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The Future of Civil Justice Reform and Empirical Legal Scholarship: A Reply

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THE FUTURE OF CIVIL JUSTICE REFORM AND EMPIRICAL LEGAL SCHOLARSHIP: A REPLY

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I will resist temptation and avoid dwelling upon Professor Tobias's generous comments[1] regarding my empirical study of case disposition time in civil trials.[2] Indeed, given Professor Tobias's graciousness, I am severely tempted to leave well enough alone. However, one particular aspect of Professor Tobias's Response—his implicit treatment of issues relating to both the supply of and demand for empirical legal scholarship—raises an important issue that warrants further discussion.

In *Justice Delayed?* and other work,[3] I make a case for the increased production of empirical legal scholarship. In *Justice Delayed?*, I present findings from my initial study of civil case disposition time. By empirically analyzing a large national sample of civil cases, I identify specific variables that influence case disposition time. I then compare the group of variables that emerges as influential from my study and the group of variables that frequently receives attention from policymakers and recent civil justice reform legislation. Because these two groups of variables are not the same, I suggest that future efforts to reform the civil justice system should consider the limited but growing empirical scholarship. Much of my argument for increased empirical legal scholarship thus far has focused principally on supply-side issues. Implicit in my argument is the assumption that an increase in the supply of empirical legal scholarship will influence (increase) the demand for such work.

In his Response to *Justice Delayed?*, Professor Tobias generally accepts my argument for increased attention to and development of our empirical legal scholarship base, especially where it bears on civil

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[1] *See* Carl Tobias, *Civil Justice Delay and Empirical Data: A Response to Professor Heise*, 51 CASE W. RES. L. REV. 235 (2001).

[2] *See* Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000).

[3] *See, e.g.*, Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807 (1999).

justice reform.[4] More importantly, he provides additional examples in the civil justice area of the problems that arise when the lawmakers and policymakers who formulate and implement legal reforms ignore germane social science. I take the overall thrust of Professor Tobias's Response to underscore empirical legal scholarship's particular salience to legal reform generally and civil justice reform in particular. The larger point that data rather than anecdote should inform public policy and legal reform appears to unite us.[5]

Professor Tobias's Response instructively spans both the supply and demand sides of the equation. In so doing, he illustrates important limitations to my operating assumption regarding the relation between the supply of and demand for empirical legal scholarship. Professor Tobias illustrates the possibility that the demand for empirical scholarship might not respond (positively) to an increased supply of such scholarship, especially if one set of consumers—policymakers and lawmakers—does not develop a taste for or appreciation of empirical studies. Professor Tobias is not alone in this concern.[6] In this Reply, I take up more directly the supply-side aspects of the empirical legal scholarship issue, with particular attention to possible interactions between demand and supply.

Justice Delayed? explains the uneasy relation between social science (in this instance, empirical legal research) and lawmakers in the civil justice reform context by emphasizing the relative dearth of helpful empirical research.[7] Professor Tobias adds factors to my explanation such as insufficient or unclear communications among interested parties.[8] More importantly, he also points out that lawmakers simply might ignore or, worse still, not want empirical legal research.[9] Professor Tobias's descriptions of specific instances involving the Civil Justice Reform Act of 1990,[10] promulgation of the 2000 civil procedure amendments,[11] and the 1993 amendment of Rule 26[12]

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[4] *See* Tobias, *supra* note 1, at 246-47.

[5] *Compare* Tobias, *supra* note 1, at 249 ("[T]here must be considerable, additional rigorous assessment of the civil justice system before it will be possible to reach definitive conclusions about precisely how they operate and might be improved."), *with* Heise, *supra* note 2, at 848-49 (arguing for more empirical research that will inform reformers seeking to improve the civil justice system). For a discussion about the influence of anecdotal evidence on public health policy, see David A. Hyman, *Lies, Damned Lies, and Narrative*, 73 IND. L.J. 797 (1998).

[6] *See, e.g.*, James J. White, *Phoebe's Lament*, 98 MICH. L. REV. 2773, 2774 (2000) ("[L]egislators consume little of [the empirical research done by law professors].").

[7] *See* Heise, *supra* note 2, at 818-22 (discussing a RAND evaluation of the Civil Justice Reform Act of 1990—the only major research project).

[8] *See* Tobias, *supra* note 1, at 242-43.

[9] *See id.* at 247 ("It bears reiteration that even the finest empirical data alone will not foster improvement, unless procedural policymakers consider and employ the information which evaluators have collected.").

[10] 28 U.S.C. §§ 471-82 (1994).

[11] Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 344-46 (U.S. 2000).

aptly illustrate how policymakers can ignore data even in those instances in which germane data are available.[13] Professor Tobias's comments raise important questions bearing on the relation between the supply of and demand for empirical legal scholarship.

To the extent that Professor Tobias's assessment is correct, an immediate question arises: why would lawmakers and policymakers ignore empirical legal research? In a recent *Michigan Law Review* symposium issue focusing on empirical research in commercial transactions,[14] Professor James White bemoans the lack of relevant empirical research and notes that what little work exists "has had a most limited impact on commercial legislation."[15] Indeed, Professor White's observations call into question the underlying point of the symposium. In his essay, White identifies possible structural and non-structural reasons for this relative lack of demand.[16] According to White, structural reasons include the types of problems lawmakers confront, aspects relating to the legislatures themselves, and characteristics peculiar to empirical legal research.[17] Non-structural reasons include lawmakers' skepticism of and unfamiliarity with empirical research.[18] Professor White notes that empirical legal scholarship's weak influence—at least in the commercial transactions area[19]—is not a function of any defects in the empirical work; rather it is a function of lawmakers' resistance to using such information.

Insofar as both Professor Tobias and I (and, presumably, Professor White and others) call for more empirical work to be undertaken and used as an evidentiary foundation for future civil justice reform, Professor White's impressions of the commercial transactions area are educational and must be assessed. Although some might quibble with Professor White's characterization of empirical works' influence in the commercial transactions area, his is certainly a plausible characterization. However, even if Professor White's observation is correct with respect to commercial transaction law, I am not prepared to generalize such a finding to all other legal areas. Moreover, the audience for empirical legal scholarship includes more than lawmakers. Despite my reluctance, however, it is clear that the implications for other areas are potentially quite severe. Finally, his assessment of the commercial transactions area, however disconcerting to empirical

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[12] FED. R. CIV. P. 26 (imposing a duty of initial disclosure and requiring a pre-scheduling conference meeting of the parties).

[13] *See* Tobias, *supra* note 1, at 245-46.

[14] *See* Symposium, *Empirical Research in Commercial Transactions*, 98 MICH. L. REV. 2421 (2000).

[15] White, *supra* note 6, at 2774.

[16] *See id.*

[17] *See id.* at 2778-79.

[18] *See id.* at 2776-78.

[19] *See id.* at 2774 ("[E]mpirical work has had a most limited impact on commercial legislation and . . . strong reasons will keep it so.").

legal scholars, may be both correct and generalizable to other areas of the law. More alarming is that if empirical legal research is not taken seriously by legislators and policymakers in the commercial area—an area that benefits from a comparatively ample supply of data amenable to research—it is even less likely to be taken seriously in other areas where available data are scarce.

Other scholars advance perspectives less dire than those articulated by Professors White and, to a lesser extent, Tobias. Other avenues exist that might help stimulate lawmakers and policymakers' appetite for empirical research. Professor Hershkoff suggests that judges, through their exercise of judicial review, can encourage lawmakers to consider social science evidence in their policymaking duties.[20] Other scholars suggest that lawmakers will resist relying on empirical research until they understand the basic methods of social science.[21] Professor Faigman notes that education can eliminate some barriers that too often separate lawmakers and social science research.[22] Similarly, Professor Hanna seeks to stimulate lawmakers' appetites for empirical research by imploring researchers to present their findings in a manner that is more generally accessible to those who might not be experts in a particular field.[23]

My implicit assumption that an increased supply of empirical legal scholarship will positively influence the demand for such research remains a possibility, yet it does not reflect the full richness and contours of the relations between supply and demand in this context. Professor Tobias's Response and other related works make it clear that the relationship between the supply of and demand for empirical legal scholarship is a complicated one. Studies of these interactions in general and the influence (if any) of empirical studies on specific legislation in particular deserve increased scholarly attention. Examples of such research efforts in the social sciences abound.[24]

I remain delighted by Professor Tobias's endorsement of my call for greater empirical work in the civil justice area. The informed and helpful observations of Professors Tobias and White about the de-

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[20] *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1177 (1999).

[21] *See* David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1080-81 (1989).

[22] *See id.* at 1081.

[23] *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1582-83 (1998).

[24] For example, the influence of a seminal piece of education research conducted by Professor James S. Coleman and colleagues on decades of educational policy, *see* JAMES S. COLEMAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), has received considerable scholarly attention. For one set of comprehensive responses to Coleman and colleagues, see ON EQUALITY OF EDUCATIONAL OPPORTUNITY: PAPERS DERIVING FROM THE HARVARD UNIVERSITY FACULTY SEMINAR ON THE COLEMAN REPORT (Frederick Mosteller & Daniel P. Moynihan eds., 1972).

mand for empirical legal scholarship, at least among lawmakers and policymakers, supply an important piece to a larger scholarly puzzle. Although their observations fuel some level of pessimism about whether research findings will inform public policy, such pessimism neither dislodges me from my conclusion in *Justice Delayed?* nor diminishes my enthusiasm for on-going and future empirical legal research projects.