium issue on discovery, which emerged out of the Advisory Committee’s 1997 Boston Conference, Judge Paul Niemeyer, Chair of the Advisory Committee, acknowledged that there were very good reasons *not* to engage in further reform of the discovery rules. As he described it, there were “persuasive indicators that the discovery rules are not broken.” Niemeyer, *supra* note 41, at 517. Yet, he argued, two persistent questions justified the Advisory Committee’s renewed examination of the discovery regime: “1. When fully used, is the discovery process too expensive for what it contributes to the dispute resolution process; and 2. Are there rules changes that can be made which might reduce the cost and delay of discovery without undermining a policy of full disclosure?” *Id.*

<sup>43</sup> “The Committee appeared to have a general view that discovery was problematic, that discovery practice was deteriorating for a variety of reasons, that experiments with discovery reform on the state and local level appeared to be working, and that some change in the Federal Rules was apt.” Stempel, *supra* note 28, at 554–55.

<sup>44</sup> Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT’L & COMP. L. 153, 164 (1999) (citing Judicial Conference, *Alternative Proposals for Reduction of Cost and Delay: Assessment of Principles, Guidelines and Techniques*, 175 F.R.D. 62, 98 (1997)).

Following in the same vein as earlier cost-and-delay-driven reforms, this discovery review solicited empirical research but ultimately ignored its conclusions. Two studies served as the “centerpiece research” of the conference. This research included the 1997 Rand study and the 1997 FJC study, which were prepared at the discovery subcommittee’s request.<sup>45</sup> Those studies plainly cut against the discovery-abuse narrative.<sup>46</sup> Yet, as Stempel describes it, the “gravitational pull of the venerable myth of discovery abuse” meant that the reforms to emerge from that process were nonetheless designed to tackle the “problem” of discovery abuse.<sup>47</sup>

The discussion surrounding appointment of a discovery subcommittee gives some indication of how the cost-and-delay narrative informed the Advisory Committee’s inquiry. The October 1996 committee minutes explain the appointment of a discovery subcommittee thus:

[I]t was observed that most studies of the causes of popular dissatisfaction with the administration of civil procedure focus in large part on discovery. Discovery is expensive. Discovery is often conducted in a mean-spirited way. Discovery is used as a strategic tool, not to facilitate resolution of a controversy. Attorney self-regulation too often fails to work, as adversariness gets in the way of more professional behavior.<sup>48</sup>

Advisory Committee Chair Niemeyer identified three central questions guiding the Committee’s discovery project: what is the cost of discovery; do the costs exceed the benefits to such a degree that requires action; and, if remedies are needed, can changes be made without interfering with the full development of information for trial?<sup>49</sup>

The Advisory Committee operated on the presumption that discovery reform should be directed at whether the cost of discovery exceeds its benefits, and if so, whether reforms can be devised that “do not interfere with the full development of information for trial.”<sup>50</sup> Despite the failure of three decades of empirical studies to verify

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<sup>45</sup> See *infra* notes 132–42 and accompanying text.

<sup>46</sup> See *infra* Part II.A.

<sup>47</sup> Stempel, *supra* note 28, at 555.

<sup>48</sup> CIVIL RULES ADVISORY COMM., MINUTES FROM THE OCTOBER 17–18, 1996, MEETING.

<sup>49</sup> Stempel, *supra* note 28, at 555.

<sup>50</sup> *Id.* (quoting CIVIL RULES ADVISORY COMM., MINUTES FROM THE OCTOBER 6–7, 1997, MEETING).

concerns over the costs of discovery and potential abuse, the Advisory Committee nonetheless took as its starting premise that this was the inquiry to be investigated.<sup>51</sup>

The story of the 2000 amendments helps to illustrate the great force of the cost-and-delay narrative. In meetings leading up to the 2000 amendments, the discovery subcommittee reported its findings: “Discovery seems to be working quite well in general.”<sup>52</sup> Yet, strangely, the subcommittee recommended a major revision of the discovery rules, one that generated significant opposition from the bar. At the Advisory Committee’s October 1997 meeting, it was stated that “[o]ut-of-control discovery is common,” despite the subcommittee’s own review of the empirical data that led it to conclude that discovery was generally working well.<sup>53</sup> The view that discovery was “out of control” was once again assumed without any effort to examine whether that was true.<sup>54</sup>

Most recently, in May of 2010, the Advisory Committee hosted the Duke Conference to discuss possible solutions to the costs of civil litigation in the federal courts. In advance of the conference, the Advisory Committee solicited empirical studies, scholarly papers, and commentary from the bench and bar, a process that began over a year in advance of the conference date.<sup>55</sup> The submissions to the Duke

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<sup>51</sup> Thus, it appears, other discovery concerns, such as informational asymmetry and tactics that might be aimed at shielding client information from one’s adversary, were off the table from the start. As Stempel describes it, the reforms “plac[e] the burdens of discovery reform on those seeking information rather than upon those opposing its release.” *Id.* at 556.

<sup>52</sup> CIVIL RULES ADVISORY COMM., *supra* note 42.

<sup>53</sup> CIVIL RULES ADVISORY COMM., MINUTES FROM THE MARCH 16–17, 1998, MEETING.

<sup>54</sup> Note that certain Advisory Committee members moved to abandon the proposed limitation on the scope of discovery arguing that it would: (1) encourage resistance to discovery, (2) spawn satellite litigation due to ambiguity of the proposed language, and (3) limit enforcement of regulatory laws including excessive force, products liability, and employment discrimination. Stempel, *supra* note 28, at 570. They argued that the ability to obtain a broader subject-matter scope of discovery through application to the court was no cure, as it served to shift transaction costs and relied on major investment of judicial time that made it likely that discovery would not happen. *Id.* at 570–71. Judge Shira Scheindlin emphasized that empirical data did not support a need for change. *Id.* at 571. Scheindlin also opposed the scope change because she viewed it as “polarizing,” pointing out that the public comments break down almost exactly along the lines of whether the attorney generally represents plaintiffs or defendants. *Id.* This effort ultimately failed. *Id.* at 572.

<sup>55</sup> John G. Koeltl, *Introduction: Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537 (2010).

Conference reflected widespread pessimism about the civil justice system among legal professionals. The federal courts committee of the New York City Bar Association described the aim of Rule 1 as “an empty promise,” describing the system as “too cumbersome, expensive and time consuming.”<sup>56</sup> The American College of Trial Lawyers (ACTL) explained that its member survey was motivated by “increasing concerns” about “unacceptable delays and prohibitive expense.”<sup>57</sup> A report on litigation costs at major companies lamented that “[t]he reality is that the high transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases.”<sup>58</sup> Detailing the findings of a survey of Fortune 200 companies, the authors wrote, “The survey confirms empirically what corporate counsel have long known anecdotally—the transaction costs of litigation against large companies, especially discovery, are so high that the mandate of Rule 1 . . . is simply not being met.”<sup>59</sup>

Thus, the concerns embedded in the cost-and-delay narrative served as an impetus for Duke Conference activity. The bulk of what the Duke Conference labeled “empirical data”<sup>60</sup> consisted of opinion surveys that reflected the concerns and beliefs among legal professionals. These surveys make clear that the cost-and-delay narrative is very much still in play. One prominent contribution was the result of collaboration between the ACTL and the Institute for the Advancement of the American Legal System (IAALS).<sup>61</sup> The ACTL and the IAALS developed a survey that was administered to the Fellows of the ACTL, the American Bar Association’s Section on Litigation, and the National Employment Lawyers Association

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<sup>56</sup> FED. COURTS COMM., *supra* note 2, at 2.

<sup>57</sup> ACTL & IAALS, *supra* note 3, at 1.

<sup>58</sup> LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 14, at 2.

<sup>59</sup> *Id.* The authors conclude that average outside litigation cost increased seventy-three percent between 2000 and 2008, and that average annual litigation costs as a percentage of revenues increased seventy-eight percent between 2000 and 2008. *Id.* at 2–3.

<sup>60</sup> The data presented were mostly attorney opinion surveys that provided data on what beliefs attorneys have about the civil procedural system. It generally did not collect data that could provide information on how the system actually operates.

<sup>61</sup> The IAALS’s existence is, itself, a reflection of the persistence of the cost-and-delay narrative. The organization’s “mission is to participate in the achievement of a transparent, fair, and cost-effective civil justice system that is accountable to and trusted by those it serves.” ACTL & IAALS, *supra* note 3, at iii. This general mission is supported “[i]n the civil justice reform area[ by] studying the relationship between existing Rules of Civil Procedure and cost and delay in the civil justice system.” *Id.*



(NELA).<sup>62</sup> The ACTL and the IAALS identified several themes emerging from their survey. They confirmed that costs are too high and cases take too long.<sup>63</sup> As a result, meritorious cases are never brought, and frivolous or marginal cases are settled in order to avoid the high costs of litigation.<sup>64</sup> The ACTL and the IAALS also reported that, because issues are not identified early enough, discovery remains unfocused, resulting in costly discovery that can become its own end.<sup>65</sup> These phenomena—great cost, slow process, and delay in issue-identification—appear to open the door to abuse.<sup>66</sup> In these surveys, attorney opinion was consistent with decades-old beliefs about cost and delay. Discovery was cited as the top cause of delay in civil litigation, and sixty-six percent of ABA participants reported that electronic discovery is always abused. Seventy-five percent of ABA respondents “confirmed the fact that electronic discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense.”<sup>67</sup> The majority of ACTL Fellows surveyed did not believe the discovery system works well, and seventy-one percent “thought that discovery is used as a tool to force settlement.”<sup>68</sup> In reliance on these survey results, the ACTL and the IAALS suggested several reforms to the Federal Rules, including several discovery proposals that would limit the availability of discovery beyond initial disclosures, with a broad range of possible limitations as to scope, type, persons from whom discovery can be sought, and numerical or time limitations.<sup>69</sup> The ACTL and the IAALS proposed, among other things, that the civil system adopt a principle of “limited discovery proportionately tied to the claims

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<sup>62</sup> The survey administered to members of the ABA Section on Litigation and of NELA was a modified version of that administered to the ACTL Fellows. For a detailed account of the differences across the survey instruments, see EMERY G. LEE III & THOMAS WILLGING, *FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE* (2010).

<sup>63</sup> ACTL & IAALS, *supra* note 3, at 2.

<sup>64</sup> *Id.*; see also LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 14.

<sup>65</sup> ACTL & IAALS, *supra* note 3, at 2.

<sup>66</sup> *Id.* In explaining the problems with electronic discovery, the report quoted one respondent’s reply that “[t]he bigger the case the more the abuse and the bigger the nightmare.” *Id.*

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *Id.* at 9.

<sup>69</sup> *Id.* at 8–17.

actually at issue, after which there will be no more.”<sup>70</sup> The clear thrust of these proposals is to reign in a discovery system that is perceived currently as having no limits and enabling discovery disproportionate to the benefits and the matter at issue. The ACTL and IAALS operate on the basis of survey results remarkably consistent with the story of civil litigation that has been told since the 1970s. As we shall see below, however, these opinions are out of step with the hard data to emerge from the Duke Conference. Attorney impressions captured by the opinion surveys are in conflict with the picture that emerges from available empirical data.<sup>71</sup>

Just how distorted a vision of civil process is the cost-and-delay narrative? We turn in the next Part to the empirical studies themselves to get a sense of just how wide a divergence there is between the cost-and-delay narrative and empirical research.

## II

### THE EMPIRICAL RESEARCH

There are limitations to what the empirical studies we have can tell us. Many of the empirical questions we ask are not readily quantifiable. For instance, how many meritorious claims are *not* brought due to the high cost of litigation, to heightened pleading standards, or to other procedural barriers? Other questions implicated by the cost narrative are not amenable to an empirical answer. For example, how valuable is the ability to bring legal claims in court? And, relatedly, how open should courts be to claim making? Do the courts function primarily as sites for the resolution of differences among private parties, or does their value lie substantially in interpreting and enforcing the law—both common and statutory? Some of the debates about procedure touch fundamentally on our vision of what role we would like courts to play in society. An accurate empirical picture can help us have an informed debate about the issue, but it cannot suggest which is the best role for courts to play.<sup>72</sup> With these limitations in mind, we turn now to existing empirical data, spanning the last four decades, to understand that the

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<sup>70</sup> *Id.* at 10.

<sup>71</sup> *See infra* Part II.A.

<sup>72</sup> Arthur Miller provides a detailed consideration of the difficulties attendant to empirical work in this area and the scope of questions not susceptible to empirical review. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

cost narrative's persuasiveness does not rest on an empirical foundation.

#### A. *The 2009 FJC Study*

In 2008, the Civil Rules Advisory Committee began a new and wide-ranging endeavor to generate information that would help determine how best to reform the federal procedural rules.<sup>73</sup> As in prior years, the Committee focused substantial attention on discovery practice. Despite years of discovery reform, and with the latest changes to discovery practice still newly minted, the Committee nonetheless framed its initial empirical inquiry around discovery. Specifically, it aimed to understand the problem that discovery poses in terms of litigation cost and delay, as well as to determine how electronic discovery was working in light of the 2006 amendments to the Federal Rules.<sup>74</sup>

The Committee's focus made sense. In the ten years since it had last commissioned data on discovery from the FJC, the discovery landscape had changed dramatically. In the decade since 1998, communication and storage of information seem to have shifted overwhelmingly to electronic means. It seemed reasonable to presume that the predominance of electronically stored information (ESI) in the lives of the majority of Americans would lead to substantial changes in the amount and cost of discovery in federal courts. Perhaps the findings of earlier studies would no longer hold in the electronic information world. The rulemakers had already responded to this possibility with the 2006 amendments to the Federal Rules specifically addressing electronic discovery.<sup>75</sup> The Advisory Committee thus sought information on the impact of these amendments.<sup>76</sup>

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<sup>73</sup> Given the Civil Rules Advisory Committee is tasked with reviewing the civil procedural rules to continue to improve how civil litigation functions in the federal courts, it is no surprise that they were seeking to understand where new reforms would be most effective. Nonetheless the Committee's extensive efforts in organizing the Duke Conference are admirable. The Committee commissioned reports from the FJC, solicited data through surveys of attorneys, and garnered input from judges, scholars, and local and national bar associations. Koeltl, *supra* note 55.

<sup>74</sup> *See id.* at 538, 544.

<sup>75</sup> The 2006 amendments revised Rules 16, 26, 33, 34, 37, and 45 to address concerns about electronic discovery practice.

<sup>76</sup> Koeltl, *supra* note 55, at 544.

With these concerns in mind, the Advisory Committee turned to the FJC to prepare a study that would help to inform the Committee during the Duke Conference in 2010.<sup>77</sup> The Committee asked the FJC to focus on the issues that would be the subject of the Duke Conference, namely the costs of discovery and how electronic discovery was functioning under the revised rules.<sup>78</sup> The FJC designed the study to focus on these issues.<sup>79</sup>

In particular, the 2009 FJC study identified a sample of cases that would maximize the development of information about how discovery operates in the federal system. Cases that are unlikely to result in discovery were excluded; cases that were important for understanding the cost of discovery—namely cases that had been in the system for four or more years and cases that had ended in trial—were overrepresented in the sample.<sup>80</sup>

Given the Advisory Committee's continued concerns about discovery, and the widespread belief that the prevalence of electronic discovery had effected a sea-change in federal practice, the results of the 2009 FJC study were surprising, to say the least. The 2009 FJC study identified the amount at stake as the greatest determinant of cost in civil litigation.<sup>81</sup> While the study confirmed substantial electronic discovery activity, neither the increased costs nor the electronic discovery itself reach the level imagined by the cost narrative.<sup>82</sup>

As the Duke Conference organizers had presumed, the use of electronic discovery has become common, though perhaps not reaching the ubiquity imagined by some advocates of reform. Thirty to forty percent of cases involving discovery in the 2009 FJC study reported requests for production of ESI.<sup>83</sup> Also as expected, cases that involved a request for ESI tended to generate a higher estimate of discovery costs as a percentage of total costs than did non-ESI

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<sup>77</sup> LEE & WILLGING, *supra* note 6, at 5.

<sup>78</sup> Ultimately, the study was designed with a somewhat expanded scope. Although it did focus primarily on discovery, and electronic discovery in particular, the 2009 FJC study also sought information on case management, specific reform proposals, and attorney satisfaction with the Federal Rules as a whole. *See id.* at 2.

<sup>79</sup> The 2009 FJC study was designed to parallel a previous FJC study, discussed *infra* note 130. LEE & WILLGING, *supra* note 6, at 5.

<sup>80</sup> The sample selection is described in detail *supra* note 6.

<sup>81</sup> LEE & WILLGING, *supra* note 6, at 1–2.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 1. Over eighty percent of all respondents reported at least some form of discovery activity. *Id.*

discovery cases.<sup>84</sup> However, in the words of the 2009 FJC study authors, this difference was “not substantial[.]”<sup>85</sup> Indeed, whether the increased costs in cases involving electronic discovery are attributable to the electronic discovery itself is far from clear. When study respondents were asked to estimate electronic discovery costs as a percentage of total discovery costs, plaintiffs’ attorneys’ median estimate was five percent, and defendants’ was ten percent. “In other words, in half of the cases with an electronic discovery request . . . electronic discovery costs accounted for just 5 percent for plaintiff attorneys’ discovery costs and 10 percent for defendant attorneys.”<sup>86</sup>

Most significant among the data, however, were the estimates provided of litigation cost. The study examined estimated costs for all cases in which any discovery was taken.<sup>87</sup> The median cost reported by plaintiffs’ attorneys in such cases was \$15,000.<sup>88</sup> This

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<sup>84</sup> *Id.* at 36.

<sup>85</sup> *Id.* at 39.

<sup>86</sup> *Id.* at 40. The study’s authors explain that “defendants producing ESI do not consistently face higher costs than similarly situated defendants in cases without electronic discovery. Factors internal to the company and its information systems, not the Federal Rules, are responsible for some of these costs.” Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 785 (2010).

<sup>87</sup> This comprised eighty-six percent of respondents. LEE & WILLGING, *supra* note 6, at 8. One weakness of much of the empirical information available is that it is survey information. That is, it is not independently verifiable and relies on attorney impressions or self-reports of costs in a given case. The 2009 FJC study authors explain it thus: “The point is obvious, but we state it for clarity’s sake: the model estimates presented in this section are only as good as the respondents’ reports of costs in the closed cases.” EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS 2 (2010).

<sup>88</sup> LEE & WILLGING, *supra* note 6, at 35–36. The question asked attorneys to “*estimate*, if possible, the total litigation costs for your firm and your client in the named case, including the costs of discovery and any hourly fees for attorneys or paralegals. If the case was handled on a contingency fee basis, please estimate the total litigation costs to your firm.” *Id.* at 94. The median cost reported by plaintiffs’ attorneys in electronic discovery cases was \$30,000. *Id.* at 35. The median cost in electronic discovery cases on the defense side was \$40,000. *Id.* at 37. The costs are generally consistent with data from a case-based study conducted by the FJC (1997 FJC study) adjusted for inflation. Lee & Willging, *supra* note 86, at 770.

One would not want to minimize the burdens presented by costs ranging in the tens of thousands of dollars. It is not difficult to imagine federal claims, particularly employment or civil rights claims, for which this median cost point of \$15,000 or \$20,000 would be burdensome if not prohibitively high. But these are not the costs that Duke Conference organizers and participants had in mind when they described the federal system as in “crisis.” A quick look at some of the discussion of the FJC data in the Duke Conference literature makes this clear. See *supra* note 13 for examples.

figure was \$20,000 for defendants' attorneys.<sup>89</sup> Attorneys were also asked to estimate the percentage of total cost expended in discovery. The median response for plaintiffs' attorneys was twenty percent.<sup>90</sup> For defendants' attorneys, the estimate of discovery cost as a percentage of total cost was twenty-seven percent.<sup>91</sup>

Much of the concern over the cost of litigation generally, and of discovery costs in particular, centers around disproportionate costs.<sup>92</sup> It was therefore important to the FJC study to obtain estimates not only of the costs of litigation to each side but also of the ratio of costs to the stakes in the case.<sup>93</sup> Here, the figures should alleviate concerns that total litigation or discovery costs are "out of control." For plaintiffs, the median ratio of discovery cost to stakes was 1.6%.<sup>94</sup> For defendants, the reported median was 3.3%.<sup>95</sup>

Because there is no objective basis for determining what amount of discovery expenditure is proportionate or appropriate,<sup>96</sup> the 2009 FJC study sought a normative assessment from survey respondents by asking them what percentage of total litigation costs discovery costs

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<sup>89</sup> LEE & WILLGING, *supra* note 6, at 37.

<sup>90</sup> *Id.* This estimate was 0.1% at the tenth percentile and eighty percent at the ninety-fifth percentile. *Id.* Nearly ten percent of plaintiffs' attorneys estimated discovery as zero percent of total cost. *Id.*

<sup>91</sup> *Id.* at 38. This estimate was five percent at the tenth percentile and eighty percent at the ninety-fifth percentile. *Id.* Almost five percent of defendants' attorneys estimated discovery as zero percent of total cost. *Id.*

<sup>92</sup> See, e.g., John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 571–75 (2010) (articulating concerns that costs of discovery vastly outweigh benefits, that cases settle under pressure from discovery costs unrelated to stakes and merits of case, and that discovery costs are increasing disproportionately); Koeltl, *supra* note 55, at 538.

<sup>93</sup> The figures for stakes, as for costs, in the 2009 FJC study rely on attorney estimates of the stakes in the closed case. While an imperfect mechanism for assessing stakes, this method avoids problematic assessments of stakes tied to damages requests in pleadings or other contexts in which the figures might have very little relation to the strength of the claim. It seems reasonable to presume that an attorney's estimate of stakes in a given case would take into account the attorney's assessment of the strength of the claims.

<sup>94</sup> LEE & WILLGING, *supra* note 6, at 42.

<sup>95</sup> *Id.*

<sup>96</sup> Indeed, as Lee and Willging explain:

[L]arge percentages of practitioners agree that "[l]itigation is too expensive." But it is difficult to know what one is supposed to make of this finding. In one sense, litigation is almost always too expensive. It would often be less expensive to not have the dispute in the first place, or, barring that, less costly to find a way to resolve the dispute without recourse to the courts.

Lee & Willging, *supra* note 86, at 769.

should represent.<sup>97</sup> “Surprisingly,” the study authors write, “the median estimates of discovery costs to total litigation costs provided by survey respondents were *lower* than the median responses to the normative question.”<sup>98</sup> Whereas the median estimates of *actual* discovery costs to total litigation costs were twenty percent by plaintiffs’ attorneys and twenty-seven percent by defendants’ attorneys, the median *normative* assessments were thirty-three percent and forty percent, respectively.<sup>99</sup>

The fact that the study’s estimates of cost are lower than the cost narrative’s conventional wisdom would predict is especially worth exploring given the study’s careful design. The study was designed to capture information about contemporary discovery practice and cost. In this context, nondiscovery cases tell us little of use, whereas cases of greater duration or complexity promise to provide a richer discovery picture. As a result, the study is designed, if anything, to overestimate discovery volume and cost. Moreover, asking attorneys about the attributes of a recent case in which they were involved goes some way to overcoming the problems of the attorney opinion surveys that abound. By asking specifically about a recently closed case, the 2009 FJC study was able to focus attorney attention to an actual case, leaving them less reliant on conventional wisdom and availability bias.<sup>100</sup>

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<sup>97</sup> LEE & WILLGING, *supra* note 6, at 105.

<sup>98</sup> *Id.* at 40.

<sup>99</sup> *Id.*

<sup>100</sup> While the 2009 FJC study methodology usefully highlights the lack of empirical support for the cost-and-delay narrative, other aspects of the study design may reflect its focus on concerns animated by the cost narrative itself. That is, because it seeks to measure the cost-and-delay problem, with a special focus on the discovery context, the questions asked and the frame provided ignore other significant complaints about the federal procedural system. Some plaintiffs’ attorney comments appended to the study suggest other areas that might have been explored, such as discovery delays and discovery avoidance, limitations on number and length of depositions, information asymmetries, expanding disclosure obligations, and the delay in starting discovery until the Rule 16 conference, to name a few. Some illustrative comments follow:

“The current restrictions on discovery (e.g., number of depositions, 7 hr depositions) are skewed in favor of defendants. The cost of litigation in federal court is NOT unduly increased by discovery.” *Id.* at 115. “[T]he biggest issue is disproportionate resources (both legal and economic) when I bring meritorious claims against large multi-national entities. . . . [A] recognition of the parties’ relative financial resources would be appreciated, particularly when dealing with discovery delays.” *Id.* at 119. “This was a difficult survey to complete given that my clients are primarily individual employees that sue for discrimination or other civil rights violations.” *Id.* at 138. “I represent plaintiffs, who are generally low income, in civil rights litigation. The major stumbling block to

That the closed-case study methodology goes some way to alleviating the flaws of attorney opinion surveys is suggested by some of the findings of the 2009 FJC study itself. The normative assessments of discovery as a percentage of total cost are one example of this phenomenon. When asked to reflect in the abstract on the right amount of discovery cost for a “typical case,” respondents’ estimates increase as compared to their actual experience with the closed case that was the subject of the study.<sup>101</sup> In the “typical case,” the attorney falls back on the “common-sense” narrative of cost and delay. This benefit was also apparent in responses to questions concerning the point of the case at which attorneys believed issues are narrowed and framed for resolution. When asked about the closed case that the attorney had just completed litigating, 34.0% of plaintiffs’ attorneys and 20.4% of defendants’ attorneys responded that this focus occurred at the initial complaint.<sup>102</sup> In contrast, when asked about the “typical case,” the initial complaint was selected by just 10.1% of plaintiffs’ attorneys and 3.9% of defendants’ attorneys.<sup>103</sup>

The 2009 FJC study authors, Emery Lee and Thomas Willging, prepared a multivariate analysis of the factors associated with

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resolution of my cases is the failure of defendants to provide much that is useful in their Answers and Initial Disclosures. Not until we have gone through several rounds of discovery, motions to compel production and depositions do they get serious about settlement.” *Id.* “In employment litigation the plaintiff is always disadvantaged in discovery. The defense has all the information and control of most of the witnesses. Early, mandatory, comprehensive disclosure would serve to begin to even the playing field.” *Id.* “Limiting discovery in employment discrimination cases makes it even more difficult for plaintiffs to prove their cases, since they have to prove what a decision maker was thinking when he made the challenged decision. The proof is almost always exclusively in the possession of the defendant.” *Id.* “Many of the questions were not relevant to my practice because I engage in civil rights litigation under Titles II and III of the ADA, which have fee and cost shifting provisions. My clients never pay for costs or fees. My recovery of my fees and costs comes from the defendants.” *Id.* “The survey seems to be at least, in part, written to assist the big corporation try to limit their exposure in discovery and e-discovery. I believe the rules in Federal Court are already much more strict than in State Court and do not need to be amended. The system works well and should not be changed. If anything, Federal Courts could relax their standards a little. Less discovery would allow more defendants to avoid liability.” *Id.* at 142. “Generally, I found this survey to be biased—in a clear way—to encourage responses that would support greater limits and more cost sharing of discovery cost, which in turn disproportionately would adversely impact plaintiffs.” *Id.*

<sup>101</sup> *Id.* at 40.

<sup>102</sup> *Id.* at 45.

<sup>103</sup> *Id.* at 46.



litigation costs as reported in the study.<sup>104</sup> This analysis found nine traits that were associated with higher litigation costs for both plaintiffs and defendants, even after controlling for other factors.<sup>105</sup> However, while the analysis showed that a number of variables influenced cost,<sup>106</sup> Lee and Willging found that “the stakes in the litigation are, empirically, the best predictor of costs.”<sup>107</sup> Variation in stakes explains almost thirty-seven percent of variation in reported costs for plaintiffs and almost forty-seven percent of the variation in reported costs for defendants.<sup>108</sup> Lee and Willging explain that “if the monetary stakes in a case double, all else being equal, the costs increase by 25 percent.”<sup>109</sup>

In the plaintiff model of the multivariate analysis, most of the hypotheses were supported by the results.<sup>110</sup> Higher-stakes cases and cases with longer processing times were associated with higher costs for plaintiffs.<sup>111</sup> Electronic discovery was associated with higher costs for parties requesting ESI, even after controlling for other

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<sup>104</sup> LEE & WILLGING, *supra* note 87. There are several methodological points that bear noting: (1) Lee and Willging create two separate model estimates because they believe there are good reasons to suspect differences in costs depending on whether a party is a plaintiff or defendant, (2) the large sample size allowed for two separate models with large numbers of explanatory variables, (3) the analysis tested nineteen hypotheses, and (4) the models included controls for nature-of-suit categories common in the sampled cases such as contracts, torts, civil rights, consumer credit, labor, and intellectual property. *Id.* at 1–3. The baseline estimates for the models were for the roughly ten percent of sampled cases that did not fall into those six categories of cases. The fifth point worth noting is that there was also a variable included to capture each district’s judicial workload, as well as controls for circuit-level differences in cost. *Id.* at 3.

<sup>105</sup> *Id.* at 1. The nine traits are: (1) higher monetary stakes in the underlying litigation, (2) longer periods of time from filing to disposition, (3) trial dispositions, (4) electronic discovery requests from both plaintiff and defendant in the case, (5) disputes over electronic discovery, (6) greater case complexity, (7) summary judgment practice, (8) concern over the nonmonetary stakes in the underlying litigation, and (9) and representation by larger law firms. *Id.* There were also factors that explained variation in cases represented by plaintiffs. *Id.* These included the number of expert depositions taken and hourly billing. *Id.* Other factors explained variation in defendants’ attorney responses, including the number of types of discovery reported and contentiousness between the parties. *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Lee & Willging, *supra* note 86, at 768.

<sup>108</sup> *Id.* at 771.

<sup>109</sup> *Id.* at 771–72.

<sup>110</sup> LEE & WILLGING, *supra* note 87, at 5. The plaintiff model was statistically significant at the 0.001 level and explained approximately sixty-two percent of the variation in the dependent variable. *Id.*

<sup>111</sup> *Id.*

factors, and costs were higher for parties who not only requested but also produced ESI.<sup>112</sup> Similarly, most of the hypotheses were supported by the results in the defendant model.<sup>113</sup> Here, too, higher stakes and longer processing times were associated with higher costs and increased factual complexity.<sup>114</sup> Unsurprisingly, when a case was terminated through trial, it also tended to have higher costs, around twenty-four percent higher than cases not ending in trial, all other factors being equal.<sup>115</sup> A ruling on summary judgment increased defendants' reported costs by approximately twenty-two percent, controlling for other factors.<sup>116</sup> While defendants' costs were higher by about seventeen percent in cases in which the defendant was both requested to produce and produced ESI, this was not the case when the defendant was a requesting-only or producing-only party.<sup>117</sup>

The multivariate analysis also identifies cost drivers that do not fit into our customary understanding of cost and delay in the federal courts and are not typically the focus of reform efforts. The multivariate analysis found that, for both plaintiff and defendant models, the importance of non-monetary stakes to the client increased costs substantially, all else being equal.<sup>118</sup> In addition, the structure of attorney representation affects costs. The analysis showed that larger firms tended to have higher costs, even when controlling for other factors.<sup>119</sup> When an attorney worked in a firm with five hundred attorneys or more, costs were more than double those of a solo practitioner.<sup>120</sup> For plaintiffs' attorneys at large firms, costs were 109% higher; for defendants' attorneys, these costs were 156%

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<sup>112</sup> *Id.*

<sup>113</sup> *See id.* at 7–8. The defendant model was statistically significant at the 0.001 level and explained approximately seventy-six percent of the variation in the dependent variable. *Id.* at 7.

<sup>114</sup> *Id.* “A 1% increase in stakes was associated with a 0.25% increase in reported costs. . . . A 1% increase in case duration was associated with a 0.26% increase in costs, all else equal.” *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 8.

<sup>117</sup> *Id.* at 7 (“Thus, one cannot conclude that these parties had higher costs than parties in non-ESI cases, once factors such as case complexity, firm size, and stakes, among others, are controlled for.”).

<sup>118</sup> *Id.* at 6, 8. For plaintiffs, costs increased by about forty-two percent. *Id.* at 6. For defendants, the increase was twenty-five percent. *Id.* at 8.

<sup>119</sup> *Id.* at 6, 8.

<sup>120</sup> *Id.* at 6. The number of plaintiffs' attorneys reporting that they used hourly billing was almost one out of every three. *Id.*

higher.<sup>121</sup> In addition, hourly billing was associated with higher costs (by roughly twenty-five percent) for plaintiffs' attorneys.<sup>122</sup> Coupled with the study's other findings, these variations call into question not only the assumptions of the cost narrative but also the items targeted for procedural reform.<sup>123</sup>

### *B. Prior Empirical Studies*

Although the 2009 FJC study stood in contrast to most of the surveys presented at the Duke Conference, what makes it truly remarkable, from the perspective of the cost narrative, is how unremarkable it actually is. Nearly every effort to quantify litigation costs and to understand discovery practice over the last four decades has reached results similar to the 2009 FJC study.<sup>124</sup> Empirical studies have repeatedly failed to document exorbitant costs or widespread discovery abuse; they have generally found the volume of discovery, the costs of discovery, and the total costs of litigation to be less than expected. Both discovery costs and total cost have been found to relate to stakes, case complexity, and duration.

Since the early 1960s, those engaged in rule reform have sought out empirical data to help guide their efforts. In response to rising concerns about discovery and the potential for abuse, the Advisory Committee commissioned the Columbia Project for Effective Justice (Columbia Project) to develop data that would assist in crafting civil procedural reform.<sup>125</sup> The Columbia Project was one of the first and perhaps most comprehensive evaluations of discovery, and it concluded that the broad discovery regime enabled by the 1938 Rules did not create severe or common problems.<sup>126</sup> The Columbia Project found that discovery costs were not excessive but rather tied to the

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<sup>121</sup> *Id.* at 6, 8.

<sup>122</sup> *Id.* at 6. This correlation was not found in the defendant model, perhaps because there is such limited information of defendants' attorneys engaging in alternatives to hourly billing. *See id.* at 8. In the 2010 FJC study, fewer than five percent of defendants' attorneys reported using an alternative billing method. *See id.*

<sup>123</sup> *See generally* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073 (2002) (arguing that procedural rules are not a source of litigation costs).

<sup>124</sup> *See supra* Part II.A; *infra* Part II.B.

<sup>125</sup> For a full discussion of the findings of the Columbia Project, see GLASER, *supra* note 17.

<sup>126</sup> *See id.* at 160–61, 185–87.

stakes in the case.<sup>127</sup> Attorneys, it found, were less likely to engage in discovery if the predicted recovery was low (at that time, under \$2500), and very likely to engage in discovery if the predicted outcome was high (at that time, more than \$40,000).<sup>128</sup> No fundamental changes to the structure of discovery were made as part of the 1970 amendments to the Federal Rules, largely because the Columbia Project revealed that “[t]he costs of discovery do not appear to be oppressive, as a general matter, either in relation to ability to pay or to the stakes of the litigation.”<sup>129</sup>

The 1978 FJC discovery study made similar findings. The study found both occurrence of discovery and overall discovery volume to be lower than expected.<sup>130</sup> There was no formal discovery at all reported in approximately fifty-two percent of the cases reviewed by the 1978 study.<sup>131</sup> When discovery was taken, it tended not to be voluminous. In fewer than five percent of cases examined were there

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<sup>127</sup> See *id.* at 186–87.

<sup>128</sup> See *id.* at 56. Whereas two-thirds of attorneys who predicted recovery of less than \$2500 engaged in discovery, seventy-five percent of those predicting recovery between \$2500 and \$40,000 did, and ninety-two percent of attorneys predicting recovery over \$40,000 did so. *Id.*

<sup>129</sup> FED. R. CIV. P. 26 advisory committee’s notes (1970) (“The Columbia Survey concludes, in general, that there is no empirical evidence to warrant a fundamental change in the philosophy of the discovery rules. No widespread or profound failings are disclosed in the scope or availability of discovery.”).

<sup>130</sup> PAUL R. CONNOLLY ET AL., FED. JUDICIAL CTR., JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY (1978). It seems likely that the use of discovery is higher today than it was in 1978. The 2009 FJC study found that over eighty percent of survey respondents reported the use of some form of discovery, although the sample in the 2009 study was specifically designed to identify cases that would involve discovery activity. LEE & WILLGING, *supra* note 6, at 1. Other changes in discovery practice lend credence to the presumption that today’s discovery incidence might be higher. For example, in the 1978 study, depositions were the most frequently used discovery device, CONNOLLY ET AL., *supra*, at 28, whereas today, document requests are the most common. See LEE & WILLGING, *supra* note 6, at 8 fig.2. However, comparisons remain difficult. We have no recent study that is comparable to the 1978 FJC discovery project, both in the sample utilized and in the 1978 study’s review of case files and docket sheets to create a detailed database based not simply on attorney reports of the sample cases. As two researchers who have studied empirical questions related to discovery explain, “A sampling strategy designed to create a rich source of information about discovery by uncovering high-discovery or problem-discovery cases is suitable for much discovery research, but does not provide a solid basis for estimating discovery incidence rates for civil litigation as a whole.” Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 791 (1998).

<sup>131</sup> CONNOLLY ET AL., *supra* note 130, at 28.

more than ten requests for discovery.<sup>132</sup> Moreover, though reports of abuse were rare, motions for sanctions tended to be granted when filed.<sup>133</sup> Study authors also found that there were identifiable factors affecting the amount of discovery, including proxies for case complexity such as the number of parties involved and the presence of cross and counterclaims.<sup>134</sup> Amount in controversy was also found to affect the amount of discovery.<sup>135</sup> Once again, based on the findings of the 1978 FJC discovery study, the Advisory Committee decided not to move forward with broad discovery reforms that had been proposed by the ABA, finding them to be unwarranted based on the data.<sup>136</sup>

Studies from the 1990s were surprisingly consistent with the data from the 1960s and 1970s. Indeed, authors of the 1997 FJC study write,

Empirical research about discovery in civil litigation has yielded results that differ from the conventional wisdom, which claims that discovery is abusive, time-consuming, unproductive, and too costly. In contrast to this picture of discovery, empirical research over the last three decades has shown consistently that voluminous discovery tends to be related to case characteristics such as complexity and case type, that the typical case has relatively little discovery, conducted at costs that are proportionate to the stakes of the litigation, and that discovery generally—but with notable

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<sup>132</sup> See *id.* It should be acknowledged, however, that volume of discovery is hard to capture. One can easily envision a single request for discovery that is onerous and requires production of vast amounts of documents. Even more difficult is determining the quality of the discovery and its appropriateness to the case. For a detailed exploration of the challenges facing any effort to study discovery abuse empirically, see Mullenix, *Discovery in Disarray*, *supra* note 28.

<sup>133</sup> See CONNOLLY ET AL., *supra* note 130, at 19–20.

<sup>134</sup> *Id.* at 40.

<sup>135</sup> *Id.* The 1978 study found amount in controversy was a weaker identifier of the amount of discovery. *Id.* This may be because amount in controversy is a less reliable indicator of the stakes in a case than attorney estimates of stakes. Compare *id.* at 50–51, with Lee & Willging, *supra* note 86, at 771–72, and GLASER, *supra* note 17, at 56–57. The 1978 study suggests this same limitation: “Apparently, the amount claimed by the plaintiff in the complaint bears little relationship to the actual value of the case.” CONNOLLY ET AL., *supra* note 130, at 51.

<sup>136</sup> The Advisory Committee considered proposals aimed at eliminating abuse that included changes to the scope of discovery and limitations on interrogatories. However, citing the 1978 FJC discovery study, the committee note states, “There has been widespread criticism of abuse of discovery. . . . The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases.” FED. R. CIV. P. 26 advisory committee’s note (discussing amendments to Rule 26).

exceptions—yields information that aids in the just disposition of cases.<sup>137</sup>

The 1997 FJC study surveyed the attorneys of record in federal cases that had closed in the final quarter of 1996.<sup>138</sup> As with the FJC's study a decade later, median total costs and expenditures on discovery appeared to be much lower than the expectations of the bench and bar, and both appeared to be far more proportional to both cost and litigants' ability to pay.<sup>139</sup> The 1997 FJC results indicated that the median total cost of litigation, including attorneys' fees, was approximately \$13,000 per client.<sup>140</sup> This total cost was associated most strongly with the monetary stakes in the litigation.<sup>141</sup> However, costs were also found to increase as each of a number of factors increased, including the size of the law firm handling the case, the complexity of the case, and the level of contentiousness of the dispute.<sup>142</sup> Finally, discovery expenses were found to be low relative to the stakes in the litigation. The median estimate was that discovery costs amounted to three percent of the stakes.<sup>143</sup>

Given that procedural reform has repeatedly targeted discovery with the aim of curtailing litigation costs,<sup>144</sup> empirical studies have

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<sup>137</sup> Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rules Amendments*, 39 B.C. L. REV. 525 (1998) (footnotes omitted); see also THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 52 (1997) [hereinafter WILLGING ET AL., DISCOVERY & DISCLOSURE PRACTICE] (discussing how the extent of discovery and discovery-related problems are likely related to the size of the case and various other case characteristics).

<sup>138</sup> WILLGING ET AL., DISCOVERY & DISCLOSURE PRACTICE, *supra* note 137, at 1, 57. The study's design resembles that of the 2009 FJC study. For comparative purposes, the FJC sought to parallel parts of the 2009 study to those of the 1997 study. See LEE & WILLGING, *supra* note 6, at 5 n.3.

<sup>139</sup> See WILLGING ET AL., DISCOVERY & DISCLOSURE PRACTICE, *supra* note 137, at 14–15.

<sup>140</sup> *Id.* at 14. This includes all costs incurred through the attorney, including fees, transcript costs, costs associated with expert witnesses, and so forth. *Id.* It does not include any expenses incurred by the client separately.

<sup>141</sup> *Id.* at 16–17.

<sup>142</sup> *Id.* at 54.

<sup>143</sup> *Id.* at 16. At the ninety-fifth percentile, this figure was thirty-two percent. *Id.* at 17 tbl.6. Not only did discovery expenditures appear reasonable in relation to stakes but also more attorneys thought that discovery expenses were low relative to the stakes (twenty percent) than found them to be too high (fifteen percent). *Id.* at 18 tbl.8. Roughly half of the attorneys thought that discovery costs were “right” relative to the stakes. *Id.*

<sup>144</sup> See Mullenix, *The Counter-Reformation in Procedural Justice*, *supra* note 28, at 386.

sought to estimate discovery's contribution to the total cost of litigation. Each report supports the conclusion that discovery costs themselves are exaggerated and calls into question the utility of reform efforts targeting discovery. The 1997 FJC study lends greatest credence to the concerns over discovery expense, estimating discovery costs at nearly fifty percent of total litigation cost.<sup>145</sup> All other studies have found discovery costs to be a much smaller share of litigation expense. From the Columbia Project's estimates of discovery accounting for nineteen to thirty-six percent of litigation costs,<sup>146</sup> to a Rand study finding that lawyer work hours on discovery comprise zero to thirty-eight hours of total attorney work hours for general civil cases,<sup>147</sup> the empirical data find discovery costs to represent a much smaller percentage of total litigation expenses than imagined by the public or estimated by experienced attorneys.<sup>148</sup> The 2009 FJC study found median estimates of discovery at twenty percent of total costs for plaintiffs and twenty-seven percent of total costs for defendants.<sup>149</sup> Summarizing these four decades of research, Emery Lee and Thomas Willging explain that the studies indicate "[t]here will be some more discovery-heavy cases, of course, but 20 to 50 percent [of total litigation cost] is what we would expect in a typical case," and, "perhaps even in the typical major case," although, as Lee and Willging note, the data on such large cases are limited.<sup>150</sup> When these ranges are compared with the dominant descriptions of

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<sup>145</sup> WILLGING ET AL., DISCOVERY & DISCLOSURE PRACTICE, *supra* note 137, at 15 tbl.4.

<sup>146</sup> GLASER, *supra* note 17, at 180 tbl.43.

<sup>147</sup> JAMES S. KAKALIK ET AL., DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA (1998), *available at* [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2009/MR941.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/MR941.pdf). This study concluded that "[d]iscovery [was] not a pervasive litigation cost problem for the majority of cases." *Id.* at 27. For cases lasting more than 270 days, RAND found post-filing discovery accounted for thirty-six percent of attorney work hours. *Id.* at xxi tbl.S.2. RAND used attorney work hours as a proxy for cost because they found calculation of litigation costs across different attorneys' fee structures was too difficult. *Id.* at xvii.

<sup>148</sup> Compare this twenty-to-fifty-percent range to the median estimates of seventy percent reported by the Institute for the Advancement of the American Legal System. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, PRESERVING ACCESS AND IDENTIFYING EXCESS: AREAS OF CONVERGENCE AND CONSENSUS IN THE 2010 CONFERENCE MATERIALS 5 (2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/IAALS,%20Preserving%20Access%20and%20Identifying%20Excess.pdf>.

<sup>149</sup> LEE & WILLGING, *supra* note 6, at 38 tbl.6, 39 tbl.7.

<sup>150</sup> Lee & Willging, *supra* note 86, at 781.

discovery costs found in attorney surveys,<sup>151</sup> judicial opinions,<sup>152</sup> and public discourse,<sup>153</sup> it becomes clear that the cost narrative is out of touch with the empirical data. Coming to grips with why this may be is the aim of the following Part.

### III

#### EXPLAINING THE RESILIENCE OF THE COST-AND-DELAY NARRATIVE

As the preceding Parts describe, there exists a major gap between the vision of civil justice presented by the cost-and-delay narrative and that outlined by existing empirical studies. This inconsistency demands attention, not only because reform of civil procedure has long been marching to the beat of the cost-and-delay drum, but also because attempting to explain the discrepancy enables us to identify other failings of the civil justice system. The benefits to be gained for reform efforts are two-fold. These can avoid implementing changes on the basis of cost-and-delay assumptions that may not, in fact, be true; recognizing the unsubstantiated nature of the cost-and-delay narrative should help to improve the quality of reform proposals. Moreover, because the cost-and delay narrative enables the national debate to elide other weaknesses of the civil system, it is unable to address these underlying sources of dissatisfaction. Through careful examination of the cost-and-delay narrative's resilience, we develop a better understanding of the other sources of dissatisfaction with civil justice that have helped to create a receptive audience for the narrative. Thus far, understanding the narrative's persuasiveness has not been the focus of the literature. However, some suggestions about

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<sup>151</sup> See, e.g., NAT'L EMP'T LAWYERS ASS'N, SUMMARY OF RESULTS OF FEDERAL JUDICIAL CENTER SURVEY OF NELA MEMBERS 34 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/NELA,%20Summary%20of%20Results%20of%20FJC%20Survey%20of%20NELA%20Members.pdf>; AM. BAR ASS'N SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 98 (2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf>. In both surveys, attorneys' median estimate for the percentage of costs incurred in connection with discovery was seventy percent. Notably, responding to a question about what percentage of costs *should* be incurred in discovery, attorneys' median estimate was fifty percent.

<sup>152</sup> See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (relying on an Advisory Committee memorandum reporting that "discovery accounts for as much as 90 percent of litigation costs" in support of need to factor in potential discovery expense when considering dismissal of antitrust complaint).

<sup>153</sup> Mullenix, *Discovery in Disarray*, *supra* note 28, at 1401–02 (detailing politicians' and journalists' statements that discovery amounted to eighty percent of litigation costs).



causality are worthy of closer consideration.<sup>154</sup> Here, I identify three common themes arising in the cost-and-delay literature that provide a foundation for further examination into this question. The first relies on cultural and psychological factors to explain the dissemination of the narrative. These factors include widespread media distortion of legal stories and the way that cognitive bias works to amplify elements of the cost narrative. The second strand identifies sociological factors that support the narrative. Here, specifically, scholars point to the interest of the defense bar in propagating the narrative and the broader interests that professionals develop in intensifying the belief that litigation costs are high. I also discuss how the hierarchical structure of the legal profession contributes to the persuasiveness of the cost-and-delay narrative among influential members of the bar. The final explanatory theme turns to political and historical developments to account for the success of the cost-and-delay narrative. This strand describes how the narrative is bound up in certain political battles over what role law should play in society: a backlash to the expansion of rights, remedies, and discovery; the political struggle over the extent to which laws will be enforced; the question of what the legal system can achieve through the courts; and the extent to which the appropriate cost of litigation is a political—nonempirical—concern that implicates the very purpose and function of the legal system.

#### *A. Cultural and Psychological Factors*

Among the factors most often cited to explain the strength of the cost narrative is the role that the media plays, both by uncritically transmitting claims about excess cost and delay and by privileging remarkable stories. Unsurprisingly, large jury verdicts tend to garner media attention, whereas smaller verdicts or appellate review of large verdicts get less coverage, if any at all.<sup>155</sup> Less predictably, studies

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<sup>154</sup> The scholar most often associated with examining this discrepancy is Mark Galanter, a long-time chronicler of the ways in which popular ideas about the legal system, such as the “litigation explosion” and American litigiousness, persist in the face of careful empirical refutation by Galanter himself and many of his colleagues. The discovery reforms of the 1990s brought additional scholarly attention to the peculiarly powerful cost-and-delay narrative in the works of Linda Mullenix, Elizabeth Thornburg, and Jeffrey Stempel, among others.

<sup>155</sup> See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 744–47 (1998). Galanter discusses Oscar Chase’s analysis of how *The New York Times* and *New York Newsday* covered personal injury jury

have found that media overreport on certain types of cases, such as medical malpractice and product liability cases. One study found that though these types of cases comprised only eleven percent of tort filings and led to thirteen percent of tort trials, they made up seventy-four percent of the cases reported on.<sup>156</sup> Newspapers have also been found to report a much higher proportion of verdicts in favor of plaintiffs than those in favor of defendants.<sup>157</sup>

Linda Mullenix has carefully documented the media's role in fanning the flames of the cost-and-delay narrative during the late 1980s and early 1990s, in advance of the CJRA's passage. She demonstrates how unsubstantiated claims about the cost of discovery and level of litigiousness were repeated without verification by nationally syndicated columnists in the run up to the CJRA legislative effort.<sup>158</sup> Similarly, media coverage of sensational lawsuit stories has lent credence to the idea that Americans are unusually litigious. Mullenix opines, "We believe America is the most litigious society on earth not because this is true, but because the media have told us so over and over again. . . . We believe American civil litigation is out of hand because notoriously greedy lawyers engage in serious discovery abuse—not because they do, but because litigiousness has become linked in our minds with discovery abuse."<sup>159</sup>

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awards. *Id.* at 745. Chase compared the awards covered in the two newspapers with the awards reported in the *New York Jury Verdict Reporter* over a six-year period. *Id.* at 745. The average awards reported by the newspapers ranged from 6 to 17.2 times as large as the average awards recorded in the *Reporter*. *Id.*

<sup>156</sup> *See id.* at 744.

<sup>157</sup> *Id.* at 746 ("[A] verdict for the plaintiff is twelve times more likely to be reported than is a defense verdict. An award of punitive damages ratchets up the coverage disparity even further.").

<sup>158</sup> Mullenix, *Discovery in Disarray*, *supra* note 28, at 1402–03. The statistics parroted from then-Vice President Daniel Quayle's address to the American Bar Association included claims that seventy percent of the lawyers in the world lived in the United States, that Americans file eighteen million new lawsuits per year, and that seventy-seven percent of lawyers admit to abusing discovery. *Id.* These were not substantiated. *See id.* at 1441–42.

<sup>159</sup> *Id.* at 1395–96. Another image disseminated by media coverage is that of the unethical and rapacious attorney. It is a character that plays a pivotal role in the cost-and-delay narrative. The narrative trades in caricature of the venal lawyer. There are too many cases filed because lawyers file baseless claims in pursuit of their own financial gain. Discovery abuse is rampant because lawyers use it to rack up fees against clients. The system cannot be trusted to self regulate because that would require the ethical conduct of lawyers within the system. The "widespread distrust of lawyers . . . lend[s] credence" to the cost narrative. *Id.* at 1409. Galanter quotes a Republican political operative providing this advice: "Unlike most complex issues, the problems in our civil justice system come with a ready made villain: the lawyer. . . . It's almost impossible to go too far when it

Yet the question remains, why do the media cover litigation this way? The media do not have an independent interest in questions of cost and delay that would clearly bias them toward one view of civil justice reform over another. Nonetheless, the civil justice story that emerges from media reporting supports the account of cost and delay. Important work has been done to show how media coverage misrepresents the way the civil justice system functions. With this established, the question that must now be explored is why this is so. In order to fully understand the media's role, and to begin to make sense of the cost-and-delay narrative, it is necessary to explore more fully the context in which the media operates.

There remains a corresponding question: what makes the media's story resonate with the population? The public is not simply a passive audience that absorbs and accepts whatever story the media tells. Marc Galanter suggests that a more nuanced view of the audience may lie in psychological research on cognitive bias.<sup>160</sup> Lessons from cognitive psychology tell us that the brain is ill-suited to make use of data of certain kinds and in certain contexts.<sup>161</sup> The tendency to ignore relevant information about baseline frequencies and, consequently, to poorly gauge the representativeness of the data is relevant to assessing the cost-and-delay narrative. The frequency of widely discussed or publicized events may be overestimated. Confirmation bias—that is, the increased receptiveness to evidence that confirms what we already believe or think we know—leads to exaggerated certainty as to the accuracy of one's knowledge. Galanter explains, “In other words, the way our minds are built inclines us to think that we know more than we do.”<sup>162</sup> As a result, lawyers and businessmen may be highly confident about their own estimates of litigation frequency, cost, duration, and the nature of discovery, even though these assessments may be wrought with

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comes to demonizing lawyers. . . . Make the lawyer your villain by contrasting him with the ‘little guy,’ the innocent, hard-working American who he takes to the cleaners.” Galanter, *supra* note 155, at 748 (quoting THE LUNTZ RESEARCH COS., LANGUAGE OF THE 21ST CENTURY 128 (1997)). Similar to claims of media distortion, explanations that rely on a negative view of lawyers also leave us wondering why that negative view of lawyers persists. While it is true that the cost-and-delay narrative plays on the nation's dim view of lawyers, it is unclear from where this distaste for lawyers arose.

<sup>160</sup> *Id.* at 743–44.

<sup>161</sup> *See id.*

<sup>162</sup> *Id.* at 744.

cognitive biases that make them inaccurate.<sup>163</sup> Galanter posits that the interpretive effort required to assess liability risks “is a complex interpretive undertaking ideally suited for the appearance of the kinds of flawed intuitive judgment described in the cognitive psychology literature.”<sup>164</sup>

The psychological explanation, however, rests on some under-investigated assumptions. Why does the cost-and-delay narrative come to prominence when it does, and in the form that it takes? Would not our cognitive tendencies create the same pressures in the first three decades of the *Federal Rules of Civil Procedure* as in subsequent decades? Some cognitive biases, such as confirmation bias, are psychological tendencies, but they do not suggest a necessary content. In this context, confirmation bias would suggest that individuals are more attentive to information that supports the existing belief of the civil justice system as crippled by cost and delay. The cognitive bias does not itself explain why existing knowledge of civil justice is concerned with cost and delay. What accounts for the existence and strength of those beliefs? Understanding the context in which cognitive bias operates is crucial. I believe that the political and historical factors described in this Part shed some light on these questions and can supply that context.

Almost every account that attempts to refute the cost-and-delay narrative draws attention to the lack of empirical information supporting it and the lack of empirical study that could facilitate informed decision making about the civil justice system. Much of this discussion emphasizes that we have a scarcity of studies providing hard data.<sup>165</sup> Galanter attributes this in part to a legal

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<sup>163</sup> Galanter explains that the overconfidence in handicapping litigation frequency, cost, and size has been documented in empirical work undertaken by Theodore Eisenberg and Stewart Schwab. “In contrast to the widespread perception of ‘numerous successful constitutional tort cases imposing massive monetary costs on state and local governments,’ [they] find ‘relatively fewer cases, meeting with poor success and having a modest fiscal impact.’” *Id.* (quoting Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 530 (1989)). Eisenberg and Schwab provide that the error in perception results when individuals generalize from the pool of visible cases, available through published opinions, to the much larger pool of unobserved cases. *Id.* High-profile constitutional tort cases thus have disproportionate impact on evaluations of how constitutional tort litigation impacts the system on the whole.

<sup>164</sup> *Id.*

<sup>165</sup> Much of the research that is relied on consists of opinion surveys rather than actual empirical study. See discussion *supra* Part I. Discussing the litigation crisis and its relationship to the change in interpretation of Rule 56, Miller writes,

culture “uninterested in aggregates and empirical verification.”<sup>166</sup> There is not sufficient political will to invest in the collection of data that would be required to accumulate what he calls “a fund of systematic social knowledge about the working of the civil justice system.”<sup>167</sup> In a similar vein, Mullenix asserts that “[n]o group or institution commissioned case-based empirical research into federal court discovery.”<sup>168</sup> Mullenix argues that “soft social science methodologies” help to buttress what she terms “the myth of discovery abuse.”<sup>169</sup> Lacking the systematic knowledge of how civil justice operates, we are free to substitute our own hunches and impressions and make room for the persuasive force of the cost-and-delay narrative.<sup>170</sup>

Furthermore, important architects of the civil rules have drawn attention to the fact that much of the information that would be helpful in assessing the truth of the cost-and-delay narrative, or the effects of proposed reforms, is not susceptible to empirical study. Miller describes the challenges of determining the impact that changes to the pleading standard have on the system as a whole. While studies are under way to evaluate the effect, if any, that heightened pleading standards are having on the rate of dismissal, Miller asks, how do we count the cases that are not brought due to the

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[A] meaningful debate, however, requires empirical evidence to evaluate the direct and indirect effects of enhancing the Rule 56 procedure. This need is all the more urgent given that the efficiency gains offered to justify promoting use of summary judgment may be offset by negative effects on other system values, such as accuracy, fairness, the day-in-court principle, and the jury trial right.

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1048 (2003).

Paul Carrington explains that there was “a manifest shortage of data to resolve conflicting observations bearing on the feasibility of [procedural reform] proposals.” Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 625 (2010).

<sup>166</sup> Galanter, *supra* note 155, at 741 (footnote omitted).

<sup>167</sup> *Id.* at 740.

<sup>168</sup> Mullenix, *Discovery in Disarray*, *supra* note 28, at 1432.

<sup>169</sup> *Id.* at 1410. Additionally, she states: “The civil justice reform movement proceeded without the benefit of any empirical study designed to determine whether discovery abuse actually was a problem in federal civil litigation.” *Id.* at 1432.

<sup>170</sup> Galanter highlights the knowledge gap, because he finds it gives force to the litigation crisis narrative: “[T]he experiential gap is filled not by systematic data, but by gleanings from the media.” Galanter, *supra* note 155, at 743.

change in standard?<sup>171</sup> Even less susceptible to measurement would be gaining any sense of the quality of the claims that are dismissed—that is, how many meritorious claims will be filtered out due to the new pleading standards.<sup>172</sup>

Mullenix argues for the development of “sound empirical investigation” in order to counteract the “surveys, . . . anecdotes, and war stories” that ignore empirical evidence and rely instead on the accepted cost-and-delay narrative.<sup>173</sup> She describes some of the best empirical investigations of discovery issues but concludes that these studies underscore the difficulty of providing more than a measure of the *quantity* of discovery activity.<sup>174</sup> Researchers have had little success developing *qualitative* assessments of discovery practice.<sup>175</sup> Although Mullenix presents these challenges of “qualitative assessment” as methodological difficulties, I believe they actually point to a more significant difficulty at the heart of civil procedural debates. The very questions implicated by the cost-and-delay narrative—that is, whether civil justice is worth the burdens that it entails—are not questions susceptible to empirical verification. This limitation helps to explain the persuasiveness of the cost-and-delay narrative in the face of empirical data that seems to contradict it.

As Miller has explained, our studies count the “countable,” but they cannot speak, of course, to the things that are not measurable. Miller has stated this in the context of specific phenomena that may not be susceptible to measurement, such as the extent of harm that will go unremedied because claims are never brought (in contrast to measuring the percentage of motions to dismiss that are granted—that is a change that can be measured).<sup>176</sup> Implicit in Miller’s observation,

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<sup>171</sup> Author’s Notes from the 2010 Civil Litigation Conference at the Duke University School of Law (May 10–11, 2010) (on file with author).

<sup>172</sup> *Id.*

<sup>173</sup> Mullenix, *Discovery in Disarray*, *supra* note 28, at 1432. Mullenix takes as examples of “hard social science,” the 1978 FJC study of civil discovery, discussed *supra* Part II.B; a 1982 FJC study that sought to make qualitative assessments of discovery practice as an expansion on the quantitative findings of the 1978 FJC study; and a 1993 study of civil discovery in the state courts undertaken by the National Center for State Courts. *Id.* at 1433–42. Significantly, the 1982 FJC study was never published due to the “methodological problems” encountered in its efforts to document the qualitative dimensions of discovery practice. *Id.* at 1436. “The Baltimore study demonstrates the extreme difficulty of getting beyond anecdotes and opinions, in order to better document and assess the reality of discovery abuse.” *Id.* at 1440.

<sup>174</sup> *See id.* at 1434–42.

<sup>175</sup> *See id.*

<sup>176</sup> *See* Miller, *supra* note 72, at 47–49.

however, is that whether the civil system is “too costly” is, at base, not a question for which empirical inquiry can provide an answer. The question is a normative one, requiring that we decide what type of civil system we wish to have and what role we want courts to play in organizing behavior and, ultimately, in doing justice.

Thus, while literature on the knowledge gap identifies important lacuna in the empirical data, it also helps us to appreciate that the underlying concerns of the cost-and-delay narrative cannot be answered by empirical study. To develop the normative response that a solution ultimately requires demands that we pay closer attention to the historical and political context in which the civil justice system operates.

### *B. Sociological Factors*

While media distortion plays a role in most efforts to explain the cost-and-delay narrative, by far the most common cause identified is the role of interest-group influence.<sup>177</sup> Particularly, commentators note that repeat defendants are actively involved not only in advocating for reforms on the basis of the cost narrative but also in underwriting the dissemination of the narrative itself.<sup>178</sup> This is because procedural changes made in response to the cost narrative are widely understood to benefit defendants over plaintiffs, to help limit liability and curtail plaintiff access to justice. The role of business groups and insurance interests in proposing and passing reform legislation through the CJRA and the 2000 amendments is well documented. Mullenix’s thorough history of the CJRA’s passage emphasizes the business ties permeating the studies and activities that assisted in creating the legislation. She identifies how pro-business and insurance organizations helped to underwrite surveys that were then relied upon by the Brookings-Biden Task Force and the subsequent CJRA legislation.<sup>179</sup> There, pro-defendant forces were overrepresented on the task force itself and were subsequently “double counted,” as many of these industry representatives not only

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<sup>177</sup> See, e.g., Carrington, *supra* note 165, at 609–10; Mullenix, *Discovery in Disarray*, *supra* note 28, at 1396, 1416–25; Stempel, *supra* note 28, at 552–59.

<sup>178</sup> E.g., Galanter, *supra* note 155, at 747–48; Mullenix, *Discovery in Disarray*, *supra* note 28, at 1405–06.

<sup>179</sup> See Mullenix, *Discovery in Disarray*, *supra* note 28, at 1416–17.

served on the task force but also testified at the ensuing congressional hearings.<sup>180</sup> Mullenix describes the CJRA's legislative history as

a masterpiece of dishonesty and disinformation, all pressed into service by constituencies using civil justice reform rhetoric to secure advantageous procedural rules. Disingenuously, the CJRA's congressional supporters used survey poll research as evidence of facts. Thus, the legislative history is a stunning illustration of how perception and belief were used—at times naively, at times cynically—to shoulder the burden of proving the existence of a crisis in federal civil litigation.<sup>181</sup>

Discussing the 1998 proposed discovery rule changes, Elizabeth Thornburg declares, “It is no secret that the anti-discovery pressure has come from defendants, especially defendants in product liability, securities, and antitrust cases.”<sup>182</sup> Thornburg points out that discovery reform placing new limits on discovery had been taking place since the early 1980s.<sup>183</sup> Yet here was the Advisory Committee, hot on the heels of the CJRA's sweeping discovery-related legislation, proposing a new set of changes that once again aimed to curtail discovery. More discovery reform was on the table in 1998, explains Thornburg, because “organized forces have united to argue in favor of cutbacks in discovery. . . . This group consists in large part of repeat corporate defendants and their insurers.”<sup>184</sup> The chair of the Advisory Committee explained that it was renewing its examination of discovery “in response to ‘longstanding concerns’ about discovery abuse,” and described the “depth of dissatisfaction with discovery.”<sup>185</sup> Despite these claims of widespread dissatisfaction, the Committee heard the opposite from plaintiff-based

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<sup>180</sup> *See id.*

<sup>181</sup> *Id.* at 1420–21.

<sup>182</sup> Elizabeth G. Thornburg, *Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 243 (1999).

<sup>183</sup> *See id.* at 230.

<sup>184</sup> *Id.* Thornburg seems to imply that the Advisory Committee was susceptible to the pleas of defense interests in part because of the loyalties of Committee members themselves. Noting that the chair of the Committee, Judge Paul Niemeyer, “made review of discovery the highest priority for the Committee,” Thornburg drops a footnote detailing Niemeyer's practice experience at a large “business law firm.” *Id.* at 244. In subsequent text and notes, Thornburg points out that Niemeyer willingly recycles the claim that discovery constitutes eighty percent of costs, even though he admits that he knows of no empirical foundation for the claim, and even though the studies that the Committee commissions contradict the premise. *Id.* at 245 n.97. Stempel similarly calls attention to the defense-oriented backgrounds of the Advisory Committee. *See* Stempel, *supra* note 28, at 530.

<sup>185</sup> Thornburg, *supra* note 182, at 245.



advocacy groups, who described discovery abuse as “rare” and recommended against further discovery rules changes.<sup>186</sup> In contrast, defense-oriented organizations (including bar associations and think tanks) supported reform in ways that would limit discovery.<sup>187</sup> Thornburg concludes that “[t]he kinds of amendments proposed by the Advisory Committee, then, are those sought by groups that tend to appear in court as defendants and by their lawyers.”<sup>188</sup>

Galanter’s work suggests that the relationship of defense bar interests to the cost narrative is deeper than simply encouraging legislation in reliance on it.<sup>189</sup> Galanter describes the important role the “canon of tort horror stories” plays in maintaining and expanding a pessimistic view of the legal system in crisis.<sup>190</sup> Such horror stories are “promoted” by defense-oriented groups such as the American Tort Reform Association.<sup>191</sup> He explains how litigation “horror stories” are “circulated by entrepreneurial publicists through a succession of other media. . . . The focus is on the claimant and the triviality of the claim.”<sup>192</sup>

However, the cost-and-delay narrative is not supported exclusively through deliberate efforts by pro-business organizations. Several aspects of the way the law-related professions are organized

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.* Both the American College of Trial Lawyers and the Defense Research Institute supported the proposed scope limitations. While advocating that the scope of available discovery be narrowed, the Defense Research Institute also recommended that the recently instituted automatic disclosure regime be scaled back to a much more limited exchange of information. *Id.* A narrower discovery scope was supposed to reduce the prospect of “abusive” imposition of cost and delay through discovery, and indeed the ACTL and DRI advocated for narrowing the scope of discovery on this basis. *See id.* Nonetheless, DRI also sought to unwind the automatic disclosure mechanism even though it was designed to lessen cost, delay, and the possibility of abuse. *See id.*

<sup>188</sup> *Id.* at 245–46.

<sup>189</sup> *See* Galanter, *supra* note 155, at 740. Galanter refers to the work of Stephen Daniels and Joanne Martin chronicling the investment by business interests in spreading stories about problematic litigation and excessive punitive damages awards. *Id.* He writes, “Lobbyists, lawyers, pundits, and writers in corporate-sponsored think tanks have poured out the bad news about various disorders of the civil justice system, and their message has resounded loudly through the trade press and popular media.” *Id.*; *see also* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996) (arguing that the exaggerated emphasis of the costs of litigation and the level of litigiousness in American culture has had the effect of bypassing real problems with the American tort system).

<sup>190</sup> Galanter, *supra* note 155, at 729.

<sup>191</sup> *See id.*

<sup>192</sup> *Id.* at 731.

contribute to the robustness of the cost narrative. As Galanter explains, there are many professionals whose very position encourages the proliferation of the cost-and-delay narrative. Personnel professionals, for example, have strong incentive to amplify the threat of liability from wrongful discharge and themselves as a necessary protection from the onerous burdens of litigation.<sup>193</sup> Practicing lawyers have similar incentives. Galanter points also to politicians who champion the cost-and-delay narrative because it can provide a clear-cut issue on which to be decisive, gain votes, and fundraise.<sup>194</sup>

Simultaneously, there are structural factors that reinforce the cost-and-delay narrative. The structure and hierarchy of the legal profession itself lends credence to the cost-and-delay narrative.<sup>195</sup> Because opinion makers in the legal profession disproportionately represent large entities in complex litigation, they are most likely developing their impressions of the “normal” litigation experience in the most extraordinary contexts. That is, they are most likely to spend their time handling high-volume discovery in high-stakes litigation. Hence the 2009 FJC study’s median numbers—whether they be for total cost, amount of discovery, and proportionality of discovery<sup>196</sup>—are unlikely to look anything like the practice experience of these attorneys. This is true whether they come from large or small firms, as long as those firms handle complex commercial litigation. In this light it makes sense that, though the 2009 FJC study appears to be in

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<sup>193</sup> *Id.* at 747–48.

<sup>194</sup> *Id.* at 748. Galanter quotes one Republican political strategist providing the following advice:

[Y]ou should tap into people’s anger and frustration with practitioners of the law.

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*Make the lawyer your villain by contrasting him with the “little guy,” the innocent, hard-working American who he takes to the cleaners. Describe the plight of the poor accident victim exploited by the ambulance-chasers and the charlatans—individuals who live off the misfortunes of others.*

*Id.*

<sup>195</sup> See Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 3–5 (1984). Miller describes two arenas in which developments in the profession contribute to additional case volume in the courts. He argues that a growing profession coupled with the collapse of previously lucrative practices, such as automobile accident and divorce cases, created incentives for entrepreneurial lawyering. *Id.* at 3. When combined with a more “litigation-oriented” student profile in law schools, these developments of the legal profession helped to fuel the perception of litigation crisis and hence the cost-and-delay narrative. See *id.* at 3–4.

<sup>196</sup> See LEE & WILLGING, *supra* note 6.

line with the last three decades of findings, attendees of the Duke Conference were skeptical of the findings, since these did not seem to describe their experiences of litigation.

Though Galanter provides ample support for the notion that corporate interests have actively invested in disseminating the cost-and-delay narrative, nonetheless he finds it incomplete as an explanation for the narrative's staying power. He writes, "Surely there is an abundance of . . . calculating instrumentalism . . . but I would argue that, in an important sense, the proponents of the jaundiced view [of the civil litigation system] are creatures of the discourse rather than its authors."<sup>197</sup> Galanter suggests that we must understand the instrumentalist actions of interest groups within a broader cultural and political climate that not only shapes their positions but also, I would argue, helps determine what effect they will have. Lobbyists and publicists work to refashion legal cases into caricatures that support a narrative of cost and delay, of wasteful litigation carried out by greedy lawyers at the expense of upstanding corporate citizens.<sup>198</sup> But what makes their story compelling to individuals who likely have more in common with the plaintiff than with the corporate citizen? What makes it resonate with the legal profession itself, whose members have firsthand knowledge of the legal system?<sup>199</sup> To answer this question, we must turn our attention

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<sup>197</sup> Galanter, *supra* note 155, at 740.

<sup>198</sup> *See id.* at 726–40.

<sup>199</sup> A pessimistic view of the legal system as a whole and of lawyers in particular is more widespread among elites, including lawyers, than it is in society at large. As Galanter states:

Although beliefs and grievances about the litigation explosion, undeserving claimants, excessive regulation, the legalization of life, and the ascendancy of lawyers are widely shared, they are embraced with particular fervor by large portions of American elites. The jaundiced view is very much the view of "top people," including politicians, media people, business people, and medical people—and large sections of the legal elite.

*Id.* at 720 (footnote omitted). Galanter quotes from a pollster conducting a survey of attitudes nationwide toward lawyers and the legal system. The pollster concludes,

By and large, those who see lawyers in a more favorable light than average tend to be downscale, women, minorities, and young. . . .

Americans who are more critical than average tend to be more establishment, upscale, and male. The higher the family income and socioeconomic status, the more critical the adults are. Pluralities of college graduates feel unfavorably toward lawyers, while pluralities of non-college graduates feel favorably.

*Id.* at 720 n.12 (quoting PETER D. HART RESEARCH ASSOCS., A SURVEY OF THE ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 4–5 (1993)).

to the political and historical elements that help to sustain the cost-and-delay narrative.

### C. Political–Historical Factors

An observation made by Galanter helps shed some light on why resolving today’s procedural battles and vanquishing the cost-and-delay narrative proves so difficult. As he explains,

[P]opular opinion—is itself ambivalent about these matters, embracing the enlarged possibilities of remedy and protection but scorning others’ overeager recourse to them. . . . “[A]lthough Americans respond to the rhetoric of individual ruggedness, they vote with an ever more legalistic fervor. Especially since the 1960s, this lawyer-hating nation of individualists has supported—demanded, even—measure after measure enacting new rights that can be enforced only through lawyers and courts.”<sup>200</sup>

This ambivalence is at the heart of the cost-and-delay narrative’s appeal. The persistent call to reform civil process to combat (undocumented) cost and delay serves as a proxy for a political struggle over enforcement of legal rights. Paul Carrington characterizes the procedural reform movement as “[o]ne form of deregulation politics” which seeks to limit the regulatory regime established through the grant of broad court access and a multitude of legislatively enacted private rights of action.<sup>201</sup> He argues that “[a]dvocates of this kind of deregulation urged that the costs and delays of excessive litigation were disabling American businesses.”<sup>202</sup> Carrington asserts that although existing data weaken this argument, opinion makers nonetheless are “sensitive to business complaints.”<sup>203</sup> Carrington explains that “the motives of many of those seeking reform of discovery practice were primarily substantive

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<sup>200</sup> *Id.* at 750 (footnote omitted) (quoting WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 92 (1995)).

<sup>201</sup> Carrington, *supra* note 165, at 607. Carrington argues that the original design of civil procedural reform of the 1930s was “to enforce all the legal rights of citizens, whether derived from legislation or from state and federal constitutions.” *Id.* at 603. He describes the development of “[a] countervailing political force [that] arose to resist this form of privatized business regulation.” *Id.* at 606.

<sup>202</sup> *Id.* at 607.

<sup>203</sup> *Id.* at 608.

rather than procedural: they sought economic advancement, perhaps especially their own, if at the cost of decreasing civil justice.”<sup>204</sup>

Another articulation of this argument explains the influence of the cost-and-delay narrative as part of a backlash to the rapid expansion of rights, remedies, and discovery in the middle part of the twentieth century.<sup>205</sup> As Congress continued to create new private rights of action that could serve as a private enforcement mechanism to deterring unlawful behavior, business interests and others began to push back. Private enforcement power was increased even further through procedural developments, such as the 1966 revisions to the class action mechanism as well as the continued expansion of discovery available in civil suits. Given the substantial interests at stake, some of this backlash may have been a cynical attempt to protect financial gain; but the rapid transformation that took place in the civil justice system enabled claims of hyperlexis, of overburdened courts, and of excessive cost and delay to seem plausible, even to resonate, with the public.<sup>206</sup>

While preceding explanations offer useful insights, this final cluster of political–historical explanations are particularly helpful in understanding the cost-and-delay narrative. The political–historical explanations suggest that the narrative is bound up in disputes over the role that courts should play in society and that the narrative has developed as that role has been reconceptualized over the course of the last four decades. In particular, the political–historical explanations identify the disputes over more efficient procedural rules as a political conflict over the nature of the regulatory state and over the success of the courts in playing a regulatory role. Situating the cost-and-delay narrative in its political and historical context can

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<sup>204</sup> *Id.* at 610. Thornburg too suggests a direct relationship between arguments to limit discovery, largely made through a narrative of cost and delay, and the substantive aim of limiting regulation:

The tie between discovery and enforcement is no coincidence, and assuredly not a surprise to those groups seeking change. Business groups seek to limit discovery precisely *because* those limits will make it more difficult for plaintiffs to prevail in products liability suits. Having failed to pass substantive tort reform legislation, these groups seek procedural advantage; if the law cannot be changed, maybe it can be made unenforceable.

Thornburg, *supra* note 182, at 254 (footnotes omitted).

<sup>205</sup> See Miller, *supra* note 165, at 992; Miller, *supra* note 195, at 5–6.

<sup>206</sup> Miller described the relationship between the expansion of substantive rights and the proliferation of case filings. Miller, *supra* note 195, at 5–8.

explain otherwise mystifying aspects of the narrative, such as its resilience in the face of empirical evidence or the public's receptiveness to cost-and-delay tales like the tort "horror stories."<sup>207</sup>

These accounts provide important insights into how the broader political context alters the civil procedural landscape. Particularly, concerns over excessive cost of civil litigation, which have served as the driver of procedural reform for the last three decades, have staying power, because they give voice to a more general skepticism in society over economic regulation and the role of the state. The depth and breadth of these analyses is shown by the fact that they are able to account for other, non-procedural developments in law. This can be seen, for instance, in a debate that took place among legal scholars over the same period. Martha Minow describes how shifts in legal scholarship toward interdisciplinary methodologies are reflective of a broad disillusionment with courts and law arising in the 1970s. Much as Judith Resnik describes this process in the procedural context,<sup>208</sup> Minow explores this shift in the realm of legal scholarship, claiming that in the latter part of the twentieth century, a broad skepticism had developed about the value of law as a source for truth and justice.<sup>209</sup>

The developments in scholarship reflect the disillusionment with law arising among the elite—and amongst the legal elite in particular.<sup>210</sup> In the academic context, scholars came to doubt law's ability to reach determinate answers without recourse to external norms. Minow traces the development of legal thought after legal realism, which, through its recognition that law is a product of its social and political context, "shook law's foundations in knowable truth, objectively determinable rights, and reliably applied precedents."<sup>211</sup> The subsequent history of American legal thought became an exercise in reestablishing a basis for law's legitimacy.<sup>212</sup> This project dominated law through the middle half of the twentieth

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<sup>207</sup> See *supra* Part III.B.

<sup>208</sup> See Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (documenting the Federal Rules' drafters' faith in the possibility of courts to act as truth-seeking institutions and the drastic shift away from this vision in the ensuing fifty years).

<sup>209</sup> See Martha Minow, *Law Turning Outward*, 73 TELOS 79 (1987) (explaining the move to greater interdisciplinary methodologies in legal scholarship as a result of widespread disillusionment with law's ability to provide answers).

<sup>210</sup> There is evidence that such a dim view of law is indeed widespread among the nation's elites. See *supra* note 199 and accompanying text.

<sup>211</sup> Minow, *supra* note 209, at 93.

<sup>212</sup> See *id.*

century. New Deal policies played a role in this effort, initiating an expansion of the administrative state that held out the promise of law as an instrument of social transformation. According to Minow, “[t]hat New Deal experience launched the infusion of policy analysis into law.”<sup>213</sup> Through the technocratic philosophy and efforts of the New Deal, attorneys of the mid-twentieth century imagined that they would reestablish legal legitimacy.<sup>214</sup> As the political–historical accounts of the cost-and-delay narrative suggest, however, the technocratic and administrative state bumped up against significant restrictions; the regulatory function itself faced political opposition, and there emerged palpable limitations on court-driven social change. Minow explains that “[i]n the context of that period of political turmoil [the 1960s and 1970s], these ideas did not seem to answer how law could both proclaim neutrality as to substantive ends and certainty in its internal method.”<sup>215</sup>

According to Minow, the question this new legal scholarship sought to answer was “whether law can constrain raw power through reference to determinate norms or principles.”<sup>216</sup> This question closely resembles that which plays itself out in the procedural context. While proceduralists once confidently projected law as capable of rationally constraining power, and thus appropriately regulating social norms, over the last several decades this belief has declined, leaving proceduralists dissatisfied with the rules that had been designed to enable such regulation.

Resnik described this transition in 1986, as the cost-and-delay narrative began to gather substantial momentum:

[T]he Rule revisions and the current proposals reflect deep dissatisfaction with some of the beliefs embodied in the 1938 draft. The dominant claim today is that the framework has provided too many opportunities for exploitation and manipulation and too little guidance for the untutored. Many of the calls for reform seek to contract the occasions upon which procedure could be used—either by shortening the time between filing and disposition or by eliminating some of the procedural options. A justification often offered is, essentially, that ‘less is more,’ that fewer procedural

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 94. Minow describes the proliferation of scholarly trends, critical legal studies, law and economics, and law and literature that seek to understand law through disciplinary methods external to law. *Id.*

opportunities will beget more dispositions and that more dispositions are inherently desirable.<sup>217</sup>

As the demands on the civil system increased, in terms of case complexity, regulatory function, and sheer volume, the outcomes secured through extensive litigation or trial could not be shown to be better; in fact, they could not even be *experienced*, with any consistency, as better.<sup>218</sup> Accordingly, the expectation that the courts can handle these sophisticated, difficult, and broad-ranging functions has declined.<sup>219</sup>

In the nineteen-thirties, the rule drafters seemed to have had faith . . . in lawyer-based reforms in general. These gentlemen spoke about justice, truth, and the grand accomplishments of the legal profession as if they genuinely believed in them all. The Federal Rules of Civil Procedure were drafted and praised as the New Deal was being put into place. Lawyers were . . . the “new high priests,” and they carried their faith in their abilities and messages into all areas of government. In the intervening fifty years, many of these beliefs have been shaken.<sup>220</sup>

The historical framework offered by Minow and Resnik allow us to situate the cost-and-delay narrative in much larger social debates about the efficacy of law and legal reform. In so doing, the political–historical explanations provide a rich starting point for further enquiry that can both explain the phenomenon of the cost-and-delay narrative and identify useful avenues for those that seek to counter the narrative’s corrosive effect on access to civil justice.

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<sup>217</sup> Resnik, *supra* note 208, at 529.

<sup>218</sup> See *id.* at 529–30. Resnik identifies the same hostility to attorneys described by other scholars in media reports and statements by politicians, only she finds it in the Supreme Court itself:

The Court’s hostility to lawyers and to the procedures they engender is palpable: “It is scarcely open to doubt that if claimants were permitted to retain compensated attorneys the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation.”

*Id.* at 530 (quoting *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 326 (1985)).

<sup>219</sup> See *id.* at 538 (“In sum, on both the criminal and the civil sides—and relying upon rules, cases, and informal practices—the judiciary is in the midst of devising or borrowing mechanisms to bypass adjudication.”).

<sup>220</sup> *Id.* at 540–41. Additionally, Resnik stated, “The problems sought to have been resolved through procedural reform persist, and some accuse procedure of masking or worsening the indignities visited upon the citizenry. The decline in faith in adjudication and some of the open hostility towards the courts are based upon this absence of progress.” *Id.* at 541 (footnote omitted).



## CONCLUSION

The most recent data on civil process in federal courts give a fairly positive snapshot of the system's operation. Costs appear to be driven largely by a party's assessment of what is at stake in the case; discovery tends to generate the right amount of information while also being tied to stakes; and total dollar amounts for median cases tend to be far lower than the popular imagination would envision. Yet, at the very same moment, reports generated by prestigious bar associations and research institutes describe a system that is in "need of urgent attention." These diverging images of the civil justice system have been a fixture of procedural discourse for the last three decades.

Attorney opinion surveys routinely document that procedural doubt abounds and that doubt wears the cloak of the cost-and-delay narrative, yet the empirical data demand that we examine this doubt and not take it at face value. The historical-political explanations allow us to contextualize the narrative in order to understand its success and the political role that it plays. While the empirical work is helpful in debunking the cost-and-delay narrative, the historical-political accounts should remind us that these discussions about procedure cannot be, in the final analysis, empirical. Rather, we must be mindful that procedure is a normative enterprise. For even if the empirical data served to confirm the worst suspicions of the cost-and-delay narrative, that fact would not dictate a response.<sup>221</sup> Thus, to address the questions raised by the cost-and-delay narrative requires us to focus on first principles and on the role that we would like courts to play in our society. Common-sense appeals to reduction of cost and delay unhelpfully obscure more fundamental questions. Surely, cheaper and faster processes are better, all else being equal. But all else is not equal, and so the difficult work begins.

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<sup>221</sup> For example, if delay concerns center around judicial case burdens, one solution might involve appointing more judges, rather than finding ways to decrease case filings.

