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# System Adjustments

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# System Adjustments

Brendan S. Maher\*

## I. INTRODUCTION

Our civil justice system is part statutory and part common law. Even the statutory parts, of course, have little meaning without common law articulation, which, itself, becomes common law. So our civil justice system is better (if not perfectly) described as a common law civil justice system. The two terms—“common law” and “civil justice system”—identify two crucial functions of our system: to create rules and dispense justice. Countless pages, and some entire lives, have been devoted to exploring and defining the meaning of “rules” and of “justice.”<sup>1</sup> In this short Essay—having only pages to offer—I use simple versions of both terms. By “rules,” I mean the principles which can be extracted from a decision regarding how future cases would turn out. By “justice,” I mean the fair resolution of the dispute between the parties.

Regardless of the simplicity of the definitions employed, rules and justice are grand concepts. The aim of this Essay is to view them more mundanely, not because a mundane view offers a full account of either rules or justice, but because it may, given the advances in information technology in the twenty-first century, do considerable service as an agent of civil justice reform. The mundane view, taken below, is to view “rules” and “justice” as outputs of a system, namely, the civil justice system. Objective (or largely objective) measures of those things—extracted from the wealth of heretofore inaccessible data about the system—can be used to inform reform discussions.

In Part I, I explain why thinking of the law as a system, in an admittedly reductionist way, is a useful approach. It is not the only approach, or even the best approach. Whatever its imperfections, however, it is an approach from which considerable utility can flow. In Part II, I consider the task of measuring the legal system’s rule output and predict that, whatever the practical difficulties, efforts to do so will occur in the near future. In Part III,

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\* Assistant Professor, Oklahoma City University School of Law; J.D. Harvard Law School; A.B. Stanford University. Many thanks to the Washburn Law Journal for organizing an issue on the important topic of budget constraints and access to justice and inviting me to contribute.

1. See H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994); KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962); KARL N. LLEWELLYN, *THE THEORY OF RULES* (Frederick Schauer ed., 2011); Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057 (1975).

I suggest that the increasing availability of system data, and means to measure it, favors a decentralized approach to reform along federalism lines.

## II. LAW AS SYSTEM

The world is either the sum of its parts or it is more. There is a long history of a difference of opinion on whether the latter or the former is the most accurate vision of reality. Those believing the world is the sum of its parts are realists, reductionists, materialists, rationalists; those believing the world has a transcendent quality beyond aggregation are romantics, mystics, spiritualists, believers.<sup>2</sup> One can be both, of course, and I take no side and imply no promotion or criticism of either. I note the distinction only to make clear that, when it comes to law, I take in this Essay a reductionist view. I here think about law as a purely real enterprise, with no metaphysical element whatsoever beyond what law actually does in the real world we can all perceive.

Indeed, my focus is even narrower than that. I want to focus on only two things that the law does: resolve disputes and make rules. American society, quite literally, has several systems for doing that. I focus on the civil justice system and the means by which it resolves disputes and makes rules. Do we know how many disputes we want resolved, or rules made, through the court system? If not, why not? If so, how do we know? How do we know how much we want to spend on both or either? What do we think the consequences would be if we adjusted the system to change the number of disputes resolved or rules made?

The law is of profound importance. Indeed, because the rules that govern people's lives and the idea that people are entitled to justice is so important, the law is rarely analyzed as a literal system that has inputs and outputs. There appear to be, and in fact are, many things at stake in a legal system, things of such fundamental significance that to think of the law as a system with inputs and outputs that we can evaluate and adjust seems vulgar.<sup>3</sup> In some ways, it is, to the extent that one adopts a shriveled view of the values the law serves, and views it no differently than a system that produces widgets. If a system produced 100 quality widgets for \$50, that system would be preferable to a system that produced 100 quality widgets for \$100. We cannot say the same about the legal system because it is not immediately clear what the analog to widgets is. The inputs and outputs are neither easy to comprehensively define nor measure. It is definitely more difficult than keeping track of widgets.

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2. Compare DANIEL C. DENNETT, *CONSCIOUSNESS EXPLAINED* (1991), with WILLIAM SHAKESPEARE, *HAMLET*, act 1, sc. 5 ("There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy.").

3. See Brendan S. Maher, *The Civil Judicial Subsidy*, 85 *IND. L.J.* 1527, 1533-40 (2010) (discussing the different values a civil justice system serves); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 *CAL. L. REV.* 577, 582 (1997) (remarking that an open civil justice system "is the linchpin of a democratic scheme, reinforcing a multitude of democratic ideals").

On the other hand, if we could design a system that could dispense the same number of rules (with the same content), and resolve the same number of cases (as fairly as before) at less cost, than we would certainly be interested in such reforms. Law is more than rules and dispute resolution, but to the extent we can get the same level of those two things at less cost, we would have a great interest in such a modified system, to see if it was compatible with other constraints we might put on reform.<sup>4</sup>

Imagine, for example, if there were no dispute that all judges were overpaid by ten percent. Reducing their salaries by ten percent would be an incredibly desirable reform; cost would be reduced by ten percent, but system output would remain the same. The example, of course, is fantasy. Judges are *not* overpaid; almost certainly, relative to their expertise and value added, they are underpaid.<sup>5</sup> How much should their salaries be increased?

The answer is not clear. Judicial salaries below a certain level will attract insufficient talent to the bench to capably resolve disputes and make rules; judge salaries above a certain level will offer no marginal improvement on the judiciary's ability to do those things, and may even reduce the quality of the judge pool, by attracting people more interested in personal gain than honest performance of duty. Both of those "levels" of pay—the not-enough-to-get-capable-judges and the more-than-enough-to-get-capable-judges—may be difficult to identify in practice, but conceptually they offer clear boundaries.

The harder case is the one where we all agree that increased judicial pay does result in some marginal improvement in output, such as better rules, fairer resolution of disputes, or more disputes resolved with no reduction in fairness. How much are those things worth? We need to know that to determine whether the increased cost is an attractive investment of societal resources. Ideally, we would compare that expenditure with other potential expenditures and choose accordingly. But that is exceedingly difficult, for several reasons. First, it is difficult to assess whether there is any marginal improvement at all. What does it mean for a judicial system to produce better rules or to resolve disputes more fairly? Second, even assuming there is some degree of agreement as to what constitutes superior rules or fairer resolutions, what is the incremental value of such improvements; is society a lot better off or a little better off if the judicial system produces superior rules? Finally, even assuming those evaluating a judicial system were in agreement that a certain reform constituted a major improvement at cost X, is it better to spend X on improving the justice system or to spend X on improving, say, the health care system? Rarely, if ever, are reforms to the civil justice system analyzed

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4. For example, a system reform that achieved such an "improvement" through the expedient of killing off some segment of the population would clearly be unacceptable.

5. "The dramatic erosion of judicial compensation will inevitably result in a decline in the quality of persons willing to accept a lifetime appointment as a federal judge." JOHN G. ROBERTS, JR., 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2007).

in this way, which is not surprising. Comprehensive analysis of the type described above is extraordinarily difficult and contentious.

But there is another reason civil justice reforms are rarely evaluated comprehensively. In data terms, we do not know nearly as much about the civil justice system as one might expect we do. As Professor Hadfield once put it, “we know more about the on-base averages of baseball players in the nineteenth century than we do about our civil justice system.”<sup>6</sup> This is not, of course, a call to know less about nineteenth-century baseball—it is delightful to know the statistics of Oyster Burns and that he played one season for the Wilmington Quicksteps in 1884<sup>7</sup>—but instead a call to know more about the legal system, at least as much as we know about nineteenth-century baseball.

There are a variety of reasons for the data-opaqueness of the civil justice system. First, our civil justice system, like our government, is federal: there is one national court system and fifty state systems, each with different procedural and substantive rules, and each sitting as unconnected data islands. Second, until recently, the relevant data was paper data, and thus not amenable to convenient search. In the past ten years, empirical analysis of system data has become considerably easier, and, happily, much valuable empirical research has been done.<sup>8</sup> But it is no understatement to say that such work is in its infancy; we have done little more than establish small colonies on the vast continent of *Lex Empirica*. One predicts that future reform discussions will benefit from robust empirical data.<sup>9</sup>

The law—probably because until recently teasing out robust statistical correlations has proven inconvenient and difficult—has not yet had a *Moneyball* moment. For the uninitiated, *Moneyball* is a famous book by Michael Lewis (and a popular movie starring Brad Pitt) that tells the story of the Oakland A’s, a small-market baseball team that could not afford to spend as much money on its players as wealthier competitors such as the New York Yankees.<sup>10</sup> In order to compete, the A’s sought to acquire players whose value was not apparent under traditional means of player evaluation, e.g.,

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6. Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1281 (2005); see also Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1940 (2009) (“Official reformers have proceeded largely on the basis of intuition in overhauling pleading and motion practice, while adding disclosure, discovery, conference, and settlement mechanisms.”).

7. *Oyster Burns Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/b/burnsoy01.shtml> (last visited June 7, 2012).

8. See generally Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002); Clermont, *supra* note 6. The Journal of Empirical Legal Studies (“JELS”) was founded in 2003 and now ranks as a highly cited journal. See Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 905 (2011) (discussing origin and prestige of JELS).

9. See, e.g., Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1115 (“Reform proposals are based, either explicitly or implicitly, on a set of claims about how some outcome in the world would be different (usually for the better) if the reforms were adopted. Through empirical analysis, the researcher is able to assess the impact of these reforms, or any other policy intervention, on those intended outcomes.”).

10. See generally MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003).

physical appearance and batting average. The conventional wisdom favored lean, broad-shouldered specimens over portly, potatoesque players, and favored high batting averages over lots of walks or extra-base hits. It turned out that getting on base a lot (whether through a hit or a walk) and hitting for power were hugely correlated to producing wins for the team, more so than batting average and in spite of the fact that a player with such attractive stats may physically appear to favor the couch over the ballpark. Oakland acquired such players at attractive prices and was successful. Now the majority of teams and observers appreciate the value of the “new” metrics, namely on-base average and slugging percentage, employed by the A’s to build a successful team.

The rise of searchable data and a class of researchers to do it suggests that a series of *Moneyball* moments await law, in terms of divining previously unappreciated truths about the legal system and how it makes rules, changes them, and resolves disputes. Some of those truths will be discovered by private players seeking to profit from their discovery; others will be discovered by academics or government researchers seeking to understand or reform the system.

Improved empirics is not without its dangers. The law is mediated by humans, who are self-aware and can thus alter the law by reacting to empirical truths they did not know before. Certainly, the law already has such feedback effects; people take actions within and without litigation in response to what they perceive to be the recently-changed content of the law. The famous *Twombly* and *Iqbal* cases (“*Twiqbal*”) in which the U.S. Supreme Court modified the federal courts’ longstanding pleading requirements, may have led to plaintiffs’ attorneys, on the basis of intuition alone, declining to take cases they otherwise would have taken.<sup>11</sup> Empirical work evaluating whether *Twiqbal* in fact made motions to dismiss more difficult may have altered or confirmed plaintiffs’ attorneys’ intuitions.<sup>12</sup> Now imagine if conclusive empirical work were to discover a clear and strong *Twiqbal* effect with respect to a particular type of case (or a particular type of litigant) that had been previously unrecognized; that is, imagine if there were a clear statistical relationship between losing a 12(b)(6) motion post-*Twiqbal* and having a particular case characteristic. Litigants seeking representation for cases having that characteristic might have a particularly hard time finding representation. That might be good or bad, depending on the salient characteristic.

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11. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) (arguing that *Twombly* and *Iqbal* changed federal pleading standards and destabilized the entire system of civil litigation); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010) (explaining that *Twiqbal* changed the old notice pleading standard to a new “plausibility” regime).

12. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 598 fig. 1 (2010); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 605 (2012).

## III. MEASURING RULE OUTPUT

In a recent case, the Supreme Court interpreted the Federal Arbitration Act (“FAA”) to preempt California state law regarding the unconscionability of arbitration provisions.<sup>13</sup> During the course of that opinion, the Court discussed the merits of arbitration, including the ability of the parties to structure arbitral resolutions according to preference, and of the informal and expeditious nature of arbitration.<sup>14</sup> This is not surprising. Assessments of the desirability of arbitration are largely couched in dispute resolution terms, that is, whether the increased use of arbitration results in “better” dispute resolution overall.<sup>15</sup> I do not renew those debates here.

I consider instead arbitration purely from a rulemaking perspective: easier arbitration will result in fewer judicial opinions, and fewer judicial opinions will result in lower rule output, or so one might assume. But that is not necessarily the case. There is some optimal number of opinions beyond which additional opinions add nothing; the marginal value of those additional opinions, in rulemaking terms, is zero.<sup>16</sup> Indeed there is some number of opinions beyond which additional opinions are counterproductive, because they obfuscate existing understanding of legal rules. I have no idea what those numbers are, of course, and I know of no objective effort to assess at what point additional opinions would have no rulemaking value.

I note, however, that in the last twenty years, the effective number of opinions available to lawyers and judges has increased dramatically. Every federal opinion written is available electronically,<sup>17</sup> and that is increasingly true with respect to state court opinions. There may be more “noise” than ever in our judicial system. For the month of March 2010, Westlaw reflects over 14,000 decisions (8,696 federal and 5,414 state decisions) in which something was “held” and that a Westlaw account holder can immediately access.<sup>18</sup> That is a lot of “law”; might we already be at the point at which much decisional law is noise?<sup>19</sup>

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13. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

14. *Id.* at 1749.

15. See generally David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010).

16. By rulemaking, I include the making of new rules, the reversal of old rules, and the clarification of existing rules. I include noncontrolling decisions in the rulemaking calculus because persuasive power matters regarding rule development.

17. E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (2002) (requiring federal courts to make opinions available electronically).

18. The numbers were derived from a Westlaw search in AllFeds database using the search terms “held & da(aft 3/1/2010 & bef 4/1/2010)” conducted April 6, 2012, and a Westlaw search in the AllStates database using the search terms “held & da(aft 3/1/2010 & bef 4/1/2010)” conducted April 6, 2012. The state number is under representative because not all state opinions make it onto Westlaw.

19. Concerns about the volume of decisions are not new. See William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1171 (1978); see also FED. JUDICIAL CTR., OFFICE OF THE DIRECTOR, ANNUAL REPORT 1971, at 7–8 (reporting that the “widespread consensus that too many opinions are being printed and published or otherwise disseminated”).

I have intuitions on that question,<sup>20</sup> but my intuitions are quite the opposite of my point, which is that I am not aware of any ongoing effort to measure how many rules the current mass of judicial opinions are held to have produced. There is some evidence as to the aggregate judgment of the crowd of experts charged with knowing the law—i.e., judges and lawyers—regarding whether there are too few or too many opinions, in rulemaking terms.<sup>21</sup> Reasonable inferences can be made from the publication and citation rules of various courts: perhaps courts choose not to publish certain opinions, or issue opinions that are not precedential, because they believe additional opinions are noise that would confuse the law. But they may also do so in part because they believe they do not have the time to write opinions with due regard for their rule-making rather than dispute resolution content. Justifications from the courts themselves on such publication and precedent policies differ, and, in any event, the decisions of courts and their views on the matter is only one part of the equation; it is lawyers who do vastly more to apply the law because they advise clients every day about its contents on matters that never get anywhere near a judge. In any event, the significant scholarship that has developed regarding the wisdom of how judicial dispositions are to be treated indicates a profound interest in the power of formal and informal precedent, which is nothing more than rulemaking output.<sup>22</sup>

One may object that such an effort—to measure the rule output of the courts and to assess, even roughly, whether too few or too many rules are being created—is a fool’s errand. The task is not without challenges, certainly, and I cannot refute the fool’s errand charge by simply announcing a shiny and easy strategy to measure the court system’s rule output. Would that I could. But it does not seem to be a problem akin to overcoming the speed of light, which is physically impossible; there seem to be a number of approaches one might take. I know of no current effort to do so, but I predict, in the next ten years, a project of this type will occur.

The number of rules the court system is producing will vary enormously depending on how “rule” is defined. One could plausibly if not persuasively

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20. Now is not the forum to share those intuitions, which do not lend themselves to easy summary. To be clear: I do not mean to suggest that I currently believe the system overall has an undesirable amount of noise, or to suggest that reforms encouraging more arbitration necessarily serve a salutary “anti-noise” purpose.

21. COMM’N ON STRUCTURAL ALTERNATIVES FOR THE FED. CTS. OF APPEALS, WORKING PAPERS 81–82 (1998). Cf. Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 405 (2002) (noting that “attorneys do not share the view that there are too many precedential opinions available”).

22. See generally Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219 (1999); Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755 (2003); Charles E. Carpenter, Jr., *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235 (1998); Jeffrey O. Cooper, *Citability and the Nature of Precedent in the Courts of Appeals: A Response to Dean Robel*, 35 IND. L. REV. 423 (2002); Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705 (2006); Robel, *supra* note 21.

argue that every Westlaw headnote amounts to an instance of a court confirming or clarifying an existing rule. A simple tally of Westlaw headnotes in federal opinions in a year would put the rulemaking tally in the millions. A more exacting definition of rule would make the number lower. Part of the use of such an examination, of course, is the iterative process that would occur once Scholar One produced a first estimate of the courts' rulemaking output. Scholar Two might have a different definition of rule or a different means of counting. Scholar Three and Scholar Four might disagree over the meaning, rather than the numbers, of Scholar One's analysis. But the conversation would be extremely valuable for achieving a better understanding of the civil justice system, and for attempting reform. If, for example, the data suggested that certain areas of the law produced too few rules but other areas produced too many, then arbitration would be favored in the latter areas but disfavored in the former, setting aside other reasons why arbitration might be attractive. And arbitration is but one of many potential reforms that affect rule output.

#### IV. DATA-DRIVEN FEDERALISM

As I have explained, I am optimistic that accessible electronic data about the legal system will lead to an improved understanding of how the system works and its output. But it would be a mistake to ignore the process by which superior analytics might translate into superior systems. In the last two decades, massive amounts of data regarding the past and present civil justice system have become readily available. There are a multitude of ways to extract value from that data; a multitude of ways to adjust the current system such that it requires or encourages players within the system to record their behavior; and a multitude of ways to use the data to reform a system about which the sovereign now has much more information.

It is not clear which approaches will be the most successful. And it is clear that different preferences regarding a system's output exist, such that the question of whether a given data or reform approach is desirable is almost certainly one that should be evaluated on a sub-national basis, rather than a national one. The need for different approaches and heterogeneity of preferences both suggest the best approach—the best process for maximizing the value of the coming wave of superior analytics—is one of federalism.

Younger readers might not recall the societal fears of earlier decades, but one was rising crime. In the late 1980s and early 1990s, considerable policymaking effort was devoted to coming up with ways in which crime could be better and more efficiently controlled.

In 1994, NYPD Commissioner William Bratton instituted "COMPSTAT," a new system for measuring and responding to crime. To manage crime, COMPSTAT relied heavily on timely data and result-

measured responses.<sup>23</sup> Many jurisdictions have chosen to adopt similar data-driven approaches to crime management.<sup>24</sup> Other jurisdictions have rejected the approach, including the Baltimore Police Department, whose earlier attempt to adopt a COMPSTAT-like system was memorably depicted in the television series *The Wire*.<sup>25</sup> COMPSTAT would not have been possible without improved means for extracting data from crime reports. Once technological advances made COMPSTAT possible, New York adopted the approach, and it spread thereafter not on fiat but based on the perceived desirability of the approach. COMPSTAT illustrates a larger point about reform in the wake of analytic improvement. There is considerable uncertainty about whether analytic improvement mandates a particular approach to maximize a certain output value, and there is an obvious diversity of preference regarding which value should be maximized.

The extraction and application of data-driven insights will most likely be optimized under a federalist model, in which considerable discretion is reserved to the states. A long-recognized virtue of federalism has been the degree to which it accommodates experimentation, something which will be necessary when facing the tall task of making good on the promise of exponentially better data.<sup>26</sup> The odds are simply very small that a particular policymaker will fasten upon the right approach to data-mining and use; the odds are considerably greater if fifty-one sovereigns are attempting to do so.

Indeed, it is unlikely the case that a given sovereign open to several possibilities will be able to actually pursue all of them. It may very well be, for example, that certain data about the system can be better extracted if those participating in the system are called upon to answer certain questions about their expectations. There is a limit to how much a particular system can ask particular players to plausibly do. For example, if reformers in State A are interested in assessing whether the expected length of a case matches the actual length of a case, it might make sense to require all litigants to submit nonpublic estimates of dispute length. However, if reformers in State A are also interested in other information possessed by the litigants, they need to be careful not to ask too much of the litigants, or it may degrade the information

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23. James J. Willis, Stephen D. Mastrofski, & David Weisburd, *Making Sense of COMPSTAT: A Theory-Based Analysis of Organizational Change in Three Police Departments*, 41 LAW & SOC'Y REV. 147, 148 (2007) ("Crime analysts collect, analyze, and map crime statistics to spot trends and help precinct commanders identify underlying factors that explain crime incidents. Top administrators use this information to quiz precinct commanders on the crime in their beats and to hold them responsible for solving the problems. Failure to provide satisfactory responses to these inquiries may lead to stern criticism or removal from command.").

24. James J. Willis & Stephen D. Mastrofski, *Compstat and the New Penology: A Paradigm Shift in Policing?*, 52 BRIT. J. CRIMINOLOGY 73, 75 (2012).

25. *Baltimore Drops CompStat*, AMERICAN POLICE BEAT, <http://www.apbweb.com/featured-articles/1593-baltimore-scraps-compstat.html> (last visited June 7, 2012); see also *The Wire*, Season Three (HBO television broadcast Sept. 19–Dec. 19, 2004).

26. See, e.g., Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) (discussing traditional justifications for federalism, including experimentation).

received. To the extent reformers in State B are interested in information being gathered by State A, they might reasonably choose to gather other information from players in State B, in the hopes that such information can add to the overall data about the civil justice system. Obviously for the data from the different systems to be useful to the decisionmakers in the other system there would need to be some similarity between the salient parts of the two systems. Nonetheless, it is likely that significant similarity between systems exists such that various jurisdictions can benefit from the data extraction occurring in other systems while gathering different data themselves.

Recent measurement attempts regarding the use of court resources have used surveys to measure the minutes of court time devoted to particular case events—status conferences, summary disposition motions, etc.—occurring within the federal court system, as well as the overall minutes devoted to particular subject areas of the law.<sup>27</sup> These measurement efforts, in my view, are welcomed, because they describe the degree to which the judicial subsidy—i.e., the tax dollars expended to provide judicial services to those who have a dispute they wish to resolve in court—is consumed by certain types of cases and certain types of events. It would not be difficult to imagine a state that wishes to gather more information on the judicial subsidy and requires litigants to provide additional (nonpublic) information about themselves, such as income level, frequency of litigation, or expected legal bills. This information, combined with minutes consumed (per event and per subject area) and rules produced, would provide a profoundly useful picture of the justice system.

If, for example, commercial disputes were consuming significant judicial minutes and resulting in modest rule output, the case would be very strong for reforms designed at extracting user fees for such uses of the system because there is little reason to believe such fees would hurt the system in a way that charging court fees to injured, poor individuals would. Alternatively, one might promote strong pro-arbitration rules for particular types of disputes, depending on their system usage and output.

Another virtue of federalism is different responses to the same data. Imagine if State C(alifornia) and State T(exas) analyzed their respective systems and determined that each of them, in subject area A, had a judicial system that devoted X judicial minutes to that subject and resolved Y number of disputes and produced Z number of rules. Imagine further, simply for the

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27. See PATRICIA LOMBARD & CAROL KRAFKA, 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY (2005); Maher, *supra* note 3, at 1543 (“For example, the 2003–2004 *Federal Case-Weighting Study* (the first federal weighting study to formally estimate time per case event) supplied estimates of the average time consumed by pretrial events, such as dispositive motion resolution, and included in its estimates judicial time spent outside of the courtroom (reading briefs, doing legal research, drafting opinions) in particular types of cases.”).

sake of argument, that the numbers for State C and State T, adjusted for population, were exactly the same. The desirability of reform, and the appropriate specific reforms, would clearly vary between states. Absent a compelling reason why a sub-national response was inappropriate (such as an externality or a reason to believe that a state was not responsive to a voiceless constituency), the presumption would be to permit States C and T to adopt reforms that reflect local preference. State C, for example, might prefer spending more money to ensure the disputes were resolved with only a very low chance of error and favor the resolution of disputes in such a way as to produce rule-containing opinions. State T might prefer to ensure that disputes were resolved expeditiously and affirmatively disfavor resolutions likely to result in rule-containing opinions.

Indeed, this is one reason to question the Supreme Court's solicitude for nationalized approaches to civil justice reform. In two significant areas, arbitration and benefit disputes, the Court has taken an anti-federalist approach. Regarding the national approach to arbitration, in a case mentioned above, the Court effectively ruled that a statute passed in 1925—almost ninety years ago—reflected a congressional determination that arbitral resolution of disputes be favored over state preferences to the contrary, unless state preference was reflected in a general law of contract.<sup>28</sup> With respect to benefit disputes—i.e., disputes regarding the provision of health care and retirement income to private employees, which are extremely common in federal courts—the Court has for decades interpreted the relevant federal statute to preclude State prerogative on most of the questions of dispute resolution.<sup>29</sup> One could not fault the Court were the relevant statutes—the FAA and ERISA—abundantly clear on the scope of preemption. The Court, after all, need apply Congress's will where it is constitutional to do so.

Yet the widely-held view, in both instances, is that the statutes are amenable to multiple interpretations and that the Court's chosen path reflects its own policy judgments about the undesirability of solutions other than a centralized one. To wit, the Court, in construing the FAA and ERISA, appears to have assertively embraced a national approach that is hostile to traditional (i.e., broadly discretionary on the part of judges and juries) litigation resolution, and left little room for the states to do otherwise.<sup>30</sup> Some deny this account, certainly, and assert the Court is doing only what the

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28. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

29. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 217–18 (2004) (“Under ordinary principles of conflict pre-emption, then, even a state law that can arguably be characterized as ‘regulating insurance’ will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA’s remedial scheme.”).

30. See generally David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13 (2011) (analyzing the Court’s interpretation of the FAA); Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433 (2010) (evaluating the Court’s interpretation of ERISA).

statute commands.<sup>31</sup> But if we are to assume that the Court is exploiting textual ambiguity to give flight to its own policy preferences, then one hopes that the Court will realize that, in the coming years, improved analytics will strengthen the case for a decentralized approach to civil justice reform. Perhaps members of the current Court might now be open to reappraising their preferences. In any event, in the next ten years, several members of the Court will depart the bench, and one hopes the future Justices will appreciate the need for a decentralized approach to making optimal use of the emerging civil justice data frontier.

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31. See, e.g., Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U. L. REV. COLLOQUY 53 (2011) (approving of the Court's interpretation of the FAA).