Michigan Law Review

Volume 83 | Issue 4

1985

Measuring the Costs of Civil Justice

Edward Brunet

Lewis and Clark Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Courts Commons](#), and the [Litigation Commons](#)

Recommended Citation

Edward Brunet, *Measuring the Costs of Civil Justice*, 83 MICH. L. REV. 916 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol83/iss4/25>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

MEASURING THE COSTS OF CIVIL JUSTICE†

Edward Brunet*

COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES. By J.S. Kakalik and R.L. Ross. Santa Monica: Rand Corporation. 1983. Pp. xxix, 125. \$10.

I. INTRODUCTION

Costs of the Civil Justice System: Court Expenditures for Various Types of Civil Cases is a product of the times. In the age of governmentally mandated zero-based budgeting it is not surprising that a book has been written that purports to calculate a "nationwide annual government expenditure for processing civil cases" (p. vi). The primary mission of this book and a series of other cost studies undertaken by its publisher, the Rand Corporation's Institute for Civil Justice — "to improve understanding of all the public and private costs of the civil justice system" (p. v) — reveals a quantitative philosophical approach. At a time of increasing social science focus on law in general¹ and judicial administration in particular,² *Costs of the Civil Justice System* reflects a currently widespread social concern with governmental expenditures of all kinds, including courts.

Costs of the Civil Justice System is a deceptively simple book, full of interesting, valuable and potentially misleading information concerning the costs of American civil litigation. The book provides cost data

† I wish to thank Edinburgh University, Faculty of Law, for the generous research facilities provided during the writing of this review.

* Professor of Law, Lewis and Clark Law School. B.A. 1966, Northwestern University; J.D. 1969, University of Illinois; LL.M. 1972, University of Virginia. — Ed.

1. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Kaye, *Thinking Like a Statistician*, 34 J. LEGAL ED. 97 (1984); Leff, *Law and*, 87 YALE L.J. 989 (1978); *Symposium: The Place of Economics in Legal Education*, 33 J. LEGAL EDUC. 183 (1983). Other Rand studies sponsored by the Institute for Civil Justice include J. KAKALIK, P. EBENER, W. FELSTINER & M. SHANLEY, *COSTS OF ASBESTOS LITIGATION* (1983); J. KAKALIK & A. ROBYN, *COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES* (1982); M. SHANLEY & M. PETERSON, *COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980* (1983).

2. See, e.g., Brunet, *A Study in the Allocation of Scarce Judicial Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701 (1978); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); McDonald & Kirsch, *Use of the Delphi Method as a Means of Assessing Judicial Manpower Needs*, 3 JUST. SYS. J. 314 (1978); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); *Current Developments in Judicial Administration*, 80 F.R.D. 147 (1978); *Symposium: Reducing Delay in the Courts*, 62 JUDICATURE 11 (1978).

on civil litigation by type of case, component part of a case and, amazingly, a calculation of the national cost of civil litigation — \$2.2 billion in fiscal year 1980 (pp. xx, 82). Readers learn that 1982 government expenditures per judge varied dramatically, from a low \$261,000 to the federal high of \$752,000 (pp. ix, 30, 33); that trial and particularly jury trial costs constitute a large percentage of all litigation costs (pp. xi-xiii), and that jurisdictions spend far less to process probate or domestic relations cases than to handle tort or property rights litigation (p. 81). The entire thrust of this slim volume, which holds more pages of statistical tables than pages of text, is quantitative in nature. Indeed, the book might be described as a group of seventy eight tables separated by textual description of the data reported, explanation of methodology and definition of terms used.

Consistent with the positivistic nature of this book, the authors eschew all but the most obvious impressionistic explanations for the cost data presented and steadfastly report statistical results without making judgments about their findings. This is a work that avoids controversy and epic conclusions and, in so doing, permits the reader to interpret for himself the data reported. The Foreword of the book, written by Gustave Shubert, Director of the Institute for Civil Justice, emphasizes the book's narrowly "factual" goals and warns that "the authors make no judgments on the appropriateness of the total size of public expenditures or the amounts of public funds required to process civil cases" (p. iv). In Shubert's terms the "hard data" found in the *The Costs of the Civil Justice System* will permit subsequent value judgments, presumably by others (p. iv).

To the book's likely readers, its quantitative style represents both its greatest strength and its greatest weakness. Academics and social scientists, some of whom are now in judicial policymaking positions as professional court administrators, will find the cold numbers presented immensely valuable. After all, this is the first book ever to estimate the amount spent on civil litigation in the United States. The book also provides fascinating new information regarding yearly state and federal expenditures per judge (pp. 21-36), fiscal year 1982 state and federal expenditures on different component parts of civil cases (pp. 37-43) and comparisons of the amounts spent by different jurisdictions on similar types of civil cases (pp. 43-80). The book's informative data is of tremendous utility since it replaces rank speculation on the cost of resolving disputes with "carefully derived fact" (p. iv). Accordingly, this book will help inform and resolve numerous policy questions surely in need of hard data, such as whether America is spending too much on litigation,³ on jury trials or on certain types of civil cases.

3. For the view that American expenditures on civil litigation are excessive, see Burger, *Agenda for 2000 A.D. — Need for Systematic Anticipation*, 70 F.R.D. 83 (1976). For a contrary view, see Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC. REV. 701 (1977);

Nonetheless, the unrelenting social science nature of *Costs of the Civil Justice System* will probably cause it to be condemned or, worse, cast aside by other likely readers, all of whom would gain by contemplating its narrow findings. The book's social science style is at odds with the generalist tradition of American lawyers and courts. The measurement of time spent on various judicial functions, calculated and expressed in "judge-minutes" (pp. 10-11, 24)⁴ will likely evoke a negative response in the mainstream of judges and lawyers. Similarly, organized bar and bench leadership may have a hard time with the heavy and forbidding social science jargon used throughout. Most of the material is set out in statistical tables that, while appealing to many statistically oriented "sports nut" lawyers, may not be easily digestible to working judges or leaders of the organized bar. The authors do provide helpful textual elaboration of most of the important data revealed in the charts. Nonetheless, consistent use of hyphen-laden phraseology such as "government expenditure per case-related judge-minute," a key cost concept used throughout and calculated by "divid[ing] the number of case-related work-minutes in a judge's work-year" into the "total government expenditure per [full-time-equivalent] judge in the entire state" (p. 24), while acceptable in a social science journal, may be so tedious as to risk the policy influence this important work should hold. Moreover, the authors' doggedly neutral, positivistic social science style, while representing an entirely valid philosophy, may make the book difficult and dry to the judge or lawyer wanting the authors to provide reasons, hunches and "guesstimates" regarding some of the fascinating data presented.

These potential frustrations to influential readers — after all, groups comprised of judges and senior attorneys make or recommend judicial administrative policy⁵ — constitute a glaring weakness of *Costs of the Civil Justice System*. It will be unfortunate if this book is read and contemplated only by academics and specialists. By provid-

Nader, Book Review, 132 U. PA. L. REV. 621, 635-36 (1984) (observing that there is "substantial evidence . . . that litigation . . . is not great in proportion to the population and the need in America").

4. The authors used data collected by the jurisdictions studied (California, Florida and Washington and the United States District Courts) to arrive at the "judge-minute," or "judicial work-minute." For example, according to data from California, there are 74,000 case-related minutes available per yer per judicial position in Los Angeles (5.74 hours per day) and 72,600 minutes per year in the remainder of California (5.63 hours per day). P. 24 (citing 1 JUDICIAL COUNCIL OF CALIFORNIA, 1981 JUDICIAL COUNCIL REPORT and 2 ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 96 (1981)).

5. See, e.g., CAL. CONST. art. 6, §6 (providing for judicial conference of diverse membership); IDAHO CONST. art. 5, § 13 (leaving to state supreme court authority to pass rules of procedure); 28 U.S.C. § 331 (1982) (authorizing United States Judicial Conference, composed of judges from various courts, to recommend needed procedural reform to U.S. Supreme Court); OR. REV. STAT. §§ 1.725, 1.730 (1983) (creating Council on Court Procedures composed of judges, attorneys, and a public member and authorizing council to make rules relating to court administration).

ing easily understandable explanations of the various calculations and terms presented, together with more textual speculation carefully identified as such, the authors might have reached the book's appropriate audience without sacrificing the valid social science tenet that avoids mixing positive data with normative beliefs.⁶ Nonetheless, persevering policymakers and others familiar with social science style will find the statistical results extremely useful and fully capable of stimulating research agendas of paramount significance. Before examining the book's implications, this review sketches its contents and, because of the work's quantitative style, probes its methodology.

II. CORE CONTENTS

A. *Organization and Methodology*

Costs of the Civil Justice System is organized clearly and simply. A short and succinct Executive Summary (pp. v-xx) begins the book with a rather more discursive and less statistical overview of its contents and statistical results. Following a brief Introduction (pp. 1-4), chapter 2, entitled "Research Approach" (pp. 5-20), offers a crisp explanation of methodology. Chapter 3, entitled "Government Expenditure per Judge" (pp. 21-36) presents "estimates of the average annual government expenditure per judge" in the jurisdictions analyzed (p. 21). The authors intend the estimates to be comprehensive, including such indirect expenses as sums spent by other agencies for the judges' fringe benefits, salaries of clerks, bailiffs, secretaries and court administrators. Chapter 4, entitled "Government Expenditures and Judge-time Per Civil Case Filed" (pp. 37-80) consists of two parts. First, the authors divide the process of civil litigation into various segments or "activities" and present comparative data on how the jurisdictions studied expend resources on the particular "case activity" identified. Second, the authors present comparative data reflecting the cost of resolving seven different types of civil cases. The short final chapter, "Nation-wide Government Expenditure for Processing Civil Cases" (pp. 81-85), estimates the cost — for the entire United States — of processing seven different categories of civil cases. Three separate appendices conclude the book, the most helpful of which is entitled "Sources of Data and Methods of Calculating Expenditure Estimates in Section III" (pp. 93-105). Here the authors explain, in footnote style, some of the steps used to compile the statistics published in tabular form in chapter 3, "Government Expenditure per Judge," and cite to the primary source data published and collected by state and federal court administrators.

This appendix describing data sources, together with the chapter on "Research Approach," discloses a methodology that is utterly

6. See note 25 *infra* and accompanying text.

pragmatic. Rather than collecting new information, the study relied upon existing data previously gathered by the federal trial courts and by the various states.⁷ The authors used statistics from only four jurisdictions, California, Florida, Washington and the United States District Courts. The study, which used published and unpublished data and interviews with court administrative staff (p. 5), focused on these four jurisdictions because they were thought to possess "the detailed data required" (p. 7). Each jurisdiction studied had "extensive special survey data on the time required for case processing activities, disaggregated for various civil case categories" (p. viii). In addition, expenditure data was deemed "available" and "accessible" in these jurisdictions (p. viii). The Research Approach chapter reveals the authors' selectivity: although they examined statistics of the sixteen states that collected data for different types of civil cases, they were forced to eliminate nine states due to inadequate detail on case types (p. 8). Similarly, four of the remaining seven states "did not have data on the time per activity for civil cases" (p. 8). In a nutshell, the study focused on these four jurisdictions because they constituted the *only* court systems that maintained data on the expenditure of time on various activities within litigation, and which broke that litigation down into differing types of civil cases.

The chapter on methodology indicates how completely the authors became prisoners of data from the four jurisdictions on which they relied. Kakalik and Ross frankly concede the considerable maturity of some of this baseline data; some of the estimates made using "the most recent available data" (p. 5) relied upon dated statistics. For example, they use statistics regarding "judge-minutes" spent on various case tasks that were compiled by the four jurisdictions throughout the 1970's.⁸ The use of such vintage data is disquieting, but perhaps reasonable in view of the apparent pragmatic impossibility of collecting new data. The authors freely admit that the 1975 Florida data "no longer accurately reflect[s] the time involved in case processing,"⁹ but they proceeded to use the results anyway, since the "1975 data from Florida were gathered with the same detail as those from California

7. The authors concede that "collection of new data would have yielded more precise estimates," but reason pragmatically that "we should exploit the full potential of available data first." P. vi.

8. For California, the authors chose to rely primarily on data collected in 1974 to yield "judge minutes" spent on different activities. P. 9. Similar data from Florida was collected in 1975, from Washington in 1976 and from the Federal courts in 1979 and 1970. Pp. 10-11. The 1979 federal data reported time "per case filed by type of case" but did not reveal the time spent on various activities within cases. P. 10. The authors used the most recent study that provides such a detailed breakdown (by activity within a case) — a 1970 study said by its compiler to be "relevant even though there have been some changes in courts and court culture since 1970." P. 11 (citing interview with Steven Flanders, Circuit Executive, Judicial Council of the Second Circuit, U.S. Court of Appeals, Dec. 16, 1981).

9. P. 10 (citing a letter from D. Conn, Administrator, Florida State Courts System, to the Institute for Civil Justice, July 26, 1982).

and Washington, and are better than those from nearly all other states" (p. 10). Kakalik and Ross did manage to rule out the so-called "window effect," a distortion of the 1970 federal study caused by the fact that the 132-day period allotted for the survey was obviously much shorter than the duration of most of the cases studied,¹⁰ by excluding the methodology used to extrapolate from the results of the 1970 study and relying solely on its underlying original data (pp. 11-12).¹¹

It is understandable and justifiable that throughout this study the authors' statistical conclusions are expressed as "estimates" (pp. 6, *passim*); the statistics relied upon were simply too unreliable to be expressed as precise amounts. The problem of mature data is not the only reason the authors wisely used the "estimate" approach. A further difficulty arose from the fact that the jurisdictions did not systematically collect data on courts of limited jurisdiction. Accordingly, the authors excluded most¹² courts of limited jurisdiction from all their estimated expenditures and focused instead on courts of general jurisdiction (p. 14). The exclusion of such labor intensive courts — small claims courts, municipal courts, juvenile courts, bankruptcy courts — prevented significant sums of public expenditure from being included in the study. Further, the authors' focus on court *spending* resulted in the exclusion of court *income* — "fees, fines, [or] charges" (p. 6). And amounts spent by litigants were, of course, not considered a component of court spending. These rather restrictive definitions of "court spending" also caused the authors to exclude governmental expenditures "for correctional, prosecutorial, or law enforcement functions" (p. 6). Although the detailed statistical treatment of court time did include time spent by judges' support staff, these figures were allocated among case types and case functions solely on the basis of the amount of time the judge himself spent on those cases and functions; statistics on court staff time allocated to case functions or case type "almost

10. See S. FLANDERS, THE 1979 FEDERAL DISTRICT COURT TIME STUDY 22-26 (1980) ("window effect" exists since "a survey almost certainly captures less of the time for cases in which the typical trial is long than for shorter cases").

11. The frustration and just plain hard work faced by the authors is illustrated by their solution to the "window effect" problem of the 1970 study. Although they used the 1970 study's "original computer tapes," they applied a different methodology. They learned that the sample data collection covered 22% of all judge work-years during fiscal year 1970, identified the "reported time to process all cases during the sample data collection," and divided that time "by the estimated number of cases filed during the sample data collection period" (total number of cases filed in 1970 "times 22 percent of judge work years for which we had usable data." P. 12). Kakalik and Ross maintain that "[t]his gave an estimate of the judge-time required to process the average cases filed of each type." P. 12.

12. The authors did include courts of limited jurisdiction where the states studied collected data by case category relevant to them. P. 14. The states studied did maintain data relevant to some litigation categories normally considered by courts of limited jurisdiction — domestic relations, mental health and probate and guardianship, but for some reason the vast proportion of states excluded courts of limited jurisdiction for some or most data collection exercises. In all probability the busy — hectic may be a better term — litigation schedules of courts of limited jurisdiction frustrates and increases the costs of data collection.

never were available" (p. 6). Thus, the authors simply assumed "that staff time was proportional to judge-time" (p. 6).¹³

The authors chose to divide all civil cases into seven types: "domestic relations, mental health, probate and guardianship, property rights and condemnation, torts, contracts and other civil complaints, and other civil petitions" (pp. 15-16), as a means to "facilitate interstate and federal comparisons" (p. 15). Since they never provide any justification of this classification system, the authors simply appear to be using categories already created by the three states they studied. A perusal of appendix A (pp. 87-91) reveals that California, Florida and Washington classify cases in quite a similar manner, although Florida uses a somewhat greater number of case classifications. In contrast, the richly detailed federal scheme for classifying civil cases divides federal litigation into eleven broad "nature of suit" categories¹⁴ and over seventy subcategories (p. 92).¹⁵ Where a state created multiple subclasses relevant to one of the seven main categories, Kakalik and Ross simply combined that state's categories and constituted the aggregate as one of the seven classifications.¹⁶ Given the relatively narrow specific categories such as "mental health and probate," the catch-all category of "contracts and other civil complaints" loomed large. Although the category that the authors call "other civil petitions" smacks of a confusing second residuary case classification, the study limited this seemingly amorphous category to "civil petitions not included in the other six categories" (p. 65) and offered as illustrations "adoptions, change of name, prisoner petitions for writ of habeas corpus, and administrative law reviews" (p. 74). Given the more com-

13. Kakalik and Ross speculate that

court reporters spent more of their time on trials than did judges, that judges' secretaries distributed their time among activities much as judges did, and that clerks were caught up in processing the paperwork spawned by the earlier stages of litigation and hence expended less of their time on trials than did judges. P. 6.

14. The federal civil case categories are contract, real property, personal injury, personal property, civil rights, prisoner petitions, forfeiture/penalty, labor, property rights, other statutes, and local question. P. 92.

15. For example, the personal injury category separates cases into ten subtypes: Airplane; Airplane product liability; Assault, libel, and slander; Federal employers' liability; Marine; Marine product liability; Motor vehicle; Motor vehicle product liability; Other personal injury; and Personal injury product liability. P. 92. The detailed federal scheme also lists specific statutory subheadings within their respective categories. For example, "Miller Act" litigation (40 U.S.C. §§ 270a-d (1982)), involving suits based upon surety bonds on federal construction projects, and "Medicare Act" litigation (Health Insurance for the Aged Act, Pub. L. No. 89-97, tit. I, 79 Stat. 290 (July 30, 1965)) each constitute a separate subheading under the general "contract" case type. P. 92. The only catch-all federal case group, "Other statutes," is divided into 17 subheadings, including Antitrust, Bankruptcy, Selective Service, Social Security, Tax suits, and Constitutionality of state statutes. P. 92.

16. For example, the authors used California's category of "Probate and Guardianship" for one of their seven case categories. California and the authors defined this category to include "ordinary probate proceedings, will contests, and guardianship and conservatorship proceedings." P. 46. Washington's case categories separated guardianship from probate litigation. Kakalik and Ross logically included statistics from both Washington categories. Pp. 46-48.

prehensive category of "contracts and other civil complaints," the study apparently intended the "other civil petition" category to be much narrower.

The authors' other major methodological step involved dividing cases into component "activities." The four jurisdictions analyzed divided cases into between seven and fourteen activities (p. 15). The authors distilled this information by selecting five "case-related activities": (1) "motions and hearings"; (2) "pretrial, settlement and other conferences"; (3) "non-jury trials"; (4) "jury trials"; and (5) "other" (p. 16). Presumably Kakalik and Ross were again somewhat inhibited in their own scheme of categorization by the relatively small number of categories available within the four jurisdictions studied.

B. *A Thumbnail Sketch of the Results*

The results of *Costs of the Civil Justice System's* national cost calculations are certain to be of interest to policymakers, and themselves provide further insight into the style of the Rand study. The authors estimate 1980 fiscal year court expenditures for the entire United States to exceed \$2 billion (pp. 82-85). To update this figure one must adjust for the study's iceberg effect — the aforementioned exclusion of minor courts or courts of limited jurisdiction and the four-year-old age of the data used.¹⁷

The authors' nationwide estimates as to the types of civil cases filed are also worth summarizing.¹⁸ The 8,145,000 state civil cases filed in 1980 broke down into widely varying numbers of cases filed in each of the seven major categories: 134,000 filings involved property rights; 157,000, mental health; 661,000, torts; 871,000, probate and guardianship; 2,242,000, domestic relations and 4,079,000 fell within the combined catch-all categories of "contracts and other civil complaints" and "other civil petitions" (p. 83). Similar categorical data for the federal courts were less revealing since three of the categories relevant to the states — domestic relations, mental health and probate and guardianship — are not within federal subject-matter jurisdiction. Nonetheless, it is significant that the bulk federal court filings were in the "contracts and other civil complaints" category — 112,249 of a total of 180,576 filings (with only 32,315 tort suits and only 8,301 filings involving property rights) (p. 85). The study's estimates of federal expenditure by category generally corresponded to the volume of filings, with most of the money, \$212 million, being spent on the catch-

17. Government expenditures on criminal courts were, of course, also excluded from this study focusing upon government civil litigation spending.

18. The authors were forced to estimate case filing categories for the majority of states that do not report case types. They "took the data from those states that did report in 1976, calculated a case filing rate per 100,000 population for each type of case in those states that reported data, and then extrapolated to all using the 1980 population of 224 millions [sic]." P. 83.

all "contracts and other civil complaints" category and comparatively modest amounts on property rights (\$3 million), and torts (\$56 million) (p. 85).

The chapter which examines "per-judge" expenditures neatly illustrates the relatively meager spending on judicial salaries in relation to the entire "judicial package" of court expenditures. The study found that judicial salaries amounted to one-sixth the cost of the total "judge package" in the three states studied and only one-tenth in the U.S. District Court (p. ix). The authors do a good job reporting data regarding most of the mushrooming expenditures that now supplement the simple cost of judging, including amounts for court administrators, data processing, secretarial staff, bailiffs, court reporters, libraries, buildings,¹⁹ janitorial services, fringe benefits and even indirect costs (pp. 21-22).

This same chapter further reveals that expenditures on state "judge packages" were relatively similar across state lines. These state packages ranged from Washington's low of \$261,000 per judge (p. 30) to California's high of \$383,000 per judge (p. 23). In contrast, the federal government spent an estimated \$752,000 each year per judge (p. 34). In one of the book's relatively few direct impressionistic explanations the authors observe that the "higher expenditure per federal judge is accounted for by both higher salaries and higher numbers of support staff per judge" (p. 35).²⁰

The authors proceed to combine this information on "per-judge" expenditures with data on the amount of judicial time spent on the various case tasks described earlier to calculate an estimated "government expenditure per case-related judge-minute" (pp. x-xi). In fiscal year 1982 these amounts varied from an average of \$3.76 to \$5.23 for the three states studied, compared with a \$9.41 average for U.S. District Courts (pp. xi, 33). The authors reduced the mind-boggling array of statistics regarding the number of judicial work days per year²¹ to estimate the hours allocated daily to "case related" tasks; case hours worked per day ranged from a low of 4.7 for the Washington courts to a high of 6.5 for Florida (pp. 27, 31).

The chapter concerning comparative costs for each case type and

19. Estimating the cost of capital expenditures such as court buildings proved particularly troublesome. The authors point out the lack of information needed to "estimate the square foot-age allocation, construction cost, anticipated usage rate, useful lifetime, and facility maintenance and improvement expenditures." P. 22. Instead, they used data reflecting "current facility expenditures" for given years and recognized that such yearly budget costs may not equal the sum of the "annualized cost of the facility allocated over its lifetime." P. 22.

20. Kakalik and Ross report that the number of judicial support staff per judge ranges from a high of 11.9 for federal courts to a low of 5.7 persons in the state of Washington. Pp. 31, 35. Federal judicial salaries for fiscal year 1982 averaged \$70,300; the average annual state-court judicial salary for 1982 was \$45,633, with a range from \$33,000 to \$66,900. Pp. 34-35.

21. The authors estimated a federal court work-year of 215 days, pp. 33-34, and identified work-years for the three states studied ranging from 221 to 225 days. Pp. 24-31.

activity provides numerous estimates showing fairly wide discrepancies among jurisdictions. Estimates of expenditures on the case activity known as "trials" (a category which excludes, among others, activities such as motion practice) as a percentage of total court expenditure yielded a range from a low of 33% for United States District Courts to a high of 63% for California, excluding Los Angeles (p. 39). These figures prompted the authors to provide another of their rare analytic explanations:

Trials (particularly jury trials) were rare, but when they did occur they were costly in time and money. . . . [A] civil jury trial occurred in only 1 to 5 percent of the cases but required an average of two to five days of judge-time, depending on the court. A nonjury trial occurred in only 6 to 15 percent of the cases and typically required one day or less of judge time. [P. 37.]

The percentage of case-related judge time and total expenditure devoted to motion hearings ranged from a low of 10% in Washington to a high of 31% in Florida and California excluding Los Angeles (p. 39). In contrast, the range of judicial resources expended on "conferences"²² varied from 4% in Florida to 14% in California excluding Los Angeles (p. 39).

Kakalik and Ross also estimate the average fiscal year 1982 expenditure needed to dispose of a case at each of three different "activity" stages. Not suprisingly, they found that "expenditure varies dramatically, depending on when the case is disposed [sic]" (p. 37). For example, a Washington case completed after only one motion hearing and one conference cost \$230, but if it was continued to include an additional conference and a nonjury trial it cost \$536 (p. 41); if a jury trial was needed, Washington costs rose to \$2,809 (p. 41).

The authors wisely include data on the respective jurisdictions' case load per judge. The results showed a large disparity between the low in the federal courts (350 per judge) and the greater loads in all three of the states studied (855 per California judge, 777 per Washington judge and 660 per Florida judge) (p. 44). This distinction "may owe [sic] partly to a greater complexity of cases filed [in federal courts]" (p. 43).

The statistical estimates relating to the seven different categories of

22. The authors never define the term "conferences," although at one point they describe the category as "settlement and other types of conferences," and other case-related pretrial activities. P. 37. A review of appendix C reveals that the states studied subcategorized "conferences" into various types: California maintained data for "Pretrial (status) conferences, trial setting conferences and settlement conferences," p. 107, whereas Florida and Washington lumped together "Pretrial, Settlement, and other conferences." Pp. 108-09. The federal trial courts reported figures that included "pretrial" and "other conferences and hearings." P. 110. Because of their reliance upon the data and methodology of these four jurisdictions, it appears that Kakalik and Ross were forced to use the most general definition of a "conference," since they were unable to break down the more general Florida and Washington conference data into the more specific California "conference" subparts.

cases yielded thirty-five tables, the largest statistical grouping in the book. An overview of the data set forth in these tables reveals that "[b]oth state and federal expenditures differed significantly by type of civil case" (p. xvii). Grouping together the three state court systems, the authors calculated a fiscal 1982 "Estimated Government Expenditure per Case Filed, by Type of Civil Case." The states' median expenditure per category ranged from relatively low amounts for probate and guardianship (\$99), domestic relations (\$124) and "other civil petitions" (\$171) to higher amounts for property rights (\$589), torts (\$407) and "contracts and other civil complaints" (\$370) (p. xvii).

The states spent roughly similar amounts for some types of cases; the authors estimated a range of torts spending from "\$300 to \$500" (p. 65). In contrast, other case categories showed bewildering ranges of state spending; for property rights and condemnation the range covered Florida's low of \$245 to California's high of \$933 (p. 64). The range for "contracts and other civil complaints" was also staggering — anywhere from \$200 to \$700 for the states to, in startling contrast, an *average* cost of nearly \$2000 in the federal district courts (p. 65). The estimates of median federal expenditures showed the highest figures for cases in this catchall category of "contracts and other civil complaints," with torts cases (\$1740) a close second. Expenditures for cases involving property rights (\$406) and "other civil petitions" (\$577) were relatively modest. Even the lowest federal expenditures per case, however, exceeded most of the relatively higher state expenditures in each category.

The smorgasbord of tables described above is completed by estimates of the *percentage* of government expenditures devoted to each of the seven case categories. Readers learn among other things that trials account for thirty-two to fifty-three percent of the costs incurred by states in domestic relations cases, a range significantly higher than that shown for probate and guardianship cases, in which states spend between two and thirty-eight percent of all case expenditures on trials. The difference, of course, derives from the relatively small proportion of all probate cases that result in trial (p. 48).

III. IMPACT AND IMPLICATIONS

A. *Methodological Implications: The Price of Pragmatism*

Costs of the Civil Justice System exhibits a mix of methodological problems and positive innovations that are sure to affect the book's public reception. First and foremost, the decision to report comprehensively upon governmental spending for civil litigation is entirely salutary. There is no doubt that a book of this nature satisfies a felt and timely need for raw data on court costs that will aid those who make policy regarding civil court spending, jurisdiction and procedure.

As I indicated earlier, the authors'²³ decision to forsake almost all impressions and focus slavishly on reporting hard data has both positive and negative implications. One positive aspect of this basic methodological decision to eschew opinion for hard factual reporting²⁴ is that it is consistent with the notion that social scientists should, whenever possible, avoid normative opinion and prefer empirical fact.²⁵ And while no one could accuse this study of blurring the distinction between the positive "is" and the normative "ought,"²⁶ readers may rightly be troubled as to whether the original compilers of the data from the four key jurisdictions whose systems formed the basis of this study possessed similar hard-and-fast views and skills concerning the "is-ought" question. After all, Kakalik and Ross were entirely dependent on prior studies and surveys in California, Florida, Washington and the federal courts. *Costs of the Civil Justice System* presents a methodological philosophy only for its own work and does not offer a corresponding philosophy for the important primary source studies. Moreover, the attempt made in the Foreword to remove any question of "is-ought confusion" manifests an outmoded philosophy that assumes a social scientist's robot-like ability to separate routinely the positive from the normative — a task viewed as impossible by some who posit that any work of statistical reporting is likely to contain implicit value-laden assumptions.²⁷ Nonetheless, the authors' choice primarily to report rather than interpret statistics was wise and perhaps inevitable; the statistics standing alone raise a formidable research agenda for further analysis.²⁸

This failure to present a methodological philosophy for the under-

23. The book's Foreword clarifies that this decision may have been that of the authors' "employer," the Institute for Civil Justice. P. iv. Indeed, it is possible that the book was funded by a conditional grant preventing the Institute and its authors from including opinion. The book reveals no funding source, however.

24. For a study with a differing style, containing more opinion, see T. CHURCH, *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978).

25. See generally M. REIN, *SOCIAL SCIENCE AND PUBLIC POLICY* 79, 85-88 (1976).

26. For an illustration of the antagonism which may be created by this sort of methodological "blur," see Buchanan, *Good Economics — Bad Law*, 60 VA. L. REV. 483 (1974); see also Polinsky, *Economic Analysis as a Potentially Defective Product*, 87 HARV. L. REV. 1655 (1974); Krier, Book Review, 122 U. PA. L. REV. 1664 (1974) (all critical of the handling of normative issues in Richard Posner's *ECONOMIC ANALYSIS OF LAW* (1974)).

27. See, e.g., P. BRIDGMAN, *THE WAY THINGS ARE* 2 (1959) (arguing that a physicist cannot divorce personal preferences from a given scheme of experimentation); G. MYRDAL, *VALUE IN SOCIAL THEORY* 261 (1958) ("[V]alue premises are necessary in research and no study and no book can be *wertfrei*, free from valuations."); see also G. MYRDAL, *OBJECTIVITY IN SOCIAL RESEARCH* 3-5 (1969). For the view that empirical researchers cannot resolve matters of policy "solely or directly from empirical facts," see Hastie, *Judgment Non Obstantibus Datis*, 79 MICH. L. REV. 728, 735-36 (1981).

28. See text at notes 51-73 *infra*. For the very logical suggestion that empirical legal research is pragmatic and essential to subsequent normative evaluations, see Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 580-81 (1984). For an earlier discourse see Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17 (1924).

lying data is directly related to another of the book's shortcomings: *Costs of the Civil Justice System* fails adequately to detail and document the relevant data base itself. To be sure, the authors provide much primary source data from the four jurisdictions studied. Also, the book's appendices are very helpful to the reader wanting assurances that the authors' secondary conclusions and calculations were properly reasoned from original data. The careful reader will search in vain, however, for critical information relating to the four data bases. For example, in order to understand the authors' quite general case categorization scheme the reader may examine case classifications of the four jurisdictions studied (Appendix A, pp. 87-92). But there is no explanation of how or why state data compilers chose their respective categories. The frustration caused by such omissions is particularly acute in the case of the giant catch-all category, "contracts and other civil complaints." A reader's quite justifiable instinct to probe underlying data for some support and a rationale for such a comprehensive and seemingly amorphous case repository is met with disappointment.

An identical problem faces the reader possessing the natural urge to explore the meaning of the so-called case "activities." The authors never explain why they chose only the three broad activities, "motion hearings," "conferences," and "trials." Nonetheless, the careful reader knows that the authors were imprisoned by the activity designations used by the four jurisdictions analyzed. Clarification of the reasoning behind state choices of these respective case "activities," and in some cases (such as the activity known as "conferences") even a satisfactory definition of the activity, is lacking. Moreover, the authors' designation of the category, "other," along with the three case activities does not serve them well. Thus, for example, the case activity table detailing court expenditures devoted to various activities makes little sense for Washington; the table shows Washington spending 10% on "motion hearings," 5% on "conferences," 45% on trials and a whopping 40% on "other" (p. 39). The reader is left to thumb through appendix C searching for a definition of the significant Washington "other." Finally stumbling upon appendix C's table C.3 (p. 109), the reader's curiosity is not satisfied by learning that somehow Washington lumps together "other case-related activities in chambers, prorated nonspecified high-volume activities, and bench recess" to form a Kafkaesque definition of "other" (p. 109).

In a similar vein, some of the authors' case categorizations defy logic. The authors and the three states studied exclude adoption and paternity litigation from the "domestic relations" or "family law" category (pp. 87-91). Perhaps there is a perfectly good reason buttressing this exclusion but none is ever provided, and the reader is left with the impression that Kakalik and Ross followed religiously the classificatory methodology of unnamed earlier state court administrators. Sim-

ilarly, the authors were quite willing to follow the lead of California, which reported only *eminent domain* cases in its own "property rights" case category, leaving any other property case to the "other civil complaints" repository (p. 58). Accordingly, the authors' "property rights" category reflects the California error (p. 58). The authors' broad definition of "other civil petitions"²⁹ reflects a quirk of the very specific federal case categorization scheme³⁰ which only inserts "prisoner petitions" in this category (p. 74). Accordingly, Kakalik and Ross only include the "prisoner petitions" statistics compiled earlier by federal court administrators in their own federal "other civil petitions" category, despite the fact that using the federal definition significantly under-reported the number of cases in this category.³¹

The foregoing criticisms all relate to the authors' choice to use data collected earlier by four jurisdictions. Having made this decision, Kakalik and Ross were bound to the methodological quirks of the compilers of the data they relied upon. Occasionally the authors did identify and rectify problems in their data base; their treatment of the "window effect" is illustrative.³² However, their failure to make additional efforts to correct prior methodological errors seriously detracts from the book. Failing a correction of these errors, Kakalik and Ross should at least have included comprehensive descriptions of the methods used to gather data by the jurisdictions studied. Readers cannot know, for example, whether data was collected by independent observation or by "self-reporting."³³ This problem, together with the failure to reveal the justifications underlying the four jurisdictions'

29. The authors offer as illustrations of cases in this category "adoptions, change of name, prisoner petitions for writ of habeas corpus, and administrative law reviews." P. 74. Any logical relationship between judicial review of administrative action and adoption escapes this reviewer.

30. See note 15 *supra* and accompanying text.

31. The authors similarly embrace previous methodological mistakes when they include Washington non-jury trial data in jury trial calculation for "commercial, property, and tort cases." P. xviii.

32. See note 11 *supra*.

33. "Self-reporting" data surveys rely upon primary data collection by the individual object of the study. For example, a self-reporting study of the time judges spend on various activities would have the judges themselves complete forms on how they allocate their time. In contrast, an observation method calls for independent assessment of allocation of a judge's time by a third-party observer. While each method has its drawbacks — reality is never easy to replicate — the reliability of self-reporting mechanisms completed without adequate pre-testing and training is questionable. See generally Carter, *The Efficient Conduct of Social Science Research and Administrative Review Procedure*, in SOLUTIONS TO ETHICAL AND LEGAL PROBLEMS IN SOCIAL RESEARCH 171, 171-72 (R. Boruch & J. Cecil eds. 1983); Reiss, *Inappropriate Theories and Inadequate Methods as Policy Plagues: Self-Reported Delinquency and the Law*, in SOCIAL POLICY AND SOCIOLOGY 211, 219-20 (N. Demerath, O. Larsen & K. Schuessler eds. 1975). Nonetheless, judicial self-reporting of task and time allocation may be reasonable. Most judges experienced earlier careers as attorneys and, accordingly, probably possess skill in completing time forms. Moreover, judges themselves represent the "best evidence" of the time spent on various tasks. Independent observers are only a secondary source not easily able to ascertain when a particular judge switches from one case activity to another. Also, executing a reliable "observation method" scheme of data collection may prove particularly costly.

designation of "case activities" and "categories," makes the reader skeptical as to the veracity and reliability of the state and federal statistics utilized.

Speaking more broadly, the authors' pragmatic choice of California, Florida and Washington as the research focus raises serious questions as to whether these jurisdictions form a satisfactorily typical sample of American states. Readers may be troubled that these states were chosen not for their representative qualities but rather because their court administrators happen to have collected data on component case activities and categories.³⁴ Without some measure of whether these states constitute an appropriate sample as to case types and case activities it may be error to use these states to form the "nationwide" estimates provided in the concluding chapter.³⁵ This criticism is somewhat mitigated by the authors' careful and continued use of the term "estimates" and their utterly frank confession explaining the practical choice of the three states and the federal courts. Yet, nowhere is the choice of these four jurisdictions ever defended as typical or representative.

In stark contrast to this collection of criticisms, the methodology and most of the terminology employed by Kakalik and Ross to calculate expenditures per judge should serve as a model for subsequent studies. Their attempt comprehensively to collect and report governmental spending relating to case processing, reflected in the broad concept of the "judge package," mirrors reality and corrects the distorted and unduly narrow view that public expenditures stop with judicial salaries. This broad integration of "court costs" to include previously ignored spending ranging from the cost for court buildings to court-related data processing illustrates that judicial salaries are only a relatively modest segment of societal spending on litigation. The authors' decision to include federal as well as state statistics was similarly successful. The numerous contrasts between federal and state expenditures present serious questions for further consideration.³⁶

B. *The Jurisprudence of Measuring Public Spending for Dispute Resolution*

One of the most significant benefits of *Costs of the Civil Justice System* is its focus upon the deceptive process of measuring public spending on courts. Yet, some are sure to contend that the entire sub-

34. Other recent statistical examinations, in contrast, have selected jurisdictions to ensure a diverse sample. See, e.g., J. MARTIN & E. PRESCOTT, APPELLATE COURT DELAY: STRUCTURAL RESPONSES TO THE PROBLEMS OF VOLUME AND DELAY 3 (1981) (sample courts "chosen to provide diversity in several key aspects, among them caseload, reported case processing time, and geographic location").

35. See H. FREEMAN & C. SHERWOOD, SOCIAL RESEARCH AND SOCIAL POLICY 108-11 (1970).

36. See text at notes 63-65 *infra*.

ject matter of this book is improper, that public spending for dispute resolution or "justice" should not be quantified or measured. Implicit in such criticism may be a fear that the act of measuring implies a philosophical predisposition that the entity studied is in fact overspending and should be spending less. Given the difficulty in achieving value-free empirical studies, such a fear may be entirely justified.

Nonetheless, this criticism should not prevent such serious cost studies of the court system as the present Rand project. Empirical examination of courts — indeed, the entire growing field of judicial administration — falls squarely into utilitarian thinking and the Benthamite tradition.³⁷ One cannot efficiently allocate resources without first identifying them and determining their current allocation and level of public support. Cost studies of the courts should be thought of as cost examinations of the judicial branch, and, as such, simply part of the ongoing and familiar task of measuring spending levels in order to further efficiency and inform the public. Such studies should be no more subject to the criticism that they mask a hidden agenda than a cost analysis of a particular administrative agency.³⁸

Examining courts to improve efficiency is entirely central to achieving justice. In order to determine if courts are misallocating resources by overspending on selected categories of cases or activities within cases, studies like this book are essential. They contribute to a more smoothly running court system and thereby enhance the likelihood of justice. Even Rawls would say, I think, that an efficiency-enhancing endeavor such as *Costs of the Civil Justice System* would contribute to his general conception of justice.³⁹

Indeed, the the jurisprudential legitimacy of *Costs of the Civil Justice System* should be no more in question than the entire "legal realism" movement. The apparent connection between the modern movement toward empirical legal research and its antecedent roots in American legal realism seems, surprisingly, relatively unexplored. Empirical studies of the legal system may be viewed as a form of pragmatic pursuit of Holmes' maxim that "the life of the law has not been logic: it has been experience."⁴⁰ Karl Llewellyn's brand of legal real-

37. Cf. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11-12 (J. Burns & H.L.A. Hart eds. 1970) (a utilitarian inquiry into efficiency would include "every measure of government").

38. See, e.g., Breyer & McAvoy, *Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 HARV. L. REV. 941 (1973).

39. See J. RAWLS, A THEORY OF JUSTICE 67-71 (1971). Rawls includes "the principle of efficiency" as a key component of his multi-part aggregation of "justice." Of course, Rawls' definition of justice embraces values other than efficiency, for "efficiency cannot serve alone as a conception of justice." *Id.* at 71.

40. O. HOLMES, THE COMMON LAW 1 (1881). See also O. HOLMES, *Learning and Science*, in COLLECTED LEGAL PAPERS 138, 139 (1920) (ideal legal system "should draw its postulates . . . from science"); Summers, *Pragmatic Instrumentalism in Twentieth Century American*

ism focused on the anthropological norms of cultures.⁴¹ And empirical research represents much of the modern work product of psychology, sociology and economics, the preferred research subjects of the early realists.⁴² Accordingly, empirical investigations of judicial output represent an entirely logical historical extension of legal realism itself.⁴³

C. Court Spending as a Public Good

Popular criticism of the growing increase in litigation in America is very much in vogue. The Chief Justice of the United States Supreme Court⁴⁴ and the American Bar Association⁴⁵ have each pronounced that contemporary America is overly litigious. A clear corollary to such comments is that the United States spends too much on litigation.⁴⁶ It is possible that reviewers of the present Rand study will use its findings as evidence supporting this view.

In truth, courts should be viewed as a public good, a service financed by society to achieve gains which would be unavailable without public provision.⁴⁷ Litigation yields benefits greater than those

Legal Thought — A Synthesis and Critique of Our Dominant General Theory About Law and Its Use, 66 CORNELL L. REV. 861, 862 (1981) (Holmes a precursor to legal realist movement).

41. See, e.g., K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941); Llewellyn, *The Normative, the Legal and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1940).

42. See, e.g., Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Hutchins & Schlesinger, *Some Observations on the Law of Evidence — The Competency of Witnesses*, 37 YALE L.J. 1017 (1928); Moore & Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929). See generally Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L.J. 671; Loh, *Psycholegal Research: Past and Present*, 79 MICH. L. REV. 659, 663-71 (1981).

43. For an interesting exploration of the relationship between the "Critical Legal Studies" movement, legal realism and empirical research, see Trubek, *supra* note 28; see also Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL EDUC. 184 (1983); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984); Barnett, Book Review, 97 HARV. L. REV. 1223, 1234-35 (1984) (reviewing E. FARNSWORTH, *CONTRACTS* (1982)); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982).

44. See Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274 (1982); Burger, *supra* note 3, at 83 (in address to National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Chief Justice Burger advocates alternatives to litigation as contemporary solution to clogged courts).

45. See *Kill All the Lawyers? Maybe There's an Alternative*, Wall St. J., Dec. 13, 1982, at 30, col. 1.

46. See Bok, *A Flawed System* (pts. 1 & 2), N.Y. ST. B.J., Oct. 1983, at 8; N.Y. ST. B.J., Nov. 1983, at 31.

47. For further explanation of the public good concept, see J. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968); Head & Shoup, *Public Goods, Private Goods, and Ambiguous Goods*, 79 ECON. J. 567 (1969); Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954). State-supported education (at least for most economists) and national defense each provide examples of a public good. If the supply of education were left to the private market, less education would be demanded by buyers and the output of valuable societal gains would decrease, thereby justifying public subsidy to achieve a higher consumption of education. For more detailed discussion of courts as a public good, see R. MABRY, *AN ECO-*

accruing to the litigants themselves. Without free access to publicly supplied civil courts, disputes would be left to privately supplied means of resolution such as mediation, arbitration and the growing variety of alternative modes of resolving disputes. Disputants unable to finance the necessary tolls exacted for such services would likely resort to self-help mechanisms or, worse, to violence.⁴⁸ Publicly funded courts avoid these negative effects and, accordingly, merit some level of state subsidy.

Critics of this line of reasoning may contend that the burgeoning level of interest in mediation reflects popular dissatisfaction with publicly financed courts, and thereby challenges their level of funding. Public goods, however, need not operate in a state-supported monopoly setting. Privately funded mechanisms for civil litigation can and should be permitted to operate freely along with "public good" courts. The analogy to public education is appropriate. Few supporters of state-supported university education would ban private college alternatives. Indeed, the contemporaneous provision of privately funded means of resolving disputes provides healthy competition to the state and federal courts. The fear (often ascribed to Learned Hand, among others) that the entrenched monopolist will become less efficient by leading a "quiet life"⁴⁹ applies quite well to support the current growth of juridical competitors at the expense of the formerly entrenched, monopolistic public courts. Such efficiency-producing rivalry should stimulate the performance of publicly funded courts as they too begin to adopt new dispute resolution procedures borrowed from this healthy competitive laboratory.

There is a second reason that courts are public goods. Their output, case law, is of immense societal value. Just as society pays legislators to enact positive law, it subsidizes civil litigation to produce case law. The recorded cases provide valuable guidance to nonlitigants attempting to order their private affairs outside court. This "private ordering"⁵⁰ effect of civil litigation is in fact regularly and systematically used by competitors of publicly supported court systems, since one of the tools used in mediation is to predict a probable court outcome as a

NOMIC INVESTIGATION OF STATE AND LOCAL JUDICIARY SERVICES 176-85 (1977); Brunet, *supra* note 2, at 706-08; Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 675 (1973).

48. See K. LLEWELLYN & E. HOEBEL, *supra* note 41, at 20 (law has a significant purpose "to channel behavior in such manner as to prevent or avoid conflict").

49. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (Hand, J.) ("Many people believe" that monopoly power "deadens initiative, discourages thrift and depresses energy.").

50. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 209 (unpubl. 1958) (private ordering defined as process whereby individuals structure their business and personal lives without resort to litigation, using law as a tool for guidance); Cavers, *Legal Education and Lawyer Made Law*, 54 W. VA. L. REV. 177, 179 (1952) (lawyers regularly make "law" by crafting contracts that structure and resolve a dispute).

means to produce what will be perceived as a "fair" settlement.⁵¹ Thus, this case law, the product of an efficient microscopic focus for decisionmaking much different than the macroscopic procedure used by a legislative body,⁵² constitutes a separate justification for subsidizing courts as a public good.

Separate and distinct from, but related to, the private ordering effect of civil litigation is another reason to consider courts a public good: courts produce social change. Such social change, which may be understood as the attainment of private and social *justice*, has a major impact on the society of which the litigants form only a part. The recent books of Lieberman⁵³ and Auerbach⁵⁴ consider publicly supported courts a valid and necessary means of producing justice. Scholarship as diverse as that of Laura Nader⁵⁵ and Charles Black⁵⁶ views American litigation as one needed method of achieving justice in a pluralistic society. Opponents of the value-laden notion that courts produce justice might criticize this aspect of judicial productivity. Yet, it is difficult to deny that civil courts have, in fact, produced a level of justice as a form of output which goes beyond the simple guidance function of private ordering.

The fact that courts constitute public goods should not give them a blank check for expenditures. A study such as that by Kakalik and Ross highlights the magnitude of "public good" court spending and effectively forces others to examine the utility of current expenditure levels.

IV. CONCLUSION AND RESEARCH AGENDA

Despite its methodological flaws, *Costs of the Civil Justice System* creates a diverse agenda for subsequent research. While a book review is not the place for carefully dissecting some of this book's compli-

51. See J. AUERBACH, *JUSTICE WITHOUT LAW?* 141-42 (1983) (an increase in the volume of American law causes alternatives to courts to flourish, but also increases the dependence of such alternatives upon the court system); R. FISHER & W. URY, *GETTING TO YES* (1981); J. FOLBERG & A. TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 245-46 (1984); Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 671 (1976).

52. I do not mean to suggest that judicial case law is somehow superior to legislation. For such a view, consider B. LEONI, *FREEDOM AND THE LAW* (1961). The intensive, custom-crafted nature of a case holding is, however, much different than across-the-board legislation. See Schwartz, *Administrative Terminology and The Administrative Procedure Act*, 48 MICH. L. REV. 57, 66-67 (1949).

53. See J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 189-90 (1981) (litigation needed to produce change in a democracy).

54. See J. AUERBACH, *supra* note 51, at 145 ("American deification of legal rights requires an accessible legal system for their protection"); see also Auerbach, *Legal Education and Some of its Discontents*, 34 J. LEGAL EDUC. 43, 45 (1984).

55. See NO ACCESS TO LAW (L. Nader ed. 1980); Nader, *supra* note 3.

56. See C. BLACK, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 34-55 (1960).

cated and controversial ramifications, it is useful to probe initially some of most telling statistical revelations of the Kakalik and Ross book.

A. *The Sad Condition of Statistical Records Relating to Judicial Administration*

Readers of this book are sure to sense the lowly and underfunded status of statistical recordkeeping regarding courts. The authors were severely constrained by the deficiencies of state-court data generally and by certain deficiencies even within their four-jurisdiction data base. This review's criticisms of methodology condemn the existing methods and statistics used by Kakalik and Ross much more than the authors themselves. If only sixteen states maintain any records breaking down cases by category (p. 7), the remainder of our states are making no tangible effort to study possible cost differences by type of case. The authors' pragmatic but flawed use of "old" data illustrates that even those states most advanced in data collection have not *regularly* collected data on type of case or case activity. The authors used "no longer accurate" 1975 Florida data because it was "better than those from nearly all other states" (p. 10). And even the most sophisticated states did not maintain usable data on courts of limited jurisdiction. Nor do states collect potentially useful data on court staff time allocated to particular case functions (p. 6).

The lack of a uniform methodology or convention for collecting litigation data clearly frustrates anyone attempting to analyze the available information. Further, the existing means of breaking down caseloads into component case types merits rethinking. The continued use of unwieldy repository categories such as "contract and other civil complaints" is confusing and serves little purpose.

It seems surprising that in 1985 judicial administration remains balkanized. States disagree as to the categories of cases to be differentiated, the appropriate activities within cases to be examined, and the "costs" to be included as "judicial costs." Perhaps such differences are to be expected from a federal system comprising fifty-one jurisdictions. Yet, if judicial administration is ever to occupy the central policy role urged by its proponents,⁵⁷ a major effort to improve litigation data collection and methodology is essential. Scholars, court administrators, bar and bench must combine to study both the methodology of judicial administration and the need for data collection.

57. See generally Hurst, *The Functions of Courts in the United States 1950-1980*, 15 LAW & SOC. REV. 401 (1981); Rosenberg, *Civil Justice Research and Civil Justice Reform*, 15 LAW & SOC. REV. 473 (1981).

B. *Probing the High Cost of Trial and, Specifically, Jury Trial*

Costs of the Civil Justice System reveals that a staggering proportion of all court expenditures are devoted to trial costs, and that jury trial costs constitute the greatest portion of these amounts. While this result is not terribly surprising, analysts viewing the hard costs cannot help but question whether such costs are justifiable. To be sure, the right to trial by jury is constitutionally protected in both federal⁵⁸ and state⁵⁹ litigation. But the pragmatic, even cost-sensitive manner in which courts analyze the right to jury trial⁶⁰ means that additional cost-cutting tools may be desired, or at least considered in this area. Similarly, renewed research must be undertaken on the jurisprudential value system supporting civil jury trials, with a view toward defining more clearly a set of beliefs warranting the present expenditure level.⁶¹

The relatively high cost of all trials, jury or bench, is certain to feed existing efforts to implement new settlement and mediation mechanisms.⁶² This movement toward resolving litigation without trial appears all the more significant after reading the Kakalik and Ross research.

C. *Exploring the Comparatively High Price Tag of Federal Justice*

Readers cannot help but notice the comparatively high price tag for federal litigation when compared with state costs. While the plainly larger federal judicial bureaucracy partially explains the cost differences, skeptics may question why the cost of litigation need vary so substantially between federal and state courts. Some of the cost differences can be explained by the "complex" nature of some federal cases and by the fact that federal courts seldom hear the relatively inexpensive domestic relations, probate, and mental health cases processed by comparatively low-cost state courts (p. xvii). This does not explain, however, the huge federal expenditure of \$1740 in fiscal year 1982 to process the average torts case, compared with the rela-

58. U.S. CONST. amend. VII.

59. See, e.g., ALASKA CONST. art. I, § 16; CAL. CONST. art. I, § 16; ILL. CONST. art. I, § 13; OR. CONST. art. I, § 17.

60. Consider, for example, *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979) (replacing mutuality of estoppel with modern approach to collateral estoppel not inconsistent with seventh amendment); *Atlas Roofing Co. v. OSHA*, 430 U.S. 442 (1977) (right to jury trial no bar to administrative adjudication); *Colgrove v. Battin*, 413 U.S. 149 (1973) (six-member jury constitutionally permissible); *Galloway v. United States*, 319 U.S. 372 (1943) (directed verdicts do not offend seventh amendment).

61. See Helwig, *The American Jury System: A Time for Reexamination*, 55 JUDICATURE 96, 98 (1971) (calling for "an open-minded review of every aspect of our present jury trial system").

62. See, e.g., Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 66 (recommending careful study of cost shifting under FED. R. CRV. P. 68 to losing parties who earlier refused settlement); Danzig & Lowey, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC. REV. 675, 685-91 (1975); McEwen & Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC. REV. 11 (1984).

tively modest national average of \$300 - \$500 expended by states to process tort litigation (p. 65). Why so great a difference?

Although the descriptions of state and federal civil case categories contained in appendix A (pp. 87-92) do not reveal vast differences in federal and state tort litigation, there may be significant differences in the procedures used to process these cases. The federal statistics may have included leniently certified class-action litigation now made more expensive by consolidated pretrial procedures.⁶³ While class actions might be viewed by a budget accountant as increasing the "cost of justice," they represent a way to process more efficiently, in larger case units, multiple tort claims.⁶⁴ Without any assurance that similar case processing procedures were used by state and federal courts, speculation on modes of attacking federal costs seems premature.

Moreover, the federal "case" may in fact not be comparable to a case of a similar category filed in a state court. Liberal federal discovery rules⁶⁵ and the generally favorable reputation of life-tenured federal judges may cause attorneys to file their more substantial cases in federal courts. If this forum shopping occurs, statistics that compare the relative federal-state costs of processing facially similar but factually dissimilar types of cases often using different procedures are at best of modest value.

D. *Assessing the Aggregate Cost of Civil Justice and the Alleged "Litigious" American Society*

The cost data revealed by *Costs of the Civil Justice System* should inform the current debate concerning whether American society is overly litigious, and therefore spending too much on courts. A number of scholars, some associated with the Critical Legal Studies movement,⁶⁶ have challenged the popular rhetoric that the state and federal courts are somehow handling "too many" cases.⁶⁷ Laura Nader asserts that there is "substantial evidence . . . that [U.S.] litigation . . . is not great in proportion to the population and the need in America."⁶⁸ The influential work of Friedman and Percival, who studied the caseload of California trial courts between the years 1890 and 1970, demonstrated that American courts have replaced the resolution

63. See FED. R. CIV. P. 23; 28 U.S.C. § 1407(a) (1982).

64. See Dam, *Class Actions: Efficiency, Compensation, Deterrence and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975).

65. See FED. R. CIV. P. 26-37.

66. See, e.g., Galanter, *supra* note 2; Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

67. For the standard view that Americans are overly litigious, see the sources cited at notes 44-45 *supra*. See also Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972).

68. Nader, *supra* note 3, at 635.

of cases limited to serious disputes with the processing of relatively routine and numerous administrative cases such as probate, name changes and uncontested divorces.⁶⁹ The "processing" nature of this caseload differs substantially with the mythical hotly contested dispute. And the recent Civil Litigation Research Project found that only 11.2% of disputes result in litigation, a rate termed "not . . . particularly high."⁷⁰

Indeed, others argue that American spending on the judiciary lags behind that of similar industrial powers.⁷¹ This contention that American public expenditures for courts are inadequate and surely not excessive is logically related to the looming question of whether America is overly litigious. An examination of the nature of the disputes processed rather than the mere number of cases filed provides one helpful means of assessing this issue. Another approach is to examine the aggregate sum spent. Kakalik and Ross estimate that American courts expended over \$2 billion in fiscal year 1980 to process civil cases. This amount should be compared to that of other law-making enterprises such as legislative bodies and administrative agencies.

Scholars engaging in such studies may well conclude that \$2 billion represents an incredible bargain when compared to other government expenditures.⁷² At a time when combined state and federal budgets exceed \$1 trillion,⁷³ a reasonable person might viscerally conclude that tax-supported court expenditures of \$2 billion — a minuscule proportion of all government spending — is a comparatively modest expenditure given the value of state and federal courts as a public good.

69. See Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y. REV. 267 (1976).

70. Trubek, et al., *supra* note 66, at 86.

71. See Johnson & Drew, *This Nation Has Money for Everything —Except its Courts*, JUDGES' J., Summer 1984, at 8, 9-10 (comparing U.S. spending on judges to that of Canada, England and Wales, France, Italy, Sweden and West Germany).

72. For example, Critical Legal Studies advocates might declare the \$2 billion spent on courts in 1980 to be miniscule when compared to a U.S. fiscal year 1981 military defense budget of \$157.6 billion. See INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, STRATEGIC SURVEY 1980-1981 at 43 (1981); White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 668-70 (1984).

73. Federal spending for fiscal year 1983 surpassed \$795 billion. ECONOMIC REPORT OF THE PRESIDENT 305 (Feb. 1984). State and local government spending for fiscal year 1983 exceeded \$420 billion. *Id.* at 310.