

# LITIGATION REALITIES

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*After both summarizing recent empirical work and presenting new observations on each of the six phases of a civil lawsuit (forum, pretrial, settlement, trial, judgment, and appeal), the authors draw a series of lessons for understanding and using empirical methods in the study of the legal system's operation. In so doing, they generate implications for current and projected policy debates concerning litigation, while identifying areas that demand further empirical work.*

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## INTRODUCTION

Louis XVI's journal entry for July 14, 1789, was "Nothing."<sup>1</sup> The lawyer who today ignores empirical research risks giving in retrospect the very same impression.

Law, admittedly, has long ignored empirical methods. Legal theory, doctrine, and administration sprang from logic and intuition, rather than from scientifically appraised experience, no matter what Justice Holmes may have implied to the contrary.<sup>2</sup> But a new era is dawning. Empirical research should soon have a revolutionary impact on the law.

We propose in this Article to discuss what the legal community is beginning to learn about litigation, thanks to the recent application of empirical methods to legal studies.<sup>3</sup> Synthesizing our earlier publications and extending them, we treat the six phases of a lawsuit: forum selection, pretrial practice, settlement process, trial practice, judgment entry, and appellate practice. For each of these phases, we offer three perspectives: First, we overview the legal landscape of that phase, while also providing a graph of new descriptive but unanalyzed data as a snapshot of that phase—for example, a time trend in the selection between state and federal forums. Second, summarizing some prior work, published by ourselves or by others, we illustrate the insights that empirical analysis can give into the realities of that phase—for example, the sizable effect of forum on outcome. Third, we draw from that work some lessons for understanding and using empirical methods in the study of the legal system's operation<sup>4</sup>—for

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<sup>1</sup> See DUC DE CASTRIES, *LE TESTAMENT DE LA MONARCHIE: L'AGONIE DE LA ROYAUTE* 192–93 (1959). *But cf.* Interview by François-Xavier de Guibert with Paul Girault de Coursac & Pierrette Girault de Coursac, in PAUL GIRAULT DE COURSAK & PIERRETTE GIRAULT DE COURSAK, *ENTRETIENS SUR LOUIS 16*, at 144–45 (1990) (explaining that, in actuality, this much maligned monarch was noting only that there had been no hunt that day).

<sup>2</sup> See O.W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown & Co. 1881) ("The life of the law has not been logic: it has been experience."). *But cf.* O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."). For a discussion of Holmes's approach to legal reasoning, see generally Thomas C. Grey, *Holmes on the Logic of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 133 (Steven J. Burton ed., 2000).

<sup>3</sup> See generally Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 105 (1997) (advocating "empirical research about civil justice"); Symposium, *Empirical Studies of Civil Procedure* (pts. I & II), *LAW & CONTEMP. PROBS.*, Summer 1988, at 1 (presenting a variety of empirical insights on procedural issues), Autumn 1988, at 1 (same).

<sup>4</sup> See Theodore Eisenberg, *Empirical Methods and the Law*, 95 J. AM. STAT. ASS'N 665, 665 (2000) (distinguishing empirical studies of the legal system's operation from scientific analysis used in individual legal cases), *reprinted in* *STATISTICS IN THE 21ST CENTURY* 179, 179 (Adrian E. Raftery et al. eds., 2002).

example, a taxonomy of the various empirical methodologies along with their powers and limits.

## I

### FORUM: HEREIN OF METHODOLOGY

#### A. Forum Selection

“The name of the game is forum-shopping,” as we (and countless lawyers) have observed elsewhere.<sup>5</sup> In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all lawsuits, regardless of their ultimate disposition, entail forum selection.

In our earlier article, *Exorcising the Evil of Forum-Shopping*, we sketched the big picture along the following lines.<sup>6</sup> We began by considering the individual case. The plaintiff’s opening moves include shopping for the most favorable forum, be it some state or the federal system and be it any particular place within the jurisdiction. Then, we noted, the defendant’s parries and thrusts might include some forum-shopping in return, possibly by removal or by a motion for change of venue.<sup>7</sup> Forum is worth fighting over because outcome often turns on forum, as we shall soon show. When the dust settles, the case does too—but on terms that reflect the results of the skirmishing. Thus, the fight over forum can often be the critical dispute in the case.

When we cumulated these tendencies systemically, we observed that forum selection is very important not only to the litigator, but also to the office lawyer drafting contracts with an eye toward possible future litigation.<sup>8</sup> Not surprisingly, there exists an entire treatise devoted to the subject of forum selection.<sup>9</sup> Then, once in litigation, the parties frequently dispute forum.<sup>10</sup> Litigators deal with nearly as many change-of-venue motions as trials.<sup>11</sup> Thus, forum selection is a critical concern of the legal system.

Now consider some new data on removal, as presented in Figure 1.<sup>12</sup> Although the overwhelming majority of all cases are, of course,

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<sup>5</sup> See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) [hereinafter *Forum-Shopping*]. It appears that policy-makers are joining the forum-selection game, as demonstrated by how the fighting over the Patients’ Bill of Rights legislation has come to center on the question of federal or state forum. See Jess Bravin & Milo Geyelin, *Patients Face New Limits Under Compromise Bill*, WALL ST. J., Aug. 3, 2001, at A8.

<sup>6</sup> *Forum-Shopping*, *supra* note 5, at 1508–09.

<sup>7</sup> See *id.* at 1508.

<sup>8</sup> See *id.* at 1508–09.

<sup>9</sup> ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION (rev. 2d ed. 2001).

<sup>10</sup> See *id.* § 1:02 (discussing specific cases involving disputes over forum).

<sup>11</sup> See *Forum-Shopping*, *supra* note 5, at 1509 & n.3.

<sup>12</sup> We describe the source of these data *infra* text accompanying note 43. We eliminated asbestos cases from the Northern District of Ohio in 1990 to avoid the distortion

initiated in state courts,<sup>13</sup> a surprising number of those cases are removed to federal court.<sup>14</sup> The obvious story is one of forum selection.<sup>15</sup> Within that story, however, is a surprising time trend. The graph shows removal rates over the thirty-year period for which computerized data exist. The upper line shows the proportion of diversity cases that originated as removals. The lower line shows the proportion of those removed cases that the district court remanded. The obvious removal story, when altered to account for these time lines, suggests the possibility of increasing abuse of removal as a forum-selection device, a story that nicely conforms with anecdotal impression.<sup>16</sup>

## B. Forum Effect

What is the effect of forum selection on the outcome of cases? Practitioners and policymakers alike obviously have interest in this question. We previously used empirical methods to investigate the effect of forum both in the context of removal from state to federal court<sup>17</sup> and in the context of transfer of venue between federal district courts.<sup>18</sup> These methods entail much more analysis than a sterile data compilation like Figure 1 but, as we shall explain, they involve as much art as science.

Let us define "win rate" as the fraction of plaintiff wins among all judgments for either plaintiff or defendant. Our *Removal* article shows that plaintiffs' win rate in removed cases is very low, as compared to state court cases and cases originating in federal court. For example,

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created by their unusually high number. We do not provide data as to the remand rate prior to 1979 because they are reliable only from fiscal 1979, when there were changes in the Administrative Office's coding practices.

<sup>13</sup> See DANIEL JOHN MEADOR, *AMERICAN COURTS* 31–33 (2d ed. 2000).

<sup>14</sup> See *infra* fig.1.

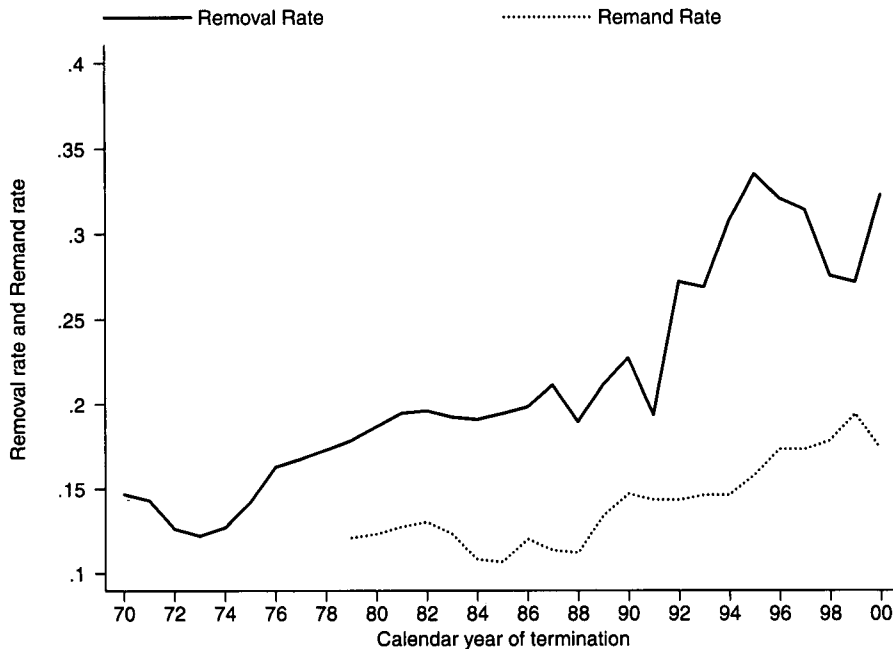
<sup>15</sup> Moreover, between 1% and 2% of federal cases are transferred from one venue to another. Interestingly, much like the removal rate, the transfer rate has evinced a significant proportionate increase over recent decades. See *Forum-Shopping*, *supra* note 5, at 1526–29.

<sup>16</sup> Compare, e.g., *Acosta v. Master Maint. & Constr., Inc.*, 52 F. Supp. 2d 699, 706–07 (M.D. La. 1999) (upholding removal by defendant insurers on tenuous basis of foreign arbitrability), with, e.g., *Aluminum Co. of Am. v. Admiral Ins. Co.*, No. C93-32C (W.D. Wash. Apr. 9, 1993) (remanding after removal by a nonparty-insurer). A prominent tactic by defendants in tobacco litigation was to remove early and often, or even late in the game. See, e.g., *Ieyoub v. Am. Tobacco Co.*, No. CIV.A.96-0908, 1996 WL 544210, at \*3 (W.D. La. July 16, 1996) (removal after filing of complaint); *Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000) (removal after verdict).

<sup>17</sup> Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) [hereinafter *Removal*].

<sup>18</sup> *Forum-Shopping*, *supra* note 5; see also Kevin M. Clermont & Theodore Eisenberg, *Simplifying the Choice of Forum: A Reply*, 75 WASH. U. L.Q. 1551 (1997) (defending our thesis on transfer).

FIGURE 1: REMOVAL AND REMAND RATES IN FEDERAL DIVERSITY CASES



Source: Administrative Office data

the win rate in original diversity cases is 71%, but for removed diversity cases is only 34%.<sup>19</sup>

The explanation could be the ready one based on the purpose of removal: by removing, defendants defeat plaintiffs' forum advantage and shift the biases, inconveniences, court quality, and procedural law in the defendants' favor.<sup>20</sup> Alternatively, the explanation might lie not in forum impact but instead in case selection: removed cases may simply be a set of weak cases involving (1) out-of-state defendants who have satisfied or settled all but plaintiffs' weakest cases or (2) plaintiff attorneys who have demonstrated their incompetence by already exposing their clients to removal.<sup>21</sup> Our analysis indicated that both forum impact and case selection are at work.<sup>22</sup> Thus, forum really does affect outcome, with removal taking the defendant to a much more favorable forum.<sup>23</sup> After regression—a statistical technique that helps to make removed cases comparable in kind to other cases and thus to

<sup>19</sup> *Removal*, *supra* note 17, at 593, 594 tbl.1.

<sup>20</sup> *See id.* at 599–602.

<sup>21</sup> *See id.* at 602–06.

<sup>22</sup> *Id.* at 606–07.

<sup>23</sup> *Id.* at 607.

neutralize the case-selection effect<sup>24</sup>—the impact of removal remains sizable and significant. The statistical analysis indicates a residual removal effect for diversity cases that would reduce a plaintiff's 50% odds for success to about 39%.<sup>25</sup> This 11% reduction from even odds represents the impact of a federal forum on the case—the *removal effect*.<sup>26</sup>

We also studied the *transfer effect*, whereby plaintiffs' win rate drops markedly after transfer of venue. Plaintiffs' win rate in federal civil cases drops from 58% in cases in which there is no transfer to 29% in transferred cases.<sup>27</sup>

For transfer, the loss of a favorable forum, which results in a strongly shifted balance of inconveniences and a shift of local biases, seems to be the primary explanation, because explanations based on differences in the respective strengths of nontransferred and transferred cases are weak.<sup>28</sup> That is, the win rate declines largely because the plaintiffs have lost a forum advantage. A plaintiff's 50% odds would drop after transfer of venue to approximately 40%, after controlling for all available variables.<sup>29</sup>

The comparison of removal and transfer suggests a consistent *forum effect*, whereby the plaintiffs' loss of forum advantage due to removal or transfer reduces their chance of winning by about one-fifth. Here the insight coming from empirical research is no surprise, as it mainly confirms what most lawyers already knew. The name of the game indeed is forum-shopping, and so all those lawyers out there are not wasting their clients' money on forum fights.

This empirical result is working its way into further research. A recent article of the doctrinal variety, in which the author attempts to rationalize the prevailing forum-selection doctrines that permit all this forum-shopping, builds on the established premise of a sizable forum effect.<sup>30</sup> More recently, Professor Kimberly Moore undertook "the first large-scale empirical analysis of patent enforcement in the federal

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<sup>24</sup> See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1129–32 (1996) [hereinafter *Xenophilia*] (discussing the use of multivariate regression to study the effect of party citizenship on outcome). Multivariate regression is a statistical technique that quantifies the influence of each of several factors (independent variables) on the phenomenon being studied (dependent variable). See generally MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 350–479 (2d ed. 2001) (applying regression analysis to various legal issues).

<sup>25</sup> *Removal*, *supra* note 17, at 606.

<sup>26</sup> See *id.* at 606–07.

<sup>27</sup> *Forum-Shopping*, *supra* note 5, at 1511–12.

<sup>28</sup> See *id.* at 1514, 1516–17, 1524–25.

<sup>29</sup> See *id.* at 1524 & n.39 (showing reduction to 40%); cf. *Removal*, *supra* note 17, at 603 n.67 (showing reduction to 38% for diversity cases).

<sup>30</sup> Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168, 200 (2000).

district courts.”<sup>31</sup> Consistent with the empirical results described in this Article, she concludes that a wide choice of forum exists in patent litigation, that parties actively work to select forum, and that forum continues to play a critical role in the outcome of patent litigation:<sup>32</sup> “Forum shopping is alive and well in patent litigation.”<sup>33</sup>

### C. Methods of Empirical Research

The social sciences—economics, psychology, sociology, law, and so on—employ a variety of empirical methods. Empirical methods are those that employ means for the systematic observation of experience in pursuit of inductive ends. The social scientists either create experience by experiment or find experience in records, and then they analyze this experience. In analyzing experience, the social scientists might apply a variety of tools. The most powerful of these—and the weapon that has enabled a revolution in legal studies—is statistics. Statistical analysis entails the assembly and organization of plentiful data, which are almost always in the form of numbers, and analysis of the data to reach inductive conclusions.<sup>34</sup> In the particular arena of legal studies, the statistical research to date divides into three groups, which differ in their method of data assembly.

*First*, there are statistical analyses of published judicial decisions.<sup>35</sup> In a sense, this group of studies represented a systematization of traditional legal research. Instead of reporting the fruits of years of subjective reading of opinions that had crossed one’s desk, the legal scholar turned to selecting randomly, coding tirelessly, and then analyzing hundreds of cases. This new kind of research was a step forward. And it has become much easier to do given the development of computerized commercial databases of legal materials. But it is a very risky undertaking.<sup>36</sup> On the one hand, judicial decisions represent only the very tip of the mass of grievances.<sup>37</sup> From that highpoint of actual judicial decisions, it is tough to infer truths about the underlying mass

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<sup>31</sup> Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 892 (2001).

<sup>32</sup> *Id.* at 937–38.

<sup>33</sup> *Id.* at 937.

<sup>34</sup> See generally Exchange, *Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1 (2002) (presenting several articles debating the utility and relevance of applying social science rules of inference to empirical legal studies).

<sup>35</sup> See, e.g., DONALD R. SONGER, REGINALD S. SHEEHAN & SUSAN B. HAIRE, *CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS* (2000); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1 (1998).

<sup>36</sup> See Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 75 (2001) (“Understanding these diverse [determinants of publication] is crucial for . . . legal academics and social scientists who rely upon databases of published opinions to track judicial behavior.”).

<sup>37</sup> See *infra* Part III.A.

of disputes or what lies below disputes. On the other hand, published decisions are a skewed sample of that tip of judicial decisions. A rather small percentage of judicial decisions reach publication. This shortcoming is becoming more serious. The publication rate even for the heavily published decisions of the federal courts of appeals has dipped from almost 50% in 1976 to just over 20% in 2000.<sup>38</sup> This reduced sample is certainly not representative of all judicial decisions. For example, publication trends skew seriously toward publication of reversals rather than affirmances: federal courts of appeals' civil decisions show an 82% affirmance rate for all appeals from tried judgments, but their published decisions in comparable cases show only a 63% affirmance rate.<sup>39</sup>

*Second*, the real heroes of empirical research create their own data for their subsequent statistical analyses.<sup>40</sup> They might do this by experimental work or by archival research. That is, they might, for example, feed a series of simulated cases to a number of mock juries. Or they might spend months stumbling around in dusty court files, and then go out in the field to uncover each case's real facts to which the file coldly alludes. These methods have long been possible, and for just as long they have gone rarely employed. And that situation will persist into the future. Basically, the reason is that this kind of work is a drag. It voraciously consumes time and money. Moreover, there is no one to do it. Law-trained persons are unsuited by temperament and training. High opportunity cost and low professional reward also disincline them. Non-law-trained persons are, well, not trained in law. Social scientists have plenty to study that does not require the courage and effort of venturing into the mysterious realm of the law.

*Third*, the most promising group of statistical studies involves analyses of publicly available, usually governmental, databases.<sup>41</sup> One could view this approach as a way to overcome the limits and risks of published-decision research. Or one could view it as a free-riding version of the heroic approach. It is both, because it yields valid results

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<sup>38</sup> See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. (forthcoming) (manuscript at 120, on file with authors) [hereinafter *Plaintiphobia*].

<sup>39</sup> See *id.*

<sup>40</sup> See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (Univ. of Chi. Press 1971) (1966); see also John Kaplan, Book Review, 115 U. PA. L. REV. 475 (1967) (reviewing KALVEN & ZEISEL, *supra*); Michael H. Walsh, *The American Jury: A Reassessment*, 79 YALE L.J. 142 (1969) (book review) (same). See generally Valerie P. Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 LAW & SOC. INQUIRY 323 (1991) (assessing the historical impact of *The American Jury* on legal and social science research).

<sup>41</sup> See, e.g., Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 577 (describing "a low cost bricolage strategy of trying to capture, refine, and juxtapose scattered data already in the public domain").



by feasible means. Broad and growing databases are available at no cost. Access is easy, especially given the Internet's increasing power. Inexpensive but sophisticated commercial statistical software now exists, rendering the analysis step more achievable. In short, everything is in place for an explosion of empirical work. So it is this group of statistical studies that should have the biggest impact on the law.

As explicit illustrations of this third group, consider the foregoing studies of data on forum selection, by us and by Kimberly Moore.<sup>42</sup> Where did all that stuff come from? It came from data gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research.<sup>43</sup> We shall be using this one body of data throughout this Article. In an earlier article, we described the database, and its strengths and weaknesses, in the following way.<sup>44</sup>

These data convey details of all cases terminated in the federal courts since fiscal 1970. When any civil case terminates in a federal district court or court of appeals, the court clerk transmits to the Administrative Office a form containing information about the case.<sup>45</sup> The forms include, inter alia, data regarding the names of the parties, the subject-matter category and the jurisdictional basis of the case, the case's origin in the district as original or removed or transferred, the amount demanded, the dates of filing and termination in the district court or the court of appeals, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached decision, the prevailing party and the relief granted.<sup>46</sup> Thus, the computerized database, compiled from these forms, contains data concerning all of the millions of federal civil cases over many years from the whole country.

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<sup>42</sup> See *Removal*, *supra* note 17; *Forum-Shopping*, *supra* note 5; Moore, *supra* note 31.

<sup>43</sup> See 11 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES transmittal 64, at II-18 to -28 (Mar. 1, 1985) (district court); 11 ADMIN. OFFICE OF THE U.S. COURTS, STATISTICS MANUAL ch. I, at 7-43 (June 1989) (court of appeals). For a complete description of the Administrative Office database, see INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970-1997, ICPSR 8429 (1998). For easy access to part of this database, see Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry*, at <http://empirical.law.cornell.edu> (last modified Sept. 20, 2002), which is discussed in Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. 94 (1996). For a more detailed discussion of this database's strengths and weaknesses, see *Removal*, *supra* note 17, at 585-87; Frank B. Cross, *Comparative Judicial Databases*, 83 JUDICATURE 248 (2000); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 380-83 (2000).

<sup>44</sup> *Removal*, *supra* note 17, at 585-87.

<sup>45</sup> *Id.* at 585.

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

In the aggregate, the data appear reliable. Still, data of such vast coverage, gathered under sometimes confusing instructions, must involve minor *gaps and misclassifications*. The data were entered by many different people over an extended period,<sup>47</sup> although this dispersion at least would neutralize mistakes and biases. Also, the standards for coding have changed over time,<sup>48</sup> which necessitates careful attention. Only in fiscal 1979 did the Administrative Office start to record which party prevailed by judgment in the trial court. In fiscal 1986 it began to indicate meaningfully the citizenship of the two principal parties in diversity cases as well as their corporate or individual status.

When working with outcomes, one faces a difficulty in dealing with *formal wins*. This database records only formal outcome, as in judgment for plaintiff or defendant.<sup>49</sup> So a formal loss, which may have been worthwhile for the plaintiff because of its deterrent effect or other long-run benefit, counts as a loss. And a formal win, which may have resulted in an unexpectedly small or economically insufficient recovery, still counts as a win. Nevertheless, formal outcomes, especially when averaged over all cases for many years, can tell the researcher quite a bit.

Yet another difficulty lies in limiting the focus to *technical judgments*. Many grievances are abandoned, claims satisfied, and disputes settled. Most litigated cases settle or terminate in some manner, short of judgment, that prevents ascertaining the winner from afar. Nevertheless, remember that judgments comprise much more than trial outcomes. For Administrative Office purposes, judgments might be the result of adjudication, consent, or default, although they normally do not include voluntary dismissals or dismissals for lack of prosecution.<sup>50</sup> Again, then, although the researcher must keep the data's limitations in mind, the study of judgments can yield much information.

Most unfortunately, the Administrative Office data do not contain many other things one would like to know. They show *no particulars* of each lawsuit.<sup>51</sup> For example, although the Administrative Office form distinguishes among many subject-matter categories, including branches of tort such as medical malpractice and motor vehicle, it does not distinguish among types of claims within the categories.<sup>52</sup> This failing is an important limitation, because outcomes depend heavily on the type of case. One must always control for the case category. But one would always like to control on a finer

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 586.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

level. More generally, the Administrative Office's data are just a bunch of codes about a limited number of case features. This situation restricts what one can study about the legal system, and surely makes risky any behavioral inferences one might draw therefrom. But these data are markedly better than nothing, and other databases do and will exist for the study of other legal matters.

## II

### PRETRIAL: HEREIN OF REFORM

#### A. Disposition Time

The pretrial phase of litigation obviously is the lengthiest phase. Naturally, then, it has been the focus of reform efforts to speed up litigation. Reform has overhauled pleading and motion practice, while adding disclosure, discovery, and conference mechanisms. Just as naturally, one would think, the reformers would have demanded empirical groundwork. But they have not. Instead, they have proceeded largely on the basis of logic and intuition.

It is also not surprising that reformers focus on delay in litigation, whether in the pretrial phase or in the other phases of a lawsuit. "Delay in the courts is unqualifiedly bad."<sup>53</sup> Justice delayed is justice denied, after all. And there is plenty of delay for everyone.

Figure 2 shows delay, although it does not support a view that the problem has increased recently. The upper dashed line shows the average time from filing to termination for those cases that the procedural progress code indicates were resolved during or after trial. More importantly, the lower dashed line shows the time from filing to termination for the much more numerous cases resolved before trial begins.<sup>54</sup> These untried cases do not take that long to reach termination, and the mean length of time to termination has not increased over the years despite the considerable increase in the courts' caseload as indicated by the solid line.<sup>55</sup>

Moreover, there is good reason to proceed with wariness before accepting the truth either of old maxims about delay or of new proposals for reform based merely on logic and intuition. Both recent theoretical work and recent empirical study argue for such caution.

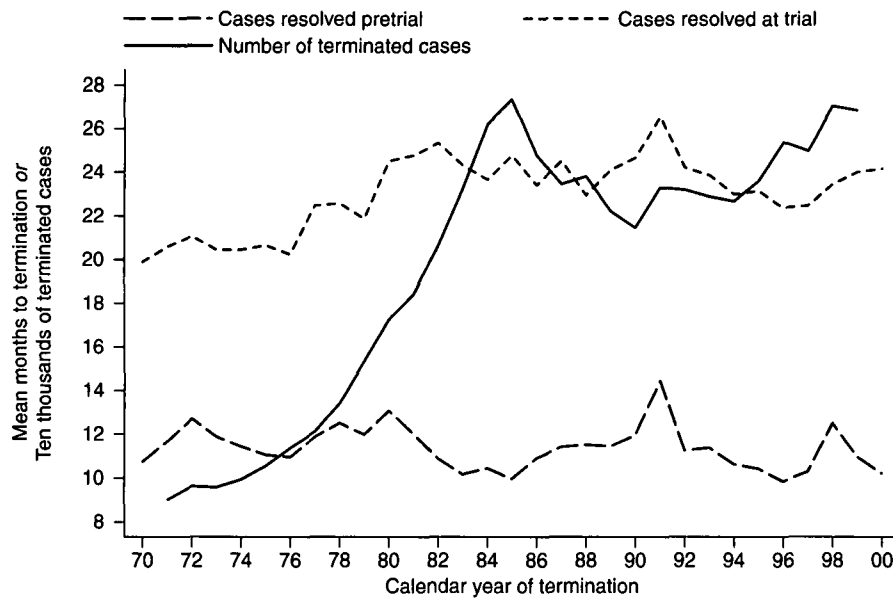
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<sup>53</sup> HANS ZEISEL, HARRY KALVEN, JR. & BERNARD BUCHHOLZ, *DELAY IN THE COURT*, at xxii (2d ed. 1978).

<sup>54</sup> The Administrative Office data underlying Figure 2 show that during the whole thirty-year period, 95% of terminations occurred before trial began. Over that time, the percentage has been increasing, as the incidence of trial has decreased.

<sup>55</sup> The solid line in Figure 2 shows the raw number of terminated cases per year.

FIGURE 2: TIME TO TERMINATION OF FEDERAL CIVIL CASES



Source: Administrative Office data

Theoretical work argues that delay is not necessarily an evil.<sup>56</sup> Delay is an unavoidable feature of life, and it is not an evil in itself.<sup>57</sup> The only evil is excessive delay, where excessive means that the costs of delay outweigh its benefits.<sup>58</sup> The costs of figuratively queuing to try a case tend to be exaggerated, because the parties can engage in other pursuits while waiting.<sup>59</sup> Queuing in fact has some benefits, such as lowering the demand for trials.<sup>60</sup>

Another study, both empirical and theoretical, shows that the many obvious reforms simply have not worked and will not work to reduce delay.<sup>61</sup> The study's basic insight is that any reduction in delay increases the incentive to litigate and reduces the parties' incentives to settle, with the consequent increase in litigation offsetting the re-

<sup>56</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.12 (5th ed. 1998); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 445-48 (1973).

<sup>57</sup> See Posner, *supra* note 56, at 445-46.

<sup>58</sup> See *id.* at 445.

<sup>59</sup> See POSNER, *supra* note 56, § 21.12, at 637.

<sup>60</sup> See *id.* § 21.12, at 637-38.

<sup>61</sup> See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989); cf. John Leubsdorf, *The Myth of Civil Procedure Reform*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 53 (Adrian A.S. Zuckerman ed., 1999) (questioning more generally the efficacy of procedural reform).

duction in delay.<sup>62</sup> Most attempts at reform, such as adding judges, will only increase the number of trials, rather than decrease the time to disposition. Adding judges to the system to reduce congestion is similar to expanding the number of freeway lanes, an improvement that would draw traffic off the side streets and from public transportation.<sup>63</sup> More cases might flow into the system, and the lesser burden of litigating might reduce the subsequent incentives to settle, so the increased number of judges would adjudicate at basically the same speed.

Empirical work in this area is rare because of the scarcity of data and the inherently complex nature of the relevant research questions. It is unclear even what to measure, no less how to measure in a controlled way. However, the empirical work that exists is consistently discouraging for reformers. A recent study utilized state court data to demonstrate that the use of particular processes, such as alternative dispute resolution (ADR), does not correlate with shortened disposition times, while the factors that do so correlate, such as forum locale and case category, are simply beyond the reach of process-oriented reform.<sup>64</sup>

Some related empirical work that we have done further counsels caution. Using the Administrative Office database of federal civil cases, but limiting our search to sizable tort and contract categories that clearly involved a choice between jury and judge trial, we showed that judge-trying cases last longer than jury-trying cases over their lives on the docket even though actual jury trials themselves proceed twice as slowly as judge trials: the mean judge-trying case spends 755 days on the district court docket, while the mean jury-trying case terminates in 678 days.<sup>65</sup> That is, although most commentators have assumed that the wait in the jury queue was longer than the wait for a judge's trial and decision,<sup>66</sup> the reality is the opposite. The most likely explanation is that the press of other duties leads judges to interrupt bench trials and postpone their eventual decisions.<sup>67</sup> Consequently, any reform

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<sup>62</sup> See Priest, *supra* note 61, at 533-39.

<sup>63</sup> See Posner, *supra* note 56, at 448.

<sup>64</sup> See Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000).

<sup>65</sup> Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176, 176-78 (1996) [hereinafter *Speed*].

<sup>66</sup> See, e.g., POSNER, *supra* note 56, § 21.13, at 641 ("Court queues are almost always greatest for parties seeking civil jury trials. . . . Parties are . . . 'charged' more for jury trials by being made to wait in line longer."); Leon Sarpy, *Civil Juries, Their Decline and Eventual Fall*, 11 LOY. L. REV. 243, 255-56 (1963) (similar implication); see also GORDON BERMANT, JOE S. CECIL, ALAN J. CHASET, E. ALLAN LIND & PATRICIA A. LOMBARD, FED. JUDICIAL CTR., PROTRACTED CIVIL TRIALS: VIEWS FROM THE BENCH AND THE BAR 43-45 (1981) (reporting survey results).

<sup>67</sup> *Speed*, *supra* note 65, at 199.

aimed at restricting jury trials in order to reduce delay<sup>68</sup> is apt to be counterproductive. Thus, we added the note of caution that assumptions about delay are risky, making empirical study a necessity.

## B. Mandatory Disclosure

One of the most controversial pretrial reforms of recent times has been mandatory disclosure.<sup>69</sup> The federal rulemakers introduced this new mechanism in 1993.<sup>70</sup> Parties now must disclose certain core information that elaborates on the pleaded facts, without awaiting a discovery request. Under Federal Rule of Civil Procedure 26(a), there are three distinct types of disclosure: initial disclosures, expert information, and pretrial disclosures.<sup>71</sup>

In particular, the 1993 version of Rule 26(a)(1) required disclosure, as the so-called initial disclosures, of routine evidentiary and insurance matters. These matters comprised (1) individuals “likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings,” (2) documents and things “in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings,” (3) computation of claimed damages, and (4) insurance agreements that might cover part or all of an eventual judgment.<sup>72</sup> However, districts by local rule could alter these initial disclosure obligations.<sup>73</sup> Indeed, almost half the districts opted out of the standard scheme by diminishing initial disclosure to some degree.<sup>74</sup>

The federal rulemakers’ introduction of mandatory disclosure aimed at achieving some savings in delay and expense, and also at moderating litigants’ adversarial behavior in the pretrial process.<sup>75</sup> They credited as their inspiration the anecdotal advocacy of disclosure in law review articles by Professor Wayne Brazil and by Judge William

<sup>68</sup> See Heise, *supra* note 64, at 815–16 (describing two broad approaches to procedural reform).

<sup>69</sup> See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 845–46 (1993) (“[O]ne would have thought both that care in drafting should produce an easily comprehensible rule and that a vehicle of cultural change should not be riddled with escape hatches.”); see also Carl Tobias, *Civil Justice Delay and Empirical Data: A Response to Professor Heise*, 51 CASE W. RES. L. REV. 235, 237–38, 244–46 (2000) (observing the controversy surrounding the 1993 amendment of Rule 26).

<sup>70</sup> See FED. R. CIV. P. 26 advisory committee’s note (1993 amendment).

<sup>71</sup> FED. R. CIV. P. 26(a).

<sup>72</sup> FED. R. CIV. P. 26(a)(1)(A)–(D) (1993) (amended 2000).

<sup>73</sup> FED. R. CIV. P. 26(a)(1) (1993) (amended 2000).

<sup>74</sup> See DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN THE UNITED STATES COURTS, WITH SPECIFIC ATTENTION TO COURTS’ RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1998).

<sup>75</sup> See FED. R. CIV. P. 26 advisory committee’s note (1993 amendment).

Schwarzer.<sup>76</sup> However, critics claimed that disclosure, in its routine operation and by the consequent disputes, would actually increase delays and expenses.<sup>77</sup> Also, critics argued that disclosure would counterproductively clash with the prevailing adversary system and with the Rules' notice pleading scheme.<sup>78</sup> After the rulemakers' introduction of disclosure, the unabating controversy prompted them finally to commission empirical studies from both the Federal Judicial Center (FJC)<sup>79</sup> and the RAND Institute for Civil Justice (RAND).<sup>80</sup>

The FJC reported a survey of two thousand attorneys involved in one thousand general civil cases terminated in 1996 that were likely to have some discovery activities, a survey with a 59% response rate.<sup>81</sup> Most of the responding attorneys felt that initial disclosure had no effect on delay or fairness, but, of those who detected effects, more attorneys believed the effects to be positive than negative.<sup>82</sup> Also, the respondents rarely reported fears of increased satellite litigation.<sup>83</sup> Finally, by statistical analysis of its small sample of cases, the FJC found that the use of initial disclosure tended to shorten actual disposition time.<sup>84</sup>

The RAND report used its preexisting data to compare a small group of district courts with local rules requiring some type of disclosure during 1992–1993 to another small group with no such rules.<sup>85</sup> The data included the attorneys' subjective measures of satisfaction and sense of fairness, as well as objective measures of attorneys' hours worked and case disposition time.<sup>86</sup> RAND found no significant effect

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<sup>76</sup> See *id.* (citing Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1348 (1978), and William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 721–23 (1989)).

<sup>77</sup> See, e.g., Order of April 22, 1993, 507 U.S. 1089, 1099 (Scalia, J., dissenting).

<sup>78</sup> See, e.g., Alfred W. Cortese Jr. & Kathleen L. Blaner, *A Change in the Rules Draws Fire*, NAT'L L.J., Oct. 18, 1993, at 25, 26.

<sup>79</sup> THOMAS E. WILLGING, JOHN SHAPARD, DONNA STIENSTRA & DEAN MILETICH, FED. JUDICIAL CTR., *DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES* (1997).

<sup>80</sup> JAMES S. KAKALIK, DEBORAH R. HENSLER, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, INST. FOR CIVIL JUSTICE, *DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA* (1998).

<sup>81</sup> WILLGING ET AL., *supra* note 79, at 1, app. A at 57–58.

<sup>82</sup> *Id.* at 26 & tbl.17.

<sup>83</sup> See *id.* at 27.

<sup>84</sup> See *id.* at 55.

<sup>85</sup> KAKALIK ET AL., *supra* note 80, at 1–3. RAND had gathered the data at the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States, as part of an independent evaluation mandated by the Civil Justice Reform Act of 1990. See *id.* at v, xv & n.1. For a description of the data set, see *id.* at 3–5.

<sup>86</sup> See *id.* at 5–8, 6 n.4.

of disclosure on fairness sensed, hours worked, or disposition time, but mandatory disclosure did markedly lower attorney satisfaction.<sup>87</sup>

In 2000, based on these two imperfect studies, the rulemakers amended Rule 26(a)(1) to prohibit district courts from opting out of the initial disclosure requirements, to exempt eight specified categories of proceedings from initial disclosure, and, most importantly, to change the scope of the initial disclosure obligations.<sup>88</sup> Now, a party need only disclose witnesses, and documents and things in the party's custody or control, "that the disclosing party may use to support its claims or defenses."<sup>89</sup> Such disclosures of *favorable* information need no longer be triggered by "disputed facts alleged with particularity in the pleadings."<sup>90</sup>

Kuo-Chang Huang, a graduate student at Cornell Law School, recognized the shortcomings of the two previous studies and performed his own clever study of disclosure using the Administrative Office data.<sup>91</sup> Among other statistical analyses, he "vertically" compared disposition time in the years before a district court required initial disclosure with disposition time after adoption of such disclosure.<sup>92</sup> He also "horizontally" compared district courts that required initial disclosure with district courts that had opted out of such disclosure.<sup>93</sup> Applying multivariate regression, Huang showed that adoption of initial disclosure tended slightly but significantly to slow down disposition.<sup>94</sup> He concluded that, because it has almost no practical effects, this controversial device has no justification.<sup>95</sup> Thus, the rulemakers would have been better advised just to eliminate initial disclosure.<sup>96</sup>

### C. Need for Empirical Research

Our lesson here is an obvious one, and others have made it already. Not only do practitioners and students need to attend to em-

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<sup>87</sup> See *id.* at 48–52.

<sup>88</sup> See FED. R. CIV. P. 26(a)(1); FED. R. CIV. P. 26 advisory committee's note (2000 amendment).

<sup>89</sup> FED. R. CIV. P. 26(a)(1).

<sup>90</sup> Compare FED. R. CIV. P. 26 advisory committee's note (2000 amendment) (discussing the requirement of identification of "witnesses and documents that the disclosing party may use to support its claims or defenses"), with FED. R. CIV. P. 26(a)(1) (1993) (amended 2000) (incorporating the "relevant to disputed facts alleged with particularity in the pleadings" standard for matter subject to initial disclosure).

<sup>91</sup> Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 PACE L. REV. 203 (2000).

<sup>92</sup> *Id.* at 242–44.

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* at 255, 263.

<sup>95</sup> *Id.* at 262–64.

<sup>96</sup> *Id.* at 264; see also Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post: The Continuing Odyssey of Discovery "Reform,"* LAW & CONTEMP. PROBS., Spring/Summer 2001, at 197, 225–28 (questioning the justifications for and utility of the federal disclosure rules).



pirical methods, but so do commentators on the legal system ranging from academics to journalists. Most of all, empirical studies must be put before those who govern the system. Indeed, there is a “compelling need for public policymakers to commission expert, independent evaluations that systematically gather, analyze, and synthesize dependable empirical data.”<sup>97</sup> The data might come from archival research, or they might even come from field experiments conducted with the help of local rules.<sup>98</sup>

Then the policymakers must “closely consult and carefully apply the material assembled when reforming civil justice.”<sup>99</sup> There is a demand-side problem as well as a supply-side problem with empirical studies: almost nobody in power pays attention to the few studies that do exist.<sup>100</sup> The courts’ strange experience with mandatory disclosure serves as a fine example of what can go wrong.

### III

#### SETTLEMENT: HEREIN OF SELECTION

##### A. Importance of Settlement

Most lawsuits do not make it all the way through the pretrial practice we have just examined. Indeed, most disputes do not even become lawsuits. Injured persons abandon or settle the overwhelming majority of grievances at some point along the line.<sup>101</sup>

A useful image is the so-called grievance pyramid on the next page. This image represents, as one progresses up the steps of the pyramid, how the whole realm of experiences narrows to disputes, a subset that produces in turn those selected cases we can study in archives like the Administrative Office database. Infinite experiences produce countless disputes, which yield few cases. For example, only a small percentage of grievances ripen into claims, by the aggrieved’s voicing the grievance to the injurer; most aggrieved persons accept their injury, taking it as part of life or just figuring that no remedy is available; tellingly, the theorists in this subject sometimes refer to acceptance as “lumping it.” Similarly, most disputants never make it to a lawyer, much less to a courthouse.

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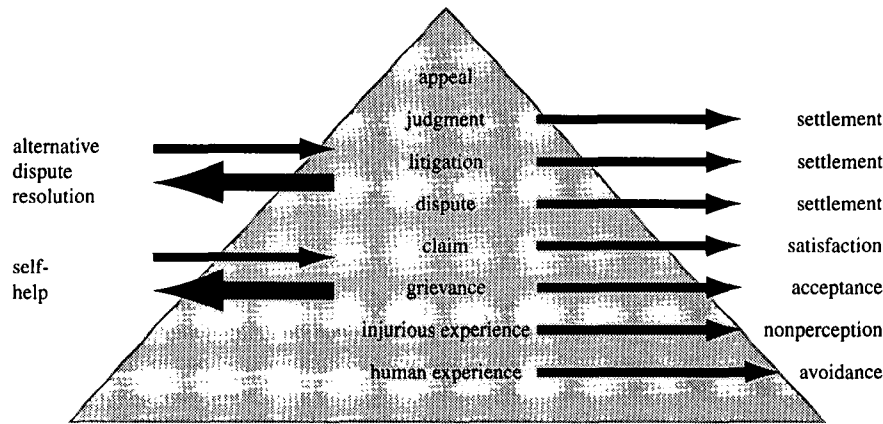
<sup>97</sup> Tobias, *supra* note 69, at 244.

<sup>98</sup> *See id.* at 242 & n.36, 245 & n.46. *But see* Garth, *supra* note 3, at 106–13 (cataloguing the difficulties of such reform-oriented research).

<sup>99</sup> Tobias, *supra* note 69, at 249.

<sup>100</sup> *See* Michael Heise, *The Future of Civil Justice Reform and Empirical Legal Scholarship: A Reply*, 51 CASE W. RES. L. REV. 251, 251–54 (2000).

<sup>101</sup> In this subpart, we draw heavily from RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 5–11 (7th ed. Supp. 2002).



The slope of the sides of the pyramid is quite gentle. That is, a huge percentage of situations leaves the pyramid at each step upward. A survey of more than five thousand households indicated that during the previous three years just over a third of them had perceived one or more grievances of certain litigable types; 71.8% of those grievances produced a claim informally; 63.0% of those claims met an initial rebuff to produce a dispute; and 11.2% of those disputes resulted in filing a lawsuit.<sup>102</sup> Indeed, these percentages are exaggeratedly high, because the survey limited its inquiries to grievances involving \$1000 or more.<sup>103</sup> But even for such substantial grievances, litigation is by no means a knee-jerk or common reaction in America, as overall only about 5% of the survey's grievances ultimately resulted in a court filing.<sup>104</sup>

In the world of litigation at the top of the pyramid, the sides' slope remains gentle. Of the relatively few filed cases, only a small percentage make it through the procedural system to a contested judgment. We can use the Administrative Office database to look at all the 259,637 federal civil cases terminated during fiscal 2000. Of these, the parties settled at least 66.7% in one way or another; the court adjudicated approximately 12.9% at the pretrial stage, as by a motion under Rule 12 or 56, and about 1.9% at the trial stage; and the other 18.5% of the cases fell into a welter of other disposition method codes, such as remand or transfer to another court, whereby most will result in an eventual settlement rather than a final adjudication. That is, if the "other" grouping grows, settlement grows as well.

Figure 3 shows the fate of filed cases over the years, dividing all civil cases among the above four sets of disposition methods, the cod-

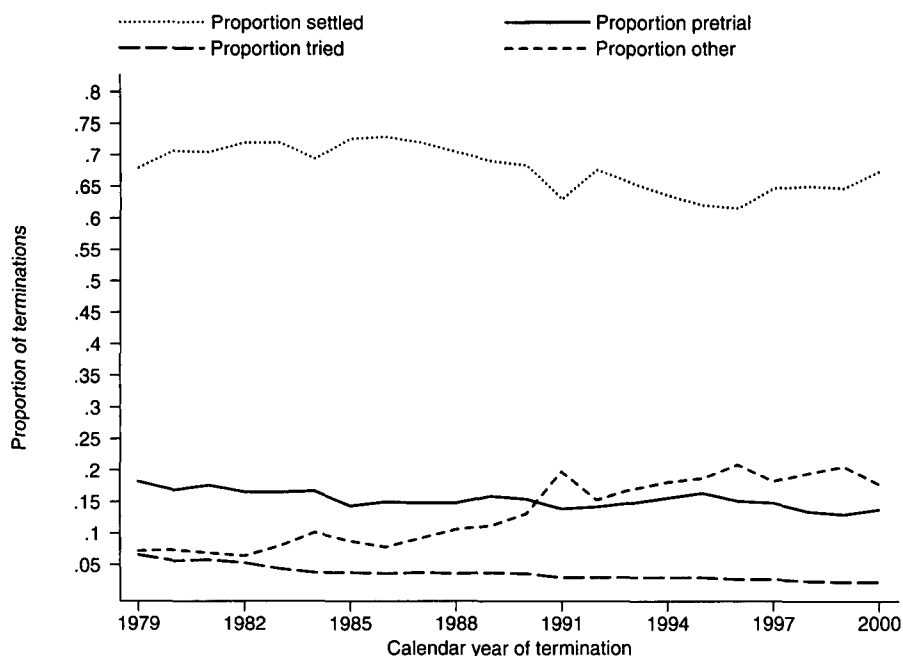
<sup>102</sup> See David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 86 (1983).

<sup>103</sup> *Id.* at 80-81.

<sup>104</sup> See *id.* at 87 fig.2.

ing of which became consistent enough to use only in fiscal 1979. It tells a story of the continuing dominance of settlement. Indeed, given that most "other" dispositions result in eventual settlement, the graph implies a growing dominance of settlement, against a backdrop of a diminishing role for adjudication and especially for civil trial.

FIGURE 3: METHOD OF DISPOSITION IN FEDERAL CIVIL CASES



Source: Administrative Office data

### B. Settlement's Effect on Win Rates

A basic truth, then, is that settlement is numerically much more important than actual litigation. Yet empirical research tends to focus on the readily observable, and litigation is much more observable than settlement. Indeed, judgment is the most observable feature of litigation. Therefore, the popular form of recent empirical studies involves examining the parties' success in obtaining judgment after litigation.<sup>105</sup>

Not only are such judgment data readily available, but they appear to be full of meaning as well. An analyst usually uses win-rate data to get at some underlying factor affecting outcome generally, such as some substantive or procedural rule or some nonlegal factor

<sup>105</sup> This subpart draws heavily from *Removal*, *supra* note 17, at 587-91.

favoring one side or the other in the set of all disputes. Yet this interpretive step based on win-rate data can easily lead the analyst astray, because win-rate data inherently entail near-fatal ambiguity.<sup>106</sup>

The ambiguity arises from the *selection effect* of the settlement process, whereby the parties' selection of the cases to push through litigation produces a biased sample from the mass of underlying disputes.<sup>107</sup> More specifically, disputes and cases that clearly favor either the plaintiff or the defendant tend to settle readily, because both sides can save costs by settling in light of their knowledge of the applicable law and all other aspects of the case.<sup>108</sup> Difficult cases falling close to the applicable decisional criterion tend not to settle, because the parties are more likely to disagree substantially in their predicted outcomes.<sup>109</sup> These unsettled close cases fall more or less equally on either side of the criterion, regardless of the position of that criterion and regardless of the underlying distribution of disputes.<sup>110</sup> Thus, even if, say, the legal criterion, such as strict liability, highly favors plaintiffs, one might not observe a plaintiff win rate well above 50%. Instead, case selection will leave for adjudication a residue of unsettled close cases, which consequently exhibit some nonextreme equilibrium win rate. In other words, the case-selection effect means that the win rate reveals something about the set of adjudged cases, a universe dominated by close cases—but reveals little about the underlying, variegated mass of disputes and cases.

According to case-selection effect theory, any distinction between two streams of cases that the parties evaluate without systematic inaccuracy should lead to no difference in adjudicated win rates. Indeed, under simplifying assumptions, and as a limiting implication, the theory suggests a trial win rate of 50% for both streams. But the theory does not actually predict any universal win rate, or that two streams' rates will be precisely the same. Reality is too complicated to produce a 50% win rate. What factors might lead to win rates different from 50%? There are three types of such factors.

*First*, different stakes to the parties is the most common explanation of win rates that depart from the idealized predictions of case-

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<sup>106</sup> A disturbing example lies in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298–300 (7th Cir. 1995), in which Chief Judge Posner used the defendant drug companies' 92.3% win rate in thirteen prior cases brought by other hemophiliacs to justify denial of class-action status to the hemophiliac plaintiffs in the case at bar. See generally JOEL BEST, DAMNED LIES AND STATISTICS 162–66 (2001) (contrasting cynical approach to statistics with naive approach).

<sup>107</sup> For background material regarding selection effect, see sources cited in *Removal*, *supra* note 17, at 588 n.21.

<sup>108</sup> *Id.* at 588.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

selection effect.<sup>111</sup> The doctor whose reputation may be harmed will have more at stake than the dollars that one plaintiff seeks. The company defending a product liability action will have more at stake than the money sought in the particular case. Such differential stakes may make defendants more willing to settle the plaintiffs' stronger cases, and so lead to plaintiffs' win rates lower than either 50% or whatever other level one expects absent the differential stakes. Analogously, greater stakes to plaintiffs may raise their win rates.

Many other factors are of this contextual type, in that they all constitute real-world complications that alter the economic model's simplified assumptions and consequently its purified predictions. Illustratively, for a stream of cases in which the main dispute concerns damages based on clear liability, obviously the win rate would increase. Similarly, differences in the two sides' access to information and competence in forecasting would affect the win rate. Or if the two streams of cases under study differ in costs of litigating or in awards upon winning, win rates would not equalize.

*Second*, another type of powerful explanation of aberrant win rates would be the parties' mutual misperceptions about the prevailing standard of decision. If the parties perceive the adjudicator to be favorable to the plaintiff, but the adjudicator turns out not to be, then the supposedly close cases would turn out to be losers and the win rate would drop. Similarly, if the adjudicator appears to be neutral, but turns out to be unfavorable to the plaintiff, then the win rate would drop. Imagined biases or unperceived biases of the adjudicator therefore affect win rate.

The direction of the effect on win rate is opposite to the misperception. A suppressed win rate might not mean that plaintiffs suffer a disadvantage, but merely that plaintiffs are not as advantaged as the parties think. A slanted win rate might therefore mean almost the opposite of what it seems to mean. This complexity adds a cruel twist to win-rate data's inherent ambiguity.

*Third*, average strength of the cases is a type of factor different in kind from the contextual factors and from misperception. This factor draws on the reassuring thought that a stream of stronger claims should have a higher win rate than a stream of weaker claims. The claims' strength could lie in favorable facts or in an easy legal criterion, or it could result from unevenly matched adversaries or from a biased adjudicator. In other words, case-selection effect is merely a tendency to remove meaning from outcome data, but it may not completely do so. Thus, for example, our earlier work found that transfer

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<sup>111</sup> See, e.g., sources cited *id.* at 589 n.25.

of venue out of a forum favorable to the plaintiff results, despite settlement's effect, in a lowered win rate.<sup>112</sup>

Generally, the factor of case strength is at play throughout the dispute-resolution process. At the earlier termination stages, this factor enjoys greater influence, so there one can infer with greater confidence from win rates.<sup>113</sup> But its weight tends to diminish as settlement weeds out the cases, so that in trial data this factor has largely but not completely disappeared. Still, a strong positive correlation exists between win rates on pretrial motion and at trial.<sup>114</sup> Also, win rates for settlements and for judgments seem to correlate.<sup>115</sup>

In sum, our work has shown that one should not expect 50% win rates.<sup>116</sup> Real-world win rates are complicated to interpret, because of the interplay of the aforementioned factors. Understanding those factors is therefore essential. For example, as already noted, we have shown that the plaintiffs' win rate in federal civil cases is 58% in cases in which there is no transfer and 29% in transferred cases.<sup>117</sup> Interestingly, the comparable win rate for termination at *early* procedural stages is 73% in nontransfer cases and 26% in transfer cases, while the comparable win rates at *trial* are 45% and 47%.<sup>118</sup> Given settlement's role in causing win rates to converge but not to equalize as the litigation process progresses, these two streams of nontransfer and transfer cases retain a potentially meaningful difference.

### C. Settlement's Effect on Data Interpretation

Win rates, as just suggested, may retain residual meaning, which the settlement process has not obliterated. The challenge is to tease out the residual meaning in win-rate data by removing the inherent case-selection ambiguities—thereby isolating, say, the remaining implications of the case-strength factor. That is, careful research and theorizing can often succeed in overcoming the effect of settlement.<sup>119</sup>

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<sup>112</sup> See *supra* Part I.B.

<sup>113</sup> See, e.g., Theodore Eisenberg, John Goerdts, Brian Ostrom & David Rottman, *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 445–47 (1996) (showing downward time trend in product liability win rate that is observable in earlier stages but not at trial).

<sup>114</sup> See Theodore Eisenberg, *The Relationship Between Plaintiff Success Rates Before Trial and at Trial*, 154 J. ROYAL STAT. SOC'Y ser. A, pt. 1, at 111 (1991).

<sup>115</sup> See Theodore Eisenberg, *Negotiation, Lawyering, and Adjudication: Kritzer on Brokers and Deals*, 19 LAW & SOC. INQUIRY 275, 292–93 & n.64 (1994).

<sup>116</sup> See, e.g., Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990).

<sup>117</sup> See *supra* text accompanying note 27.

<sup>118</sup> See *Forum-Shopping*, *supra* note 5, at 1520 tbl.1.

<sup>119</sup> This subpart draws heavily from *Removal*, *supra* note 17, at 591–92.

For example, as seen in our transfer data,<sup>120</sup> we have found what may be called a *refraction effect*, whereby in the progress of litigation a case stream's win rate usually approaches some nonextreme trial win rate.<sup>121</sup> In other words, the refraction effect reflects the tendency of clear cases to drop out as litigation progresses, so that the win rates at the various pretrial stages progressively close in on that nonextreme trial win rate. The trial win rate may not convey much meaning by itself, making it often dangerous to work only with trial data. Nevertheless, thanks to the refraction effect, the trial data's meaning becomes clearer as one tracks back to the mass of underlying cases and disputes.

More generally, the *first step* of careful research and theorizing involves making sure that the comparison is apples to apples. The most useful tool here is regression.<sup>122</sup> Multivariate regression works to segregate the independent effects of various variables, such as year and case category, on win rates.<sup>123</sup> The dependent variable here—what one is trying to explain—is whether the judgment is a win or a loss for plaintiff. The regression should use a broad set of independent variables—factors that may affect the win rate—as controls. This statistical technique helps to ensure that any comparison of win rates rests on cases that are as similar as possible.

The *second step* involves formulating the possible explanations of the observed phenomenon and then testing them by investigating additional variables. For example, if a possible explanation of a low rate of success is inept counsel, one might compare win rates for corporate and individual parties, to see if the observed effect is more pronounced for individuals with their possibly less qualified counsel. Such a process can eliminate many possible explanations.

The *third step* involves application of a plausibility screen to the surviving explanations. Some will just make much more sense than others, fitting better within the framework of accumulated experience and knowledge. For example, lower conviction rates in judge-trying criminal cases (50%) than in jury-trying criminal cases (80%) probably do not mean that the judges rather than juries are overly sympathetic to the accused; instead, case selection is the more plausible explanation, as criminal defendants with solid defenses tend to prefer judge

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<sup>120</sup> See *supra* text accompanying note 118.

<sup>121</sup> See Joel Waldfoegel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J.L. & ECON. 451, 471–74 (1998) (providing evidence of refraction effect). On the disappearance of the refraction effect on appeal, see Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 135 n.19 (2001) [hereinafter *Defendants' Advantage*].

<sup>122</sup> See *supra* note 24.

<sup>123</sup> See *supra* note 24.

trials.<sup>124</sup> Such reliance on experience and knowledge may not sound too scientific. That is true. In fact, the preceding two steps were less rigorous than they may have sounded.

Our point, indeed, is that this form of analysis is as much art as science. And it is a difficult and subjective art. For example, surely there would be a predilection to accept the first plausible explanation, as one works through the straightforward explanations of case strength before wrestling with the more indirect case-selection contextual explanations or resorting to convoluted explanations based on parties' misperceptions. Such predilection is dangerous. *Caveat emptor* accordingly applies to this form of art.

Consider why empirical studies tend to be surprising. Unlike law and economics, which reassuringly tends to find that the common law makes sense, law and empirical methods' studies tend to be shocking. They tend to upset so-called common knowledge. This tendency is not attributable only to prevailing ignorance. It is more an effect of the researchers' motivations to look for jarring patterns. Researchers see lots of numbers, but they pause on and later report on the numbers that startle. For example, if jury-tried cases did spend more time on the docket, as most people supposed, we probably would not have written up our results on disposition time.<sup>125</sup> Yet any surprising empirical result could be largely an artifact of the case-selection effect, and consequently be unrevealing about the realities of the legal system.

In sum, empirical research can provide valuable insights. But the consumer of empirical research must cautiously verify that the researchers had no axe to grind, that they truly immersed themselves in the data, and that they explained their investigatory and reasoning processes in detail. All this requires time and effort from the user and the researchers. Both art and science demand no less.<sup>126</sup>

#### IV

##### TRIAL: HEREIN OF ANECDOTE

###### A. Decline of Civil Trial

As settlement and like dispositions have blossomed, the civil trial has all but disappeared.<sup>127</sup> Many have noted this trend, although

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<sup>124</sup> See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1165-66 (1992) [hereinafter *Jury or Judge*].

<sup>125</sup> See *supra* note 65 and accompanying text.

<sup>126</sup> See generally Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, LAW & CONTEMP. PROBS., Summer 1988, at 55 (discussing problems with the application of empirical research to public policy).

<sup>127</sup> The trend of the vanishing civil trial is apparent from the Annual Report of the Director of the Administrative Office of the United States Courts [hereinafter AO]. Over



there is less agreement on cause.<sup>128</sup> Interestingly, and not noted elsewhere, we find that the number of judge trials has recently fallen even more precipitously than the number of jury trials.<sup>129</sup> The latter development is especially mysterious because both queues for trial pass through the same person—the trial judge.<sup>130</sup>

Figure 4 presents some suggestive data on these time trends.<sup>131</sup> The dashed lines show jury and judge trials as a percentage of all federal civil terminations. These percentages decreased with the passing years. The solid line shows the increasing ratio of jury trials to judge trials. For example, in 1979 there was one jury trial for every two judge trials, and by 2000 there were more than two jury trials for every judge trial. However, much more analysis would be necessary to get a solid hold on the causes, or even on the real size of the decline given a

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the years its Tables C-4, prepared with the procedural progress codes for cases terminated during or after trial, show a steady decrease from almost 12% of civil terminations reaching trial in the 1960s to the current levels approaching 2%. Compare AO, at 208 tbl.C-4 (1968) (showing 11.8% rate), with AO, at 154 tbl.C-4 (2001) (showing 2.2% rate). As that period progressed, the growing number of federal judges led to an increase in the absolute number of civil trials as the caseload grew, reaching a peak in fiscal 1985 of 12,570 trials according to the AO's measure. See AO, at 308 tbl.C-4 (1985). However, civil trials per year have since dropped to fewer than half that number, so today there are about as many civil trials as there were in fiscal 1961. Compare AO, at 246 tbl.C-4 (1961) (showing 5,553 trials), with AO, at 154 tbl.C-4 (2001) (showing 5,401 trials).

<sup>128</sup> See, e.g., Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 46–48 (1996) (emphasizing growth of the criminal trial docket); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 1–3 (1996) (emphasizing systemic pressure to settle); Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 669–72, 671 tbl.1, 677–78 (1993) (emphasizing, in part, the growth in number and complexity of civil cases); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 526–39 (1986) (emphasizing judicial and cultural assumptions); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632–39 (emphasizing increase in judges' pretrial tasks); Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24–26, 27 (emphasizing push toward ADR).

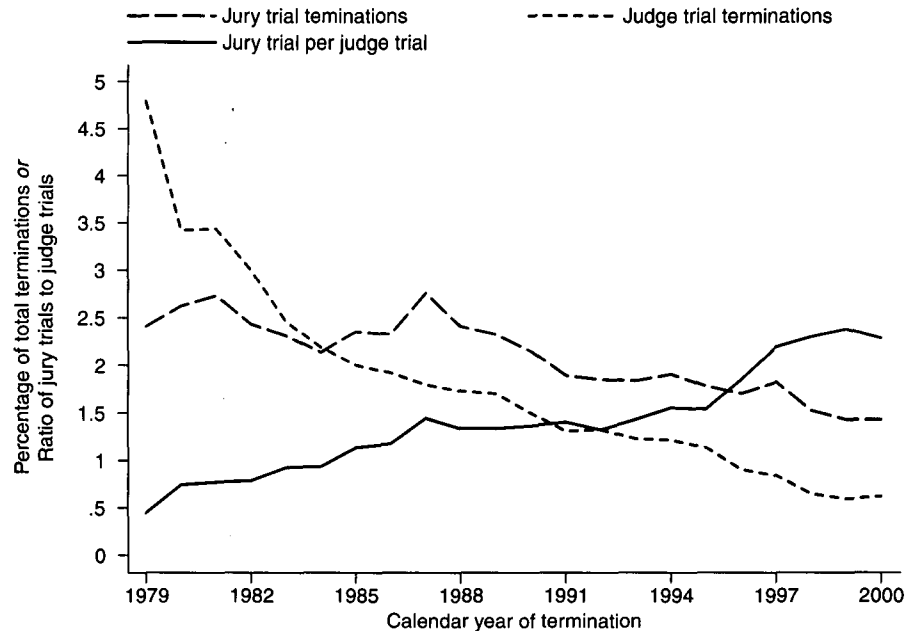
<sup>129</sup> See *infra* text accompanying note 131.

<sup>130</sup> The explanation does not reside in a single case category such as jobs (Administrative Office category #442), where the jury right has expanded in the recent past. The mass of cases, without the jobs cases, shows virtually the same drop in the absolute and relative use of judge trial. The explanation would have to be a broader one, such as judicial distaste for a time-consuming task like bench trial. See *supra* text accompanying notes 65–68. Or, as the disincentives to trial have increased, those litigants who prefer jury trial have proved to be the more determined group.

<sup>131</sup> We used the procedural progress codes of 7 and 9—termination during and after jury trial—to define jury trial usage. See 11 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES transmittal 64, at II-21 to -26 (Mar. 1, 1985) (district court). However, we used disposition method code 9—judgment on court trial—to define judge trial usage. Here we abandoned the procedural progress codes for judge trials because, unfortunately, the Administrative Office defines “trial” to include all contested proceedings in which evidence is introduced. See ADMIN. OFFICE OF THE U.S. COURTS, CIVIL STATISTICAL REPORTING GUIDE 3:18 (1999). This definition would distort analysis of the data by categorizing some motion hearings as judge trials. Also unfortunately, the disposition method code did not become consistent until fiscal 1979.

changing legal environment. And then there would be the contentious issues surrounding the normative implications of the vanishing civil trial and bench trial.

FIGURE 4: JURY AND JUDGE USAGE IN FEDERAL CIVIL TRIALS



Source: Administrative Office data

## B. Trial by Jury or Judge

The classic work on jury/judge differences is by Professors Harry Kalven and Hans Zeisel.<sup>132</sup> They addressed reliability (the ability to treat like cases alike) of jury decision making. Their questionnaires to presiding judges in some 4000 actual state and federal civil jury trials nationwide in the 1950s—asking the judges how they would decide those same cases—yielded data showing a 78% agreement between judge and jury on liability.<sup>133</sup> When compared to other human decision makers, the rate of agreement is more impressive than it first appears. This 78% agreement rate is better than the rate of agreement between scientists doing peer review, employment interviewers ranking applicants, and psychiatrists and physicians diagnosing pa-

<sup>132</sup> KALVEN & ZEISEL, *supra* note 40, at 63–64; see also Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1063–68 (1964) (comparing jury verdicts and judges' desired outcomes in surveyed trials). We draw this description of their work from *Jury or Judge*, *supra* note 124, at 1153.

<sup>133</sup> KALVEN & ZEISEL, *supra* note 40, at 63–64.

tients, and almost as good as the 79% or 80% rate of agreement between judges themselves making sentencing decisions in an experimental setting.<sup>134</sup>

Incidentally, when judge and jury did disagree in the Kalven and Zeisel study, they exhibited no distinct pattern other than the juries' very small tendency to favor plaintiffs relative to judges. The jury but not the judge found for the plaintiff in 12% of the cases, while the judge but not the jury found for the plaintiff in 10% of the cases.<sup>135</sup>

A quarter-century later we performed the first large-scale comparison of plaintiff win rates and recoveries in federal civil cases actually tried before either juries or judges.<sup>136</sup> Unlike Kalven and Zeisel, we compared outcomes in the stream of cases going through jury trial to outcomes after bench trials, the two streams of course comprising different cases.<sup>137</sup> The cases all came from sizable tort and contract categories that clearly involved a choice between jury and judge trial. In two of the most controversial areas of modern tort law, product liability and medical malpractice, the win rates substantially differ from other categories' win rates and in a surprising way: plaintiffs in these two areas prevail after trial at a much higher rate before judges (48%) than they do before juries (28%).<sup>138</sup> Furthermore, in medical malpractice but not in product liability, the mean recovery in judge trials is higher than the mean recovery in jury trials.<sup>139</sup>

These empirical results proved resistant to all simple explanations, such as differences in the size of award explaining differences in win rates.<sup>140</sup> So we considered the results in light of the parties' ability to select which cases reach jury or judge trial. Lawyers entertain long-standing perceptions of juries as biased and incompetent, relative to judges.<sup>141</sup> These perceptions have the consequence of a selection of cases reaching jury trial that differs from the case selection reaching judge trial. In particular, in certain categories of cases, lawyers view

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<sup>134</sup> See Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, LAW & CONTEMP. PROBS., Autumn 1988, at 243, 246-48 (reporting research by Shari S. Diamond).

<sup>135</sup> KALVEN & ZEISEL, *supra* note 40, at 64.

<sup>136</sup> *Jury or Judge*, *supra* note 124. Numerous smaller studies give fairly consistent support to our results. See *Defendants' Advantage*, *supra* note 121, at 144-45; *Jury or Judge*, *supra* note 124, at 1151-55. The same is true in studies of specific case categories. See *id.* at 1154 n.78 (citing sources); Elizabeth Graddy, *Juries and Unpredictability in Products Liability Damage Awards*, 23 LAW & POL'Y 29 (2001). *But cf.* Moore, *supra* note 31 (performing a sophisticated analysis of patent cases, involving field work to verify the Administrative Office's data, and concluding that some significant jury/judge differences do exist in patent litigation); Kimberly A. Moore, *Jury Demands: Who's Asking?* (Mar. 27, 2002) (unpublished manuscript, on file with authors) (similar).

<sup>137</sup> *Jury or Judge*, *supra* note 124, at 1133.

<sup>138</sup> *Id.* at 1125-26, 1137 tbl.3.

<sup>139</sup> *Id.* at 1126, 1141 tbl.4.

<sup>140</sup> See, e.g., *id.* at 1140-43.

<sup>141</sup> See *id.* at 1149-51.

the jury trial option as relatively favorable to plaintiffs.<sup>142</sup> They then settle cases in a way that leaves for trial by jury or judge a residue of what they consider close cases, with juries accordingly seeing on average weaker cases.<sup>143</sup> But the perceptions turn out to be misperceptions, as jury and judge turn out to perform similarly. There is no evidence that juries are relatively biased or incompetent.<sup>144</sup> Thus, the jury produces fewer winners than expected, while the judge produces more winners.

Our conclusion, after a lengthy article based on a wealth of data covering all sorts of cases, was that (1) the most plausible explanation of the data lies in small differences between judges' and juries' treatment of cases and, much more substantially, in the parties' varying the selection of cases that reach judges and juries; (2) litigants' stereotypical views about juries may lead them to act unwisely in choosing between judge trials and jury trials; and (3) the surprising win rates in product liability and medical malpractice cases may stem from the especially strong misperceptions litigants hold about judge and jury behavior in these cases.<sup>145</sup> More simply put, certain groups of plaintiffs do far better before judges, but the reason likely lies in prevailing misperceptions about juries, rather than in differences between judges and juries. Judges and juries are in fact not so different.

### C. Persistence of Anecdote

Nevertheless, the old views based on anecdote persist. Despite years of research that rebuts stereotypes about juries, every day lawyers and policymakers act on the basis of those stereotypes. Why are such misperceptions about the legal system so resilient? Why do the misperceptions not eventually undergo correction, as lawyers repeatedly observe the consequences of their misperceptions?

In general, longstanding misperceptions about the legal system are not uncommon.<sup>146</sup> On the particular subject of jury/judge per-

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<sup>142</sup> See *id.* at 1161–62.

<sup>143</sup> See *id.* at 1160–61.

<sup>144</sup> See Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 826–27 (2001) (discussing obstacles to unbiased decision making common to judges and juries).

<sup>145</sup> See *Jury or Judge*, *supra* note 124, at 1170–74.

<sup>146</sup> See Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 501–02 (1989); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 541 (1990). For discussions of the pitfalls inherent in human reasoning and social judgment processes, see THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF*

formance, elitist perceptions of a biased and incompetent jury system seem to conform to the natural order of things and can even be comforting. Persuasive and accessible empirical evidence to the contrary has been slow in accumulating. Finally, many lawyers simply prefer to rely on intuition informed by personal experience and anecdote.<sup>147</sup> All in all, lawyers' misperceptions of jury/judge differences have understandably prevailed for a long time.

If one accepts the new empirical evidence, however, practical lessons start to emerge. Returning to the same example of product liability and medical malpractice, one could conclude that the jury is less of an advantage for plaintiffs, and the judge less of a disadvantage, than other lawyers think. That realization should affect the terms of settlement. Moreover, if only one side comes to that realization, that side could manipulate the jury/judge choice to its bargaining advantage.

## V

### JUDGMENT: HEREIN OF REALM OF UNKNOWNNS

#### A. Award of Damages

Everyone knows that awards of damages have gone out of control . . . . Well, that is not quite true.<sup>148</sup>

Figure 5 shows, by its solid line, the median trial award for plaintiffs after a completed trial in tort cases of the general personal-injury type. Except for an unexplained spike around 1990, those awards do not seem to be out of control. Indeed, the ratio of mean tort award in such cases to mean award in cases of the general contract type has been decreasing in recent years. Even the ratio of mean award in all product liability cases to the mean award in general contract cases is decreasing.

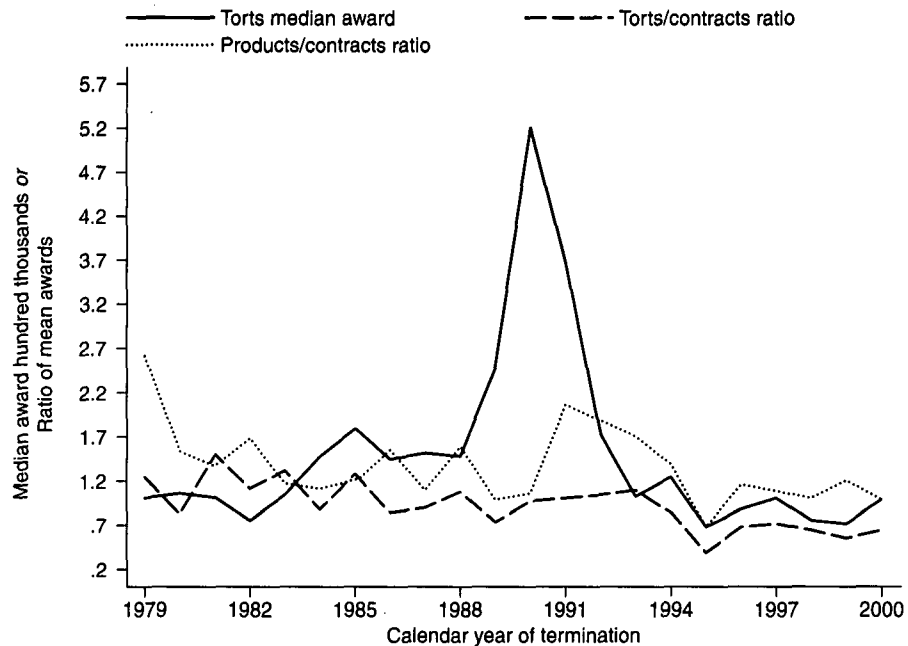
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HUMAN REASONING IN EVERYDAY LIFE (1991); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE 195-296 (1980).

<sup>147</sup> See generally Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 227-51 (discussing the ways in which perceptions of the legal system are shaped by anecdotal and experiential conceptions of juries and the litigation process).

<sup>148</sup> See Theodore Eisenberg, *Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle*, 36 WAKE FOREST L. REV. 1129, 1132-36 (2001); see also Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison* 14 n.54 (Sept. 3, 2002) (unpublished manuscript, on file with authors) (discussing tendency of even Administrative Office data to overstate somewhat the actual damages awarded).

FIGURE 5: AWARD OF DAMAGES IN FEDERAL CIVIL TRIALS



Source: Administrative Office data

### B. Foreigner Effect

Everyone knows that foreigners fare badly in U.S. courts . . . . Well, that is not true either, according to our prior research.<sup>149</sup>

In fact, foreign plaintiffs suing domestic defendants consistently enjoy a higher win rate (80%) than domestic plaintiffs suing domestic defendants (64%) in federal diversity and alienage actions.<sup>150</sup> Likewise, foreign defendants sued by domestic plaintiffs fare better (50%) than those domestic defendants sued by domestic plaintiffs.<sup>151</sup>

Why? Our analysis rejected the implausible notion that U.S. courts have a pro-foreigner bias, as well as the more plausible explanation that foreign parties litigate better than domestic parties.<sup>152</sup> Instead, it appears that foreigners' fears of U.S. courts lead them to

<sup>149</sup> See *Xenophilia*, *supra* note 24. But see Kimberly A. Moore, *Xenophobia in American Courts: An Empirical Study of Patent Litigation* (Apr. 2, 2002) (unpublished manuscript, on file with authors) (analyzing patent cases to conclude that foreigners do fare badly in patent litigation, thereby further supporting the uniqueness of patent litigation, as suggested *supra* note 136).

<sup>150</sup> *Xenophilia*, *supra* note 24, at 1122-23.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1132-33.

pursue only an unusually strong set of cases.<sup>153</sup> That is, foreigners are averse to litigating here and hence are more selective in choosing strong cases to pursue to judgment. When the foreigners do not encounter the expected level of bias, they end up winning more of their cases.<sup>154</sup> So, it is case selection at work.

### C. Determinants of Trial Outcome

A major point of this Article is that all of us know very little about litigation realities. The realm of unknowns is vast.<sup>155</sup>

What precisely determines who wins judgment lies within that realm. However, the existing evidence, such as it is, suggests that our trial courts perform with considerable neutrality.<sup>156</sup> The strength of the case on the merits turns out to be the most important determinant of outcome.<sup>157</sup> In brief, it appears that our civil justice system performs quite well, “in a sober and predictable manner in important and controversial areas.”<sup>158</sup>

Most of the other stuff that we think we know by common knowledge also belongs to that realm of unknowns. The realization of all that we do not know should produce skepticism about accepted truths based on anecdote, for example, with regard to the impact on outcome of factors off the merits. But it should not produce pervasive agnosticism, or knee-jerk rejection of empirical studies.<sup>159</sup> Instead, the preferable reaction would be to put common knowledge to the test.

Sometimes common knowledge will turn out to be true after all, as in the matter of the forum effect.<sup>160</sup> Sometimes it will turn out to be false, as in the matter of the foreigner effect.<sup>161</sup> Although we could not prove that anti-foreign bias is nonexistent in U.S. courts, we could say that the available data do not support the view that U.S. courts harbor xenophobic bias.<sup>162</sup> The data instead suggest that foreigners would be wise to lessen their general aversion to litigation here.<sup>163</sup>

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<sup>153</sup> *Id.* at 1133–34.

<sup>154</sup> *See id.* at 1134.

<sup>155</sup> *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

<sup>156</sup> *See Defendants' Advantage*, *supra* note 121, at 141–42.

<sup>157</sup> *See Jury or Judge*, *supra* note 124, at 1152 & n.68.

<sup>158</sup> Eisenberg, *supra* note 4, at 668; *see also* Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839 (2002) (showing that juror demographics do not explain trial outcomes, although locale does matter).

<sup>159</sup> *See* BEST, *supra* note 106, at 164–66.

<sup>160</sup> *See supra* Part I.B.

<sup>161</sup> *See supra* Part V.B.

<sup>162</sup> *Xenophilia*, *supra* note 24, at 1132.

<sup>163</sup> *Id.* at 1143.

## VI

## APPEAL: HEREIN OF ASSAULT ON UNKNOWNNS

## A. Affirmance Effect

The striking feature about federal civil appeals—published and unpublished—is the high rate of affirmance. Our work shows the affirmance rate to be about 80%.<sup>164</sup> While win rates in the trial court can be high or low across case categories, affirmance rates in the appellate court remain elevated for all kinds of cases.<sup>165</sup>

Figure 6 shows this pattern nicely, with some new data on judgments for plaintiff or defendant after a completed trial in four case categories: general contract, general personal-injury tort, medical malpractice, and jobs.<sup>166</sup> The lower set of four lines comprises the trial win rates for those four case categories. Note that the win rates are fairly steady over time, except for jobs, which has the lowest win rate but one that has been gently increasing over the whole period. The cluster of four lines near the top comprises recent years' affirmance rates for those cases. Note how high the affirmance rates are, with jobs being the highest. So, jobs cases are usually unsuccessful below, and the trial result usually meets affirmance on appeal.

As we explained in an earlier article, this *affirmance effect* might seem unsurprising at first glance.<sup>167</sup> One might expect a high affirmance rate because of appellate deference to the district court's result. One might even expect a high affirmance rate when review is *de novo*, because of the tendency of experts to agree at about a 75% rate.<sup>168</sup> Combining the two expectations based on appellate deference and expert agreement would push one's expected affirmance rate even higher toward 80%. Appellate judges should and do lean toward affirmance as the usual course.

However, if the high affirmance rate is owing to those deference and expertise factors, why do the parties not take them into account and settle all but the close appeals, thereby whittling down that high affirmance rate? The usual brand of case-selection theory says that appeals should act like trials.<sup>169</sup> Appeals that clearly favor either the appellant or the appellee would tend to be settled readily, because both sides could save costs by so acting in light of their knowledge of

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<sup>164</sup> See *Defendants' Advantage*, *supra* note 121, at 130–34; *Plaintiphobia*, *supra* note 38, at 123.

<sup>165</sup> See *Jury or Judge*, *supra* note 124, app. A; *Plaintiphobia*, *supra* note 38, at 107 tbl.2.

<sup>166</sup> We describe the source of these data *infra* text accompanying note 174. As to the affirmance rate, we could calculate it only from fiscal 1988, when the Administrative Office started to code the district court docket number in the appellate data set. So far these data extend only through fiscal 1997.

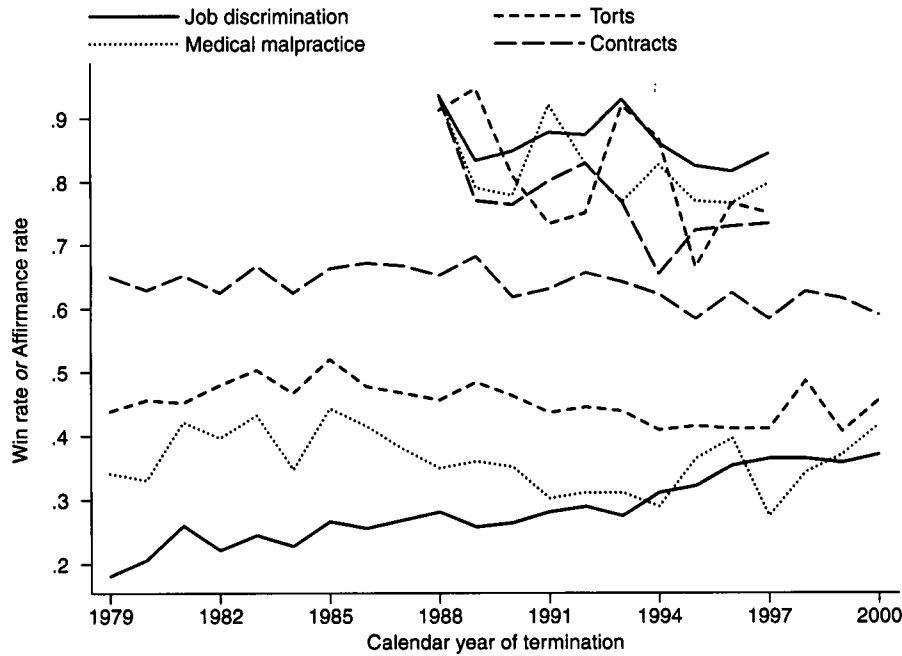
<sup>167</sup> *Defendants' Advantage*, *supra* note 121, at 131–34.

<sup>168</sup> See *id.* at 131.

<sup>169</sup> See *id.* at 132 n.11.



FIGURE 6: WIN RATES AND AFFIRMANCE RATES FOR FEDERAL CIVIL TRIALS



Source: Administrative Office data

all aspects of the case. Difficult appeals falling close to the applicable decisional criterion would tend not to settle, because the parties would be more likely to disagree substantially with respect to their predicted outcomes. These unsettled, difficult appeals entailing divergent expectations would fall more or less equally on either side of the decisional criterion, regardless of both the position of that criterion and the underlying distribution of cases. Case selection, then, should leave for appellate adjudication a residue of appeals exhibiting some nonextreme affirmance rate. Indeed, under simplifying assumptions, and as a limiting implication, case-selection theorizing would even predict a 50% affirmance rate.<sup>170</sup> That is clearly wrong, as the data prove.

Thus, the persistently elevated affirmance rate suggests that settlement is not very effective at the appellate stage in weeding out clear cases. If every judgment underwent appeal, one would expect about an 80% affirmance rate because of reviewers' deference and because of experts' agreement. In fact, only a fraction of judgments undergo

<sup>170</sup> See *id.* at 132 n.12.

appeal—about a fifth<sup>171</sup>—and yet one nevertheless still sees an 80% affirmance rate. It seems as if the parties have chosen to appeal, by whatever selection method they employ, a set of cases that functions, at least with regard to overall affirmance, as if it were a random sampling. In sum, case selection apparently has a limited effect in systematically filtering the cases for adjudication on appeal.

Why would that be? Perhaps the failure to filter out clear appeals is owing to appeals' not being very costly.<sup>172</sup> After slogging through the trial court, the parties must see the small cost and effort in appealing as comparatively insignificant. Judgment below leaves the winner feeling vindicated, the aggrieved loser wanting justice at long last. Something telling emerges in the countless scenes on the evening news in which losers immediately proclaim on the courthouse steps their intention to appeal. About a fifth of losing parties decide that they might as well stagger to the finish line, pretty much regardless of the chances on appeal. Simply put, an 80% affirmance rate suggests that the law should consider reform aimed at the efficiency of forcing the would-be appellant to pause. A possible reform proposal would involve shifting attorneys' fees on appeal to a losing appellant, which would seem a fair condition of access to a second court for a party already found to be in the wrong.<sup>173</sup>

## B. Plaintiff Effect

Our most recent series of articles used a new data set that we constructed from the Administrative Office's data by linking federal district court civil cases with their treatment in the federal courts of appeals.<sup>174</sup> The results were surprising. Our original intent was to study the jury/judge distinction on appeal, but the difference between appellate treatments of these two streams of cases turned out to be insignificant.<sup>175</sup> The real story lay in plaintiff/defendant differences.<sup>176</sup>

<sup>171</sup> See *id.* at 130–31, 154 & tbl.5; *Plaintiphobia*, *supra* note 38, at 105–06 & tbl.1, 119 tbl.5.

<sup>172</sup> See *Defendants' Advantage*, *supra* note 121, at 133 & n.13.

<sup>173</sup> See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 385, 421, 424 (1995) (suggesting a need for increased court fees on appeal).

<sup>174</sup> See Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); *Defendants' Advantage*, *supra* note 121; *Plaintiphobia*, *supra* note 38. For empirical work on the Supreme Court, see LAWRENCE BAUM, *THE SUPREME COURT* (7th ed. 2001), and compare ROBERT A. CARP & RONALD STIDHAM, *THE FEDERAL COURTS* (4th ed. 2001) (similar book in the same series, but treating the lower courts); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (using empirical approach to explain decision making as based on the attitudes and values of the Justices).

<sup>175</sup> See *Defendants' Advantage*, *supra* note 121, at 126–27, 130.

<sup>176</sup> See *Plaintiphobia*, *supra* note 38, at 102–03.

The data show that defendants succeed more than plaintiffs on appeal. For example, defendants appealing their losses after trial obtain reversals at a 33% rate, while losing plaintiffs succeed in only 12% of their appeals from trials.<sup>177</sup> Therefore, defendants emerge from the appellate court in a much better position than when they left the trial court. That observation is fact.

Why would that be? This question takes us into speculation. We think that the plaintiffs' lower reversal rate stems from real but hitherto unappreciated differences between appellate and trial courts. Both descriptive analyses of the results and more formal regression models dispel explanations based solely on case selection, and instead support an explanation based on appellate judges' attitudes toward trial-level adjudicators. The appellate judges may act on their perceptions of the trial courts as being pro-plaintiff. The appellate court consequently would be more favorably disposed to the defendant than are the trial judge and the jury. This appellate favoritism would be appropriate if the trial courts were in fact biased in favor of the plaintiff. But as empirical evidence accumulates in refutation of trial court bias on the plaintiff/defendant axis,<sup>178</sup> any such judicial perceptions at the appellate level appear increasingly to be misperceptions. Alternatively, unconscious biases may be at work. Perhaps appellate judges' greater distance from the trial process creates an environment in which it is easier to discount harms to the plaintiff. In any event, the data suggesting that appellate judges lean in favor of the defendant become a cause for concern. In short, we think we have unearthed an *anti-plaintiff effect* in federal appellate courts that is troublesome.

### C. Determinants of Appellate Outcome

Another major point of this Article is that empirical methods, as they push back the realm of unknowns, offer judges, practitioners, and policymakers some really practical lessons. We may not know precisely what determines who prevails on appeal,<sup>179</sup> but we are beginning to understand some of the factors involved.

For instance, emerging from our appellate research, our thesis is a simple one: misperceptions exist, and they have effects. Widespread misperceptions of the trial process exist. These misperceptions could affect appellate outcome. The discovery of a plaintiffs' disadvantage on appeal may contain lessons for appellate judges. Any suppositions about trial court and jury biases should cease to affect appellate deci-

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<sup>177</sup> *Id.* at 106.

<sup>178</sup> See *supra* Part V.C.

<sup>179</sup> On the uncertain role of party wealth and experience, for example, see *Plaintiphobia*, *supra* note 38, at 122.

sions. Each appellate judge could approach that goal by realizing that some commonly held views are misperceptions, and by recognizing that the role of these misperceptions in appellate decision making is undesirable.

Likewise, the affirmance effect would seem to impart a lesson to practitioners who are weighing the advisability of appealing a loss. All too frequently, an appeal is a waste of money. Meanwhile, policymakers should perhaps augment the expense to the participants, in order to further discourage appeals.

#### CONCLUSION

Data are good.