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## Civil Justice Reform: Juggling Between Politics and Perfection

### Cover Page Footnote

Assistant Professor of Law, Widener University School of Law; J.D., University of Chicago School of Law 1980. The author served as the Reporter for the Advisory Group appointed by the United States District Court for Delaware pursuant to the Civil Justice Reform Act of 1990. Nevertheless, the opinions stated in this article are solely those of the author. I would like to thank Professors Alan Garfield, Charles Geyh, Robert Hayman, Mary Brigid McManamon, and Carl Tobias for their comments on this article. I also would like to thank Jennifer Mayo and Paul Padien, Widener University School of Law Class of 1995, and Craig Hoogstraten, Widener University School of Law Class of 1994, for their assistance in preparing this article.

# CIVIL JUSTICE REFORM: JUGGLING BETWEEN POLITICS AND PERFECTION

PATRICK JOHNSTON\*

*In this Article, Professor Johnston analyzes the Civil Justice Reform Act of 1990 and its requirement that every United States District Court direct substantial resources toward reducing delay in the courts. He discusses the Civil Justice Reform Act in the context of a tradition of reform efforts directed at reducing delay, and considers how it shapes our understanding of delay, and ultimately, procedural justice. Professor Johnston questions the utility of using the speed of case processing as a gauge of procedural justice, and criticizes the limited model of procedural justice promoted by the Act and other similar efforts of delay reduction. Professor Johnston concludes that such reform efforts are dangerous because of their effect of narrowing our concerns for and understanding of procedural justice.*

“For who would bear . . . the law’s delay . . . .”

Hamlet Prince of Denmark, Act III, scene I

## INTRODUCTION

WHAT is “procedural justice”<sup>1</sup> and what methods best achieve it? As Mirjan Damaska has suggested, such questions comprise part of an “immense and bewildering subject,” the investigation of which can make us “uncertain about the adequacy of our basic points of reference.”<sup>2</sup> Although discussions of procedural justice have not engendered

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1. Discussions about dispute resolution or adjudication often distinguish between the justice of procedural laws and the justice of substantive laws. Traditionally, substantive law defines rights, duties or powers of people and institutions with respect to one another. The law of contracts or torts would be an example of substantive law. Procedural law, on the other hand, governs the processes for resolving a dispute about substantive law rights or duties. A rule prescribing how parties disputing substantive law rights should present their claims to a court would be an example of a procedural law. For general discussions of the distinctions made between substance and procedure, see, e.g., Michael D. Bayles, *Procedural Justice: Allocating to Individuals 3-4* (1990); Fleming James, Jr. et al., *Civil Procedure 1-3* (4th ed. 1992); Richard L. Marcus et al., *Civil Procedure: A Modern Approach 1* (1989). While I avoid providing a comprehensive definition of “justice” in this article, I will use the term “procedural justice” broadly to suggest an assessment of the quality or success of procedural law in providing dispute-resolution participants what we think they are due.

2. Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 1* (1986).

a consensus on definitions or approaches,<sup>3</sup> certain notions about procedural justice seem to persist. One such belief is that the amount of time procedures take to provide substantive justice affects our perception of the quality of justice. Few would fail to recognize the adage "Justice delayed is justice denied."<sup>4</sup> Our fascination with the amount of time it takes courts to resolve disputes extends across centuries—at least from the Magna Carta<sup>5</sup> through the Federal Rules of Civil Procedure.<sup>6</sup> Concern with the problems of delay also extends beyond Anglo-American jurisprudence.<sup>7</sup> Indeed, perpetual worry over "justice delayed" might be viewed as the fate of humanity rather than a chosen tradition.<sup>8</sup>

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3. For some recent examples of varied approaches in discussing "procedural justice," see, e.g., Robert M. Cover & Owen M. Fiss, *The Structure of Procedure* 2-46 (1979) (providing edited readings which address various values assigned to procedural law); Damaska, *supra* note 2 (providing a conceptual framework for understanding disparate mechanisms of legal procedure based on the organization of procedural authority and the functions of government); E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988) (presenting a social psychology study of procedural justice); John Rawls, *A Theory of Justice* 85-86 (1971) (distinguishing between "pure," "perfect," and "imperfect" procedural justice).

4. This often quoted phrase has been attributed to William Ewart Gladstone, the Prime Minister of Great Britain from 1868-1874. See Laurence J. Peter, *Peter's Quotations* 276 (1977).

5. "The fortieth clause [of the Magna Carta] provides that right and justice shall not be sold or denied or delayed." 1 William Holdsworth, *A History of English Law* 57-58 (7th ed. 1956).

6. Federal Rule of Civil Procedure 1 has provided, in part, since 1938: "They [the rules] shall be construed to secure the just, *speedy* and inexpensive determination of every action." Fed. R. Civ. P. 1 (emphasis added). Effective December 1, 1993, Rule 1 provides that the Federal Rules of Civil Procedure shall be "construed and *administered* to secure the just, speedy and inexpensive determination of every action." 146 F.R.D. 405 (emphasis added). The Advisory Committee notes to Rule 1, as amended, describe the purpose of the amendment as ensuring "that civil litigation is resolved not only fairly, but also without undue cost and delay." 146 F.R.D. 535.

7. See, e.g., Mauro Cappelletti, *The Judicial Process in Comparative Perspective* 243 (1989) ("[T]he problem of delay in court is one which plagues many countries . . ."); World Association of Judges/International Legal Center, *Court Congestion* (1971) (papers of a workshop held in Venice from November 12 to November 15, 1970 to discuss congestion and delay in the administration of justice and suggest remedial approaches to the problem). The problem of delay apparently has also plagued ecclesiastical courts. See Maurice Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies, in The Courts, the Public, and the Law Explosion* 29, 30 (Harry W. Jones ed., 1965) (reporting a 1965 New York Times headline which referred to Pope Paul exhorting the matrimonial courts of the Roman Catholic church to reduce delay).

8. See, e.g., Jane W. Adler et al., *The Pace of Litigation: Conference Proceedings*, at iii (1982) ("[T]he professional literature indicates dissatisfaction with the pace of legal proceedings in all civilizations that have left written records . . ."); Thomas W. Church, Jr. et al., *Pretrial Delay: A Review and Bibliography*, at ix (1978) ("Delayed disposition of cases is a critical problem facing the nation's trial courts. It regularly receives adverse attention from the press and criticism from the public."); Jefferson B. Fordham, *Foreword* to A. Leo Levin & Edward A. Woolley, *Dispatch and Delay: A Field Study of Judicial Administration in Pennsylvania*, at iii (1961) ("Time marches on and many changes come about, but the law's delay, like the common cold, abides with us."); Richard S. Miller, *A Program for the Elimination of the Hardships of Litigation Delay*, 27 Ohio St. L.J. 402, 402 (1966) ("Like the weather it [litigation delay] is a common topic of conversation, at least among judges and lawyers."); George L. Priest, *Private Litigants and the Court Con-*

One recent manifestation of the delay legacy is the Civil Justice Reform Act of 1990 ("CJRA" or "Act").<sup>9</sup> The CJRA has made delay more than a matter of historical or philosophical interest for the ninety-four United States district courts. The Act forces each district court to embrace delay anxiety as well as ponder corrective therapies. Because of the CJRA, United States district courts will be engaged until 1997<sup>10</sup> in a continuous self-examination for the delay which the Act assumes generally infects civil dispute resolution processes.<sup>11</sup> The CJRA does not specifically define the delay which it seeks to have district courts abate, nor does it explicitly prescribe a particular therapy for all courts where delay is found. Nevertheless, the Act presents the reduction of delay as a matter of paramount importance.

Both proponents and opponents of the CJRA have suggested that it is—in whole or in part—revolutionary.<sup>12</sup> Whether or not the CJRA rises

*gestion Problem*, 69 B.U. L. Rev. 527, 527 (1989) ("Litigation delay has proven a ceaseless and unremitting problem of modern civil justice.").

9. The Civil Justice Reform Act of 1990 comprises Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (Supp. IV 1992)).

10. The CJRA expires on December 1, 1997. See § 103(a), 104 Stat. at 5096. The Act will not bind district courts after that date.

11. For a discussion of the particular requirements of the CJRA, see *infra* text accompanying notes 18-81. For a discussion of the assumption of delay underlying the CJRA, see *infra* text accompanying notes 155-271.

12. See Report of the Advisory Group for the United States District Court of the Eastern District of Pennsylvania Appointed Under the Civil Justice Reform Act of 1990, at 1 (1991) ("The Civil Justice Reform Act of 1990 is the most significant piece of legislation that the Congress has enacted in the last three decades directed to procedures of the federal courts for reducing cost and delay in civil litigation."); Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 Cornell J.L. & Pub. Pol'y 1, 4 (1992) ("[T]he [Civil Justice Reform Act of 1990] implements, for the first time, a national strategy to attack the problems of cost and delay in civil litigation."); Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. Rev. 445, 490 (1992) ("The CJRA . . . will overhaul unnecessarily the infrastructure of the civil litigation process."); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 Minn. L. Rev. 375, 377 (1992) [hereinafter Mullenix, *Counter-Reformation*] ("The Civil Justice Reform Act of 1990 is fomenting a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938."); Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 Law & Contemp. Probs. 105 (1991) ("The CJRA promises to have a profound impact on the practice of civil litigation in the federal court system."). For other articles addressing the Civil Justice Reform Act, see Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity With Our International Rivals*, 13 U. Pa. J. Int'l Bus. L. 1 (1992); R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. Pitt. L. Rev. 687 (1993); Mary Brigid McManamon, *Is the Recent Frenzy of Civil Justice Reform a Cure-all or a Placebo? An Examination of the Plans of Two Pilot Districts*, 11 Rev. Litig. 329 (1992); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 Minn. L. Rev. 1283 (1993) [hereinafter Mullenix, *Unconstitutional Rulemaking*]; Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 Rev. Litig. 165 (1992) [hereinafter Mullenix, *Civil Justice Reform*]; Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 Ohio St. J. on

to the level of a revolution, it does impose new and substantial burdens on the federal courts and their resources.<sup>13</sup> Accordingly, we should examine whether delay deserves the attention which the CJRA mandates. Certainly the term "delay" carries with it a sense of contamination of optimal processes, and it is not a concept normally associated with justice.<sup>14</sup> Consequently, the goal of eliminating delay initially may seem neither exceptional nor unwarranted. However, if legislation reduces the number of lenses through which we view the quality of justice, then, in effect, it promotes a particular understanding of procedural justice. Legislation such as the CJRA, therefore, may be viewed as a political<sup>15</sup> choice as to what "procedural justice" shall mean in the federal courts.

While I do not intend to promote the perversity of delay here, I do hope to shed light on the effects of the "emerging resolve to eliminate delay,"<sup>16</sup> as exemplified by the CJRA. In this Article, I consider how the CJRA "revolution" shapes our understanding of delay and, ultimately, procedural justice.<sup>17</sup> In Part I, I provide a brief primer on the CJRA, describing the Act and its genesis. An understanding of the CJRA's terms and its legislative history is necessary to appreciate the extent of the resources which the Act dedicates to the delay issue and the emphasis which the Act places on delay. In addition, the explanation of the Act in Part I suggests how the CJRA limits the focus of federal courts and induces anxiety about being "fast enough." In Part II, I explain how the CJRA fails to define adequately the task it has given to the district courts, and I analyze how those courts might understand the scope of

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Disp. Resol. 115 (1991); William K. Slate II, *Early Implementation Districts: Pioneers and a Plethora of New Local Rules*, 11 Rev. Litig. 367 (1992); Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 Wash. & Lee L. Rev. 89 (1993); Carl Tobias, *Essay, Recalibrating the Civil Justice Reform Act*, 30 Harv. J. Legis. 115 (1993) [hereinafter Tobias, *Recalibrating*]; Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 Ariz. St. L.J. 1393 (1992) [hereinafter Tobias, *Civil Justice Reform and the Balkanization*].

13. For a description of the obligations imposed by the Act, see *infra* text accompanying notes 37-80.

14. For example, Black's Law Dictionary defines "delay" to mean: "To retard; obstruct; put off; postpone; defer; procrastinate; prolong the time of or before; hinder; interpose obstacles; as when it is said that a conveyance was made to 'hinder and delay creditors.'" Black's Law Dictionary 425 (6th ed. 1990). See also Mary L. Luskin, *Building a Theory of Case Processing Time*, 62 Judicature 115, 116 (1978) (noting that delay usually indicates abnormal or unacceptable time lapse).

15. I use the term "political" to refer to competition between competing interests for priority or leadership. See Webster's New Collegiate Dictionary 883 (1981). Cf. Mullenix, *Unconstitutional Rulemaking*, *supra* note 12, at 1338 (criticizing the CJRA as a "highly political" piece of legislation and a cynical attempt by Congress to wrest procedural rulemaking authority from the judiciary).

16. Larry L. Sipes, *Reducing Delay in State Courts: A March Against Folly*, 37 Rutgers L. Rev. 299, 317 (1985).

17. For other articles addressing the CJRA's impact on procedural justice, see Mullenix, *Counter-Reformation*, *supra* note 12, at 382 (describing the Act as one dimension of a political agenda which seeks to impose a certain vision of procedural justice at the federal level); Robel, *supra* note 12, at 128-31 (suggesting the CJRA fosters a corporate political agenda).

their job of delay reduction. Part II considers not only the CJRA but also the language, activities, and assumptions of advocates of delay reform in general. Finally, in Part III, I criticize the limited model of procedural justice promoted by the CJRA and similar efforts of delay reduction proponents. I question the utility of using the speed of case processing as a gauge of procedural justice, and I conclude that efforts at delay reduction such as the CJRA mask the broad range of concerns covered by the term "justice." In short, instead of fostering positive reform, the approach championed by the CJRA may diminish the opportunity of approximating justice through the federal courts.

## I. THE CIVIL JUSTICE REFORM ACT AND ITS GENESIS

The CJRA followed, in large part, from the work of a task force ("Brookings task force") convened by the Brookings Institution<sup>18</sup> and the Foundation for Change<sup>19</sup> at the request of Senator Joseph Biden.<sup>20</sup> In 1988, Senator Biden prompted the Brookings task force to "develop a set of recommendations to alleviate the problems of excessive cost and delay"<sup>21</sup> in civil litigation. The membership of the task force was se-

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18. The Brookings Institution has described itself as "an independent organization devoted to nonpartisan research, education and publication in economics, government, foreign policy, and the social sciences generally. Its principal purposes are to aid in the development of sound public policies and to promote public understanding of issues of national importance." Justice for All: Reducing Cost and Delay in Civil Litigation, Report of a Task Force, at v (1989) [hereinafter Justice for All].

19. The Foundation for Change has described itself as "a nonprofit corporation organized to foster, promote and directly participate in research, study and educational programs on a variety of complex public policy issues. The Foundation's objective is to involve itself in complicated issues where there is a need for experts to study and consider various policy options." Foundation for Change Civil Litigation Project: Procedural Reform of the Civil Justice System, A Study Conducted by Louis Harris and Associates 12, reprinted in *Federal Courts Study Committee Implementation Act and Civil Justice Reform Act: Hearings on H.R. 5381 and H.R. 3898 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 511 (1990) [hereinafter *House Hearings*]. Mark Gitenstein, the Executive Director of the Foundation for Change and a co-reporter for the Brookings task force, had served as Chief Counsel to the Judiciary Committee of the United States Senate. See Justice for All, *supra* note 18, at vii, 45.

20. See S. Rep. No. 416, 101st Cong., 2d. Sess. 13 (1990) [hereinafter S. Rep. No. 416], reprinted in 1990 U.S.C.C.A.N. 6802, 6816; H.R. Rep. No. 732, 101st Cong., 2d Sess. 8 (1990) [hereinafter H.R. Rep. No. 732], reprinted in *House Hearings, supra* note 19, at 292; Justice for All, *supra* note 18, at vii; Biden, *supra* note 12, at 4. S. Rep. No. 416 accompanied S. 2648, an amendment in the nature of a substitute for S. 2027 (the first version of the CJRA), as approved and reported by the Senate Committee on the Judiciary on July 12, 1990. See *infra* note 35 (describing the Act's legislative history). H.R. Rep. No. 732 accompanied H.R. 3898, as amended and approved by the House on September 18, 1990. See *House Hearings, supra* note 19, at 285. Senator Biden (D. Del.), the chair of the Senate Judiciary Committee, also served as the Honorary Chairman of the Foundation for Change. See *id.* at 511.

21. Justice for All, *supra* note 18, at vii. The task force published its findings and recommendations in Justice for All, *supra* note 18 [hereinafter "the Brookings report"]. The task force focused only on problems with the federal civil justice system, and primarily the civil justice system in district courts. See *id.* at vii.

lected to provide a broad spectrum of authorities representing the competing interests in the civil justice system.<sup>22</sup> The task force consisted of litigators from the plaintiffs' and defense bars, civil rights lawyers, representatives of the insurance industry, general counsel of corporations, representatives of environmental and consumer organizations, former judges, law professors, and social scientists.<sup>23</sup> The task force agreed to submit only those recommendations on which all its members agreed. In

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22. See S. Rep. No. 416, *supra* note 20, at 13.

23. The membership of the Brookings task force included: Debra Ballen, Vice President for Policy Development and Research at the American Insurance Association in Washington, D.C.; Robert Banks, Counsel to Latham & Watkins in New York, N.Y. and formerly General Counsel of the Xerox Corporation; Robert G. Begam, a former President of the Association of Trial Lawyers of America; Gideon Cashman, a senior partner at Pryor, Cashman, Sherman & Flynn in New York; Alfred W. Cortese, a partner at Kirkland & Ellis in Washington, D.C.; Susan Getzendanner, a partner at Skadden, Arps, Slate, Meagher & Flom in Chicago and a former United States District Court judge; Mark Gitenstein, *see supra* note 19; Barry Goldstein, Director of the Washington office of the NAACP Legal Defense and Educational Fund; Jamie Gorelick, a partner at Miller, Cassidy, Larrocca & Lewin in Washington, D.C.; Marcia D. Greenberger, the Managing Attorney of the National Women's Law Center in Washington, D.C.; Patrick Head, Vice President and General Counsel of the FMC Corporation; Deborah Hensler, Director of Research at the Institute for Civil Justice, Rand Corporation; W. Michael House, a partner at Shaw, Pitman, Potts & Trowbridge in Washington, D.C.; Shirley Hufstedler, a partner at Hufstedler, Miller, Kaus & Beardsley in Los Angeles and a former judge on the United States Court of Appeals for the Ninth Circuit; Kenneth Kay, a partner at Preston, Thorgrimson, Ellis & Holman, Washington, D.C.; Gene Kimmelman, the Legislative Director of the Consumer Federation of America; Norman Krivosha, Executive Vice President-Administration and General Counsel for Ameritas Financial Services of Lincoln, Nebraska; Leo Levin, Professor of Law Emeritus at the University of Pennsylvania Law School and a former Director of the Federal Judicial Center; Carl D. Ligio, General Counsel of Ernst & Young in New York and formerly Chairman of the Board of the American Corporate Counsel Association; Robert E. Litan, a Senior Fellow and Director of the Center for Economic Progress within the Economic Studies Program at the Brookings Institution; Frank McFadden, the Senior Vice President and General Counsel of Blount, Inc. and a former Chief Judge of the United States District Court for the District of Alabama; Francis McGovern, a Professor of Law at the School of Public Health, University of Alabama at Birmingham; Stephen B. Middlebrook, the Senior Vice President and General Counsel at Aetna Life & Casualty; Edward Muller, Vice President, General Counsel, and Chief Administrative Officer of Whittaker Corporation; Robert M. Osgood, a partner in the London office of Sullivan & Cromwell; Alan Parker, Deputy Executive Director of the Association of Trial Lawyers of America; Richard Paul, Vice President and General Counsel of Xerox Corporation; Judyth Pendell, Assistant Vice President of Law and Public Affairs at Aetna Life & Casualty; John A. Pendergrass, Senior Attorney in Research & Policy Analysis Division of the Environmental Law Institute; George Priest, Professor of Law and Economics at the Yale Law School; Charles E. Renfrew, Director and Vice President-Law of the Chevron Corporation and formerly a United States district court judge for the Northern District of California; Tony Roisman, of counsel to Cohen, Milstein & Hausfeld and former director of Trial Lawyers for Public Justice; John F. Schmutz, Senior Vice President and General Counsel for E. I. duPont de Nemours & Company; Christopher Schroeder, Professor of Law at the Duke University Law School; Bill Wagner, the President of the Association of Trial Lawyers of America; and Diane Wood, Associate Dean and Professor of Law at the University of Chicago Law School. See Justice for All, *supra* note 18, at 45-49. The Brookings report also identifies other individuals who provided assistance to the task force during its deliberations. See *id.* at 49.



effect, each of the thirty-six members of the task force had the authority to veto any proposed recommendation.<sup>24</sup>

Despite the diverse backgrounds of the task force's membership, its voting procedures, and the hopes of Senator Biden, it is not certain that the task force's recommendations reflect a consensus among all those interested in the process of civil litigation. Scholars of the CJRA have criticized the task force membership as being unduly weighted towards corporate and insurance industry interests and for failing to include any active judicial officers.<sup>25</sup>

After discussing and debating reform proposals over a nine month period,<sup>26</sup> the Brookings task force produced a lengthy set of recommendations for reducing costs and delays in federal civil litigation.<sup>27</sup> The recommendations addressed three broad aspects of federal civil litigation: procedure,<sup>28</sup> judicial resources,<sup>29</sup> and the activities of attorneys and clients that affect cost and delay.<sup>30</sup> The majority of the recommendations concerned changes in procedure, i.e., steps that courts and judges could take to reduce cost and delay in civil litigation.<sup>31</sup> Through its recommendations for procedural reform, the Brookings task force hoped to provide participants in the civil justice system with the "proper incentives" to minimize cost and delay.<sup>32</sup>

Less than six months after the Brookings task force issued its report, Senator Biden introduced his initial version of the CJRA in the Senate on January 25, 1990.<sup>33</sup> Senator Biden's bill relied heavily on the procedural recommendations of the Brookings task force.<sup>34</sup> Although both the

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24. See Biden, *supra* note 12, at 5.

25. See S. Rep. No. 416, *supra* note 20, at 71 (Sen. Hatch stated that the Civil Justice Reform Act, as originally introduced, was "the product, in large part, of a task force on which not a single sitting Federal district court judge was a member"); McManamon, *supra* note 12, at 360-61; Mullenix, *Counter-Reformation*, *supra* note 12, at 389 n.42; Robel, *supra* note 12, at 117. *But see* Justice for All, *supra* note 18, at vii (referring to current federal judges assisting members of the taskforce).

26. The task-force held six meetings between September 1988 and June 1989. See S. Rep. No. 416, *supra* note 20, at 13; H.R. Rep. No. 732, *supra* note 20, at 9.

27. See Justice for All, *supra* note 18, at 8-39.

28. See *id.* at 8-29.

29. See *id.* at 30-33.

30. See *id.* at 34-39.

31. The Brookings task force made twelve recommendations for procedural reform, four recommendations concerning judicial resources, and provided a general discussion of steps that clients and attorneys might take to reduce litigation costs and delay. See *supra* notes 28-30.

32. Justice for All, *supra* note 18, at viii, 9.

33. See S. 2027, 101st Cong., 2d Sess. (1990), reprinted in *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 517 (1990) [hereinafter *Senate Hearings*]. On January 25, 1990, Senators Biden, Heflin, Kohl, Metzenbaum, Simon, Specter, and Thurmond introduced S. 2027 in the Senate. See S. Rep. No. 416, *supra* note 20, at 3. Congressmen Brooks, Fish, Kastenmeier, and Moorhead introduced a companion bill in the House of Representatives as H.R. 3898. See H.R. 3898, 101st Cong., 2d Sess. (1990), reprinted in *House Hearings*, *supra* note 19, at 51.

34. See S. Rep. No. 416, *supra* note 20, at 13 ("The genesis for many of the ideas

House of Representatives and the Senate made amendments to the CJRA before adopting it, the CJRA never shifted its focus from the reduction of cost and delay in the federal courts.<sup>35</sup>

The first recommendation of the Brookings task force called for a statute requiring each district court to develop and adopt a formal plan to reduce cost and delay in civil litigation.<sup>36</sup> Similarly, at the heart of the CJRA lies the requirement that each district court implement a "civil justice expense and delay reduction plan"<sup>37</sup> ("Plan") by December 1, 1993.<sup>38</sup> The stated purpose of this requirement is "to facilitate deliberate

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embraced within [the CJRA] is the report . . . 'Justice For All[:] Reducing Costs and Delays in Civil Litigation'"); see also *infra* notes 36, 38, 39, 41, 60 and accompanying text.

35. Between January and May of 1990, the Senate Committee on the Judiciary received comments and objections on S. 2027 from lawyers, judges, and bar associations. See S. Rep. No. 416, *supra* note 20, at 4. On March 6, 1990, the Senate held hearings on S. 2027. See *id.* As a result of the comments and hearings, on May 17, 1990, Senators Biden and Thurmond introduced the Judicial Improvements Act of 1990, S. 2648, 101st Cong., 2d Sess. (1990), reprinted in *Senate Hearings, supra* note 33, at 548. See S. Rep. No. 416, *supra* note 20, at 3-4. Title I of S. 2648 constituted a revised Civil Justice Reform Act of 1990. See *id.* at 4. The Senate Committee on the Judiciary held hearings on S. 2648 on June 26, 1990. See *id.* On July 12, 1990, the Senate Committee approved an amendment in the nature of a substitute for S. 2648 and reported favorably on S. 2648. See *id.* at 35. On September 6, 1990, the House of Representatives Subcommittee on Courts, Intellectual Property and the Administration of Justice held hearings on H.R. 3898 and the changes made in the CJRA by the Senate Judiciary Committee through S. 2648. See H. Rep. No. 732, *supra* note 20, at 8. On September 14, 1990, the House Subcommittee reported favorably on an amendment to H.R. 3898 in the nature of a substitute, and the full Committee on the Judiciary of the House reported favorably on the amended H.R. 3898 on September 18, 1990. See *id.* at 9. By voice vote, the House of Representatives approved H.R. 3898, as amended, on September 27, 1990. See 136 Cong. Rec. H8266 (daily ed. Sept. 27, 1990); 46 Cong. Q. Almanac 523 (1990). On October 27, 1990, the Senate agreed by voice vote on a compromise to H.R. 3898 (as passed by the House of Representatives) in the form of an amendment to S. 2648 offered by Senators Biden and Thurmond. See 136 Cong. Rec. S17,904 (daily ed. Oct. 27, 1990). S. 2648, as passed, was then consolidated with a number of other titles and inserted as the amended text of H.R. 5316 which was passed again and sent to the House. The House then cleared H.R. 5316 by voice vote shortly after midnight on October 28, 1990. See 136 Cong. Rec. H13,297, H13,316 (daily ed. Oct. 27, 1990); 46 Cong. Q. Almanac 523 (1990).

36. See *Justice for All, supra* note 18, at 12.

37. 28 U.S.C. § 471 (Supp. IV 1992). Each district court may develop its own plan or adopt a model plan which the Act requires the Judicial Conference of the United States to develop. See *id.*; 28 U.S.C. § 477 (Supp. IV 1992).

38. See § 103(b)(1), 104 Stat. at 5096. The Brookings report had recommended that all district courts implement "Civil Justice Reform Plans" within one year. See *Justice for All, supra* note 18, at 12. Consistent with that recommendation, the CJRA provided that any district court which developed and implemented its Plan no earlier than June 30, 1991 and no later than December 31, 1991 should be designated by the Judicial Conference as an Early Implementation District Court. See § 103(c), 104 Stat. at 5096. The Act encouraged Early Implementation Districts by making them eligible for additional resources to implement their Plans. See *id.* In addition to the Pilot and Demonstration districts identified *infra* notes 73-74, 20 other district courts qualified as Early Implementation Districts. See Civil Justice Reform Act Report: Development and Implementation of Early Implementation Districts and Pilot Courts 2 (1992) [hereinafter Civil Justice Reform Act Report]. For an evaluation of the work of the Early Implementation Districts, see Tobias, *Recalibrating, supra* note 12.

adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."<sup>39</sup> Despite this broadly stated purpose, the Act concentrates on only two of the announced goals—the reduction of cost and delay.<sup>40</sup>

The initial development of each court's Plan rests primarily with an advisory group which the Act requires the chief judge of each district court to appoint.<sup>41</sup> Congress intended the advisory groups to be the primary instigators of court reform.<sup>42</sup> Under the CJRA, the advisory groups should consist of "attorneys and other persons who are representative of major categories of litigants in such court."<sup>43</sup> Congress adopted the advisory group mechanism based on the belief that reform that proceeds from the "bottom up," i.e., from the users of the system, would more likely be successful in identifying the needs of a district and ensuring compliance with any reforms proposed by the group.<sup>44</sup> The drafters of the Act also hoped that the advisory groups would "stimulate . . . dialogue between the bench, the bar and [clients] about methods for streamlining litigation practice."<sup>45</sup>

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39. 28 U.S.C. § 471 (Supp. IV 1992). The Brookings report identified the purpose of such Plans as the streamlining of discovery, the improvement of judicial case management, and renewed commitment to the "just, speedy and inexpensive" resolution of civil disputes." Justice for All, *supra* note 18, at 12.

40. The focus of the Act on cost and delay and not more broadly on a definition of "justice" has concerned some commentators. See Mullenix, *Civil Justice Reform*, *supra* note 12, at 199; Mullenix, *Counter-Reformation*, *supra* note 12, at 438-39. But see 136 Cong. Rec. 599 (1990) (statement of Sen. Joseph Biden introducing S. 2027) ("[A]doption of time standards does not mean that speed will have somehow displaced justice as the primary judicial goal in the adjudication of cases.").

41. See 28 U.S.C. § 478 (Supp. IV 1992). The Brookings report also suggested similar planning groups to develop civil justice reform plans. See Justice for All, *supra* note 18, at 11-12.

42. See, e.g., Biden, *supra* note 12, at 8 (characterizing the advisory groups as the "engine for reform").

43. 28 U.S.C. § 478(b) (Supp. IV 1992). With the exception of the United States Attorney for the district, no member of an advisory group may serve longer than four years. See 28 U.S.C. §§ 478(c), (d) (Supp. IV 1992). For a discussion of the "balance" of the advisory groups as actually constituted, see Lauren K. Robel, *Grass Roots Procedure: The Turn to Localism in Civil Justice Reform*, Brook. L. Rev. (forthcoming 1993). The use of advisory groups has been criticized as elitist and undemocratic. See Mullenix, *Counter-Reformation*, *supra* note 12, at 407; Tobias, *Civil Justice Reform and the Balkanization*, *supra* note 12, at 1404-05.

44. See S. Rep. No. 416, *supra* note 20, at 14, 15; H.R. Rep. No. 732, *supra* note 20, at 10. Building reform from the "bottom up" was identified as the first of six cornerstone principles of the CJRA. See S. Rep. No. 416, *supra* note 20, at 14. The other components considered "essential" were: "(2) promulgating a national, statutory policy in support of judicial case management; (3) imposing greater controls on the discovery process; (4) establishing differentiated case management systems; (5) improving motions practice and reducing undue delays associated with decisions on motions; and (6) expanding and enhancing the use of alternative dispute resolution." *Id.*; see H.R. Rep. No. 732, *supra* note 20, at 10-11.

45. S. Rep. No. 416, *supra* note 20, at 14 (quoting Justice for All, *supra* note 18, at 12).

The CJRA instructs each advisory group to complete a "thorough assessment"<sup>46</sup> of its court for the purpose of identifying "the principal causes of cost and delay in civil litigation"<sup>47</sup> in the district. The Act also directs each advisory group to provide its district court with a report which contains recommendations of "measures, rules and programs" to reduce such cost and delay and which describes the group's bases for its recommendations.<sup>48</sup> Each advisory group must base its findings and recommendations—at least in part—on assessments of several factors. Those factors include: (1) the condition of the district court's civil and criminal dockets;<sup>49</sup> (2) trends in case filings and in demands placed on court resources;<sup>50</sup> (3) court procedures and the ways in which litigants and their attorneys conduct litigation;<sup>51</sup> and (4) the impact of new legislation on the courts.<sup>52</sup> In developing its report, an advisory group also must "take into account the particular needs and circumstances" of its own district.<sup>53</sup>

The CJRA permits the judges of a district court to exercise considerable discretion in choosing the specific contents of the court's Plan.<sup>54</sup> The Act does, however, impose practical limits on the judges' discretion. First, the Act prohibits a court from adopting a Plan without considering the report and recommendations of the district's advisory group concerning the reduction of cost and delay in that district.<sup>55</sup> In addition, the CJRA requires a committee—composed of the chief judge of each district court in a circuit and the chief judge of the court of appeals for the circuit—to review each Plan prepared by a district court in that circuit and to make suggestions for additional or modified provisions in the

46. 28 U.S.C. § 472(c)(1) (Supp. IV 1992).

47. 28 U.S.C. § 472(c)(1)(C) (Supp. IV 1992). *See also* Tobias, *Civil Justice Reform and the Balkanization*, *supra* note 12, at 1415 (criticizing portions of § 472 as being internally inconsistent).

48. 28 U.S.C. § 472(b)(2)-(3) (Supp. IV 1992).

49. *See* 28 U.S.C. § 472(c)(1)(A) (Supp. IV 1992).

50. *See* 28 U.S.C. § 472(c)(1)(B) (Supp. IV 1992).

51. *See* 28 U.S.C. § 472(c)(1)(C) (Supp. IV 1992).

52. *See* 28 U.S.C. § 472(c)(1)(D) (Supp. IV 1992).

53. 28 U.S.C. § 472(c)(2) (Supp. IV 1992). Commentators have criticized the Act for this district-specific approach, claiming that it may lead to a multitude of local rules inconsistent with the uniformity in procedure among district courts which the original drafters of the Federal Rules of Civil Procedure sought to achieve. *See, e.g.*, Mullenix, *Counter-Reformation*, *supra* note 12, at 380-82 (commenting on the CJRA conflict with uniformity); Tobias, *Civil Justice Reform and the Balkanization*, *supra* note 12, at 1402 (referring to the "balkanization" that civil justice reform promises to effect). *But cf.* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, Stan. L. Rev. (forthcoming July 1994) (arguing that the CJRA neither authorizes nor compels local deviations from the Federal Rules of Civil Procedure).

54. For example, the CJRA provides that the district court shall develop or select its plan. *See* 28 U.S.C. § 471 (Supp. IV 1992). In addition, the Act suggests that a district court need only "consult" with its advisory group in creating its plan. *See* 28 U.S.C. § 473(a) (Supp. IV 1992).

55. *See* 28 U.S.C. § 472(a) (Supp. IV 1992) ("The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected . . . after consideration of the recommendations of an advisory group . . .").

Plans.<sup>56</sup> The CJRA also provides for review of each Plan by the Judicial Conference of the United States, and it permits the Judicial Conference to request modifications to Plans deemed insufficient.<sup>57</sup>

The CJRA also curtails the scope of judicial discretion by preventing a district court from becoming complacent. After adoption of a Plan, the CJRA requires repeated annual assessments by each district court, in conjunction with its advisory group.<sup>58</sup> Moreover, these annual assessments must be conducted "with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court."<sup>59</sup>

The most significant practical restriction on judicial discretion is the Act's requirement that advisory groups and courts contemplate adoption of the specific methods of litigation management and cost and delay reduction set forth in the CJRA.<sup>60</sup> First, the Act requires consideration of six identified "principles and guidelines of litigation management and cost and delay reduction."<sup>61</sup> In addition to the *principles* of cost and delay reduction, the CJRA also prescribes consideration by district courts of six "litigation management and cost and delay reduction tech-

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56. See 28 U.S.C. § 474(a)(1)(A)-(B) (Supp. IV 1992).

57. See 28 U.S.C. § 474(b)(1)-(2) (Supp. IV 1992). See also Tobias, *Civil Justice Reform and the Balkanization*, *supra* note 12, at 1406-11 (criticizing the oversight activities performed to date by the Judicial Conference and the committees of chief judges).

58. See 28 U.S.C. § 475 (Supp. IV 1992).

59. *Id.*

60. See 28 U.S.C. § 473 (Supp. IV 1992). The methods of cost and delay reduction found in the Act are consistent with the recommendations for procedural reform made in the Brookings report. In addition to recommending the adoption of a "Civil Justice Reform Plan" by each district court, the Brookings report contained eleven recommendations for the content of such plans. The Brookings' recommendations promoted the approaches to case management ultimately found in the CJRA, including differentiated case management, early judicial control through the setting of firm deadlines, control and expedition of discovery, and the efficient processing of motions. See *Justice for All*, *supra* note 18, at 12-29.

61. 28 U.S.C. § 473(a) (Supp. IV 1992). Section 473(a) provides:

Content of civil justice expense and delay reduction plans

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

(A) assessing and planning the progress of a case;

(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months after the filing of the complaint, unless a judicial officer certifies that—

niques"<sup>62</sup> in formulating their Plans. The *techniques* differ from the *prin-*

(i) the demands of the case and its complexity make such a trial date incompatible with serving the ends of justice; or

(ii) the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

(D) setting, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through discovery-case management conference or a series of such conferences at which the presiding judicial officer—

(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with litigation;

(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

(ii) phase discovery in two or more stages; and

(D) sets, at the earliest practicable time, deadlines for filing motions and a time framework for their disposition;

(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial, and summary jury trial.

*Id.* [hereinafter "principles of cost and delay reduction"].

62. 28 U.S.C. § 473(b) (Supp. IV 1992). Section 473(b) of the CJRA provides:

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) a requirement that all requests for extensions of deadline for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and fac-

*cipl*es in that the latter constitute broad standards for case management and the former provide examples of specific acts consistent with the broader principles.<sup>63</sup>

The language of the CJRA does not require district courts to adopt its principles or techniques of cost and delay reduction.<sup>64</sup> Whether Congress should have required each district court to adopt specific methods of cost and delay reduction was one of the most hotly contested issues surrounding passage of the Act.<sup>65</sup> The Judicial Conference of the United States consistently opposed any draft of the CJRA which would require the courts to adopt specific methods of case management.<sup>66</sup> In fact, the

tual basis of a case to a neutral court representative selected by the court at a non-binding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

*Id.*

63. See S. Rep. No. 416, *supra* note 20, at 53.

64. Note that §§ 473(a) & (b) of the CJRA provide that the district courts and advisory groups “shall consider and may include” the principles and techniques of litigation management and cost and delay reduction. 28 U.S.C. § 473 (a), (b) (Supp. IV 1992) (emphasis added). See also *supra* notes 61-62. Although the CJRA does not require adoption of the principles and techniques described in § 473 of the Act, advisory groups are required to explain how their recommendations comply with § 473. See 28 U.S.C. § 472(b)(4) (Supp. IV 1992); see also *infra* text accompanying notes 74-76 (discussing CJRA requirement that certain district courts in the Act’s pilot program adopt the principles of cost and delay reduction).

65. S. 2027, the original CJRA introduced by Senator Biden, required district courts to include fifteen specific methods of cost and delay reduction. See S. Rep. No. 416, *supra* note 20, at 53; S. 2027 § 471(b)(1)-(15), reprinted in *Senate Hearings, supra* note 33, at 529-38. To accommodate concerns raised by the Judicial Conference in response to S. 2027 and to provide district courts more flexibility in cost and delay reduction, Senator Biden introduced a revised CJRA as Title I of S. 2648. See *supra* note 35. Section 473 of S. 2648, as introduced and approved by the Senate Committee on the Judiciary, contained a “two-tiered” approach to the content of the district courts’ Plans. See *Senate Hearings, supra* note 33, at 554-58; S. Rep. No. 416, *supra* note 20, at 53. S. 2648 required courts to adopt *principles* of cost and delay reduction, but only directed them to consider adoption of the *techniques*. See *id.* The principles of cost and delay reduction set forth in § 473(a) of S. 2648 as introduced by Senator Biden are almost identical to the principles set forth in § 473(a) of the Act. The principles of cost and delay reduction set forth in the original S. 2648, however, included a seventh principle which ultimately gave rise to § 476 of the CJRA as enacted. See *Senate Hearings, supra* note 33, at 554-57; 28 U.S.C. § 476 (Supp. IV 1992); see also *infra* text accompanying notes 144-49 (discussing § 476 and its requirements for the reporting of cases which do not meet established time standards). For the complete legislative history of the Act, see *supra* notes 33, 35.

66. See, e.g., *Senate Hearings, supra* note 33, at 212, 221 (testimony and statement of the Honorable Aubrey E. Robinson, Jr., on behalf of the Judicial Conference of the United States, raising objections to S. 2027); *id.* at 348 (statement of the Honorable Robert F. Peckham, on behalf of the Judicial Conference of the United States, objecting to the mandatory and rigid nature of some of the provisions of Title I of S. 2648, and objecting to Title I of S. 2648 as an “unwise legislative intrusion into procedural matters that are properly the province of the judiciary”); see also *House Hearings, supra* note 19, at 416-25

Judicial Conference attempted to preempt congressionally imposed case management by promulgating its own "14 Point Program" for district courts to address cost and delay in civil litigation.<sup>67</sup> The Judicial Conference program generally supported the goals underlying the CJRA.<sup>68</sup> In addition, the approaches to cost and delay reduction recommended by the Judicial Conference were very similar to those proposed in the CJRA.<sup>69</sup> Ultimately, Congress responded to some of the objections of the judiciary and enacted a CJRA which apparently leaves the specific methods of cost and delay reduction to the discretion of the district courts.<sup>70</sup> Congress, however, held to its beliefs that legislation was necessary for effective reform and that no district court should be exempt from the CJRA's provisions.<sup>71</sup>

Because the language of the CJRA does not explicitly require district courts to adopt the Act's principles and techniques of cost and delay reduction, the Act appears to afford district courts broad discretion in constructing their Plans. The Act, however, does include measures

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(comments of judges and courts of the United States Courts for the Seventh Circuit objecting to requirements of H.R. 3898); *Senate Hearings*, *supra* note 33, at 364-71 (statement of Federal Judges Association raising objections to S. 2648); Diana Murphy, *The Concerns of Federal Judges*, 74 *Judicature* 112, 114 (1990) (summarizing objections to S. 2027 and S. 2648 by the Federal Judges Association). *But see Senate Hearings*, *supra*, at 478 (letter from the Honorable John F. Gerry reporting support of the judges of the United States District Court of New Jersey for S. 2648); *id.* at 479 (letter from the Honorable Dickinson R. Debevoise supporting S. 2648).

67. *See Senate Hearings*, *supra* note 33, at 325-33 (statement of the Honorable Robert F. Peckham on behalf of the Judicial Conference of the United States); *see also Conference OKs Plan to Cut Court Costs, Delays*, Nat'l L.J., May 21, 1990, at 5. For a discussion of negotiations between Congress and the Judicial Conference concerning S. 2027 and the Judicial Conference's 14-Point Program, see S. Rep. No. 416, *supra* note 20, at 4-6, 30-32.

68. *See Senate Hearings*, *supra* note 33, at 330-31 (statement of the Honorable Robert F. Peckham on behalf of the Judicial Conference of the United States).

69. For example, the Judicial Conference program also provided for the use of advisory groups to complete the following tasks: assessments of each court's civil and criminal dockets, identification of the principal sources of cost and delay, and recommending measures to reduce cost and delay. *See House Hearings*, *supra* note 19, at 117-20 (statement by the Honorable Robert F. Peckham about Title I of S. 2648); Section by Section Comparison of the Civil Justice Reform Act of 1990 and the Judicial Conference's 14 Point Plan to Address Cost and Delay in Civil Litigation (draft memorandum prepared by Administrative Office of the United States Courts) (on file with the *Fordham Law Review*).

70. S. 2648, which contained the second version of the CJRA introduced by Senator Biden, had presented adoption of the *techniques* of cost and delay reduction as optional. *See supra* notes 62, 65. In an amendment in the nature of a substitute to H.R. 3898, the Judiciary Committee of the House of Representatives first proposed optional adoption of the *principles* of cost and delay reduction. *See H.R. Rep. No. 732*, *supra* note 20, at 3, 13.

71. The Federal Judges Association had objected to the CJRA, because, among other reasons, the Act did not exempt districts which were current on their civil dockets. *See House Hearings*, *supra* note 19, at 163 (statement of Diana Murphy, President Federal Judges Association, and Judge, U.S. District Court for the District of Minnesota). For a discussion of objections by Congress to the Judicial Conference's "14 Point Program," see S. Rep. No. 416, *supra* note 20, at 30-32.



which strongly encourage adoption of those principles and techniques.<sup>72</sup> For example, the CJRA created a "pilot program" which practically ensures that the Act's suggested principles of cost and delay reduction will eventually constitute the bases for case management in many district courts.<sup>73</sup> The CJRA directed the Judicial Conference of the United States to designate ten district courts as pilot districts.<sup>74</sup> The Act required the pilot districts to implement their Plans by December 31, 1991, and to include the Act's six principles of cost and delay reduction in their Plans<sup>75</sup> until December 31, 1994.<sup>76</sup>

As part of the pilot program study, the Judicial Conference must provide a report to Congress by the end of 1995.<sup>77</sup> The report must include an assessment of the extent to which cost and delay have been reduced as a result of the program. In addition, the report must compare the experiences of the pilot districts with the experiences of ten "comparable" districts for which adoption of the Act's principles of cost and delay reduction had been "discretionary."<sup>78</sup> Perhaps most importantly, the pilot program report also must contain a recommendation as to whether some or all of the district courts should be required to include in their

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72. Even when the language in the CJRA was changed to make adoption of the Act's principles discretionary, Congress continued to advocate adoption of the principles and techniques of cost and delay reduction set forth in the Act. For example, the House report for the amended H.R. 3898 provided: "section 473 identifies those components of effective case management that the Committee has ascertained to be the most essential, and which the Committee actively encourages the district courts to consider for inclusion in their expense and delay reduction plans." H.R. Rep. No. 732, *supra* note 20, at 10-11.

73. Section 105, 104 Stat. at 5097. In addition to the creation of the pilot program, the CJRA also designated five courts as "demonstration" districts. Section 104, 104 Stat. at 5097. The demonstration districts are: the Northern District of California, the Western District of Michigan, the Western District of Missouri, the Northern District of Ohio, and the Northern District of West Virginia. See § 104(b), 104 Stat. at 5097. With respect to the demonstration districts, the Act imposes the following requirements during the four-year period beginning on January 1, 1991: (1) the Western District of Michigan and the Northern District of Ohio must experiment with systems of differentiated case management that provide for the assignment of cases to appropriate processing tracks; and (2) the Northern District of California, the Northern District of West Virginia and the Western District of Missouri must experiment with various methods of cost and delay reduction, including alternative dispute resolution. See § 104(b)(1)-(2), 104 Stat. at 5097.

74. See § 105(b), 104 Stat. at 5097. The CJRA dictated that at least five of the pilot districts should encompass metropolitan areas. See § 105(b)(2), 104 Stat. at 5097. The ten pilot districts are: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah and the Eastern District of Wisconsin. See Civil Justice Reform Act Report, *supra* note 38, at 1.

75. See § 105(b)(1), 104 Stat. at 5097.

76. See § 105(b)(3), 104 Stat. at 5097.

77. See § 105(c), 104 Stat. at 5098.

78. *Id.* The Act specifically provides that the Judicial Conference base its comparison on a study conducted by an independent organization with expertise in the area of federal court management. See § 105(c)(1), 104 Stat. at 5098. The Judicial Conference has enlisted the Institute for Civil Justice of the Rand Corporation to conduct the comparison study. See Institute for Civil Justice, Rand, 1993 Annual Report 30 (1993).

Plans the Act's principles of cost and delay reduction.<sup>79</sup> If the Judicial Conference does not recommend an expansion of the pilot program's requirements, the Conference must identify "alternative, more effective cost and delay reduction programs"<sup>80</sup> for implementation.

Senator Biden accurately described the practical effect of the pilot program in promoting the adoption of the Act's principles of cost and delay reduction. In advocating passage of the CJRA to the Senate, Senator Biden stated:

Within a set number of years, then, this legislation insures that one of two things will occur. Either the six principles of litigation management and cost and delay reduction that Congress has specified in this legislation will be part of district court plans nationwide, or some other program, that has been shown to be demonstrably better, will be in place. One way or the other, the situation is bound to improve.<sup>81</sup>

What conclusions can we draw from our understanding of the terms of the CJRA and its genesis? One conclusion which seems fair is that the explicit requirements of the Act and the approaches that it implicitly advocates put real pressure on the district courts not only to reduce delay, but to reduce it sufficiently to satisfy Congress. The legislative history of the Act suggests that Congress will not hesitate to use its powers to control court activity when it believes the courts have failed to use their powers effectively.<sup>82</sup>

To meet the goals of the CJRA, district courts should understand what Congress meant by the term "delay." The processing of civil dis-

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79. See § 105(c)(2)(A), 104 Stat. at 5098.

80. Section 105(c)(2)(C), 104 Stat. at 5098. The CJRA also includes additional provisions which foster adoption of its principles of litigation management. For example, the Act permits the Judicial Conference to develop one or more model Plans, based upon Plans developed and implemented by Early Implementation District Courts and provided that the model plans comply with the requirements of § 473. See 28 U.S.C. § 477(a)(1) (Supp. IV 1992). Accordingly, the CJRA requires any model plan to be based, at least in part, on Plans which the CJRA required to adopt the principles of cost and delay reduction. Furthermore, if an advisory group recommends that a district court develop its own Plan rather than adopt a model plan, the CJRA directs the group to explain the manner in which the recommended plan complied with the section of the Act setting forth the principles of cost and delay reduction. See 28 U.S.C. § 472(b)(4) (Supp. IV 1992); see also S. Rep. No. 416, *supra* note 20, at 51-52; H.R. Rep. No. 732, *supra* note 20, at 12. Consequently, the CJRA's directions for development of the model plans and non-model plans reinforces adherence to the Act's principles of case management.

81. 136 Cong. Rec. S17,575. (daily ed. Oct. 27, 1990).

82. See *Senate Hearings*, *supra* note 33, at 310. The legislative history indicates that Congress pursued judicial reform on its own through the CJRA because of a perception that the courts could not effectively use their powers under the Federal Rules of Civil Procedure to reduce cost and delay. See Justice for All, *supra* note 18, at 8; see also Robert Banks, *The Need for Reform*, 74 *Judicature* 113, 115 (1990) (reporting as a member of the Brookings task force: "While eschewing a threatening tone, [Senator Biden] advised us [at our initial gathering] that the noise level was rising in the constituency he served. If we did not move forward with reform, he counseled, the populace would demand change and change in such an environment would not necessarily produce the positive results that were desired.").

putes in district courts must take some time,<sup>83</sup> but when does the amount of time rise to the level of "delay" which should be eliminated? In Part II below, I will discuss what courts might perceive delay to mean in the context of procedural reform, and what effects such understandings may have on our system of procedural justice.

## II. THE MEANING OF DELAY AND THE SCOPE OF ACCEPTABLE DELAY REDUCTION

Just as concern with "justice delayed" is part of our heritage, uncertainty about the meaning of delay and its reduction also seems to be part of the reform tradition.<sup>84</sup> As Professor Leo Levin observed more than thirty years ago, "We have, throughout the country, achieved virtual unanimity in condemning 'delay' without even approaching agreement on 'what delay really is.'"<sup>85</sup>

References to different senses and measurements of delay have contributed, in part, to the realm of uncertainty about delay. For example, Maurice Rosenberg described a distinction between "court-system" delay and "lawyer-caused" delay.<sup>86</sup> The former sense referred to the "waiting time exacted of litigants who are ready and eager to go ahead when the court is not because other cases have priority," and the latter included "the delay which the lawyers create through their own unreadiness or unwillingness to proceed."<sup>87</sup> Students of the "delay problem"<sup>88</sup> also have held different views about what should be measured when considering delay; that is to say, from what point in the litigation process delay should be assessed.<sup>89</sup> Commentators who viewed a judge's role primarily as a passive trier of cases suggested measuring for delay only from the time the parties present a case as ready for trial until a judge and a courtroom are available.<sup>90</sup> On the other hand, supporters of delay reduction who suggested the courts assume a broader responsibility for the

83. See Luskin, *supra* note 14, at 116 ("Most would agree . . . that some time used in processing cases is normal, acceptable and even desirable."); Harry D. Nims, *The Law's Delay: The Bar's Most Urgent Problem*, 44 A.B.A. J. 27 (1958) ("Of course litigation cannot be disposed of immediately after it is started. Some lapse of time is essential and inevitable.").

84. See, e.g., Levin & Woolley, *supra* note 8, at 5 (discussing the confusion among lawyers, judges and lay persons as to what "delay" actually means).

85. *Id.* (quoting Nims, *supra* note 83). *But cf.* Rosenberg, *supra* note 7, at 32 ("Everyone understands in a general way what is meant by delay in reference to the court process: the period of waiting litigants must endure as they take their place in a long queue inching its way toward judgment.").

86. Rosenberg, *supra* note 7, at 32.

87. *Id.* Rosenberg dismissed "clients' delay" as a major factor in slowing justice, because of a lack of evidence to support such a theory. *Id.* at 35.

88. *Id.* at 34.

89. See *id.* at 33-34.

90. See Levin & Woolley, *supra* note 8, at 6; Rosenberg, *supra* note 7, at 33; see also Sipes, *supra* note 16, at 311 (discussing trends in the level of court control of case management); Hans Zeisel et al., *Foreword to Delay in the Court*, at v (2d ed., Greenwood Press 1978) ("To measure the delay, it is necessary to determine the average inter-

development of litigation proposed measurement of delay from either the date of filing or the date the case is "at issue" until the date of disposition.<sup>91</sup>

Proponents of delay reduction have directed recent efforts, such as the CJRA, at all types of delay which might occur at any point in the civil litigation process. For example, included in the CJRA are findings that "[t]he courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation,"<sup>92</sup> and that solutions to problems of delay must include significant contributions from all of those factions.<sup>93</sup> In addition, it is clear that the CJRA considers delay in civil litigation to be more than just a problem of parties who are ready for trial and waiting for an available judge or courtroom. The Act seeks to reduce delay through the early involvement of judicial officers in planning the progress of the entire case, controlling discovery, and regulating pretrial motion practice.<sup>94</sup>

Although the CJRA gives each district court the task of reducing delay throughout the litigation process, it neither describes the circumstances it proscribes nor does it furnish standards for assessing the success or failure of court efforts. In short, the Act implies that there are unsatisfactory states of case processing, but it does little to advise courts how to recognize satisfactory states. As suggested by one district court judge who supported the Act, not much time was spent identifying the problem.<sup>95</sup> It appears Congress assumed a common understanding of the term "delay" and then concentrated on solutions to the problem it assumed existed.<sup>96</sup>

It is not unusual for studies of the civil justice system to recognize a problem of delay while implying that it is not necessary or useful to de-

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val between the time the parties are ready for trial (or are judged to be so) and the time the court provides trial.").

91. See Levin & Woolley, *supra* note 8, at 6; Rosenberg, *supra* note 7, at 33; see also Luskin, *supra* note 14, at 117 (noting that the diversity of approaches in developing an operational definition of delay have included such diverse phenomena as number of pending cases, ratio of current cases to terminations, time lapse between processing stages, median case processing time, and percentage of "overage" cases on the docket). Recent empirical studies which examine the "pace" of litigation typically measure the time it takes to proceed from the filing of the complaint to final case disposition in the trial court. See, e.g., John A. Goerd, *Reexamining the Pace of Litigation in 39 Urban Trial Courts* 36 (1991) (stating that the "pace" of civil litigation is typically measured by median time from filing to disposition). For the difference between "pace" and "delay," see *infra* note 115.

92. Section 102, 104 Stat. at 5089.

93. See *id.*

94. See *id.*; 28 U.S.C. § 473 (Supp. IV 1992).

95. See *Senate Hearings, supra* note 33, at 227. (Judge Richard A. Enslin of the Western District of Michigan stated, "The task force didn't spend much time identifying the problem. We all know what the problem is. They spent time looking for what might be called innovative solutions.").

96. For a discussion of the assumption by Congress of a common public perception of delay in the courts, see *infra* text accompanying notes 159-212.

fine delay.<sup>97</sup> As one study of the system presented the issue:

Can we even define what we mean by "delay"—a term implying that there is a known or knowable optimal pace? Indeed, is it really important to define it, or is it better simply to measure the actual pace of litigation and identify the principal factors that account for it, leaving it for each citizen to judge whether the pace is satisfactory in the light of his or her own values?<sup>98</sup>

The assumption of a shared perception of acceptable delay reduction and the absence of a discussion of the meaning of delay in reform efforts such as the CJRA is significant, however. If a common understanding does not exist, then the definitional vacuum permits each district court to develop and implement its own sense of delay reduction. More importantly, reform efforts such as the CJRA may prompt district courts to develop their understanding of delay in light of the values they perceive the CJRA to promote.

Where, then, might courts charged with delay reduction seek guideposts to direct an understanding of their task? I will consider three possible sources to which one might commonly turn in an attempt to comprehend the objective of delay reduction. First, I will examine the language used by proponents of delay reduction—and the CJRA in particular—in discussing the aims of their reforms.<sup>99</sup> Second, I will investigate specific standards previously established for case processing times.<sup>100</sup> Finally, I will discuss some of the circumstances which lead proponents of delay reduction to assume that delay exists and should be reduced.<sup>101</sup>

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97. See, e.g., Church, *supra* note 8, at ix n.1 ("[W]e employ the term in its vague but commonly understood usage: delay connotes excessive processing time, but an explicit standard of excessiveness is not prescribed."); Louis Harris & Associates, Inc., *Public Attitudes Toward the Civil Justice System and Tort Law Reform 20* (1987) [hereinafter *Harris/Aetna*] (polling 2,000 adult Americans as to whether the civil justice system resolves disputes without "delay," but not defining the term); Barry Mahoney, *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts 4* (1988) (noting the difficulty in obtaining agreement on what precisely constitutes "acceptable delay" but also noting agreement that delay is a problem); Zeisel et al., *supra* note 90, at 43 ("Everyone has a rough common sense notion of what court delay means and everyone realizes that delay results from a backlog of pending suits which forces the litigants to stand in line and wait their turn."); Louis Harris & Associates, Inc., *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend At Least Half Their Time on General Civil Cases*, 69 B.U. L. Rev. 731, 734-37 (1989) [hereinafter *Judges' Opinions*] (polling 200 federal judges and 800 state judges on the "causes of delays in litigation" without defining the term); Sipes, *supra* note 16, at 299 n.2 (noting that there is no generally accepted definition of court delay, and that the lack of a definition should not preclude consideration of the problem).

98. Adler et al., *supra* note 8, at iii.

99. See *infra* part II.A.

100. See *infra* part II.B.

101. See *infra* part II.C.

A. *The Delay Reform Lexicon*

The proponents of civil justice reform and delay reduction have used a number of terms and phrases to suggest goals and problems with respect to the amount of time courts take to process civil litigation.<sup>102</sup> The Act and its legislative history<sup>103</sup> provide an abundant sample of the delay reduction vocabulary. In addition to the term "delay," the Act includes references to the following: "timely judicial relief,"<sup>104</sup> "speedy . . . resolution of civil disputes,"<sup>105</sup> "the amount of time reasonably needed,"<sup>106</sup> and "expediting the resolution of civil litigation."<sup>107</sup> And, in the various components of the legislative history, promoters of the Act describe its targets with phrases such as: "unnecessary cost and delay,"<sup>108</sup> "long delays,"<sup>109</sup> "minimal level of efficiency and economy,"<sup>110</sup> "deliberate and prompt disposition and adjudication of cases,"<sup>111</sup> "too much

102. Sir Peter Benson Maxwell noted more than one hundred years ago that differing phrases might be used to express the same object or intention of government efforts. See Sir Peter B. Maxwell, *On the Interpretation of Statutes* 288 (Fred B. Rothman & Co. 1991) (1875).

103. I use the term "legislative history" here to include the Brookings report on which the original proponents of the CJRA heavily relied. See *supra* text accompanying notes 18-35.

104. Section 102, 104 Stat. at 5089. See also Justice for All, *supra* note 18, at 5 ("timely and proper judicial relief").

105. 28 U.S.C. § 471 (Supp. IV 1992). For examples of such terms used outside of the CJRA and its legislative history, see Fed. R. Civ. P. 1 ("just, speedy, and inexpensive determination of every action"); Thomas Church, Jr., *Justice Delayed: The Pace of Litigation in Urban Trial Courts 1-2* (1978) (research grounded on assumption that speedy resolution of cases is an important social goal).

106. 28 U.S.C. § 473(a)(1) (Supp. IV 1992). For an example of such terms used outside of the CJRA and its legislative history, see American Bar Association National Conference of State Trial Judges, *Standards Relating to Court Delay Reduction 5* (1985) [hereinafter 1984 Standards] ("[A]ny elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated."); Goerd, *supra* note 91, at 36 (referring to "delay" as any time beyond that which is reasonable for obtaining a just resolution of a specific case).

107. 28 U.S.C. § 480 (Supp. IV 1992). For an example of such terms used outside of the CJRA and its legislative history, see American Bar Association, *Action Commission to Reduce Court Costs and Delay, Attacking Litigation Costs and Delay: Final Report*, at vii (1984) [hereinafter *Attacking Litigation Costs and Delay*] (referring to the study's method of selecting three models for expediting litigation).

108. H.R. Rep. No. 732, *supra* note 20, at 8; Justice for All, *supra* note 18, at 23; see also 136 Cong. Rec. 604 (1990); American Bar Association Judicial Administration Division, *Standards of Judicial Administration Volume II: Standards Relating to Trial Courts 77* (1992) [hereinafter 1992 Standards] ("[D]elay is declared to be any elapsed time beyond that necessary to prepare and conclude a particular case.").

109. S. Rep. No. 416, *supra* note 20, at 1; see also *id.* at 26 (referring to "unreasonably long" timeframes); Justice for All, *supra* note 18, at vii ("cases take too long"). For an example of such terms used outside of the CJRA and its legislative history, see *Attacking Litigation Costs and Delay*, *supra* note 107, at 1 (describing the obtaining of justice as taking "too long").

110. S. Rep. No. 416, *supra* note 20, at 2.

111. *Id.* at 6; see also *id.* at 26 ("[p]rompt and timely decisions"); 136 Cong. Rec. 603 (1990) (statement of Sen. Biden) ("[T]he legislation will help ensure that disputes are resolved fairly, promptly and inexpensively"); Justice for All, *supra* note 18, at 18

time,"<sup>112</sup> "excessive delay,"<sup>113</sup> "undue delay,"<sup>114</sup> "faster rates of disposition,"<sup>115</sup> "as quickly . . . as possible,"<sup>116</sup> and "delays that contribute to those costs."<sup>117</sup>

What guidance can such a delay dialect provide for courts with the responsibility of delay reduction? Words such as "expedite," "prompt," "quickly," and "speedy" seem to be only antonyms of delay.<sup>118</sup> Encouraging delay reduction also could be presented as encouraging expeditiousness, promptness, quickness, or speed. Whether the approach chosen promotes the reduction of a suggested negative state or the in-

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("prompt and well-focused case development") (quoting Wayne D. Brazil, *Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 Am B. Found. Res. J. 875, 917).

112. S. Rep. No. 416, *supra* note 20, at 8 (quoting Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 Yale L.J. 1643, 1644 (1985)); Justice for All, *supra* note 18, at 1 (quoting Jon O. Newman, *supra*); cf. American Bar Association Division for Judicial Services, Lawyers Conference Task Force on Reduction of Litigation Cost and Delay, *Defeating Delay: Developing and Implementing a Court Delay Reduction Program* 15 (1986) [hereinafter *Defeating Delay*] (defining delay as the "amount of processing time that exceeds the tolerable waiting period.").

113. S. Rep. No. 416, *supra* note 20, at 8 (quoting 136 Cong. Rec. 603 (1990) (statement of Sen. Biden)); see H.R. Rep. No. 732, *supra* note 20, at 8; 136 Cong. Rec. 596 (1990) (statement of Sen. Biden referring to "excessive delays"); Justice for All, *supra* note 18, at 3.

114. S. Rep. No. 416, *supra* note 20, at 14, 26.

115. *Id.* at 16; see *id.* at 19 (referring to empirical data suggesting "faster case processing times" in courts which set early, firm trial dates); see also Justice for All, *supra* note 18, at viii (reference to "speed up discovery"); *id.* at 2 ("resolve . . . disputes . . . more quickly and inexpensively"). During the last fifteen years, a number of studies ostensibly directed at delay reduction primarily concerned the characteristics of courts with a "faster" pace of litigation. See, e.g., *Attacking Litigation Costs and Delay*, *supra* note 107, at 7-22 (describing field experiments with judicial case management to reduce overall case processing time); Church, *supra* note 105, at 3 (describing an empirical study with the goal of formulating a general theory of the determinants of the pretrial pace of civil and of criminal litigation); John Goerd, *Examining Court Delay: The Pace of Litigation in 26 Urban Trial Courts*, 1987, at 3-5 (1989) (empirical study of trial courts to examine pace of litigation). John Goerd has distinguished "pace" and "delay." Goerd defines "pace" as "the time it takes to proceed from the filing of a complaint to the issuance of a verdict or judgment." "Delay" is defined as "any time beyond that which is reasonable for obtaining a just resolution of a case." Goerd, *supra* note 91, at 36.

116. Justice for All, *supra* note 18, at 6; see also *id.* at 11 ("move cases along quickly to disposition").

117. S. Rep. No. 416, *supra* note 20, at 1, 20; see Justice for All, *supra* note 18, at 35 (referring to the profession's need to lower the "costs of litigation, in money and in time"). The legislative history does identify the type of costs with which Congress was concerned as "[l]itigation transaction costs—defined as the total costs incurred by all parties to civil litigation, excluding any ultimate liability or settlement." S. Rep. No. 416, *supra* note 20, at 6; H.R. Rep. No. 732, *supra* note 20, at 9. A credible argument can be made that such phrases and other portions of the Act's legislative history suggest that Congress was concerned primarily with reducing the cost of district court litigation, and Congress proposed the reduction of delay only as a method of reducing cost. See *infra* text accompanying notes 181-185 (discussing the cost focus of survey conducted by Louis Harris & Associates, Inc. for the Foundation for Change).

118. See Roget's International Thesaurus § 131.15 (4th ed. 1977) (identifying "promptly," "quickly," "speedily," and "expeditiously" as synonyms for the phrase "without delay").

crease of the opposite positive state, the amount of direction provided is the same. One is still left questioning what is "fast enough" or what is "too slow."

In addition, the language of the delay reformers may complicate the issue of delay reduction rather than clarify it. Words used to qualify delay, such as "excessive," "long," "unnecessary," and "undue" imply degrees of delay. Such language suggests that the problem which delay reduction proponents address arises from some level of delay different than mere delay. Nevertheless, reform efforts such as the CJRA direct the courts' efforts simply to delay reduction. Does the recognition of categories such as "unnecessary" or "excessive" delay imply that the simple delay reduction suggested by the Act means nothing more than cutting case processing time, whether or not it is "unnecessary"? The CJRA leaves that question unanswered.

Even if reform efforts such as the CJRA are directed at levels of delay other than mere delay, the use of terms such as "economy," "efficiency," "excessive," "reasonably," "timely," "undue," and "unnecessary" remains troublesome. These qualifiers reflect a perception of some desired state of case processing and suggest that there are circumstances which only detract from or are not essential to that state. Again, however, the language does not afford an understanding of the precise nature of the desired state or the impediments to achieving it.<sup>119</sup> Instead of shepherding courts towards the implied desired state, the cloak of indeterminacy surrounding such words invites courts to implement disparate subjective understandings of words like "economy" and "efficiency."<sup>120</sup> In the words of Professor Joel Grossman, "Delay is a very subjective phenomenon, and what might be fast and efficient for a court, or for one party, might be a disservice to the other side."<sup>121</sup>

The lack of precision in the speech of delay reduction proponents can be analogized to the rhetoric of "due care" in traditional negligence

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119. See Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 Mich. L. Rev. 734, 738-42 (1987) (noting that to describe what is good as that which is efficient does not help us to recognize the good). Professor Charles Geyh has described § 476 of the CJRA, in particular, as being directed at "indefensible decision-making delay" on the part of district court judges. Charles G. Geyh, *Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act*, 41 Clev. St. L. Rev. (forthcoming) (manuscript at 2, 24, on file with the *Fordham Law Review*). Professor Geyh defines indefensible decision-making delay to include delays precipitated by "non-structural inefficiency, belligerence, indecisiveness, disability, sloth and neglect." *Id.* at 7-11. Professor Geyh uses the phrase "defensible delay" to refer to decision-making delay caused by factors "beyond the judges' control, or that may otherwise be justified as necessary or appropriate." *Id.* at 2-3.

120. Professor Samuel Gross has noted that even if we accept "efficiency" as a measure of the relationship between benefit and cost, we are left with the task of defining the component parts of benefit and cost. See Gross, *supra* note 119, at 738-39.

121. Adler et al., *supra* note 8, at 58. For a discussion of positive and negative perspectives on "delay," see *infra* text accompanying notes 247-71.



claims under tort law.<sup>122</sup> As one authority has noted:

When jurors deciding an issue of due care are told only that negligence is a failure to use the care that a reasonably prudent person would use in like circumstances, they are not given a "test" of negligence. Their instructions may be too general to be decisive when difficult discriminations must be made. Such instructions work much more like a crude country guidepost than like a carefully kept laboratory scale.<sup>123</sup>

Courts have recognized the abstract nature of the negligence standards and the benefit of providing more exact standards.<sup>124</sup> The proponents of the CJRA and delay reduction, on the other hand, have not addressed this difficulty.

The use by delay reduction proponents of phrases with indeterminate meanings may not be without effect. For example, as noted above, words such as "excessive" and "unnecessary" do convey the sense of a desired state of affairs. The flexibility in fulfilling the tasks described by such broad language, however, can be curtailed by language perceived as describing the same task more precisely. This dynamic between the broad and the more precise occurs in the language of delay reduction employed by the proponents of the CJRA. The proponents of the CJRA use "unnecessary delay" to describe the object of their reform, but they also use the phrases "too much time,"<sup>125</sup> "faster rates of disposition,"<sup>126</sup> and "as quickly as possible."<sup>127</sup> The value implied by such phrases can be captured by another phrase: "faster is better." If courts turn to the delay reduction lexicon for direction, then, the language leads them to understand that being faster is a value which should guide them to some otherwise unspecified desired state. The language of the CJRA lexicon, however, does not tell courts where to stop.

### B. *Predetermined, Quantitative Standards*

The development of the law of negligence demonstrates that when the law requires courts to apply broad standards of indeterminate scope such as the standard of due care, the courts will search for explicit

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122. See Clarence Morris & C. Robert Morris, Jr., *Morris on Torts* 44 (2d ed. 1980). According to Morris & Morris,

[t]raditional analyses of negligence suits divide the plaintiff's case into four elements. Plaintiff may recover only if (1) the defendant was under a *duty* to the plaintiff to use due care, (2) the defendant was guilty of a *breach* of that duty, (3) the plaintiff has suffered *damages*, and (4) the breach of the duty *proximately caused* those damages.

*Id.*

123. *Id.* at 49. See generally Michael Saltman, *The Demise of the 'Reasonable Man': A Cross-Cultural Study of a Legal Concept* (1991) (providing an anthropological analysis of the law's use of the reasonable person standard).

124. See generally Morris & Morris, *supra* note 122, at 58-79 (describing judicial efforts to develop more exact standards for the jury charge).

125. *Supra* note 112 and accompanying text.

126. *Supra* note 115 and accompanying text.

127. *Supra* note 116 and accompanying text.

benchmarks to identify the boundaries of their discretion.<sup>128</sup> For example, courts have adopted concrete standards from criminal statutes<sup>129</sup> and administrative safety measures<sup>130</sup> to identify acts or omissions which constitute negligence *per se*. Some supporters of delay reduction have adopted a similar solution. One approach to defining the term "delay" or understanding the appropriate scope of delay reduction has been to develop specific quantitative standards for the processing of civil litigation, i.e., deadlines applicable to the litigation events in all civil cases.<sup>131</sup>

The American Bar Association's ("ABA") *Standards Relating to Trial Courts*<sup>132</sup> provide examples of specific quantitative standards used to gauge delay. One current ABA standard provides, in pertinent part:

2.52 Standards of Timely Disposition.

The following time standards should be adopted and compliance monitored: (a) General Civil - 90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the court determines exceptional circumstances exist and for which a continuing review should occur.<sup>133</sup>

Since 1976, the ABA has promulgated various quantitative standards to evaluate the timeliness of civil litigation.<sup>134</sup> The ABA standards include time periods that the ABA considers to be feasible in "adequately staffed" and "well-managed" courts.<sup>135</sup> The creators of such standards recognize the need to balance concerns such as "promptly resolving legal uncertainty," "affording litigants adequate opportunity to reach negotiated settlement and adequate time to prepare for trial," and "barring

128. See *Morris & Morris*, *supra* note 122, at 58-79.

129. See *id.* at 61-72.

130. See *id.* at 72-79.

131. See *infra* notes 133-54 and accompanying text.

132. See 1984 Standards, *supra* note 106; 1992 Standards, *supra* note 108; 1976 Standards, *infra* note 134.

133. 1992 Standards, *supra* note 108, at 85. The National Conference of State Trial Judges originally developed the standard set forth in the text as adopted by the ABA. See *id.* at 87. The ABA House of Delegates adopted the standard in 1984 as an amendment to a standard adopted in 1976. See 1984 Standards, *supra* note 106, at 11. The ABA standards were developed for state trial courts, but the ABA has noted that the standards may be of significance for federal trial courts. See 1992 Standards, *supra* note 108, at viii.

134. In 1976, the ABA adopted a standard which provided that the trial or a hearing on the merits for most civil cases should occur within six months of filing, unless exceptional circumstances such as complicated discovery required a longer interval. See American Bar Association Commission on Standards of Judicial Administration, Standards Relating to Trial Courts 93 (1976) [hereinafter 1976 Standards].

135. 1992 Standards, *supra* note 108, at 88; 1976 Standards, *supra* note 134, at 94. See also Comptroller General, United States General Accounting Office, Report to the Congress of the United States: Better Management Can Ease Federal Civil Case Backlog 3 (1981) (due to the lack of a definition for "backlog," the study defined the term "as those cases which had been pending in the court for one year or longer after being filed." The study also supported its definition by noting that 57 of the 71 judges interviewed in the study agreed that the one-year criterion was reasonable).

delay due to neglect."<sup>136</sup> It is believed, however, that the use of specific and measurable standards is necessary to achieve effective case management.<sup>137</sup>

Predetermined quantitative deadlines consistently have played a part in civil justice reform and in the study of the delay issue in particular.<sup>138</sup> The CJRA, however, does not directly attempt to define "delay" by reference to such explicit deadlines. Nevertheless, several sections of the Act do suggest such standards for certain litigation events. First, the principles of litigation management and cost and delay reduction suggest that civil litigation culminate in a trial, if necessary, no later than eighteen months after the filing of the complaint.<sup>139</sup> The source of the eighteen-month standard is not certain,<sup>140</sup> but it is very similar to the quantitative standard promoted by the ABA since 1984.<sup>141</sup> It is clear

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136. 1992 Standards, *supra* note 108, at 88.

137. *See id.* at 82, 87; 1976 Standards, *supra* note 134, at 87. It should be noted that the ABA standards since 1976 have assumed that case management and control of litigation by the courts is a necessity. *See id.* at 83; 1992 Standards, *supra*, at 76; 1984 Standards, *supra* note 106, at 5.

138. *See, e.g.*, Commission on Trial Court Performance Standards, National Center for State Courts, Trial Court Performance Standards, with Commentary, at vii (1990) (suggesting that the ABA standards provide recognized guidelines for timely case processing); Defeating Delay, *supra* note 112, at 13 ("Time standards, which are the goals of a delay reduction program, must be adopted."); Goerd, *supra* note 91, at 36 ("[T]he ABA disposition time standards provide a useful and widely accepted tool with which to determine the degree to which courts are concluding civil cases within a reasonable time period."); Sipes, *supra* note 16, at 312 (reporting that, in addition to the adoption of time standards by the ABA and the state chief justices, 18 states had adopted time standards governing the processing of civil cases). *But see* Justice for All, *supra* note 18, at 16, 17 (recommending the setting of presumptive time standards for disposition of various court processes, but also suggesting that each district court set its own time standards rather than imposing nationwide standards).

139. *See* 28 U.S.C. § 473(a)(2)(B) (Supp. IV 1992). The original version of the CJRA, S. 2027, recommended establishing presumptive deadlines for various dispute resolution processes, but it did not identify specific presumptive deadlines. *See* § 471(b)(1)(B), (3)(G), 5(A) of S. 2027, in *Senate Hearings, supra* note 33, at 530, 533, 534.

140. The 18-month time-frame first appeared in S. 2648, the second version of the CJRA introduced by Senator Biden. Section 473(a)(2)(B) of S. 2648 required "setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases." *Senate Hearings, supra* note 33, at 554-55. Both the Judicial Conference and the Federal Judges Association objected to this provision as unrealistic, because of factors other than case complexity or the number of pending criminal cases which affect the appropriate time for a particular civil case to go to trial. *See, e.g., House Hearings, supra* note 19, at 128 (statement by the Honorable Robert F. Peckham); *id.* at 173 (statement by the Honorable Diana E. Murphy, President, Federal Judges Association). The language in § 473(2)(b), as enacted, appeared in amended H.R. 3898. *See supra* note 35. It appears that the House of Representatives accommodated concerns raised by Judge Peckham that exceptions to the 18-month requirement be permitted when "the ends of justice outweigh the policy for providing for an early trial date." *House Hearings, supra* note 19, at 106.

141. *See supra* note 133.

that Congress intended the standard as an outside time-frame.<sup>142</sup> It should be noted that the CJRA somewhat dilutes the impact of the specific standard by providing for some exceptions, albeit only through a certification process of limited applicability.<sup>143</sup>

One other section of the Act raises specific predetermined deadlines for assessing delay. Section 476 of the CJRA provides, in part:

§ 476. Enhancement of judicial information dissemination

a) The Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—

(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

(3) the number and names of cases that have not been terminated within three years after filing.<sup>144</sup>

Although the title to section 476 implies the neutral reporting of case processing data, section 476 developed from recommendations to reduce delay by enhancing "judicial accountability" through reporting requirements.<sup>145</sup> Section 476 attempts to reduce delay resulting from perceived

142. See S. Rep. No. 416, *supra* note 20, at 54.

143. See 28 U.S.C. § 473(a)(2)(B)(i)-(ii) (Supp. IV 1992). The CJRA's legislative history reflects conflicting attitudes toward the exceptions to the 18-month standard. The Senate Report to S. 2648 notes that for some districts certification may become a way of life because of overwhelming criminal caseloads. See S. Rep. No. 416, *supra* note 20, at 54. On the other hand, the Act's primary sponsor, Senator Biden, stated while explaining the CJRA on the date of its consideration and passage by the Senate: "I hope that this exception is not abused—I hope that the exception does not swallow the rule. It is our intention that the ends of justice provision be limited to those few cases in which setting a trial within 18 months would indeed be incompatible with serving the ends of justice." 136 Cong. Rec. S17,575 (daily ed. Oct. 27, 1990). For the relative weights to be accorded various portions of a legislative history, see George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 Duke L.J. 39, 41-60.

144. 28 U.S.C. § 476(a) (Supp. IV 1992). For thorough reviews of the development of § 476 and its effects, see Dessem, *supra* note 12; Geyh, *supra* note 119.

145. See Justice for All, *supra* note 18, at 27. The Brookings task force recommended that each district court's Plan provide for the "regular publication of pending undecided motions and caseload progress." *Id.* The task force believed that such reporting mechanisms were necessary to "enhance judicial accountability" and would "encourage judges with significant backlogs in undecided motions and cases . . . to move their cases along more quickly." *Id.* S. 2027 included a finding that "the reduction of . . . delays can be encouraged by substantially expanding the availability of public information about backlogs in undecided motions." S. 2027, *reprinted in Senate Hearings, supra* note 33, at 526. S. 2027 also provided that each Plan should include "[p]rocedures for the regular publication of pending undecided motions and caseload progress for each individual judge to enhance judicial accountability." *Id.*, § 471(b)(13), at 538. S. 2648, as originally introduced on May 17, 1990, provided that the district court Plans would include provisions applying the following principle of cost and delay reduction:

judicial inactivity, and seeks to remedy that delay through the pressure of negative publicity.<sup>146</sup> Although section 476 does not explicitly identify six-month and three-year delays as "excessive," they are an example of predetermined quantitative standards which imply a more certain content for terms such as "excessive" or "undue."<sup>147</sup>

The use of predetermined quantitative deadlines as a gauge for the success of civil case processing does not solve the riddle of the relationship between case processing time and procedural justice. Even those who have advocated the use of such standards recognize the inherent danger

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[E]nhancement of the accountability of each judicial officer in a district court through semiannual reports, available to the public, that disclose for each judicial officer the number of motions that have been pending more than six months, the number of bench trials that have been submitted for more than six months, and the number of cases that have not been terminated within three years of filing.

S. 2648, § 473(a)(7), reprinted in *Senate Hearings, supra* note 33, at 557. An amended S. 2648, as approved and reported by the Senate Committee on the Judiciary, contained a § 476 almost identical to § 476 in the CJRA as enacted. The former § 476, however, contained the heading "Enhancement of judicial accountability through information dissemination," and paragraph (a) of that section began with the phrase "To enhance the accountability of each judicial officer in a district court." See S. Rep. No. 416, *supra* note 20, at 41. The language in the current § 476 first appeared in the amended H.R. 3898 approved by the Judiciary Committee of the House of Representatives. See H.R. Rep. No. 732, *supra* note 20, at 4-5. The House removed references to judicial accountability from the text of § 476 apparently in response to objections from the Judicial Conference. See Geyh, *supra* note 119, at 29.

146. See Geyh, *supra* note 119, at 23-24 ("It is this concern over adverse publicity, that section 476 seeks to exploit, by publishing data disclosing which judges are behind in their work, and to what extent."). See also S. Rep. No. 416, *supra* note 20, at 60 ("By identifying the names of the cases, the public can better assess whether the timeframe associated with deciding the motion, adjudicating the trial or disposing of the case was reasonable.").

There is some evidence to support the belief that the public will perceive the information provided in the reports under § 476 in a negative light rather than a neutral light as the title to the section might suggest. See, e.g., Terence Dungworth & Nicholas M. Pace, Statistical Overview of Civil Litigation in the Federal Courts 20 n.3 (1990) (noting that since the early 1960's the Judicial Conference has considered three-year-old cases to constitute a "judicial emergency"); Gordon Hunter, *The Slowpoke Report: Part II*, Tex. Law., Jan. 27, 1992, at 4 (describing the CJRA as providing a "kind of speedometer reading on judges' dockets," and identifying by judge the number of civil cases pending longer than three years); Gordon Hunter, *Judges Clog Federal Docket*, Tex. Law., Nov. 18, 1991, at 21 (article concerning first reports under § 476; it is accompanied by a table entitled "The Slowpoke Report," which identified by judge the number of motions and bench trial rulings pending longer than six months). But see Dessem, *supra* note 12, at 699 (suggesting that the media has paid little attention to the reports under § 476).

147. The House Committee on the Judiciary did note that the reports promulgated under § 476 could contain explanations from judges as to why a motion or a submitted bench trial had remained on the docket longer than six months or a case continued longer than three years. See H.R. Rep. No. 732, *supra* note 20, at 18. The opportunity to explain or justify dispositions beyond the six month or three year periods may seem to diminish the argument that § 476 presents predetermined standards. However, § 476 creates specific presumptions about case processing times that even the House Judiciary Committee referred to as the "usual period of time." *Id.*

of their approach. As the ABA stated in the commentary accompanying its standards in 1976:

The administration of a system of time standards must, however, avoid becoming entirely mechanical. This occurs when compliance with the time standards becomes a criterion in assessing the performance of a court or individual judge. . . . The consequence is not only impairment of the quality of justice but also loss of efficiency in that the additional errors which can result require correction through additional reconsideration, redetermination, and appellate review.<sup>148</sup>

With respect to section 476 of the CJRA, in particular, Professor Dessem has noted that the data reported under the section "merely measure judicial speed in resolving motions and cases, not whether the rights of parties are protected in the process."<sup>149</sup> In short, absolute time standards may act as an opiate which pleasantly dulls our sensibilities to other criteria of procedural justice.

The history of predetermined time standards and the reality of case processing also may detract from the credibility of such standards. For example, in 1976, justice apparently required case processing within six months.<sup>150</sup> In 1984 and 1992, however, justice could make do with a flexible standard of between twelve and eighteen months.<sup>151</sup> Furthermore, the standards often purport to reflect normal case processing capabilities.<sup>152</sup> However, empirical data strongly suggest a very different reality for many courts. For example, in John Goerd't's study of the pace of litigation in thirty-nine urban trial courts in 1987, no court met the ABA standards.<sup>153</sup> Goerd't concluded that "[o]verall, the data suggest that most courts must make considerable improvements to comply with the ABA disposition time standards."<sup>154</sup>

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148. 1976 Standards, *supra* note 134, § 2.52 commentary, at 95. Similar concerns were included in the commentary of standard 2.52 as revised in 1984 and 1992. See 1992 Standards, *supra* note 108, § 2.52 commentary, at 87-89; 1984 Standards, *supra* note 106, § 2.52 commentary, at 12-14.

149. Dessem, *supra* note 12, at 715.

150. See *supra* note 134.

151. See *supra* note 133.

152. See, e.g., 1984 Standards, *supra* note 106, § 2.52 commentary, at 13 ("The standards have been achieved in courts of all sizes that are adequately staffed and well managed."); 1976 Standards, *supra* note 134, § 2.52 commentary, at 94 ("[The standards] have proven feasible in courts that are adequately staffed and well managed.").

153. See Goerd't, *supra* note 91, at 36-37. Goerd't's study evaluated 36 state courts on their performance in comparison with the ABA standards. With respect to the ABA standard of disposing of all cases within two years of filing, Goerd't's figures showed that 11 of the 36 courts were within 10% of the standard, three courts were within 5% of the standard, and 14 courts failed to dispose of 25% or more of their cases within the two year standard. See *id.* Goerd't noted that "[t]he courts averaged 22 percent over the two-year standard." *Id.* at 36. With respect to the ABA standard that no more than 10% of cases be older than one year at disposition, only one court, which had 18% of its cases older than one year, approached the standard. See *id.* at 36-37.

154. *Id.* at 37. See also Sipes, *supra* note 16, at 312-13 (reporting that enforcement of time standards varies significantly).

### C. *The Assumption of a "Delay Problem"*

In interpreting and understanding the scope of reform efforts, there is a tradition of turning for assistance to the circumstances which instigated the reform movement.<sup>155</sup> What might we glean of delay's meaning or the acceptable scope of delay reduction if we look to the circumstances which ignite reform efforts such as the CJRA? It is clear that the CJRA rests on two assumptions about the status of district courts and delay. Congress assumed that delay plagued the process of civil litigation in district courts, and it also assumed that delay should be reduced.<sup>156</sup> As the history of court reform demonstrates, the classification of delay as a problem to be reduced or eliminated did not originate with the CJRA.<sup>157</sup> The proponents of the CJRA also were not the first to suggest that the initial step in "defeating delay" is a general acceptance that delay exists and is a problem that must and can be solved.<sup>158</sup> Given that such perceptions underlie efforts to reduce delay, I will examine in this part some of the bases commonly asserted to support the assumptions of those who struggle to reduce delay. First, I will address the alleged public outcry against delay, and then I will examine recent empirical data relating to the existence of delay. Finally, I will consider the commonly asserted consequences of delay.

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155. See, e.g., Maxwell, *supra* note 102, at 18 (noting that the meaning of a statute may be found by the "cause and necessity of making the Act").

156. The congressional findings included in the CJRA describe the problem of delay as a foregone conclusion. See § 102, 104 Stat. at 5089. Moreover, the implied assumption of a delay problem has been consistent throughout the development of the Act. See, e.g., H.R. Rep. No. 732, *supra* note 20, at 9 ("The Civil Justice Reform Act addresses the dual problems of cost and delay in Federal civil litigation."); S. Rep. No. 416, *supra* note 20, at 1 ("The Federal courts are suffering today under the scourge of two related and worsening plagues. First, the costs of civil litigation, and delays that contribute to those costs . . ."); *id.* at 6 ("The Civil Justice Reform Act addresses the dual problems of cost and delay in Federal civil litigation."); 136 Cong. Rec. 596 (1990) (introducing S. 2027, Senator Biden referred to the "escalating costs and excessive delays that characterize so much of the civil litigation conducted today in our Nation's Federal courts"). For criticisms of the presumption of a delay problem, see Dayton, *supra* note 12, at 448-49, 490; Mullenix, *Counter-Reformation*, *supra* note 12, at 386 n.29. Professor Mullenix also has suggested that the Act forced each district court to accept the assumption of delay. See *id.* at 404-05. However, in meeting the requirements of the Act, some district courts have rejected the delay assumption and concluded that they do not suffer from delay. See, e.g., *Civil Justice Reform Act Advisory Group Report for the District of South Dakota*, reprinted in 148 F.R.D. 393, 400 (1993) (stating that "the District is not 'experiencing delay'").

157. See *supra* note 8 and accompanying text; see also Macklin Fleming, *The Law's Delay: The Dragon Slain Friday Breathes Fire Again Monday*, 32 Pub. Interest 13, 16 (1973) ("In most discussion about court delay it is assumed that delay is something nobody wants, that delay happens only through incompetence, mismanagement, or neglect, that delay is abhorred by all sensible and rational persons.").

158. See, e.g., *Defeating Delay*, *supra* note 112, at 2, 7 (referring to the necessity of recognizing delay as a problem that can be solved). But see Adler et al., *supra* note 8, at 58 (Joel Grossman commenting that we should not assume "delay is bad and to be reduced by all available means"); Miller, *supra* note 8, at 403-04 (describing some of the "beneficial effects of delay").

### 1. The Public's Interest in Delay Reduction

It has been common for champions of delay reduction to present their efforts as a response to a public outcry against delay in the courts.<sup>159</sup> For example, the Brookings report, which gave rise to the Act,<sup>160</sup> refers to a civil justice system under attack because of client beliefs that it "takes too long to get to trial,"<sup>161</sup> and "broad consensus within the legal community that meaningful reforms can reduce the expenses and delay involved in civil litigation."<sup>162</sup>

Delay reformers do not always identify the particular sources of their perceptions of public opinion.<sup>163</sup> In enacting the CJRA, however, Con-

159. It has been suggested that public opinion is relevant to the reform of judicial systems and the civil litigation system because courts must have public acceptance and support if they are to function as effective branches of government. See Yankelovich, Skelly and White, Inc., *The Public Image of Courts: Highlights of a National Survey of The General Public, Judges, Lawyers and Community Leaders*, at i (1978) [hereinafter Yankelovich].

160. See *supra* text accompanying notes 18-35.

161. Justice for All, *supra* note 18, at vii. In addition to public opinion, the Brookings report also refers to a "belief, borne out by the collective experience of [the task force's] members, that the problems of cost and delay . . . are serious and in need of immediate attention . . ." *Id.* at 5. The legislative history is replete with anecdotes about various individual's experiences with civil litigation in district courts, which apparently were offered as examples of the delay problem. See, e.g., *Senate Hearings, supra* note 33, at 9, 13 (testimony of the Vice President and General Counsel of FMC Corp. concerning a case in which the court did not render a decision until two years after trial was completed and another case in which a judge took 10 months to decide a motion); *id.* at 37 (statement of the immediate past president of the Association of Trial Lawyers of America concerning a products liability case which will take two-to-three days to try, has been pending for four years, and has had trial rescheduled four times); *House Hearings, supra* note 19, at 216, 240 (statement and testimony of Director of Public Citizens Litigation Group, concerning six cases handled by his office which had been pending and fully briefed for over a year and a half before different judges in the District of Columbia); *id.* at 84-85 (statement of Congressman Bryant concerning antitrust case which took three-four years to resolve, because judge refused to set case for trial).

162. Justice for All, *supra* note 18, at 2. See also Rosenberg, *supra* note 7, at 31 (describing a conviction that grew among judges and bar leaders that "many courts would capsize in the flood of their work"). For similar references to public opinion, see, e.g., Goerd, *supra* note 115, at 4 ("It is also clear that the American public considers court delay a serious national problem."); Hon. Walter E. Hoffman, *Foreword* to Steven Flanders, *Case Management and Court Management in United States District Courts*, at vii (1977) (noting "there is a public demand for all matters . . . to be handled promptly"); Report of the Federal Courts Study Committee 3 (1990) (referring to the "mounting public and professional concern with the federal courts' congestion [and] delay"); Maureen Solomon & Douglas K. Somerlot, *Caseflow Management in the Trial Court*, at vii (1987) ("In response to public outcry about delay and increasing costs of litigation, the Lawyers Conference of the American Bar Association's Judicial Administration Division created the Task Force on the Reduction of Litigation Cost and Delay."); Banks, *supra* note 82, at 113 ("The citizenry is frustrated with high litigation costs and delay in our courts."); Newman, *supra* note 112, at 1644 ("The common perception that the litigation process is marred by undue delays and costs is correct").

163. See *supra* note 162 and accompanying text. Advocates of delay reduction often cite to the Yankelovich study, *supra* note 159. The Yankelovich study is cited to support the claim of a public outcry against delay in the courts. See, e.g., Church, *supra* note 105, at 1-2. It should be noted that the Yankelovich study sampled public opinion towards



gress relied on two surveys conducted by Louis Harris & Associates ("Harris") as a measure of public opinion. Harris conducted one survey in 1986 for Aetna Life & Casualty ("Harris/Aetna"),<sup>164</sup> and it conducted a second survey in 1988 for the Foundation for Change ("Harris/Foundation").<sup>165</sup> Analysis of the Harris survey reports raises questions about the nature and extent of the public's concern with delay in civil litigation.

The Harris/Aetna survey attempted to assess Americans' attitudes concerning the civil justice system in general and tort law reform in particular.<sup>166</sup> Harris based its analyses on interviews with approximately 2,000 adult Americans.<sup>167</sup> The survey questions addressed the broad context of "the civil justice system,"<sup>168</sup> and it did not distinguish between state and federal courts.<sup>169</sup> With respect to delay, the Harris/Aetna survey asked respondents specifically to agree or disagree with the following, affirmative statement: "The [civil justice] system provides timely resolutions of disputes without major delays."<sup>170</sup> Thirty-five percent of the respondents agreed, fifty-seven percent disagreed, and nine percent were "not sure."<sup>171</sup>

The significance to be afforded the Harris/Aetna survey is subject to question. Both the House and Senate reports noted that fifty-seven percent of the Harris/Aetna respondents believed "that the [civil justice] system fails to provide [for] resolution of disputes without delay."<sup>172</sup> The use of the survey by Congress, however, was somewhat selective. For example, the survey also solicited opinions about the need for change in

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court systems as a whole—both criminal and civil. The Yankelovich report of results does not always distinguish between attitudes toward the criminal system and attitudes toward the civil system. In addition, the Yankelovich study found that the public generally was unable to distinguish one court from another. See Yankelovich, *supra* note 159, at 2.

164. See Harris/Aetna, *supra* note 97.

165. See Louis Harris & Associates, Inc., Procedural Reform of the Civil Justice System: A Study Conducted for the Foundation for Change, Inc. (1989) [hereinafter Harris/Foundation], reprinted, in part, in *Senate Hearings*, *supra* note 33, at 91-184. The Foundation for Change commissioned the survey in connection with the activities of the Brookings taskforce, and the Brookings report also relied upon the Harris/Foundation survey. See Justice for All, *supra* note 18, at 6, 15, 18-19, 35.

166. See Harris/Aetna, *supra* note 97, at 1.

167. The survey conducted interviews with 2,130 adult Americans, but most of the survey analyses are based on the results of 2,008 interviews. In addition to sampling a substantial cross-section of adults, the survey also was designed to provide information on three smaller groups: victims of accidents who retained lawyers, victims of accidents who did not retain lawyers, and people who had been defendants. See *id.*

168. Harris defined the term "civil justice system" for survey respondents to include "lawyers, juries, judges, laws, and procedures." *Id.* at 45.

169. See *id.* app. B at 41-49.

170. *Id.* at 20.

171. *Id.* Fifty-seven percent of the Harris/Aetna respondents also agreed with the statement: "The system maintains a fair balance between the rights of the injured person and the rights of the person sued." *Id.* The latter finding may suggest that the perception of delay has not created a perception of unequal treatment between parties.

172. S. Rep. No. 416, *supra* note 20, at 6; H.R. Rep. No. 732, *supra* note 20, at 9.

the civil justice system.<sup>173</sup> The Harris/Aetna respondents were equally divided on this issue. A total of forty-eight percent thought the system required no change or only minor changes, and a total of forty-eight percent thought the system needed fundamental changes or needed to be rebuilt completely.<sup>174</sup> Harris noted that “[m]ajorities of those with the most experience with the [civil justice] system—injured people who retained lawyers (51%) and defendants in lawsuits (61%)—express[ed] support for fundamental change.”<sup>175</sup> However, it is not clear from the survey results that a negative perception of the system is a function of the level of experience with the civil justice system. With the exception of respondents characterized as “defendants,” the percentages of experienced and inexperienced respondents who expressed a negative view of the current civil justice system are not dramatically different.<sup>176</sup> In addition, although the Harris/Aetna respondents criticized the civil justice system in some respects, a substantial majority concluded that the system enables those who suffer injuries to get adequate compensation from those who are responsible.<sup>177</sup> The Harris/Aetna survey may strongly

173. See Harris/Aetna, *supra* note 97, at 23.

174. With respect to opinions on the need for change in the civil justice system, the Harris/Aetna survey asked respondents to select from a series of choices the statement that came closest to expressing the respondent’s “overall view.” *Id.* The respondents replied as follows: “The civil justice system works well and no change is necessary” (5% of respondents); “The civil justice system works pretty well, and only minor changes are necessary to make it work better” (43% of respondents); “The civil justice system has some major problems and fundamental changes are needed to make it work better” (34% of respondents); “The civil justice system has so much wrong with it that we need to completely rebuild it” (14% of respondents); and “Don’t know” or “Don’t care” (4% of respondents). *Id.*

For an earlier survey of the perceived need for court reform in general, see Yankelovich, *supra* note 159, at 18 (finding 56% of respondents with some state court experience believed the state/local court system generally to be in “great need” or “moderate need” of reform and 41% of the respondents with no state court experience expressed the same beliefs). See also *supra* note 163 (discussing limitations of the Yankelovich survey).

175. Harris/Aetna, *supra* note 97, at 24. A total of 51% of those who had been injured and retained lawyers concluded that the civil justice system needed fundamental change or to be rebuilt completely, whereas 46% of the same category of respondents concluded that either no change or only minor changes in the system were necessary. See *id.* at 23. A total of 61% of respondents identified as having had a lawsuit brought against them (“defendants”) concluded that the system needed fundamental change or to be rebuilt completely, and 39% of the defendant category concluded that either no change or minor changes were necessary. See *id.*

176. With respect to respondents who viewed the civil justice system as needing fundamental changes, the percentage of each category of respondent was as follows: (1) Not injured—34%; (2) Total injured (victims of accidents)—33%; (3) Injured but did not retain a lawyer—32%; (4) Injured and retained a lawyer—37%; (5) defendants—50%. See *id.* at 23. With respect to respondents who concluded that the civil justice system needed to be rebuilt completely, the percentages of each category were: (1) Not injured—14%. (2) Total injured—16%, (3) Injured but did not retain a lawyer—16%, (4) Injured and retained a lawyer—14%, and (5) defendants—11%. See *id.* But see Yankelovich, *supra* note 159, at iii (finding that as the actual knowledge of courts increased, an unfavorable evaluation of the courts became more likely).

177. The survey asked respondents to agree or disagree with the following statement:

support the conclusion that Americans want a "better version" of the civil justice system.<sup>178</sup> However, it seems an extreme characterization of the survey results to say that the survey demonstrates broad support for a revolutionary program of delay reduction.<sup>179</sup>

The legislative history of the CJRA also refers to the Harris/Foundation survey to support the Act's goals and methods.<sup>180</sup> The Foundation for Change broadly commissioned Harris to survey the bench and litigation bar<sup>181</sup> to determine the "degree of consensus among the judiciary and litigators about seemingly high federal civil litigation transaction costs and about delays in litigating federal civil cases, and to determine whether a consensus exists on procedural reform of the civil justice system."<sup>182</sup> The Harris/Foundation report noted that "[t]ransaction costs serve as a measure of the efficiency of the civil justice system,"<sup>183</sup> and the survey focused in particular on perceptions and attitudes concerning problems with litigation transaction costs.<sup>184</sup> Accordingly, it is not surprising that the CJRA's legislative history cites most often to the Harris/Foundation survey in the context of cost reduction.<sup>185</sup> However, proponents of the CJRA also cited to the Harris/Foundation survey to support

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"The system enables those who suffer injuries to get adequate compensation from those who are responsible." 73% of the respondents agreed; 22% of the respondents disagreed; and 6% were not sure. See Harris/Aetna, *supra* note 97, at 20.

178. See *id.* at 7; see also Yankelovich, *supra* note 159, at 52 (reporting that 62% of the survey participants felt it would be extremely or very helpful to have tax dollars spent on trying to make courts handle their cases faster).

179. The Harris/Aetna survey also addressed the other primary concern of the CJRA: the cost of civil litigation. See *supra* notes 35, 117 and accompanying text (discussing cost as a focus of the CJRA). With respect to cost, 71% of the respondents agreed that the "overall cost of lawsuits is *too high*." Harris/Aetna, *supra* note 97, at 16. In addition, 49% of the respondents disagreed with the statement, "The cost to the individual of taking legal action is reasonable." *Id.* at 20. And, 54% of the respondents disagreed with the statement, "The overall cost of the system to society is reasonable." *Id.*

180. See, e.g., S. Rep. No. 416, *supra* note 20, at 7, 19, 21 (citing the Harris/Foundation survey); *Senate Hearings, supra* note 33, at 1-2; H.R. Rep. No. 732, *supra* note 20, at 9.

181. The survey sample included 250 private litigators who represent plaintiffs, 250 private litigators who represent defendants, 100 public interest litigators who actively pursue cases in federal courts, 300 corporate general counsel from companies among the 5,000 largest American corporations, and 147 district court judges. See Harris/Foundation, *supra* note 165, at i.

182. *Id.*

183. *Id.* at iii.

184. See *id.* The majority of the questions used in the Harris/Foundation report addressed either "transaction costs" or "transaction costs or the delays that increase those costs." See *id.* app. B at 103.

185. See, e.g., S. Rep. No. 416, *supra* note 20, at 7 (characterizing the Harris/Foundation survey as "illustrat[ing] the relationship between high costs and access to the courts"); *Senate Hearings, supra* note 33, at 1-2 (referring to the Harris/Foundation survey in which a majority of litigators and federal judges stated that "the high cost of litigation unreasonably impedes access to the courts"); H.R. Rep. No. 732, *supra* note 20, at 9 ("The results of a 1989 Harris survey illustrate the relationship between high costs and access to the courts . . .").

the methods of cost *and* delay reduction promoted by the CJRA.<sup>186</sup> And, as discussed below, the Harris/Foundation survey did contain questions specifically addressing the issue of delay.<sup>187</sup>

The Harris/Foundation survey elicited attitudes toward court delay through several means. Harris constructed the survey questionnaire to provide the respondents with multiple chances to identify—and list in order of priority—problems with the civil litigation system in district courts.<sup>188</sup> The procedure for identifying problems included opportunities to identify problems on one's own as well as select problems from lists provided by Harris.<sup>189</sup>

Concerns about delay first appeared in the Harris/Foundation survey when the respondents were asked to formulate their own responses to the question, "What is the one, most serious criticism you have of the process of civil litigation in the Federal Courts today?"<sup>190</sup> With the exception of district court judges, each category of respondents presented criticisms which Harris characterized as "delays in reaching court, exacerbated by clogged dockets" more often than any other criticism.<sup>191</sup> It should be noted that no single criticism was identified by a majority of any group of respondents. When asked about their perception of any trend in disposition delays, a majority in four of the five categories of respondents believed that delays have increased "greatly" or "some-

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186. See, e.g., S. Rep. No. 416, *supra* note 20, at 19 (noting the Harris/Foundation survey found strong support for scheduling early and firm trial dates); Justice for All, *supra* note 18, at 9 (noting that the Brookings task force drew upon the findings of the Harris/Foundation survey in making the task force's recommendations).

187. See *infra* notes 190-98 and accompanying text.

188. See Harris/Foundation, *supra* note 165, at 20.

189. See *id.*

190. *Id.* app. B at 1. The question set forth in the text was the second question asked of the survey participants. See *id.*

191. *Id.* at 11. The Harris/Foundation survey reported its findings concerning the most serious criticism as follows:

what" in the past ten years.<sup>192</sup> The majorities in two of the four categories of respondents were by margins of three percent or less.<sup>193</sup>

Table 2.0  
MOST SERIOUS CRITICISM OF CIVIL LITIGATION IN  
FEDERAL COURTS TODAY (VOLUNTEERED)

A2. What is the one, most serious criticism you have of the process of civil litigation in the Federal Courts today?

Bases:	Private	Public	Interest	Corporate	Fed.
	Defense	Litigators	Litigators	Counsel	Judges
	(250)	(250)	(100)	(300)	(147)
	%	%	%	%	%
Delays/too slow in reaching court	23	25	35	29	14
Discovery abuses/ Excessive discovery/ Time consuming discovery.	13	11	11	25	31
Costs/cost of litigation	11	12	12	12	15
Backlog of cases/ clogged dockets	10	5	11	8	2
Lack of judicial authority/ involvement	6	2	1	8	4
Shortage of judges	7	5	3	2	1
Speedy Trial Act/Criminal cases heard before civil	6	5	4	1	5
Frivolous/unnecessary litigation	2	2	3	5	5
Complicated procedures/ excessive procedural rules	4	4	3	2	2
Excessive paperwork/ documentation	6	2	1	2	3
Too much judicial involvement/authority	3	5	4	2	1
Poor quality of judges	3	4	7	2	1
Lack of consistent standards/ procedures	4	2	3	2	2
Judges taking too long to make decisions	3	4	-	4	-

*Id.* Other citations included: lack of alternative methods to resolve disputes (1%), lack of firm trial dates (1%), need for early, pretrial conferences, lack of pretrial settlements, limited use of summary judgements, limited use of sanctions. *Id.* Note that Harris did not suggest possible "most serious criticisms" when it presented this issue to survey participants. *See id.* app. B at 1.

192. *Id.* at 5. With respect to perceptions of trends in disposition delays, the Harris/Foundation survey asked the following questions: "What about delays in disposing of civil cases in Federal Courts? Would you say that *delays* have increased greatly, increased somewhat, decreased somewhat, or decreased greatly in the past 10 years?" *Id.* The total percentages of each category of respondents who perceived that delays had increased "greatly" or "somewhat" were as follows: 51% of private defense litigators ("Increased greatly"—18%; "Increased somewhat"—33%); 53% of private plaintiff litigators ("Increased greatly"—16%; "Increased somewhat"—37%); 60% of public interest litigators ("Increased greatly"—17%; "Increased somewhat"—43%); 62% of corporate counsel ("Increased greatly"—21%; "Increased somewhat"—41%); and 42% of federal judges ("Increased greatly"—7%; "Increased somewhat"—35%). *Id.*

193. *See supra* note 192. For a discussion of empirical data which demonstrates stabil-

Again, whether the results of the Harris/Foundation survey justify a procedural revolution directed at delay reduction is open to question. The survey responses described above do demonstrate a bench/bar perception of a delay problem.<sup>194</sup> Responses to other questions posed by the Harris/Foundation survey, however, temper the strength of that perception. For example, at least eighty percent of respondents in each category of the Harris/Foundation survey graded the civil litigation process as working "very well" or "somewhat well," while twenty percent or less found the system to work "not very well" or "not well at all."<sup>195</sup> In addition, when asked what change they would make in the process of civil litigation if they could make only one change, small percentages of respondents chose options which focused specifically on timing.<sup>196</sup>

We also should note that neither the Harris/Aetna survey nor the Harris/Foundation survey directly questioned those polled about the relative importance of timeliness to their perception of a "better version" of

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ity—or lack of growth—in delay in federal courts generally, see *infra* text accompanying notes 217-34.

194. For an earlier survey testing the public perception of a delay problem, see Yankelovich, *supra* note 159, at ii (noting that delay was seen as major problem by 10% of the judges surveyed, 12% of the lawyers, and 36% of the public). *But see supra* note 163 (describing the limitations of the Yankelovich survey).

195. Harris/Foundation, *supra* note 165, at 6. The Harris/Foundation survey reported its findings concerning the quality of the federal courts as follows:

Table 1.3

OVER-ALL ASSESSMENT OF  
FEDERAL CIVIL LITIGATION PROCESS TODAY

A1. Over-all, how do you feel that the process of civil litigation works in the Federal Courts—would you say very well, somewhat well, not very well, or not well at all?

Bases:	Private	Public	Corporate	Corporate	Fed.
	Defense	Interest Litigators	Litigators	Counsel	Judges
	(250)	(100)	(100)	(300)	(147)
	%	%	%	%	%
Very well	36	30	16	12	49
Somewhat well	55	56	70	68	46
Not very well	6	10	8	14	3
Not well at all	2	4	4	6	1
Not sure	1	-	2	*	-

\* Less than 0.5%.

*Id.*

196. *Id.* at 75-77. The Harris/Foundation survey reported its findings concerning changes most sought as follows:

Table 18.0.1

## THE "ONE CHANGE" MOST SOUGHT

Comments Relating to: Increasing Case Management Role of Judges

E12. If you could make one change in the process of civil litigation in the federal courts today, what change would you make?

Bases:	Private Defense (250) %	Litigators Plaintiff (250) %	Public Interest Litigators (100) %	Corporate Counsel (300) %	Fed. Judges (147) %
Increase Role of Judges <i>As Case Managers</i>					
Greater judicial involvement/ authority	16	14	12	14	10
Encourage early/pretrial conferences/meetings	4	4	1	3	5
Greater use of sanctions	3	4	-	5	1
Firm trial dates	4	4	1	3	3
Control delays/bring to trial sooner	4	3	5	6	4
Swift judicial decisions	1	2	5	1	-
Encourage pretrial settlements	1	1	1	1	2
Control of docket/reduce court docket	2	2	1	1	-
Limit judicial involvement/ decrease judicial role in case management	2	2	-	2	-

Table 18.0.2

## THE "ONE CHANGE" MOST SOUGHT

Comments Relating To: Changes in Rules or Procedures

E12. If you could make one change in the process of civil litigation in the federal courts today, what change would you make?

Bases:	Private Defense (250) %	Litigators Plaintiff (250) %	Public Interest Litigators (100) %	Corporate Counsel (300) %	Fed. Judges (147) %
<i>Changes in Rules/Procedures</i>					
Enforce shorter discovery	4	5	1	4	3
Limit the use of discovery	12	10	2	20	16
Discovery reform/Modify discovery procedures	11	10	11	15	7
Losing party should pay legal fees/court fees	2	4	4	7	4
Limit costs/cost of discovery	3	4	1	1	1
Limit/simplify rules/procedures/ more flexibility	2	1	1	1	2
Insure uniform/consistent standards/procedures	2	1	-	1	-
Equitable distribution of cases/ criminal vs. civil	1	1	-	-	1
Limit paperwork/documentation	*	2	-	-	-

\* Less than 0.5%

the civil justice system.<sup>197</sup> For example, the survey results do not tell us which aspects of the civil justice system the public would be willing to sacrifice—if any—for a more timely system, if such a trade-off were necessary. Nor do the surveys indicate whether the participants in the civil justice system evaluate the system by the same criteria. The Harris/Foundation survey, in particular, sampled only the opinions of lawyers and judges, and even those results demonstrated substantial differences between judges and lawyers on the state of the system.<sup>198</sup> Accordingly, there is a risk of overemphasizing the perceptions of delay derived from these surveys.

At least one recent study of tort litigants (“Tort Litigants study”) has attempted to assess how strongly cost and delay affect litigants’ perceptions of the civil justice system.<sup>199</sup> That study reported on tort litigants’ evaluations of their experiences in resolving their claims through trials, court-annexed arbitration, judicial settlement conferences, and bilateral

Table 18.03  
THE “ONE CHANGE” MOST SOUGHT  
Other Changes

E12. If you could make one change in the process of civil litigation in the federal courts today, what change would you make?

Bases:	Private	Litigators	Public	Corporate	Fed.
	Defense	Plaintiff	Interest	Counsel	Judges
	(250)	(250)	(100)	(300)	(147)
	%	%	%	%	%
<i>Improved Resources/Professionalism</i>					
Appoint more judges	15	10	14	5	5
Improve quality of judges	4	8	16	2	1
Improve quality of attorneys	3	1	1	1	3
Reduce/less frivolous/ unnecessary litigation	1	2	-	4	-
<i>Alternative Dispute Resolution</i>					
Alternative methods of resolving disputes/use of magistrates/ Mediation/Arbitration	4	8	10	4	9
Greater use of summary judgements/strengthen summary judgement process	2	1	-	1	1
All other mentions (1 only)	19	20	19	15	26
Not sure/Refused	3	5	7	3	8

*Id.*

197. See *supra* note 178 and accompanying text.

198. See *supra* note 191 and the differences reported between judges’ and lawyers’ opinions as to delay and discovery abuses.

199. See E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 L. & Soc’y Rev. 953 (1990) [hereinafter *Tort Litigants*]. The authors of the study noted that their findings may be limited to the context of tort litigation. See *id.* at 980. The *Tort Litigants Study* also provides a useful summary of earlier studies of the opinions of participants in dispute resolution systems, including studies which suggest delay as a reason for litigant discontent. See *id.* at 953-60.



settlements in lawsuits brought in three state court systems.<sup>200</sup> The Tort Litigants study considered the litigants' evaluations of their experiences from two approaches. First, the study analyzed the litigants' judgments concerning the fairness of the procedures to which they were subject.<sup>201</sup> Second, the study evaluated the litigants' satisfaction with the outcome of their individual cases.<sup>202</sup>

With respect to judgments of procedural fairness, the Tort Litigants study found "no consistent relationship" between such judgments and the objective measure of case duration.<sup>203</sup> Nor did subjective measures of delay exhibit "much relationship" with judgments of procedural fairness.<sup>204</sup> As the reporters of the study concluded, "It is not . . . that the delay . . . of litigation do[es] not matter to [the] litigants, only that litigants do not appear to base their evaluations of the litigation experience on delay . . . considerations."<sup>205</sup> What the Tort Litigants study did find was a consistent and strong relationship between judgments of procedural fairness and perceptions of control and dignity.<sup>206</sup> With respect to satisfaction with outcomes, the Tort Litigants study found that "measures of case duration, whether objective or subjective, showed little relation to outcome satisfaction."<sup>207</sup> Moreover, as with judgments of procedural fairness, perceptions of the dignity of the procedure and litigant control over the process showed significant correlations with outcome satisfaction.<sup>208</sup> The reporters of the Tort Litigants study concluded that "reduced cost and delay, however desirable in their own right, cannot be counted on to increase litigant satisfaction and to enhance feelings of procedural justice."<sup>209</sup>

However we interpret survey results, we should keep in mind several factors. First, surveys reflect only perceptions of a problem. Public perceptions may not always correspond with realities.<sup>210</sup> Second, as professional pollsters have noted, "public opinion, of course, can change quite rapidly."<sup>211</sup> Third, the delay about which some of the public has ex-

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200. *See id.* at 961-64.

201. *See id.* at 954.

202. *See id.*

203. *Id.* at 968.

204. *Id.* at 971-72.

205. *Id.* at 972 n.27. The authors of the study did note that "litigants may view long delays . . . as unfortunate, but unavoidable, features of . . . litigation," and thus look to other aspects to assess fairness and satisfaction. *Id.*

206. *See id.* at 972. The perception of control related both to perceptions of control over the outcome as well as control over the litigation process. *See id.* The reporters of the Tort Litigants study also found that it is possible for procedures less formal than trial to have sufficient dignity to cause perceptions of high levels of justice. *See id.* at 982.

207. *Id.* at 974.

208. *See id.* at 976.

209. *Id.* at 984.

210. *See, e.g., Judges' Opinions, supra* note 97, at 732 ("Because judges believe something to be true, it does not necessarily follow that it is true.")

211. Yankelovich, *supra* note 159, at i.

pressed concern has not been defined.<sup>212</sup>

## 2. The Relevance of Empirical Studies

In their efforts to understand and reduce delay, advocates of delay reduction have not had to rely solely upon public opinion or anecdotes. Those interested in litigation processes also can employ a substantial number of recent empirical studies to assess their opinions and ground their assumptions about delay.<sup>213</sup> Analyzing the issue of delay with empirical studies that utilize the methods of social science is not a recent phenomenon.<sup>214</sup> The scope of the more recent empirical studies, however, has been broader than the range of the earlier studies.<sup>215</sup>

The Institute for Civil Justice of the Rand Corporation ("ICJ") provided the Brookings task force with an empirical study that included an analysis of empirical data relating to civil litigation in district courts.<sup>216</sup> Because concern about court delay—and a fear of increasing delay—inspired the task force's activities, the ICJ study put particular emphasis on the time taken to dispose of cases filed in the district courts.<sup>217</sup> The ICJ study broadly analyzed data in the following areas: (1) the caseload of the district court system from 1950 through 1986,<sup>218</sup> (2) the time from filing to disposition for "private civil cases" during the period 1971-

212. See *supra* notes 84-101 and accompanying text.

213. See, e.g., *Attacking Litigation Costs and Delay*, *supra* note 107, at 1-24 (empirical study in Kentucky using experimental procedures to reduce case processing); Church, *supra* note 105 (empirical study of the determinants of the pretrial pace of litigation); Dungworth & Pace, *supra* note 146 (statistical analysis of federal court delay between 1971-1986 using data from the Integrated Federal Courts Data Base); Flanders, *supra* note 162 (reporting the overall results of the District Court Studies Project, designed to help courts run more efficiently); Goerd, *supra* note 91 (presenting a broad-based analysis of the pace of litigation in 39 large urban trial courts); William E. Hewitt et al., *Courts That Succeed: Six Profiles of Successful Courts* (1990) (profiles of six metropolitan courts that share successful histories managing problems of delay); Barry Mahoney et al., *Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts* (1985) (reporting preliminary findings from research on case processing times in 18 state trial courts with the goal of developing knowledge to eliminate backlogs and delays); Mahoney, *supra* note 97 (study of court delay in eighteen urban trial courts); Comptroller General, *supra* note 135, at 16-17 (review of nine district courts to determine actions necessary to deal with civil case backlog in federal district courts).

214. See, e.g., Levin & Woolley, *supra* note 8 (reporting the investigation of court delays in seven Pennsylvania counties); Zeisel et al., *supra* note 90 (detailing the court delays in the Supreme Court of New York County (Manhattan)).

215. Barry Mahoney has noted that the earlier studies focused on a single jurisdiction, whereas the more recent studies tend to be multi-jurisdictional. See Mahoney, *supra* note 97, at 8 n.4.

216. See Dungworth & Pace, *supra* note 146, at iii [hereinafter ICJ report] (presenting report derived from the ICJ presentation to the Brookings taskforce). The ICJ has described its principal purpose as "help[ing] [to] make [the civil justice system] more efficient and more equitable by supplying policymakers with the results of empirical research. The cornerstone of the ICJ's research approach is independent and objective policy analysis." Institute for Civil Justice, *supra* note 78, at 13-14 (1993).

217. See Dungworth & Pace, *supra* note 146, at v.

218. See *id.* § II.

1986,<sup>219</sup> (3) court action prior to disposition of private civil cases during the period from 1971-1986,<sup>220</sup> (4) variations in time to disposition among district courts,<sup>221</sup> and (5) correlations between speed of case processing and factors such as case mix, court action taken prior to disposition, and the number of judges in relation to the caseload.<sup>222</sup> The ICJ's review of the district courts' caseload from 1950 to 1986 suggested that the volume and "aggregate workload" of the criminal caseload and the U.S. civil caseload<sup>223</sup> was "significantly smaller than that imposed by private civil suits" and was declining proportionately over time.<sup>224</sup> The ICJ concluded, therefore, that if delay exists in district courts it should be most manifest in the private civil caseload.<sup>225</sup> Accordingly, the ICJ focused the majority of its remaining analyses on private civil litigation.<sup>226</sup>

To assess the general assertion that delay has become a more serious problem in the district courts, the ICJ analyzed trends in the time period from filing to disposition for the district courts during the years 1971 through 1986.<sup>227</sup> The ICJ study used two methods to evaluate trends in time to disposition. First, the ICJ theorized that if delay were increasing over time, increases in the pending caseload disproportionate to the rate of new filings would be expected to have occurred.<sup>228</sup> The ICJ study showed that although the pending caseload has risen steadily systemwide since the 1970's, the increases tended to be proportionate to the growth in filings.<sup>229</sup> The pending caseload analysis did not support a conclusion

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219. *Id.* § III. The ICJ report used the term "private civil cases" to refer to cases brought under the diversity-of-citizenship or federal-question jurisdiction of district courts, excluding cases in which the United States was a plaintiff or defendant. *See id.* at 4 n.2. The report referred to cases in which the United States is a party as "U.S. civil cases." *Id.*

220. *See id.* § IV. The reason for including data analysis of court action prior to disposition when the larger concern is with court delay strikes me as less apparent than the rationales for other areas the ICJ study addressed. The ICJ analyzed data concerning court action prior to disposition in order to assess whether an appearance of timeliness had been created by reducing the amount of time and effort allocated to increased volumes of cases. *See id.* at 26. The ICJ believed that such circumstances might give rise to claims of a denial of justice. *See id.*

221. *See id.* § V.

222. *See id.* § VI. The "casemix" included filing trends for U.S. civil suits and criminal actions, as well as types of private civil cases. *See id.* at 47.

223. For a definition of "U.S. civil caseload," see ICJ report, *supra* note 216, at 8-12.

224. *Id.* at 14.

225. *See id.* at 14-15.

226. *See id.* at 15. The analyses that focused on private civil litigation include those identified *supra* text accompanying notes 219-22.

227. *See id.* at 16.

228. *See id.* In any system of case disposition that involves a time lapse from the filing to the final disposition of a case, the system will have a "pending case" until the disposition is accomplished. *See id.* at 18. If the system permits continuous filings and continuous terminations unrelated to the order of filing, as do the district courts, then the "pending caseload" at the end of any year could be represented by the following equation: Pending Year End = Pending at Beginning + Year's Filings - Year's Terminations. *See id.* at 17.

229. *See id.* at 25.

of a systemwide increase in delay during the period from 1971-1986.<sup>230</sup>

Additional support for the conclusion of the pending-caseload analysis came from the ICJ's examination of specific disposition times for private civil cases during the same period. The ICJ study found that the median and mean disposition times for private civil cases changed little over the period from 1971 to 1986, and appeared somewhat lower in the mid-1980's compared to the 1970's.<sup>231</sup> Because median and mean figures do not disclose the complete range of disposition times or the distribution of cases within the range, the ICJ study also examined disposition times in the following "time-to-disposition" categories: terminations within one year of filing, terminations within one to two years of filing, terminations within two to three years of filing, and terminations three or more years after filing.<sup>232</sup> In comparing the percentage of private civil case terminations systemwide in each of the four categories in 1971 and 1986, the ICJ found that only "modest differences" occurred.<sup>233</sup> Based on the analyses described above, the ICJ report indicated that, notwithstanding some variation between case types and considering district courts as a whole, the district court system did not suffer from a problem of increasing delay.<sup>234</sup>

The ICJ's analyses also suggested, however, that the systemwide picture presented above was somewhat misleading. It did not portray the substantial diversity that existed among individual district courts.<sup>235</sup> In the words of the ICJ, "The stable systemwide figures, then, seem to be a case of ice and fire averaging to a comfortable temperature."<sup>236</sup> For example, the ICJ study found differences across districts with respect to the

230. *See id.*

231. *See id.* at 19-20, fig 3.2. System-wide, the median was 9 months in all but four of the 16 years and only one month above or below 9 months in the other four years. *See id.* at 20. The ICJ reported that the mean disposition times were higher than the medians owing to the effect of a relatively small number of lengthy cases. *See id.*

232. *See id.* at 20 n.3.

233. In part, the ICJ analysis included the following data:

Time to Disposition for All Private Suits		
No. of Years	SY1971 %	SY1986 %
0-1	59.6	61.1
>1 but <2	22.2	23.4
>2 but <3	10.0	9.0
>3	8.1	6.7

*Id.* at 21, tbl. 3.1. "SY" refers to a "statistical year" employed by the Administrative Office of the United States Courts from July 1 through June 30. *See id.* at 2 n.6.

234. *See id.* at 25. An analysis of different case types by the ICJ revealed that a greater percentage of contract, real property and tort cases got through the system in less than one year at the end of the study period than at the beginning and opposite occurred in civil rights suits and suits based on other statutes. *See id.* at 23, tbl. 3.2. The increase in disposition times for civil rights and statutory actions, however, only made their disposition times more consistent with the disposition times of the other categories. *See id.*

235. *See id.* at 39.

236. *Id.* at 75.

following: median disposition times during the period 1971-1986,<sup>237</sup> the proportion of cases terminated "quickly" and slowly,<sup>238</sup> and changes in the number of districts from 1971 to 1986 which processed cases quickly or slowly.<sup>239</sup>

The ICJ study also attempted to identify characteristics associated with the differences in the speed of case processing exhibited by different courts. To do so, the ICJ analyzed certain courts with faster, slower, and average case processing measures<sup>240</sup> with respect to a variety of factors often assumed to affect case processing times.<sup>241</sup> The ICJ study concluded, however, that none of the factors it considered "bore much of a relationship" to the differences in case processing times of the fast, slow, and average courts.<sup>242</sup> While demonstrating that some districts might

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237. The ICJ study demonstrated that the median disposition time for private civil cases in the district court system for most of the sixteen-year period was nine months. *See id.* at 20. With the exception of two courts, the ICJ study also found that the system exhibited a "normal-looking distribution" around that figure, with the fastest group of districts showing a median of five months and the slowest group a median of fourteen months. *See id.* at 40, fig. 5.1 & n.4.

238. For example, in 1986, there were some courts in which more than 80% of all private civil filings were terminated within one year and other district courts where the percentage of such cases was below 40%. *See id.* at 41. Similar disparities also existed when considering the slower end of the disposition-time spectrum. With respect to cases taking more than three years to reach disposition, the ICJ reported that some districts had more than 20% of their cases in this category while other districts had less than 2%. *See id.*

239. The ICJ study found that more individual districts "quickly" terminated higher proportions of their caseloads in 1971 than in 1986. *See id.* For example, the ICJ found that in 1971 approximately 23 districts had terminated 70-80% of their cases within one year after filing and 7 districts had done so with respect to greater than 80% of their cases. *See id.* at 41-42, fig. 5.2. The number of districts in the corresponding categories for 1986 were 12 and 2, respectively. *See id.* The number of districts with higher percentages of suits older than three years had increased from 1971 to 1986. *See id.* at 41. In 1971, only 1 district reported terminations in cases older than three years in the 15-19% range and 26 districts had fewer than 2% of their terminations in cases older than three years; the number of districts in the corresponding categories for 1986 were 6 and 14, respectively. *See id.* at 41, 43, fig. 5.3. Not only was there variation among districts in the time-disposition measures described above, there also was change within districts during the sixteen-year study period. *See id.* at 40. For example, the ICJ report noted that the median disposition time "fell in 31 districts, rose in 50 others and remained unchanged in the remainder." *Id.* Although changes occurred in the median times for 81 out of 94 districts, more than two-thirds of all districts had a median in 1986 that was within three months of the 1971 median. *See id.*

240. For purposes of this analysis, the ICJ study segregated 30 district courts as follows. The "fast" group consisted of 10 district courts with the lowest and most stable median times to disposition between 1971 and 1986. All districts within the "fast" group had medians of 6 months or less. The "slow" group consisted of the 10 district courts with median times to disposition of 12 months or higher, as well as the "highest time-to-disposition stability." The 10 district courts in the "average" group had median times to disposition of 9 months, the systemwide figure. *See id.* at 44.

241. *See id.* at x, 75-76. The ICJ study analyzed the fast, average and slow groups with respect to the following characteristics: (1) filing trends for U.S. civil suits and criminal actions; (2) the private civil case mix; (3) the type of court action taken prior to disposition, and (4) the number of judges in relation to the caseload. *See id.* at 47-73.

242. *Id.* at 77.

fairly be characterized as "slow" or "fast" in comparison to one another, the ICJ could not answer the question of why the slow were slow.<sup>243</sup> The ICJ did conclude, however, that the fast districts did not become fast "at the expense of procedure."<sup>244</sup> That is to say, one could not appropriately infer from the ICJ study that fast courts shortchange litigants in terms of court attention or procedural opportunities.

Generally, the recent empirical studies of civil litigation in the state and federal systems, like the ICJ study, have focused on case processing times and the characteristics associated with "fast" and "slow" courts.<sup>245</sup> More importantly, many of the empirical studies concede that because they focus solely on speed and associated characteristics, they are not assessments of the quality of procedural justice.<sup>246</sup> The empirical studies may demonstrate how to be faster or slower, but they do not clearly identify when time delays deny justice.

### 3. The Consequences of Delay

Why do we commonly treat delay as an "unmitigated evil,"<sup>247</sup> as "unqualifiedly bad,"<sup>248</sup> and as "indisputably contrary to the best interests of the citizenry"?<sup>249</sup> What turns the mere passage of time into the menace of delay? Commonly, patrons of delay reduction offer a specific litany of undesirable effects which flow from delay.<sup>250</sup> The feared consequences of delay include: (1) postponement of the resolution of rights and claims

243. *See id.*

244. *Id.* at 76.

245. *See, e.g.*, sources cited *supra* note 213.

246. *See, e.g.*, Church, *supra* note 105, at 2 (noting that a study of several trial courts in which civil and criminal cases had not been delayed by any reasonable standard found little subjective evidence that speedy courts were unjust in other respects, but that "objective assessment of the 'justness' of dispositions in these courts [wa]s beyond the scope of this research"); Flanders, *supra* note 162, at 68 (finding little evidence to confirm the existence of conflict and quality, but also noting that no one on the project was qualified to render a comprehensive evaluation of the quality of justice rendered in the courts observed); Goerd, *supra* note 91, at 69 (calling for future research to examine the relationship between the pace of litigation and the quality of justice); Mahoney, *supra* note 97, at 205-06 (describing goals other than delay reduction as appropriate aspects of the "quality of justice"). *But see* Attacking Litigation Costs and Delay, *supra* note 107, at 5, 12-13 (interviews with attorneys and judges who participated in an experiment designed to reduce case processing time reflected that expedited procedures were not perceived to affect the quality of case preparation or decisionmaking); Hewitt et al., *supra* note 213, at 156 (dismissing lawyer discontent with the speed of case processing in one court as a possible reflection of personal values or the bar's lack of understanding).

247. Rosenberg, *supra* note 7, at 31.

248. Zeisel et al., *supra* note 90, at xxii.

249. Sipes, *supra* note 16, at 299.

250. The undesirable effects of delay sometimes are described in general terms, such as the denial of a "basic public service." *See* Sipes, *supra* note 16, at 299; Zeisel et al., *supra* note 90, at xxii. I believe such broad conclusions derive from the specific problems I identify *infra* text accompanying notes 250-58. For example, delay may deprive citizens of a basic public service to the extent that it affords devalued judgments, induces unfair settlements, or discourages use of the court system. Accordingly, I will not discuss further such broad characterizations of the effects of delay.

and the devaluing of judgments,<sup>251</sup> (2) a reduction in the quality of judicial fact-finding because of the tendency of memories to fade and the possibility that evidence will deteriorate,<sup>252</sup> (3) the creation of backlogs which can cause "procedural short-cuts" and inadequate consideration of cases on the merits,<sup>253</sup> (4) the fostering of disrespect for the judicial system which leads impatient individuals to seek alternative methods of dispute resolution outside the judicial system,<sup>254</sup> (5) the erosion of the effect of law because unlawful acts are not redressed for years after the acts,<sup>255</sup> (6) the inducement of financially weaker parties to accept unfair settlements,<sup>256</sup> (7) the fact that delay may affect litigants differently,<sup>257</sup> and (8) increases in litigation costs.<sup>258</sup>

One's perception of the effects of delay seems to be a matter of perspective. Aphorism can match aphorism: "justice delayed is justice denied," but "haste makes waste."<sup>259</sup> For each of the alleged faults of delay identified above, one can argue either that the circumstance is not a fault or that speed is not a certain cure. For example, the list recited above suggests that delay in litigation burdens the participants unequally by postponing and devaluing judgments, forcing settlements on weak parties, and simply treating parties differently. However, some time clearly is necessary for parties to develop their claims and defenses in the processing of civil litigation, so some "postponement" is an unavoidable conse-

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251. See 1976 Standards, *supra* note 134, at 83; Defeating Delay, *supra* note 112, at xiii (explaining that excessive delay in the disposition of civil cases prolongs and exacerbates differences between people or entities).

252. See Defeating Delay, *supra* note 112, at xiii; Miller, *supra* note 8, at 405; Rosenberg, *supra* note 7, at 31 (quoting *O'Donnell v. Watson Bros. Transp. Co.*, 183 F. Supp. 577, 581 (N.D. Ill. 1960)); Zeisel et al., *supra* note 90, at xxii.

253. See 1976 Standards, *supra* note 134, at 83 (referring to the effect of "accumulated delay").

254. See Miller, *supra* note 8, at 405; see also Zeisel et al., *supra* note 90, at xxii (noting that delay in the courts "brings to the entire court system a loss of public confidence, respect, and pride").

255. See Miller, *supra* note 8, at 405.

256. See Defeating Delay, *supra* note 112, at xiii; Miller, *supra* note 8, at 404; see also Rosenberg, *supra* note 7, at 31 (noting that delay may force parties into unjust settlements); Zeisel et al., *supra* note 90, at xxii (opining that delay "may cause severe hardship to some parties").

257. See Zeisel et al., *supra* note 90, at xxii. In addition to some of the differences in treatment noted specifically in the text, it is often suggested that delay favors the party interested in maintaining the status quo, commonly the defendant. See, e.g., Adler et al., *supra* note 8, at 93 (reporting the comments of C. Stephen Howard, "The defendant, quite frankly, is almost always interested in delay."); *id.* at 91 ("Delay may be to a defendant's advantage if there are other potential claims that have yet to be filed.").

258. For a general discussion of the link between cost and delay, see Gross, *supra* note 119, at 739 (describing delays as "generally add[ing] directly to the monetary costs of litigation, and they increase the indirect and nonmonetary costs by prolonging the participants' uncertainty and anxiety"); see also Sipes, *supra* note 16, at 299 (attributing to delay "non-productive consumption of attorney time and concomitant increases in legal fees"); *supra* note 117 (discussing the relationship between cost and delay in the CJRA).

259. Macklin Fleming, in discussing the issue of delay reduction, has referred to the "Bog of Delay" and the "Precipice of Haste." Fleming, *supra* note 157, at 15.

quence which speed cannot cure.<sup>260</sup> Moreover, a speedy resolution to an adverse judgment, rendered incorrectly because of time limits on preparation and presentation, is of no value to the losing party.<sup>261</sup> In addition, financially weak parties may be unable to survive during extended litigation, but they also may not be able to afford the multiple resources necessary to fully develop their case on a more compressed schedule.<sup>262</sup> It appears that either circumstance could lead a party to accept a settlement which it considered unfair. Furthermore, it is not clear that delay burdens parties unequally. Defendants, whom it is often assumed benefit from delay, have repeatedly stated that delay generally does not further their interests.<sup>263</sup> Even if delay does affect parties differently by benefiting one side, what applies to delay may apply to speed. Speed equally may be perceived as a benefit to one side only.<sup>264</sup>

The list of delay's negative consequences also implies that delay diminishes the quality of civil litigation by affecting the quality of fact-finding or encouraging shortcuts. Faded memories and lost evidence affect the quality of fact-finding, but curtailing the time for investigation or discovery may cause parties to miss relevant evidence which also could affect the quality of fact-finding.<sup>265</sup> Delay may create "backlogs" which pro-

260. See Luskin, *supra* note 14, at 126.

261. See Gross, *supra* note 119, at 740; Rosenberg, *supra* note 7, at 58 (noting that expediting techniques often make sharp differences in determining who wins).

262. For example, a wealthy party may be able to conduct substantial discovery in a short period of time by paying for multiple lawyers to conduct different aspects of the discovery simultaneously. The discovery process itself or the results of discovery may be used as leverage in a negotiation. A poorer party, on the other hand, may not be able to pay for the work of more than one lawyer to develop equivalent discovery in the same time period. See Adler et al., *supra* note 8, at 98-99 (prepared statements of Professor Charles Halpern concerning the effect of fast track discovery on "poorly financed" and "thinly staffed" public interest lawyers). But see *Senate Hearings, supra* note 33, at 29 (statement of Gene Kimmelman, Legislative Director, Consumer Federation of America, endorsing the CJRA as the "best method of cleaning up our legal system . . . without harming or reducing any citizen's right to [a] fair judicial process"); Harris/Foundation, *supra* note 165, at 11 (reporting that in a poll of 100 "public interest litigators", 35% identified "delays/too slow in reaching court" as the one, most serious criticism of civil litigation in the federal courts).

263. See, e.g., *Senate Hearings, supra* note 33, at 14 (statement of Patrick Head, Vice President and General Counsel of FMC Corporation, referring to several points which make it "equally as advantageous for a large corporation [who are often defendants] to proceed quickly to the merits of a case as it often is for plaintiffs"); Adler et al., *supra* note 8, at 91 (reporting the comments of James A. Hourihan that defendants such as insurance companies generally prefer to settle within a reasonable range as soon as possible to avoid attorney fees).

264. See Adler et al., *supra* note 8, at 99 (reporting the prepared comments of Professor Charles Halpern).

265. The argument that memories fade over time seems less persuasive given modern methods of preserving witness testimony, such as film, photographs and video-tape. Steven Flanders has suggested that such recorded forms of evidence do not have the same effect at trial. See Adler et al., *supra* note 8, at 71 (reported discussion following prepared comments of Joel B. Grossman). We should keep in mind, however, a fact upon which proponents and skeptics of delay reduction agree: most cases do not go to trial.



mote the use of “procedural shortcuts.”<sup>266</sup> However, even the backers of delay reduction have recognized that promoting the expedited processing of cases to avoid backlogs also may result in truncated procedures and proceedings which fail to address fully the merits of a case.<sup>267</sup>

The enumerated vices of delay also imply that delay fosters disrespect for the law and judicial systems because it permits law breakers to postpone liability, leads to a public perception of incompetence, and/or discourages use of the courts by increasing the costs of litigation.<sup>268</sup> Faster processes, however, will not guarantee respect. To the contrary, Maurice Rosenberg has noted that an emphasis on speed can promote disrespect by suggesting to parties and lawyers that courts view their cases “as merely counters in a numbers game.”<sup>269</sup> Furthermore, it has been argued that delay is good to the extent that it deters litigation and leads disputants to seek other—perhaps more creative and more suitable—methods of dispute resolution.<sup>270</sup> Simply put, the resolution of disputes without resort to traditional litigation is not recognized as inherently evil.

Finally, all those concerned with the pace of case processing do not share the belief that reducing delay necessarily reduces or controls costs. In fact, fast tracks might promote additional expenditures by parties who feel pressured to prepare their case fully before time runs out, but who would pursue fewer measures if they had additional time for reflection and planning.<sup>271</sup>

Because the analysis of the suggested effects of delay demonstrates that the same time lapse may be perceived in different ways, understanding the perceived consequences of delay does not help us discern the appropriate scope of delay reduction. The analysis reminds us, however, that

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266. See *supra* note 253 and accompanying text.

267. See, e.g., Tort Litigants, *supra* note 199, at 959 n.5 (describing studies which suggest the importance of the perceived accuracy of procedures in uncovering and presenting facts to litigants’ evaluations of litigation); Rosenberg, *supra* note 7, at 58 (noting that expedited procedures may “circumvent guarantees found in constitutional or statutory provisions”).

268. For example, Senator Biden stated in the first hearing on S. 207, “Access to the courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford.” *Senate Hearings, supra* note 33, at 1. And later, in the same hearings, Senator Biden said, “[A]nd once the middle class in this country loses confidence in the judicial system as a fair arbiter and one which they can call upon without having to hock their savings to do so—unless that happens, we are going to have a problem.” *Id.* at 3.

269. Rosenberg, *supra* note 7, at 58.

270. See Gross, *supra*, note 119, at 752-53.

271. Cf. Adler et al., *supra* note 8, at 90 (reporting the comments of James A. Hourihan, describing why an attorney would take the same amount of discovery in a compressed time period as in a longer time period). But see *id.* at 53 (reporting the comments of Steven Flanders discussing an empirical study which suggests that faster jurisdictions had somewhat more discovery activity than the slower jurisdictions, but the cause(s) of the increased activity could not be clearly attributed to the speed of case processing).

conventional wisdom notwithstanding, the speed of case processing is not necessarily an indicia of procedural justice.

### III. A CONCLUSION: JUGGLING JUSTICE AND THE POLITICAL NATURE OF DELAY REDUCTION EFFORTS

How, then, should we view reform efforts which focus on delay reduction? The definition of delay alone, fortified by tradition, presents an apparently formidable argument that such efforts must be encouraged and supported. It seems irrational to argue against reforms directed at delay reduction. Who would argue for evil? Yet an argument against delay reduction efforts is not an argument that delay is good or an argument to deny that delay reduction efforts may produce acceptable results. Rather, the argument against delay reduction efforts arises from the risks to procedural justice presented by such efforts, risks of going too far and not far enough. The argument against reform efforts which focus on delay concerns the utility of speed as a gauge to measure the success of civil litigation. The argument addresses the futility of trying to construct—or reconstruct—justice one piece at a time.

#### A. *The Risk of Going Too Far*

Even if there is a lack of consensus as to the precise elements of procedural justice, there is broad support for the idea that procedural justice requires that some time pass in civil litigation.<sup>272</sup> Moreover, it is well-accepted that allotting extreme amounts of time for civil litigation events inhibits reaching a desired or acceptable state to which we refer—at least in part—as procedural justice.<sup>273</sup> In other words, the amount of time taken in civil litigation has some effect on the nature of the dispute and the result of the process.

What delay reduction efforts become, however, are attempts to locate where procedural justice lies between “too fast” and “too slow.” That is not to say that they represent procedural justice as reigning at one specific point on the time spectrum for all types of cases or parties. Rather, reformers who emphasize the time expended in civil litigation suggest that, whether the current state of affairs drifts more towards “too slow” or “too fast,” there is some better state of affairs.<sup>274</sup> We have a tradition of frustration in seeking to eliminate delay,<sup>275</sup> because the criteria of “too fast” and “too slow” are crude instruments for assessing civil justice.<sup>276</sup> We are trying to use instruments which remain uncalibrated due to a

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272. See *supra* note 83 and accompanying text.

273. See *supra* notes 247-71 and accompanying text.

274. See *supra* notes 95-127 and accompanying text.

275. See *supra* notes 4-8 and accompanying text.

276. See Rosenberg, *supra* note 7, at 57 (“A serious debit has been the loss of a sense of proportion by many well-intentioned custodians of civil justice. Many of their cures for delay are much worse than the disease itself.”).

lack of definition.<sup>277</sup> Because we have not—and perhaps cannot—define delay in practice, we resort to what we can do or what we think we are being told to do.<sup>278</sup> That is to say, we tend to substitute the absolute pace of case processing as our standard for measuring civil litigation.<sup>279</sup>

One response to such theoretical jargon may be “so what?” Even if those commentators who focus on delay do lead us to correlate procedural justice with the pace of case processing, their efforts cannot hurt the state of procedural justice. If such reform efforts fall short of the mark, they are better than nothing. If they overshoot the mark, then the efforts of proponents from the other side of the spectrum will mitigate the effects of the miss. Faith in a tendency towards equilibrium is justified, however, only if there exist equivalent opportunities for pressure from both ends of the spectrum. That is not the case with the CJRA.

The terms and conditions of the CJRA enhance the risk of associating procedural justice with the speed of case processing. The CJRA hurls the weight of ninety-four federal district courts in one direction only. It forces each district court, in every year through 1997, to focus on whether civil litigation in the court is fast enough.<sup>280</sup> No district court is exempt from the yearly self-critique relating to speed, no matter how fast its case processing becomes.<sup>281</sup> With such incentives and no bright line marking “fast enough,” the message of the CJRA is likely to be heard not just as “faster than now is better,” but rather as “faster and faster is better and better.” Such an unguided reform effort goes too far, and the mindset promoted by the Act may not change quickly.

### B. *The Risk of Not Going Far Enough*

How might reform focusing on delay reduction be challenged as not going far enough? Our tradition of delay anxiety demonstrates that timing is a secondary interest of procedural justice, not a primary concern.<sup>282</sup> As the discussion of the perceived consequences of delay demonstrates, timing is of concern only because it *may* aid or hinder more central concerns of procedural justice.<sup>283</sup> The issue of the “quality of justice” presents a much more complex competition among social values than the focus on delay can accommodate.<sup>284</sup> For example, concerns relating to the “quality of justice” may include issues such as the appropriate allocation of government resources, protection of fundamental

277. See *supra* notes 84-127 and accompanying text.

278. See *supra* notes 92-127 and accompanying text.

279. See *supra* notes 132-54, 213-46 and accompanying text.

280. See *supra* notes 18-81 and accompanying text (a historical development of the CJRA and a description of the CJRA's requirements); see also notes 84-127 and accompanying text (for a discussion of the indeterminate nature of “delay”).

281. See *supra* notes 58, 59, 71, and accompanying text.

282. See *supra* notes 259-71 and accompanying text. *But see* Fed. R. Civ. P. 1 (reading as if justice, speed and lack of expense are goals of equal weight).

283. See *supra* notes 259-71 and accompanying text.

284. See Rosenber, *supra* note 7, at 57 (describing the “neglected problem” as quality and “not the speed[ ] of the process[ ]”).

rights, equitable distribution of wealth and power, maintenance of public order, and promotion of human dignity.<sup>285</sup> Efforts that target delay reduction obfuscate more important issues of procedural justice. Such efforts lead us to engage in activities which only appear to improve the civil justice system but which may have no causal relationship to other concerns covered by the broad phrase "procedural justice."<sup>286</sup> In short, the absence of delay does not ensure the quality of justice.

Finally, reform efforts so dramatically focused on delay reduction may constrict the range of voices which will be heard in the process of defining procedural justice. It is far from clear that delay is of equal concern to all who have an interest in the civil justice system.<sup>287</sup> By making delay reduction of primary importance, we may muffle the voices and concerns of constituencies who would emphasize other elements of justice.<sup>288</sup>

The traditional icon of justice has been a woman wearing a blindfold and holding scales aloft.<sup>289</sup> We may have become too comfortable in the belief that the scales will always balance no matter how quickly we put weights on either side. Perhaps it is time that we change our icon to that of a juggler, one whom we ask to keep many elements of procedural justice in the air. Throwing elements quickly into the air but letting them fall, or throwing and catching one element quickly will not satisfy us. Our object is to juggle a multitude of values, and it is toward that end we should focus.<sup>290</sup> We can always work on speed later.

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285. See, e.g., Robert A. B. Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 Wis. L. Rev. 893, 908-21 (describing the goals of the civil justice processes as including: resource allocation, social justice, fundamental rights protection, public order, human relations, legitimacy of governing institutions, and efficient administration of social enterprises); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 Duke L.J. 1153, 1172-77 (describing four "litigation values" as including: "dignity values, participation values, deterrence values, and effectuation [of rights] values"); Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 845-59 (identifying "valued features" as including: for litigants, autonomy and persuasion opportunities; for decision makers, concentration of power, diffusion and reallocation of power, impartiality and visibility, rationality and norm enforcement, and ritual and formality; and for decisionmaking, finality, revisionism, economy, consistency, and differentiation); Thomas D. Rowe, Jr., American Law Institute, *Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 Duke L.J. 824, 847-50 (identifying procedural values and goals as including: fairness in treatment of litigants, accuracy in factfinding, decisions in accord with applicable norms, and efficiency).

286. For example, the reporters of the Tort Litigants Study noted "if satisfaction and perceived fairness are not in reality linked to cost and delay, the procedural innovations, however effective in achieving these goals, might fail to produce improvements in perceived fairness and satisfaction." Tort Litigants, *supra* note 199, at 957.

287. See *supra* notes 199-212 and accompanying text.

288. The study of pilot districts which the Institute for Civil Justice will conduct pursuant to the CJRA will include an assessment of the satisfaction of litigants with the new procedures used in the pilot districts. See Institute for Civil Justice, *supra* note 216, at 30.

289. For an extensive discussion and analysis of representations of justice, see Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 Yale L.J. 1727 (1987).

290. See James et al., *supra* note 1, § 1.1, at 2-3 (noting that the "hardest and most important job" of a procedural system is to balance competing objectives).