Managerial Judges

Judith Resnik

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Judith Resnik

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Foreword

Everyone familiar with the American system of civil justice is aware that contemporary judicial functions often bear little resemblance to the popular stereotype of the robed figure presiding over a formal trial. The number of civil actions that are resolved through trial is a tiny fraction of the civil cases handled by the courts—well under 10 percent in recent years. One manifestation of this reality is the fact that many judges with extensive civil experience have tried relatively few civil cases to judgment. If judges were to become active in cases only as trial became imminent, as was the case in the Federal courts until relatively recently, the judiciary would much more frequently approximate the popular image.

Currently, however, the trend is running strongly in the other direction. Indeed, judges more and more often appraise their performance and that of their colleagues according to their capacity to "manage" cases to settlement in the shortest possible time. To this end, they are increasingly permitted—or in some instances mandated—to take charge of the scheduling and other administrative aspects of each action, to regulate the quantity and the timing of the parties' discovery, and to become the primary force in moving the parties forward in settlement negotiation. Sometimes this responsibility is seen to extend even to suggesting an appropriate settlement amount. Under the procedures now followed by the Federal courts, a single trial judge is responsible for all of these case management functions with respect to any given action. If settlement does not occur, the same judge usually presides at trial.

In a small but growing number of cases, management functions can also arise after a judgment has been rendered. Experience has amply demonstrated that legal issues are hardly exhausted when a court orders a prison or hospital system reformed, a school district desegregated, or a designated group such as handicapped children

to be served in a particular way.[1] The implementation process is often seen as requiring the intimate managerial supervision of a court for years or even decades after the basic question has been adjudicated, and this process itself often generates additional suits. This situation has generated a novel posttrial management role for judges, particularly those operating at the Federal level.

The introduction of the managerial role into the Federal judiciary has been accomplished without extended public debate. Moreover, the very lively discussions of the topic that have occurred within the legal profession have not generally been characterized by rigorous examination of the factual bases alleged to underlie the arguments advanced. Even now, when a case management approach would be mandated upon Federal judges through amendments to the Federal Rules of Civil Procedure that are currently awaiting Supreme Court and Congressional approval, there is very little in the professional literature that permits the interested jurist or practitioner to review the case against the prevailing trend.

Yet there are basic questions to be answered: What is it that we seek to achieve by shifting the emphasis from adjudication to case management, and how convincing is the evidence that we can accomplish our stated goals? Can a judge manage a case and still remain fit to adjudicate it fairly? Are the powers exerted upon the parties by a judge operating in a managerial role adequately checked by susceptibility to appellate review? Are there alternatives other than transforming judges into case managers that can achieve the same objective without the risks to the traditional judicial function that the transformation may pose? Can the adversarial tradition of American jurisprudence survive deemphasis of adjudication, compared to the role of the court in encouraging settlement?

Many highly respected authorities maintain that the case management approach incorporates satisfactory answers to all of these questions. The Institute for Civil Justice, while taking no position on the merits of either side of the question, is of the view that balanced debate of this important policy issue will be enhanced by publication of this carefully documented statement of the problems the author associates with the case management approach. Because this debate occurs most intensely among judges and attorneys, the analysis has been published in the *Harvard Law Review*[2] as well as in this Institute report. (This type of

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[1] See, for example, the Institute's forthcoming report, *Educational Policymaking through the Civil Justice System*, Paul T. Hill and Doren C. Madey, R-2904-ICJ.

[2] Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

dual publication in leading law journals will become a regular Institute practice with respect to issues that present a specialized or particularly intense focus of interest within the legal community.)

Although the hottest debates are likely to occur between and among lawyers, we believe that all those concerned with the civil justice system will find this report of interest. The author is careful to cite the many published analyses that have reached conclusions different from her own and to summarize their reasoning. Thus, for the reader who already knows the relevant literature, this report adds a different perspective; for the reader who is new to the subject matter, it offers both a point of view and a list of sources from which to learn other opinions. In any case, it presents a range of arguments that must be addressed if actions regarding the case management approach are to be guided by knowledge and informed opinion. The Institute's experience to date suggests that it is far too easy for both the substance and the procedures of the civil justice system to be affected by trends and fashions, rather than by facing up to the serious questions these trends may raise.

Gustave H. Shubert
Director, The Institute for Civil Justice

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MANAGERIAL JUDGES

Judith Resnik*

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Should you be called upon to function as a judge, do not be like the legal advisers who offer to place their juridical knowledge at the service of the litigating parties. . . . [Y]ou must remain silent and abstain from interference in the arguments . . . . Do not by even so much as a gesture seek to influence either prosecution or defense.

— *Commentary on the Mishnah (Pirke Avot)*[1]

There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management.

— *Preface to the* Manual for Complex Litigation[2]

I. INTRODUCTION

UNTIL recently, the American legal establishment embraced a classical view of the judicial role. Under this view, judges are not supposed to have an involvement or interest in the controversies they adjudicate. Disengagement and dispassion supposedly enable judges to decide cases fairly and impartially. The mythic emblems surrounding the goddess Justice illustrate this vision of the proper judicial attitude: Justice carries scales, reflecting the obligation to balance claims fairly; she possesses a sword, giving her great power to enforce decisions; and she wears a blindfold, protecting her from distractions.[3]

Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, "managerial" stance.[4] In growing numbers, judges are not only adjudicating the merits of issues

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[1] CHAPTERS OF THE FATHERS (PIRKE AVOT) 12 (S.R. Hirsch trans. & comm., G. Hirschler trans. 1967) (quotation taken from the Hirsch commentary).

[2] MANUAL FOR COMPLEX LITIGATION at ii (5th ed. 1982).

[3] *See infra* pp. 382–83; *see also infra* pp. 446–48 (discussing imagery of Justice).

[4] I focus on changes in the federal courts, but similar changes are underway in many state courts. *See* P. EBENER, COURT EFFORTS TO REDUCE PRETRIAL DELAY (1981); L. FREEDMAN, STATE LEGISLATION ON DISPUTE RESOLUTION (1982).

presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation. Both before and after the trial, judges are playing a critical role in shaping litigation and influencing results.

Several commentators have identified one kind of lawsuit — the "public law litigation"[5] or "structural reform" case[6] — in which federal judges have assumed a new role.[7] In these cases, judges actively supervise the implementation of a wide range of remedies designed to desegregate schools[8] and to reform prisons and other institutions.[9] Some commentators[10] have questioned the legitimacy of judges' dominance in what is now generally acknowledged to be a "new model of civil litigation."[11] Few, however, have scrutinized the managerial aspects of such postdecision judicial work.[12] Even less atten-

[5] Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter cited as Chayes, *Public Law Litigation*]. Professor Chayes defines "public law litigation" as litigation in which "the object . . . is the vindication of constitutional or statutory policies." *Id.* at 1284. More recently, Professor Chayes has also stated that:

> [T]he subject matter . . . is . . . a grievance about the content or conduct of policy — most often governmental policy, but frequently the policy of nongovernmental aggregates. . . . [The features of the litigation] press the trial judge into an active stance, with large responsibilities for organizing the case and supervising the implementation of relief.

Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982) [hereinafter cited as Chayes, *Public Law Litigation and the Burger Court*].

[6] Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

[7] *But see* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467, 510 (1980) (what is "extraordinary" about public law litigation is neither the procedures nor the remedies, but the new substantive rights recognized).

[8] *See, e.g.*, Milliken v. Bradley (Milliken II), 433 U.S. 267 (1977) (affirming district court's modified decree ordering compensatory education programs for victims of segregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (authorizing district court to use quotas, redrawing of attendance zones, optional majority-to-minority school transfers, and busing to achieve desegregation).

[9] *See* cases cited *infra* note 56; S. REP. NO. 416, 96th Cong., 2d Sess. 9–18, *reprinted in* 1980-3 U.S. CODE CONG. & AD. NEWS 787, 790–99 (Senate report on Civil Rights of Institutional Persons Act); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981) [hereinafter cited as Note, *Complex Enforcement*]; Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977) [hereinafter cited as Note, *Implementation Problems*].

[10] *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 103–06 (1979).

[11] Chayes, *Public Law Litigation*, *supra* note 5, at 1282.

[12] For an examination of some aspects of the postdecision judicial role, see *id.*; Diver, *supra* note 10.

tion has been paid to the role judges now play in the pretrial phases of both complex and routine cases.

I believe that the role of judges before adjudication[13] is undergoing a change as substantial as has been recognized in the posttrial phase of public law cases. Today, federal district judges are assigned a case at the time of its filing and assume responsibility for shepherding the case to completion.[14] Judges have described their new tasks as "case management"[15] — hence my term "managerial judges." As managers, judges learn more about cases much earlier than they did in the past. They negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation. These managerial responsibilities give judges greater power. Yet the restraints that formerly circumscribed judicial authority are conspicuously absent. Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.

This new managerial role has emerged for several reasons. One is the creation of pretrial discovery rights. The 1938 Federal Rules of Civil Procedure embodied contradictory mandates: a discovery system ("give your opponent all information relevant to the litigation") was grafted onto American adversarial norms ("protect your client zealously" and therefore "withhold what you can"). In some cases, parties argued about their obligations under the discovery rules; such disputes gen-

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[13] I use the term "adjudication" to describe a dispute resolution process in which judges employed by the government make decisions based upon information presented by the parties. Judges decide motions, preside at trials and hearings, and sometimes find facts. When ruling, judges are obliged to provide reasoned explanations for their decisions, and the parties, in turn, are obliged to obey. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); *see also* Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 152–56 (1981) (similar description of adjudicatory process). Adjudication is distinct from — but includes elements of — other forms of dispute resolution, *see* M. SHAPIRO, COURTS 1–64 (1981), and is not the only task performed by judges, *see* Schwartz, *The Other Things that Courts Do*, 28 UCLA L. REV. 438 (1981).

[14] *See* S. FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN THE UNITED STATES DISTRICT COURTS (1977); Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981); Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1978); Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978); *see also* Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RESEARCH J. 875 (discussing management of pretrial discovery).

[15] Constantino, *Judges as Case Managers*, TRIAL, Mar. 1981, at 56, 57–60; Peckham, *supra* note 14, at 770–73.

erated a need for someone to decide pretrial conflicts.[16] Trial judges accepted the assignment and have become mediators, negotiators, and planners — as well as adjudicators.[17] Moreover, once involved in pretrial discovery, many judges became convinced that their presence at other points in a lawsuit's development would be beneficial; supervision of discovery became a conduit for judicial control over all phases of litigation and thus infused lawsuits with the continual presence of the judge-overseer.

Partly because of their new oversight role and partly because of increasing case loads, many judges have become concerned with the volume of their work. To reduce the pressure, judges have turned to efficiency experts who promise "calendar control." Under the experts' guidance, judges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible.[18] During the past decade, enthusiasm for the "managerial movement" has become widespread;[19] what began as an experiment is likely soon to become obligatory. Unless the Supreme Court and Congress reject proposed amendments to the Federal Rules,[20] pretrial judicial management will be required in virtually all cases.

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[16] *See* Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1298–1305 (1978); Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543, 545–53 (1980). *But see* Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1090–92 (1979) (arguing that, if discovery rules were amended, they would strike a better balance between pretrial disclosure and the adversary system).

[17] In mediation, a third party does not impose an outcome but attempts to work a compromise between disputants. *See* Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). In negotiation, the parties bargain with each other using economic and other forms of leverage to achieve mutually acceptable outcomes. *See generally* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (discussing norms and rules that author believes order private parties' behavior during negotiation). For a discussion of the issues raised by alternative dispute resolution systems, see *Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 395 (1980–1981).

[18] *See, e.g.*, M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE (1964); Aldisert, *A Metropolitan Court Conquers Its Backlog*, 51 JUDICATURE 247 (1968); Fisher, *Judicial Mediation: How It Works Through Pre-Trial Conference* (pt. 2): *From Pure Pre-Trial to Compulsory Settlement Conferences*, 10 U. CHI. L. REV. 453 (1943); Murrah, *Pre-Trial Procedure: A Statement of Its Essentials*, 14 F.R.D. 417, 420 (1953).

[19] *See, e.g.*, FED. R. CIV. P. 16 advisory committee note (Discussion Draft 1982), *reprinted in* Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 11, 12–13 (Sept. 1982) (on file in Harvard Law School Library) [hereinafter cited as Judicial Conference Excerpt]; Brazil, *supra* note 14, at 884 (citing Peckham, *supra* note 14).

[20] *See* FED. R. CIV. P. 16(b) (Discussion Draft 1982), *reprinted in* Judicial Conference Excerpt, *supra* note 19, at 8. For an earlier version of the proposed amend-

In the rush to conquer the mountain of work, no one — neither judges, court administrators, nor legal commentators — has assessed whether relying on trial judges for informal dispute resolution and for case management, either before or after trial, is good, bad, or neutral. Little empirical evidence supports the claim that judicial management "works" either to settle cases or to provide cheaper, quicker, or fairer dispositions.[21] Proponents of judicial management have also failed to consider the systemic effects of the shift in judicial role. Management is a new form of "judicial activism," a behavior that usually attracts substantial criticism.[22] Moreover, judicial management may be teaching judges to value their statistics, such as the number of case dispositions, more than they value the quality of their dispositions. Finally, because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority. In short, managerial judging may be redefining *sub silentio* our standards of what constitutes rational, fair, and impartial adjudication.

II. UNDERLYING ASSUMPTIONS ABOUT THE TRADITIONAL JURIDICAL ROLE

A. Historical Foundations

1. The Adversarial Tradition in the United States. — Implicit in my proclamation of change is a vision of our traditional judicial system. Over the last two hundred years, the United States' system of adjudication developed attributes that distinguished it from others in practice as well as in theory. Our system was "adversarial"[23] rather than "inquisitorial."[24]

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ments to rule 16, see *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 90 F.R.D. 451, 466–78 (1981).

[21] *See infra* pp. 417–24.

[22] *See, e.g.*, D. HOROWITZ, *supra* note 10; Address by Attorney General William French Smith to the ABA House of Delegates (Jan. 25, 1982) (on file in Harvard Law School Library).

[23] In an adversarial system, the parties control the pace and shape of the litigation. They investigate, prepare, and present evidence and arguments. Some proceduralists identify "party-presentation" and "party-prosecution" as the two fundamental elements of adversarialism. *See, e.g.*, F. JAMES & G. HAZARD, CIVIL PROCEDURE 4–8 (2d ed. 1977) [hereinafter cited as JAMES & HAZARD]; Millar, *The Formative Principles of Civil Procedure* (pt. 1), 18 ILL. L. REV. 1, 9–24 (1923). *See generally* Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 16 BUFFALO L. REV. 122 (1966) (comparing roles of American and German judges).

[24] In an inquisitorial system, state agents control the litigation. *See, e.g.*, H.

Parties, rather than officers of the state, controlled case preparation. The factfinder, whether jury or judge, received evidence by listening relatively passively to the evidence chosen and the witnesses rehearsed by the parties.

The limits placed on federal judges by the adversarial system comported with the views of those who drafted the Constitution. The framers, reacting against the King's autocratic judiciary, wanted both to ensure federal judicial independence from the Executive[25] and to vest substantial adjudicatory power in the people.[26] Hence the Constitution gave a principal role to the jury in both civil[27] and criminal[28] trials and permitted Congress to limit the Supreme Court's appellate review of "factual" determinations.[29] Federal judges' power was further restricted by the "case or controversy" requirement,[30] by congressional authority over the creation of lower courts,[31] and by the constitutional commitment to open judicial decisionmaking — the "public" trial.[32]

LIEBESNY, FOREIGN LEGAL SYSTEMS (1981); J. MERRYMAN, THE CIVIL LAW TRADITION (1969); *see also* Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure* (pts. 1 & 2), 71 HARV. L. REV. 1193, 1443 (1958) (discussing German system as example of inquisitorial process) [hereinafter cited as Kaplan].

[25] *See* U.S. CONST. art. III, § 1; *see also* THE FEDERALIST Nos. 78, 79 (A. Hamilton) (life tenure and rules regarding nondiminution of salary help to ensure an independent judiciary). *See generally* Levy, *Judicial Review, History and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 1 (L. Levy ed. 1967) (discussing origins and development of federal judiciary's power to review legislative and executive acts).

[26] *See, e.g.*, Wroth, *A Revolutionary Incident: The Demise of the Royal Courts in Massachusetts, 1774–1776*, HARV. L. SCH. BULL., Winter 1975, at 15.

[27] U.S. CONST. amend. VII.

[28] *Id.* art. III, § 2, cl. 3; *id.* amend. VI.

[29] *Id.* art. III, § 2, cl. 2; *see* Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 MINN. L. REV. 53, 61–63 (1962) (arguing that Congress' power to create exceptions to the Supreme Court's appellate jurisdiction was designed to protect jury decisions).

[30] U.S. CONST. art. III, § 2, cl. 1; *see* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 3 (2d ed. 1973 & Supp. 1981).

[31] U.S. CONST. art. III, § 1; *see* Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 33–36 (1981).

[32] U.S. CONST. amend. VI. The sixth amendment guarantees the right to a "public" trial in criminal cases; the Supreme Court has held that the first amendment and the common law provide a limited right of public access to civil trials and strengthen the public's right of access to criminal trials. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

Although the Constitution does not expressly provide a public right to attend pretrial proceedings, some circuits have held that, absent a showing of serious harm, the public has a right to information obtained through discovery and litigants have a right to disseminate this information. *See, e.g.*, *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979).

The American system was not, of course, purely adversarial.[33] Inquisitorial traits included the right of the state, as personified by trial judges, to exercise some control over the evidentiary process: judges could summon or exclude witnesses and comment on testimony.[34] Nevertheless, our tradition is considered more adversarial than most,[35] and its basic principle is that the parties, not the judge, have the major responsibility for and control over the definition of the dispute.

2. Images of Justice. — Eighteenth century Americans were hardly the first to suggest that judges should not take sides in the controversies before them. Ancient cross-cultural symbols support this view of the judicial role.[36] In the Western world, the imagery of justice[37] has, with some alteration, endured over thousands of years and in varied political systems. Judicial icons, found in museums and on courtroom walls,[38] provide insight into our perceptions of appropriate judicial behavior.

For centuries, Western cultures have personified the ideal judge as a goddess.[39] Since the late Middle Ages, Justice has been depicted with scales and sword. During the last four

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[33] No system of justice is purely adversarial or inquisitorial:

> The behaviour which is expected of a judge in different ages and by different systems of law seems to fluctuate between two poles. At one of these the model is the conduct of the man of science who is making researches . . . and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there . . . merely to see that the rules of the game are observed.

F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 670–71 (2d ed. 1968).

[34] *See* JAMES & HAZARD, *supra* note 23, at 4. In federal jury trials, judges may summarize and comment on the evidence; in many states, however, judges may only summarize the evidence. *See* MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 8, at 12 (E. Cleary 2d ed. 1972) [hereinafter cited as MCCORMICK ON EVIDENCE].

[35] *Cf.* J. MERRYMAN, *supra* note 24, at 120–39 (discussing the inquisitorial features of the civil law system). *But see* Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) (analyzing three continental systems and concluding that they are very similar to the American system).

[36] *See, e.g.*, CHAPTERS OF THE FATHERS (PIRKE AVOT), *supra* note 1, ch. 1, paras. 8–9.

[37] Iconography is "that branch of the history of art which concerns itself with the subject matter or meaning of works of art, as opposed to their form." E. PANOFSKY, STUDIES IN ICONOLOGY 3 (1939). For a discussion of Justice's various appearances in the art of the Renaissance, see E. GOMBRICH, SYMBOLIC IMAGES: STUDIES IN THE ART OF THE RENAISSANCE (1945). Scholars temper their discussions of iconography with the recognition that multiple interpretations of any given symbol are possible. For instance, Justice's blindfold may be considered either a virtue or a disability. *See infra* Appendix.

[38] *See, e.g.*, COURT HOUSE: A PHOTOGRAPHIC DOCUMENT plates 69, 264 (R. Pare ed. 1978).

[39] For a discussion of the evolution of the images of justice, see *infra* Appendix.

hundred years, a blindfold has been added to complete the image.

The goddess herself — aloof and stoic — represents the physical and psychological distance between the judge and the litigants. Sometimes described as a virgin, Justice is unapproachable and incorruptible. The scales reflect evenhandedness and absolutism.[40] The sword is a symbol of power and, like the scales, executes decisions without sympathy or compromise. Finally, the blindfold protects Justice from distractions and from information that could bias or corrupt her. Masked, Justice is immune from sights that could evoke sympathy in an ordinary spectator.

The idealized image of judicial behavior in the United States conforms to the symbolism implicit in these icons.[41] The robes, the odd etiquette of the courtroom, and the appellation "your honor" all serve to remind both litigants and judges of the special nature — the essential estranged quality — of their relationship. Judges are exempt from the rules of normal social intercourse; they need not try to please litigants. Judges must decide the facts and apply the law regardless of the displeasure they incur. Stoic goddess, scales, sword, and blindfold are accurate emblems of this hard-edged, uncompromising task.

B. The Traditional Model

Olympian images of detachment, like classic Greek statuary, have an otherworldly quality. Daumier prints seem closer to reality.[42] Like the figures in a Daumier lithograph, federal judges are ordinary mortals; from the beginning they have been very active in the world about them.[43] During the eigh-

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[40] *See* Daube, *The Scales of Justice*, 63 JURID. REV. 109, 109 (1951) ("[The] symbolism of the scales expresses a deep-rooted tendency to see no shades between black and white, to admit no degrees of right and wrong, to allow no distribution of loss and gain among several litigants, to send a party away either victorious or defeated.").

[41] The United States shares its imagery of justice with other cultures, all of which insist on judicial impartiality. Not all of the other systems, however, embrace the adversarial method, which has emphasized judges' disengagement as the means of achieving impartiality.

[42] H. DAUMIER, LAWYERS AND JUSTICE (A. Rosin trans. 1971).

[43] Historians describe early American lawyers and judges as a relatively small group of prominent men who traveled in the same circles. *See, e.g.*, M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789–1816 (1978); C. WARREN, A HISTORY OF THE AMERICAN BAR ch. 9 (1911). In examining activities of the federal district court in Kentucky, for example, Tachau found that Judge Harry Innes, the most influential federal judge there from 1789 until 1816, played an active role in the state's politics and possessed substantial extrajudicial knowledge about many of

teenth and nineteenth centuries, federal judges were likely to have prior, extrajudicial knowledge of both the controversies and the participants before them; like jurors, judges often came from the localities in which the controversies arose. Apparently, prior knowledge was not considered impermissible and may have been valued.[44] But though they may have had extrajudicial contact with litigants, judges were not assigned managerial roles.

Until recently, federal judges rarely paid much attention to the filing of lawsuits.[45] Complaints were "file stamped" by court clerks, plaintiffs' checks were credited to the United States, and marshals were dispatched to serve process on defendants.[46] Once served, defendants were supposed to answer or seek dismissal within twenty days.[47] The time limit was an artifice, however, because parties commonly stipulated to extend the deadline; months would pass before a defendant filed a responsive pleading.[48] Once an answer was filed, issue was "joined"; but again, a judge would take no notice. Unless and until one of the parties requested some sort of judicial action (granting a motion for summary judgment, a date for trial, a pretrial conference), most judges did not intervene during the pretrial stage.[49] The parties might undertake discovery, negotiate settlement, or let the case lie dormant for years — all without judicial scrutiny.

Even when federal judges were brought into cases, they were not responsible for the development of the cases.[50] Al-

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the cases that he adjudicated. M. TACHAU, *supra*, ch. 2. Descriptions of work in the early federal trial courts are, however, limited. Although many court records exist, *see id.* at 5, few are complete and fewer have been catalogued and analyzed.

[44] *Cf.* Kershen, *Vicinage* (pt. 3), 30 OKLA. L. REV. 1, 75–76 (1977) (in the 18th and 19th centuries, local jurors possessed "the most knowledge concerning the character of the accused, the character of the victim and witnesses, the incident itself, and the setting in which the incident occurred," whereas today, "the goal . . . is to use jurors who are completely unfamiliar with and uninformed about all aspects of the specific criminal case").

[45] Judges sometimes learned about lawsuits before trial when, for example, plaintiffs sought a temporary restraining order or preliminary injunction.

[46] FED. R. CIV. P. 4(c). For pending revisions of rule 4, see Amendments to the Federal Rules of Civil Procedure, 93 F.R.D. 255 (1982), *effective date postponed*, 94 F.R.D. 223 (1982).

[47] FED. R. CIV. P. 12(a).

[48] *See* Rubin, *supra* note 14, at 138.

[49] *See* Fisher, *supra* note 18, at 457; *see also* Clark, *Objectives of Pre-trial Procedure*, 17 OHIO ST. L.J. 163 (1956) (describing the purposes of pretrial conferences).

[50] Modern proponents of judicial management assume that most managerial judging efforts represent a sharp break with past practice. *See, e.g.*, Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS.

though judges occasionally conducted pretrial conferences,[51] the scope and subject matter of these conferences were limited; judges were not supposed to stress the desirability of settlement. As one court explained, for the judge to "persist" at settlement efforts and then to "hear the case and render judgment . . . inevitably raises . . . suspicion as to the fairness of the court's administration of justice."[52] Yet despite the absence of judges' involvement, the vast majority of cases ended without trial.[53]

J. 147, 147 (1978) ("Judicial supervision of the civil docket is a relatively new phenomenon in American courts. Even in the federal courts, where it is best established, its antecedents do not go back more than a generation or so.").

Given that judges' pretrial activities are unlikely to be recorded, data on pretrial conferences and settlement efforts are sketchy. There are bases from which to infer that some judges assumed supervisory roles earlier in this century, *see* sources cited *supra* note 49, and in the 18th and 19th centuries, *see, e.g.*, M. TACHAU, *supra* note 43, at 85; *see also* H. SCOTT, THE COURTS OF THE STATE OF NEW YORK 43–44 (1909) (reporting that, in 17th century colonial courts in New York, judges referred especially complex cases to arbitrators, whose duty was to settle cases out of court). *See generally* Randall, *Conciliation as a Function of the Judge*, 18 KY. L.J. 330, 340 (1930) (urging American judges to adopt "conciliation" techniques that had been "widespread . . . in foreign countries for hundreds of years"). For a 16th century description of settlement efforts, see F. RABELAIS, GARGANTUA AND PANTAGRUEL bk. 3, at 141–44 (J. LeClercq trans. 1936, ed. 1942).

[51] *See* M. ROSENBERG, *supra* note 18, at 210–11 (New Jersey and three other states have had some form of mandatory pretrial conferences); 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1522 (1971) (some district judges held pretrial conferences primarily to prepare for trial; settlement was discussed occasionally); Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1068 (1955) (a few federal district courts during the early 1940's made pretrial conferences mandatory).

[52] Krattenstein v. G. Fox & Co., 155 Conn. 609, 615, 236 A.2d 466, 469 (1967). Because pretrial conferences were more common in state than federal courts until recently, state appellate courts were the principal commentators on the proper judicial role, which they saw to be limited. *See, e.g.*, Rosenfield v. Vosper, 45 Cal. App. 2d 365, 372, 114 P.2d 29, 33 (1941) (error for judge to instruct attorneys to tell their clients that "it would be to their best interests to settle"); Gullet v. McCormick, 421 S.W.2d 352, 354 (Ky. 1967) (pretrial conference should not be used to compel settlement); Knickerbocker v. Beaudette Garage Co., 190 Wis. 474, 481, 209 N.W. 763, 765 (1926) (judiciary should not "exalt the idea of . . . disposing of matters in litigation above the constitutional purposes for which our courts [were] created"). *But see* Gardner v. Mobil Oil Co., 217 Cal. App. 2d 220, 226, 31 Cal. Rptr. 731, 735 (1963) (judge who indicated his tentative conclusions and proposed a settlement figure not guilty of misconduct); Madrigale v. Corrone, 5 Conn. Cir. Ct. 521, 529, 258 A.2d 102, 106 (App. Div. 1968) (in case in which judge did not participate in negotiations either before or during trial, his urging both counsel to settle was not improper); Washington v. Sterling, 91 A.2d 844, 845 (D.C. 1952) ("[A] trial court ought not to force a settlement . . . but [may suggest] the advisability of settlement.").

[53] *See* Clark & Moore, *A New Federal Civil Procedure: Pleadings and Parties* (pt. 2), 44 YALE L.J. 1291, 1294 & n.8 (1935) (study showed that approximately 70% of all civil cases filed in federal courts did not reach a judge or jury decision).

This traditional role was not limited to nineteenth century judges. As late as 1958, Professors Kaplan and von Mehren and Judge Schaefer marveled at the vigorous efforts of German judges to convince parties to settle.[54] Ironically, their description of the German judge — "constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and adviser, [and] as insistent promoter of settlements"[55] — now seems apt for the American judge as well. Federal judges who passively await parties' pretrial requests are out of step with colleagues who have implemented a new regime of procedures designed to speed case disposition. These procedures bring cases to judges' attention shortly after filing and encourage judges both to supervise case development before trial and to manage decree implementation after trial.

III. MANAGERIAL JUDGING: A DESCRIPTION

A. The Models

I have constructed two hypothetical cases to illustrate what the new managerial role entails and how this role differs before and after trial. The contours of the first case are by now familiar; *Petite v. Governor* is a thinly fictionalized amalgam of several suits aimed at ameliorating conditions in institutions such as prisons and mental hospitals.[56] The second case, *Paulson v. Danforth, Ltd.*, is a run-of-the-mill products liability case in its early stages of pretrial preparation.[57] I elaborate

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[54] Kaplan (pt. 1), *supra* note 24, at 1223.

[55] *Id.* (pt. 2) at 1472.

[56] *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980) (declaring conditions in Texas prisons unconstitutional), *motion to stay order granted in part and denied in part per curiam*, 650 F.2d 555 (5th Cir. Unit A 1981), *additional motion to stay order granted in part and denied in part*, 666 F.2d 555 (5th Cir. 1982); Ramos v. Lamm, 485 F. Supp. 122 (D. Colo. 1979) (declaring conditions in Colorado prison system unconstitutional), *aff'd in part and remanded*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041, *original ruling adhered to on remand*, 520 F. Supp. 1059 (D. Colo. 1981); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y.) (declaring conditions at Manhattan House of Detention for Men unconstitutional), *supplemented*, 377 F. Supp. 995 (S.D.N.Y.), *aff'd in part and remanded*, 507 F.2d 333 (2d Cir. 1974), *order granting relief entered*, 389 F. Supp. 964 (S.D.N.Y.), *modified*, 396 F. Supp. 1195 (S.D.N.Y.), *aff'd*, 527 F.2d 1041 (2d Cir. 1975), *order modified*, 432 F. Supp. 769 (S.D.N.Y. 1977); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.), *modified*, 334 F. Supp. 1341 (M.D. Ala. 1971) (declaring conditions in Alabama mental health facilities unconstitutional), *modified*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[57] *See, e.g.*, Parsons v. General Motors Corp., 85 F.R.D. 724 (N.D. Ga. 1980) (automobile crash test and design information discoverable because not privileged, confidential research); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S.

and rely on the details of these hypothetical cases to demonstrate the ways in which managerial judges influence litigation. All of the details of the hypothetical cases parallel occurrences in real cases. The models I construct provide a graphic representation of the context in which management arises; they enable us to understand that, whatever is decided about its ultimate legitimacy, judicial management reflects the efforts of sincere individuals to respond to perceived needs.

1. Petite v. Governor. — *Petite* was filed in 1972 by William Petite on behalf of himself and all other inmates of Hadleyville, a maximum security state prison. Named as defendants were the warden and governor. In 1974, three months after a thirty-day trial, United States District Judge Denise Breaux found that the living conditions at Hadleyville violated the inmates' constitutional rights. Judge Breaux ordered the defendants to act "forthwith" to make incarceration in Hadleyville "constitutional." The order was affirmed in all respects on defendants' appeal; the Supreme Court denied certiorari.

In 1976, plaintiffs' counsel filed a motion for contempt. Counsel argued that defendants had done little to improve Hadleyville; conditions were worse than those found unconstitutional in 1974. Plaintiffs requested that the court revise its 1974 order to mandate specific changes and to set a timetable for their implementation.

Declining to hear argument on the motion, Judge Breaux called the parties' attorneys into her chambers and told them to resolve their differences. She rescheduled the contempt hearing for ten weeks later and ordered the parties to negotiate in the interim. Six weeks later, after plaintiffs complained that defendants would not negotiate in good faith, Judge Breaux agreed to join the discussions. She met weekly with the lawyers. At each meeting, she spoke separately with each side in a effort, which proved unsuccessful, to convince each to moderate its positions. At the opening of the third meeting, plaintiffs' counsel reported that an inmate had been stabbed to death by two cellmates. Plaintiffs requested immediate evacuation of 700 inmates so that each of those remaining could be confined in a separate cell. Judge Breaux scheduled a hearing on the request. After listening to testimony for ten days, she issued an order requiring that within thirty days the population be reduced by 300 inmates and the correctional staff be increased by twelve. One month later, when plaintiffs

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286 (1980) (reversing trial court's rejection of personal jurisdiction in products liability suit).

reported — and defendants did not dispute — that the prison population had not been reduced, Judge Breaux held the governor in civil contempt and levied fines of $500 per day. Fifteen days later, the state sent 198 inmates to federal facilities. At a conference held in chambers, the state promised the judge that it would hire ten guards within the next six weeks. Judge Breaux then lifted the contempt order and directed the parties to hold weekly meetings to negotiate a revised judgment.

In 1977, unable to obtain agreement and dissatisfied with continued unsafe and unsanitary conditions at Hadleyville, Judge Breaux issued another interim order. She decreed that inmates be given three meals a day, that the first meal be served no earlier than 6:00 a.m. and the last no earlier than 4:30 p.m., that inmates be classified according to security risk and age, that any inmate accused of violent acts be immediately segregated, that four clean-up crews of at least six workers be hired to work five days per week, and that three plumbers be employed within ten days and remain employed until each cell had a working toilet and every ten men had a functioning shower. Defendants appealed. Again the appellate court affirmed. This time, the court of appeals noted its own distress with the slow pace of improvement at Hadleyville.

Since the case returned to her in 1976, Judge Breaux has spent forty-eight trial days hearing postdecision disputes and has issued ten orders. Although Judge Breaux has often expressed a desire to end her involvement, the case remains on her docket because of plaintiffs' continued reports of noncompliance with the court's orders.

2. Paulson v. Danforth, Ltd. — On July 1, 1980, Sarah Paulson bought a "Zip," a car manufactured by the small British company Danforth, Ltd., from a dealer in Manhattan. She drove the car home to the state of Essex in the fall of 1980. On March 4, 1981, while driving at about fifty miles per hour on an interstate highway in Essex, Ms. Paulson lost control of the car and skidded into a side railing. The gas tank exploded immediately, and Ms. Paulson was badly burned. On January 4, 1982, Ms. Paulson's attorney, Robert Adams, filed *Paulson v. Danforth, Ltd.* in the United States District Court for the District of Essex. The complaint alleged that defective design had caused the gas tank to explode upon impact, and sought $750,000 in damages. The case was randomly assigned to Judge Edward Kinser.

Danforth's counsel in New York City received a copy of the complaint on January 15 and promptly telecopied it to Danforth's headquarters in London. Danforth retained Deb-

orah Alford, an Essex City lawyer, on January 18. On February 4, Danforth filed a motion to dismiss the suit for lack of personal jurisdiction. Danforth claimed that, because its only business offices in the United States were in New York and California, it could not be sued in Essex. Ms. Paulson countered that Danforth was a commercial enterprise that voluntarily and deliberately did business with people coming from and going to Essex.

On June 10, Judge Kinser denied Danforth's motion to dismiss. On June 18, Danforth filed its answer denying liability. Thereafter, pursuant to rules 33 and 34 of the Federal Rules of Civil Procedure, Mr. Adams served a set of interrogatories and a notice to produce documents. Among the fifty interrogatories were the following:

> 13. From 1977 until 1982, did Danforth test the gas tank on the "Zip" to learn about the tank's durability and ability to withstand impact?
>
> 14. If the tests described in question 13 above were performed, list below the names of all personnel who had any responsibility for the tests.

Plaintiff also made several document requests, including this one:

> 8. Provide all data on the results of any tests performed on the "Zip" from January 1, 1977, through June 1, 1982.

Plaintiff served these discovery requests on Danforth's attorney on July 10, 1982. After the thirty days that the Federal Rules permit for response had passed, Mr. Adams reminded Ms. Alford of the discovery requests. She expressed reservations about the propriety of several questions. Aware of the local district court rule requiring counsel to negotiate discovery disputes "in good faith" before filing discovery motions, the lawyers discussed the questions for several minutes but could not resolve their differences.

Twenty days later, defendant moved for a protective order. Danforth asked Judge Kinser to rule that: (1) twenty-nine of the fifty interrogatories were vague, irrelevant, or overly burdensome, or requested privileged information, and therefore need not be answered; (2) Danforth need not produce crash test data for 1977–1979 and for 1981–1982, because such statistics were irrelevant; and (3) only plaintiff's attorney could see the information produced, because of its "commercial" nature. In opposition to the motion, Mr. Adams asserted the relevance of the information and the absence of any special reason to protect the disclosure. Claiming that Danforth had

no legal basis for a protective motion, Mr. Adams requested that his client be awarded the costs and attorney's fees incurred in opposing the motion.

After Judge Kinser read the papers on the pending discovery motion, he decided that he did not know enough about plaintiff's theories to decide the questions presented. He called the attorneys to his chambers and asked them to explain more about the case. After listening for several minutes to the lawyers' posturing, Judge Kinser asked whether all these legal battles were really necessary: was not settlement the least expensive, quickest, and fairest resolution of most disputes? When the attorneys insisted upon pursuing their arguments, the judge asked whether the lawyers were acting in their clients' best interests. Had they thought about how costly the litigation would be? Did the clients know how risky trials were? That the loser would have to pay the victor's court costs? That discovery could take years and that he, the judge, had control over the schedule?

Judge Kinser then asked Mr. Adams to leave the room so that the judge could confer privately with defendant's lawyer.[58] Judge Kinser explained to Ms. Alford that he had learned a bit about plaintiff's case and that it looked "sound" to him. Did Danforth understand that a jury would surely be sympathetic to an injured plaintiff? What harm would there be in giving this injured victim some money? Had the parties talked numbers? Perhaps she could tell her client that $250,000 seemed "about right" to the judge. And perhaps she could mention that his court looked with disfavor upon uncompromising litigants.

Judge Kinser then called in plaintiff's counsel for a private meeting. Did Mr. Adams know how hard it was to prove a products liability claim? Had he thought about how long it might take to get to trial? What numbers would his client "go for"? The judge thought that $250,000 "sounded right" and that the case looked like one that "should settle."

Summoning both attorneys before him once more, Judge Kinser concluded the conference by announcing that he would defer ruling on the discovery motion until the parties had had time to negotiate further. He set a date to hold another conference in six weeks.

3. The New "Forms" of Litigation. — In cases like *Petite*, judges become enmeshed in extended relations with institutions. Many commentators have discussed the political and

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[58] Judge Kinser insisted on speaking to each side separately because real judges advised him to do so. *See, e.g.*, Aldisert, *supra* note 18, at 251.

social ramifications of this involvement,[59] but such ramifications are not the central concern of my analysis. *Petite*'s purpose is to illustrate changes occurring within the lawsuit itself.

In public law cases like *Petite*, a new form of litigation is emerging — one that is no longer "bi-polar" or "retrospective."[60] Judges are at the center; they are personally involved in the implementation of their decrees and in the prospective planning of posttrial relations among the parties.[61] Judge Breaux's bargaining, frequent contact with the parties, and supervision of the minutiae of everyday life in prison contrasts sharply with our judicial customs. No longer a detached oracle, the judge has become a consort of the litigants. Moreover, judges like the fictional Breaux become openly involved in a power struggle: when defendants publicly defy or quietly evade court decrees,[62] observers discover that judges are far less powerful than the goddess-symbol suggests.

On the other end of the litigation spectrum is *Paulson v. Danforth, Ltd.* — from its facts, an unexceptional tort case in the ordinary posture of pretrial preparation. Yet *Paulson*, like *Petite*, exemplifies the results of substantial change in the litigation process itself. Judge Kinser, like Judge Breaux, descended into the trenches to manage the case. Federal judges across the country are becoming engaged in similar pretrial managerial efforts. The new "forms"[63] of litigation can be found in all types and phases of cases on the federal docket.

B. The Sources of Judicial Management

It is useful in understanding the growth of managerial judging to distinguish (1) changes in the role of judges necessitated by procedural innovations and the articulation of new rights and remedies, from (2) changes initiated by judges themselves in response to work load pressures.

1. The Influence of Discovery on the Pretrial Phase. — Some aspects of pretrial management are an inevitable result of the implementation of the discovery system in 1938. Before the Federal Rules of Civil Procedure were adopted, parties

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[59] *See, e.g.*, Chayes, *Public Law Litigation*, *supra* note 5; Diver, *supra* note 10; Eisenberg & Yeazell, *supra* note 7; Fiss, *supra* note 6; Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); Johnson, *Observation: The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976).

[60] Chayes, *Public Law Litigation*, *supra* note 5, at 1282.

[61] *See id.* at 1284.

[62] *See, e.g.*, Newman v. Alabama, 466 F. Supp. 628, 629–35 (M.D. Ala. 1979) (describing defendants' failure to comply with court orders).

[63] Fuller, *supra* note 13, at 354–55.

preparing for trial were generally left to their own devices.[64] Creation of the new discovery rights, however, shifted the locus of pretrial preparation. Litigants became entitled to the court's help in obtaining from each other all unprivileged information "relevant to the subject matter" of the lawsuit.[65] Thus, the domain of trial judges grew.

Although many have discussed and analyzed discovery,[66] few have examined its effect on the work of trial judges and the relationship between judges and litigants. Consider, for instance, the contrast between Judge Kinser's role in ruling on the motion to dismiss and his role in ruling on the defendant's motion for a protective order. In the traditional passive mode, Danforth's motion to dismiss for lack of personal jurisdiction was Judge Kinser's first contact with the case. To rule on the motion, Judge Kinser needed little familiarity with the merits of the suit. He had only to consider Danforth's business ties with Essex to decide whether it would be fair to require Danforth to appear in the Essex federal court.[67] In traditional lawsuits, motions to dismiss — even many for summary judgment — required minimal judicial involvement; judges retrospectively evaluated the acts described by the parties in light of the applicable legal standards.[68] Indeed, judges often reached such decisions without ever speaking directly with the parties or their lawyers. When ruling on most pretrial motions, judges kept their blindfolds in place and their interest unpiqued.

In contrast, Judge Kinser could no longer remain distant after he was asked to rule on Danforth's motion for a protec-

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[64] Discovery as we know it today was unavailable for common law causes of action in the federal courts; limited discovery was allowed in actions in equity. *See* Millar, *The Mechanism of Fact-Discovery*, 32 ILL. L REV. 424, 449 (1937); *cf.* Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869–77 (1933) (discussing state court innovations with respect to common law discovery).

[65] Fed. R. Civ. P. 26(b), 28 U.S.C. § 5 (1940). Depositions could be taken only upon leave of the court after jurisdiction had been obtained, or without leave of the court after an answer had been served. Fed. R. Civ. P. 26(a), 28 U.S.C. § 5 (1940). Documents were to be produced for inspection upon the motion of any party showing good cause. Fed. R. Civ. P. 34, 28 U.S.C. § 5 (1940).

[66] *See, e.g.*, ABA SECTION OF LITIGATION, REPORT OF THE SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE (1977), *reprinted in* ABA Section of Litigation, *Second Report of the Special Committee for the Study of Discovery Abuse*, 92 F.R.D. 137 (1980) [hereinafter cited as ABA REPORT ON DISCOVERY ABUSE]; J. EBERSOLE & B. BURKE, DISCOVERY PROBLEMS IN CIVIL CASES (1980).

[67] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 203–04, 213–17 (1977); International Shoe Co. v. Washington, 326 U.S. 310, 319–20 (1945).

[68] *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 159–61 (1970) (standard for granting motion for summary judgment under rule 56); Conley v. Gibson, 355 U.S. 41, 43–48 (1957) (standard for granting motion to dismiss under rule 12(b)).

tive order. Danforth argued that twenty-nine of Ms. Paulson's fifty questions were vague, irrelevant, or overly burdensome, or requested privileged information. To decide these issues, Judge Kinser had to learn a great deal about Ms. Paulson's theories for recovery — precisely what her claim was and how she planned to prove liability. He had to evaluate each contested interrogatory and disputed document in light of this information. Would a complete response to document request 8, which demanded 1977–1982 crash test data, have assisted Ms. Paulson in establishing Danforth's negligent design or manufacture of 1980 cars? Or should disclosure have been limited to data collected in the year 1980? Was question 14, which asked for the names of those who conducted the crash tests, so ambiguously drafted that response was impossible? Or did question 14 request so much information, including the identification of hundreds of employees, that it was burdensome?

These examples illustrate that the role of judges in ruling on discovery issues is qualitatively different from their role in the traditional model. First, judges must immerse themselves in the factual details of the case. Second, to decide discovery questions, judges must consider the parties' litigating strategies: rather than engage in the traditional task of analyzing the legal import of past events, Judge Kinser had to position himself as if he were each party's lawyer and then guess about the future course of the suit.[69] What theories would make Ms. Paulson's questions relevant? What evidentiary problems did she face? Had she requested more information than was needed? Was Danforth's motion simply a tactic to delay this products liability case while others more favorable to Danforth moved forward? Could public disclosure of test data harm Danforth? Third, because the parties' briefs seldom yield the insights needed to make these assessments, judges often must engage in lengthy and informal conversations with the parties. Finally, by granting or denying discovery requests, judges alter the scope of suits by making some theories and proofs possible and others unlikely.

2. Enforcing Far-reaching Remedies: The Task for Posttrial Management. — Posttrial judicial management is also a creature, in part, of a shift — this time not in procedure, but in the use of lawsuits by diverse groups to assert novel legal rights.[70] The subject matter of such litigation does not fit easily within our traditional conception of adjudication.[71] The

[69] *Cf.* Chayes, *Public Law Litigation*, *supra* note 5, at 1296–97 (stressing importance of "prospective" factfinding in the remedial phases of public law litigation).

[70] *See* Eisenberg & Yeazell, *supra* note 7, at 473.

[71] Chayes, *Public Law Litigation*, *supra* note 5, at 1282.

purpose of many public law cases is to reorient the future dealings of the parties: to make wardens alter their treatment of inmates, to reorganize school districts, to reform mental hospitals. Such changes are not accomplished with a simple court order. The experience of the past three decades has been that many defendants seek to avoid court orders and, absent continuous oversight, often succeed.[72]

Petite is illustrative. After winning in 1974, plaintiffs tried for two years to obtain voluntary compliance with Judge Breaux's decree, yet conditions at the prison had continued to deteriorate. When Judge Breaux finally but reluctantly agreed to return to the case, she pressed for party-designed solutions. Judge Breaux was unable to obtain any action, however, until she held the governor in contempt. Thereafter, she found herself threatening contempt far more often than she would have liked. Finally, she replaced her general decree with a series of specific mandates: she detailed the number of guards per shift, the number of outdoor recreation hours to be provided each inmate, the date by which new plumbing had to be installed. Judge Breaux appointed three lawyers from the community to serve as her "monitors," and required the prison to admit them on one-hour notice, day or night. She made three unannounced visits herself. Further, Judge Breaux instituted a reporting requirement: once a month, the state had to file information detailing its progress toward implementation of the judge's orders.

Judge Breaux frequently questioned her involvement in *Petite*. She had, after all, some sympathy for the defendants; the governor and warden were, like her, public servants trying to perform demanding jobs in a world of limited resources.[73] Moreover, Judge Breaux was keenly aware of Supreme Court case law counseling her to respect the decisions of state executives.[74] Judge Breaux also disliked the publicity; each time

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[72] *See* M. HARRIS & D. SPILLER, AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS (1977); Resnik & Shaw, *Prisoners of Their Sex: Women's Health in Jails and Prisons*, in 2 PRISONERS' RIGHTS SOURCEBOOK 319, 344–46 (I. Robbins ed. 1980) (describing a defendant's chronic failure to comply with a court order).

[73] Theoretically, the expenses defendants would incur in complying are irrelevant. *See* Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975). The Supreme Court, however, has shown increased sympathy for the fiscal constraints of government defendants. *See, e.g.*, City of Newport v. Fact Concert, Inc., 453 U.S. 247 (1981) (municipal defendant is immune from punitive damages liability under 42 U.S.C. § 1983 (Supp. IV 1980)). Defendants in the fictitious *Petite* case, like the real defendants they mimic, would have informed the trial court about their finances. *See, e.g.*, Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974).

[74] *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337 (1981); *cf.* Wolfish v. Bell, 441

she issued an order, reporters telephoned, trying to pry statements from her law clerks. Finally, she had 341 other cases on her docket, many of which promised to end — if only she could return to them.

Judge Breaux's problems with *Petite* exemplify those of most judges' postdecision work. Although a few judges tackle the problems of complex institutions with zeal, most find themselves enmeshed in difficulties that admit to few, if any, solutions. Progress is slow; the relationship among the parties is acrimonious; and even with oversight, only small steps toward compliance are made.[75]

3. Management as a Quest for Efficiency. — (a) Experimentation. — The emergence of managerial judging is not simply an artifact of discovery (which generates pretrial supervision) or public law litigation (which generates posttrial supervision). Judges have also become concerned with problems of their own — the perception that the courts are too slow, justice too expensive, and judges at least partly at fault.[76] Since the early 1900's, judges have attempted to respond to criticism of their efficiency by experimenting with increasingly more managerial techniques.

Turn-of-the-century critics, led by Dean Roscoe Pound,[77] were dismayed by court delay, technical and antiquated procedural rules, and inadequate substantive laws. In his 1906 speech to the American Bar Association, Dean Pound urged the bench and bar to take responsibility for weaknesses in the administration of justice.[78] The concerns of the legal establishment led to the creation of a society devoted exclusively to the study of court administration[79] and eventually to the formulation of uniform procedures for the federal courts.

U.S. 520, 540 (1979) ("effective management" of prison held to be valid goal of prison administrators).

[75] *See, e.g.*, Fletcher, *supra* note 59; Note, *"Mastering" Intervention in Prisons*, 88 YALE L.J. 1062 (1979).

[76] *See, e.g.*, Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976) (speech to the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference)) [hereinafter cited as Burger, *Agenda*]; Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982) (annual report to the ABA on the State of the Judiciary). *See generally* D. NELSON, JUDICIAL ADMINISTRATION AND THE ADMINISTRATION OF JUSTICE (1974) (discussing problems in court management).

[77] *See* Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); Wigmore, *Roscoe Pound's St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUDICATURE SOC'Y 176 (1937).

[78] Pound, *supra* note 77, at 417.

[79] *See* Winters, *The American Judicature Society and Its Work*, 19 CONN. B.J. 67 (1945).

In 1934, Congress expressly authorized the Supreme Court to write federal rules of civil procedure.[80] Congress also preserved the power of all courts to "prescribe rules for the conduct of their business."[81] When promulgating the new Federal Rules in 1938, the Court confirmed the power of district courts to make "local" rules,[82] and established "the just, speedy, and inexpensive determination of every action"[83] as the goal of all judicial rulemaking. Further, the Supreme Court by case law has confirmed trial judges' power over the pretrial phase.[84]

Since 1938, the case load of the federal courts has increased significantly.[85] Several factors explain this growth. First, the population, and with it the number of disputants willing to go to court, has grown. Second, Congress has created and the courts have articulated a multitude of new rights and legally cognizable wrongs.[86] Third, more lawyers are now available, and some of them offer legal services to litigants who previously could not obtain such services.[87] Finally, Congress has provided for the payment of attorneys' fees to various classes

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[80] Rules Enabling Act of 1934, ch. 651, §§ 1, 2, 48 Stat. 1064, 1064 (recodified as amended at 28 U.S.C. § 2072 (1976)). Federal courts have inherent power to make rules for the orderly conduct of their business. *See* Heckers v. Fowler, 69 U.S. (2 Wall.) 123 (1865).

[81] 28 U.S.C. § 2071 (1976 & Supp. IV 1980). Statutory authority for local rulemaking had been provided since 1793. *See* Act of Mar. 2, 1793, ch. 22, § 7, 1 Stat. 333, 335.

[82] FED. R. CIV. P. 83.

[83] FED. R. CIV. P. 1.

[84] *See* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976) (per curiam); Link v. Wabash R.R., 370 U.S. 626 (1962).

[85] *Compare* AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS pt. 2, at 111 (1934) (60,515 civil cases filed in federal courts in 1932) [hereinafter cited as ALI STUDY], *with* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR 2, 4 (168,789 civil cases filed in federal courts in 1980) [hereinafter cited as 1980 DIRECTOR'S REPORT]. *See generally* Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 120, 143 (1981) (providing tables of cases processed in federal district courts in 1933–1946 and 1973–1980).

Today's federal docket is not only more voluminous, but also more complex. *See* Chayes, *Public Law Litigation*, *supra* note 5, at 1284 (today, suits are more frequently multiparty, multi-issue); Clark, *supra*, at 129–48 (same). *But see* Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 MD. L. REV. 661, 663 (1980) (questioning whether real litigation rates have increased).

[86] For a general discussion of the panoply of individual rights against agencies that are recognized by the federal courts, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

[87] *See* Cramton, *Crisis in Legal Services for the Poor*, 20 VILL. L. REV. 521 (1981).

of victorious plaintiffs and has thereby created new incentives to litigate.[88]

In addition to increased case filings, motion practice under the discovery rules has substantially increased the burdens of the federal court system. From their promulgation in 1938 to the early 1960's, the discovery rules enjoyed a "honeymoon" of sorts with judges and litigators. Both groups gradually learned how to use the new rules, which were hailed as a great advance over prior practice.[89] But by the 1960's, commentators began to worry about the uncertain scope of the discovery rules[90] and reports of discovery "abuse."[91] Moreover, new technologies — photocopiers and computers — enabled litigants to accumulate, store, retrieve, and duplicate vast quantities of information.[92] This development, in turn, increased the complexity and volume of data that could be requested and produced — or withheld.

As work load pressures grew, reformers in the 1960's and 1970's shifted their attention from procedural to administrative problems. Social scientists and popular writers, investigating trial courts for the first time,[93] described growing backlogs of pending cases and "lazy" judges devoting little time to their

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[88] *See* E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981).

[89] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("[C]ivil trials in the federal courts no longer need be carried on in the dark.").

[90] *See, e.g.*, COLUMBIA UNIVERSITY SCHOOL OF LAW PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRETRIAL DISCOVERY (1965); *Developments in the Law — Discovery*, 74 HARV. L. REV. 940 (1961). For an example of earlier concern about the problems of discovery practice, see Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480 (1958).

[91] *See* Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting); Rosenberg & King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579.

The empirical bases for the conclusion that the discovery system has been "abused" are limited. The major studies of discovery are narrowly focused and rely upon either a small number of data, *see, e.g.*, J. EBERSOLE & B. BURKE, *supra* note 66, or reports of attorneys and judges, *see, e.g.*, Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 217. For criticism of the assumptions underlying the current movement to limit discovery, see Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CALIF. L. REV. 806, 812 (1981); E.D. Elliot, Statement Before the Standing Committee on Rules of Practice and Procedure (Oct. 16, 1981) (on file in Harvard Law School Library) (the complex nature of contemporary litigation, not discovery, is the source of many problems; discovery often enables attorneys to negotiate settlements).

[92] For a discussion of the growth of recordkeeping and its relationship to litigation, see Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW. 5 (1980).

[93] *See, e.g.*, Hurst, *The Functions of Courts in the United States, 1950–1980*, 15 LAW & SOC'Y REV. 401, 403–09 (1980–1981); Sarat, *Understanding Trial Courts: A Critique of Social Science Approaches*, 61 JUDICATURE 318 (1978).

work.[94] Commentators, alarmed by delays and the absence of judicial accountability, proclaimed a "crisis in the courts."[95]

Many saw systems management as the solution.[96] Federal judges met to design procedures for case allocation and to analyze methods of expediting case disposition.[97] Congress created the Federal Judicial Center,[98] which began to train newly appointed trial judges in techniques of docket management.[99] Congress also authorized the courts of appeals to hire

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[94] "Delay" became a byword. *See, e.g.*, D. NEUBAUER, M. LIPETZ, M. LUSKIN & J. RYAN, MANAGING THE PACE OF JUSTICE: AN EVALUATION OF LEAA'S COURT DELAY-REDUCTION PROGRAMS (1981) [hereinafter cited as D. NEUBAUER]; L. SIPES, MANAGING TO REDUCE DELAY (1980); *Court Delay: Diagnosing the Problem, Testing New Treatments*, 65 JUDICATURE 57 (1981); Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83 (1975).

[95] *See, e.g.*, James, *Crisis in the Courts*, 51 JUDICATURE 283 (1968). The proclamation of a crisis in the courts is not a recent development. *See* C. DICKENS, BLEAK HOUSE ch. 1 (London 1853); H. SCOTT, *supra* note 50, at 145 (colonial New York passed laws reducing the "[m]ultiplicity" of lawsuits, "[s]hortening" lawsuits, and "[r]egulating the [p]ractice of [l]aw").

[96] *See* Navarro & Taylor, *An Application of Systems Analysis to Aid in the Efficient Administration of Justice*, 51 JUDICATURE 47 (1967); Solomon, *Reflections on Wingspread II: Looking Back and Assessing the Future*, 6 JUST. SYS. J. 165 (1981).

[97] *See, e.g.*, Becker, *Efficient Uses of Judicial Resources*, 43 F.R.D. 421 (1967); *Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 37 (1960). Before the Federal Judicial Center was established, *see infra* note 98, three mechanisms facilitated communications among judges about case load problems. First, in 1922 Congress created the Conference of Senior Circuit Judges to make policy for the district and circuit courts. This group was the forerunner of today's Judicial Conference. Second, in 1939 Congress established the Administrative Office of the United States Courts to implement the decisions of the Conference of Senior Circuit Judges and to provide staff and information to judges. Finally, individual circuits held their own conferences. *See Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 4–5 (1981). More recently, Congress created the Judicial Councils. *See* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified in scattered sections of 28 U.S.C. (Supp. IV 1980)); *see also* 28 U.S.C. §§ 331–333 (1976 & Supp. IV 1980) (statutes providing for the Judicial Conference, Judicial Councils, and Judicial Conferences of Circuits); Remington, *Circuit Council Reform: A Boat Hook for Judges and Court Administrators*, 1981 B.Y.U. L. REV. 695 (discussing judicial administration problems that led to 1980 Act). *See generally* S. FLANDERS & J. MCDERMOTT, OPERATION OF THE FEDERAL JUDICIAL COUNCILS (1978) (recommending some changes in the operation of the Judicial Councils).

[98] Act of Dec. 20, 1967, Pub. L. No. 90–219, 81 Stat. 664 (codified at 28 U.S.C. §§ 620–629 (1976)); *see* Clark, *The Federal Judicial Center*, 53 JUDICATURE 99 (1969). The FJC grew from a staff of 11 in the late 1960's to a staff of about 100 in 1979. In 1979 alone, about 5000 people participated in FJC workshops. Tamm & Reardon, *Warren E. Burger and the Administration of Justice*, 1981 B.Y.U. L. REV. 447, 511.

[99] *E.g.*, PROCEEDINGS OF SEMINAR FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES (1976) [hereinafter cited as TRAINING SEMINAR]. District courts instituted their own seminars for new judges in 1961; the FJC began to conduct seminars in 1967. Flanders, *supra* note 50, at 148.

"circuit executives" to help in organizing appellate court calendars.[100] A few district courts experimented with hiring parajudicial personnel, such as pro se clerks and district court administrators.[101] To increase judges' accountability and improve case processing,[102] federal courts instituted an individual calendar system, under which district judges were assigned direct responsibility for particular cases.[103] New recordkeeping systems coupled with computer technology permitted court administrators to gather, analyze, and distribute vast amounts of information about cases.[104] Finally, some district courts promulgated local rules that obliged litigants to submit pretrial plans, to conform to judicial timetables for trial preparation, and to seek permission to engage in extensive discovery.[105]

(b) Normalization. — Over the past fifteen years, management advocates have persuaded many colleagues of the desirability of the new techniques.[106] Amendments to the Federal Rules now pending before the Supreme Court would mandate pretrial management in virtually all cases.[107] The proposed

[100] *See* 28 U.S.C. § 332(e)-(f) (1976). Chief Justice Burger described the origin of the circuit executive program: "I took my oath [of office] on the 23rd of June, 1969, and on the morning of the 24th I met with experts in public administration, and we started the program to try to provide court executives for the District and [Circuit] Courts . . . ." Burger, *Address of Chief Justice Warren E. Burger Before the Fifth Circuit Judicial Conference*, 12 J. PUB. L. 271 (1972) (remarks of Apr. 27, 1972). The Institute for Court Management began to train court administrators in 1970. Tamm & Reardon, *supra* note 98, at 456–58. *See generally* J. MCDERMOTT & S. FLANDERS, THE IMPACT OF THE CIRCUIT EXECUTIVE ACT (1979) (reviewing the courts' experiences under the Circuit Executive Act).

[101] *See* M. SOLOMON, CASEFLOW MANAGEMENT IN THE TRIAL COURT 8–10 (1973); Note, *The Assignment of Cases to Federal District Court Judges*, 27 STAN. L. REV. 475 (1975).

[102] *See* P. DUBOIS, ADMINISTRATIVE STRUCTURES IN LARGE DISTRICT COURTS (1981); Baar, *ICM and Court Administration: The First Decade*, 6 JUST. SYS. J. 176 (1981).

[103] *See* M. SOLOMON, *supra* note 101, at 22–26. *But see* Cunningham, *Some Organizational Aspects of Calendar Management*, 4 JUST. SYS. J. 233 (1978) (consistent calendar system more important to successful case management than is any particular type of system).

[104] *See* Nihan & Wheeler, *Using Technology to Improve the Administration of Justice in the Federal Courts*, 1981 B.Y.U. L. REV. 659 (describing installation and growth of Courtran I data collection system in many federal courts).

[105] As of 1979, 10 federal district courts required pretrial conferences early in the litigation process. *See* Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 MINN. L. REV. 253, 265–66 (1979).

[106] *See* Aldisert, *supra* note 18, at 248–52; Flanders, *supra* note 50, at 153–55; Rubin, *supra* note 14, at 138.

[107] FED. R. CIV. P. 16 (Discussion Draft Sept. 1982). Draft rule 16(b) would require the issuance of scheduling orders within 120 days of the date of the complaint "except in categories exempted by the district court as inappropriate." According to the Advisory Committee, "logical candidates" for exemption include "social security

revisions to rule 16 provide that a judge:

> shall, after consulting with the attorneys for the parties and any unrepresented parties, by scheduling conference, telephone, mail, or suitable means, enter a scheduling order that limits the time (1) to join other parties and to amend the pleadings; (2) to serve and hear motions; and (3) to complete discovery.[108]

Under this new regime of judicial management, discovery disputes and efforts to promote settlement would not be the only occasions upon which Judge Kinser would become acquainted with the parties' attorneys and the details of lawsuits. Rather, by virtue of rule 16, he would be obliged to issue pretrial orders within 120 days of filing of a complaint.[109] To do so with any intelligence, he would need to learn a good deal about the lawsuits to which he was assigned.[110]

"Replaying" *Paulson v. Danforth, Ltd.* as if proposed rule 16 were in effect illustrates that the grant of pretrial power to federal judges would be expansive. In the hypothetical, Ms.

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disability matters, *habeas corpus* petitions, forfeitures, and reviews of certain administrative actions." FED. R. CIV. P. 16(b) advisory committee note (Discussion Draft Sept. 1982).

Other proposed amendments to the Federal Rules would also expand judges' powers. Draft rule 26(b) would permit judges to limit the frequency and extent of discovery if the information sought is "unreasonably cumulative or duplicative" or more readily available from another source, if the party seeking discovery has already had "ample opportunity by discovery . . . to obtain the information," or if discovery is "unduly burdensome or expensive" in light of the particular facts of the litigation. FED. R. CIV. P. 26(b) (Discussion Draft Sept. 1982). Moreover, draft rule 26(g) would require attorneys to certify that their discovery requests are reasonable. *See* FED. R. CIV. P. 26(g) (Discussion Draft Sept. 1982). Judges could punish attorneys who invalidly certified discovery requests by making the attorneys pay opposing parties' reasonable expenses and attorneys' fees. *Id.* These new rules would supplement the existing rules empowering judges to police discovery problems. Such existing rules include FED. R. CIV. P. 26(f) (authorizing judges to hold discovery conferences) and FED. R. CIV. P. 37(g) (permitting courts to sanction attorneys who do not "participate in good faith in the framing of a discovery plan").

[108] FED. R. CIV. P. 16 (Discussion Draft Sept. 1982).

[109] *See supra* note 107.

[110] To accomplish this task, judges would have to read the parties' papers and contact the lawyers to learn enough about each case to decide the pace at which to proceed. My guess is that amended rule 16 would result in conferences in most cases despite the Advisory Committee's disclaimer, *see* Letter from Walter R. Mansfield, Chairman, Advisory Committee on Civil Rules, to Judge Edward T. Gignoux, Chairman, Standing Committee on Rules of Practice and Procedure (Mar. 9, 1982) [hereinafter cited as Mansfield Letter], *reprinted in* Judicial Conference Excerpt, *supra* note 19, at 1, 3, that the rule does not require conferences. *Cf.* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264, 281 (1979) (suggesting that judges hold "regular status conferences where the parties are required to explain and defend their overall approach to the litigation").

Paulson's attorney, Mr. Adams, filed the complaint on January 4, 1982. But suppose that, instead of promptly replying, defendant asked for an additional twenty days to respond. Plaintiff's counsel readily agreed, and the parties filed a stipulation to that effect. However, Judge Kinser refused to permit any extension beyond the time permitted by the Federal Rules — twenty days after receipt of service.[111]

On May 14, Judge Kinser held a rule 16 pretrial conference. Although he had not yet decided Danforth's pending motion to dismiss for lack of personal jurisdiction, rule 16 required him to issue a pretrial order "in no event more than 120 days after filing of the complaint."[112] Ms. Alford argued that it would be a substantial waste of time and money for her to present discovery plans, because (she believed) the case should be dismissed on the jurisdictional ground. Mr. Adams was reluctant to discuss the case at all; he explained to the judge that, because no answer had been filed, he did not know what defenses would be raised, and he certainly did not want to suggest any.

Judge Kinser agreed that the conference was premature. He decided to postpone issuing a pretrial order (although he was not sure that rule 16 permitted the postponement[113]). But he told the lawyers that the case should be resolved "quickly." "Looking down the road," the judge would neither tolerate further requests for delay nor let discovery "get out of hand." This case, like most, should be settled. He instructed the parties to return to his chambers on June 30 prepared to "talk settlement" with "real numbers."

On June 10, Judge Kinser denied Danforth's motion to dismiss. On June 18, Danforth filed its answer denying liability. A week later the parties once again met with the judge in chambers. After the attorneys reported that they had no settlement proposals to offer, the judge responded by announcing his schedule for the lawsuit. He ordered each side to inform him, by August 16, of the names of their prospective

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[111] FED. R. CIV. P. 6, 12(a).

[112] FED. R. CIV. P. 16(b)(5) (Discussion Draft Sept. 1982).

[113] Draft rule 16(b)(5) does not specifically permit postponement of a pretrial order: "The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge . . . upon a showing of good cause." *Id.*

The Advisory Committee's notes do not address the issue, but the Committee's view appears to be that, although a district court may exempt a case or category of cases from the scheduling order requirement, a judge must issue an order in every nonexempted case. *Id.* advisory committee note at 15.

deponents. He directed the parties to exchange their first interrogatories by July 15, to begin taking depositions by August 25, and to finish discovery by November 30. Both sides objected, but the judge issued a pretrial order with this timetable.

Subsequently, the parties requested and obtained changes in the original scheduling order. Experts for both sides were unavailable for most of the summer of 1982, and a shipment of documents disappeared in the mail and required several months to replace. At each of the three pretrial conferences that Judge Kinser has conducted to date, he has raised the issue of settlement, but with little success. As a result of his efforts, however, the parties have begun to discuss the same "ball park" settlement figures.

Although this description of *Paulson* was presented as though proposed rule 16 were in effect, the scenario is not futuristic: under current rule 16, many federal judges manage their cases much as Judge Kinser did in the revised hypothetical.[114] As they gain more experience with such new procedures, judges are acting more forcefully. Indeed, not all judges are as circumspect as Judge Kinser. Some warn the parties that the judge would take a dim, and possibly hostile, view of either side's insistence on going to trial.[115]

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[114] Judge Kinser's approach was based on suggestions offered by several judges. *See* Aldisert, *supra* note 18; Peckham, *supra* note 14; Pollack, *Pretrial Conferences*, 50 F.R.D. 451 (1970); Rubin, *supra* note 14. Judge Pollack illustrated the boldness with which some judges manage cases when he offered the following advice on pretrial conferences to his colleagues:

> [The trial judge] conducts an informal inquiry into the nature of the case and the defense. A thumbnail sketch will suffice to orient the Judge.
>
> In many cases he will be quickly told that one or another counsel has served interrogatories. Vacate them forthwith, without prejudice. Let them be saved for a later time if they really are needed. Interrogatories have become a prime offender in abusive, burdensome, unjustified, limitless, wasteful discovery.

Pollack, *Discovery — Its Abuse and Correction*, 80 F.R.D. 219, 224 (1978).

[115] Despite occasional warnings from their colleagues, *see* Will, Merhige & Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 205 (1976) ("If you coerce a settlement . . . that is a terrible mistake."), some judges abuse their power. Because most pretrial conferences are off the record, little documentation is available. Still, attorneys pass the word that certain judges are troublesome, and a few appellate decisions supplement the anecdotes. For example, in Webbe v. McGhie Land Title Co., 549 F.2d 1358 (10th Cir. 1977), which involved a title insurance dispute, the district judge had granted summary judgment and awarded $400,000 to plaintiff, dismissed defendant insurer's third-party complaint, and entered judgment quieting title to real property in the third-party defendant. The judge ruled orally, after a brief argument, and did not supplement his findings with a written opinion. The court of appeals, reversing and remanding to a different judge for trial, appended the

C. Aspects of Managerial Judging

The models demonstrate that federal judges today devote substantial amounts of time to case management. Only when informal discussions fail do judges take their places on the bench at formal trials and hearings. To illuminate this informal world, I have isolated several aspects of judge-litigant contact in case management.[116]

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brief transcript from the hearing on third-party defendant's motion for summary judgment. The following passages are illustrative:

THE COURT:	[I]f I have got to go through all those depositions, you have got a rather poor start.
. . . .	
THE COURT:	Let's get this thing out of the way.
. . . .	
THE COURT:	Plaintiff's motion for summary judgment is granted.
[PLAINTIFF'S ATTORNEY]:	Thank you, your Honor. Your Honor —
THE COURT:	That is the ruling.
[DEFENDANT'S ATTORNEY]:	Your Honor, there are several issues in the case.
THE COURT:	That is the ruling.
[PLAINTIFF'S ATTORNEY]:	The forgery —
[DEFENDANT'S ATTORNEY]:	Is it granted purely on the item of forgery, your Honor? There are several issues in the case.
THE COURT:	Young man, I have ruled.

Id. at 1362–63.

Because the trial judge in *Webbe* had often been criticized by the appellate court, *see, e.g.*, Eckles v. Sharman, 548 F.2d 905, 911 (10th Cir. 1977), the litigants were willing to seek his recusal and challenge his decisions. The behavior of other, less notorious judges is more likely to go unchallenged. Nevertheless, some circuits have had occasion to review and reverse district court rulings made in the name of efficiency. *See, e.g.*, Beary v. City of Rye, 601 F.2d 62 (2d Cir. 1979) (trial court dismissed suit because plaintiffs had miscalculated the number of witnesses for the first day; reversed and remanded to different judge); McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (trial court dismissed suit for failure to file amended complaint on time; reversed and remanded because magistrate's insistence on deadlines was held to have unduly burdened litigants); Peterson v. Term Taxi Inc., 429 F.2d 888 (2d Cir. 1970) (per curiam) (trial court dismissed action upon plaintiff's failure to appear for trial at appointed time; reversed because delinquency resulted only from plaintiff's poor judgment in leaving town for the weekend without consulting his attorney). *But see, e.g.*, Beaufort Concrete Co. v. Atlantic States Constr. Co., 352 F.2d 460 (5th Cir. 1965) (district court did not abuse its discretion in refusing to consider plaintiff's affidavits, which were submitted late and without good excuse on day of summary judgment hearing), *cert. denied*, 384 U.S. 1004 (1966). Justice Black, however, would have granted certiorari. *See* 384 U.S. at 1004 (Black, J., dissenting) ("This is another in a growing number of cases in which the Federal Rules of Civil Procedure have been used to prevent the fair and just determination of a lawsuit on the merits.").

[116] My views about aspects of case management are based on my experience as a litigator, on descriptions by judges and others of how cases are managed, *see, e.g.*, sources cited *supra* note 14, and on studies of litigation, *see, e.g.*, M. HARRIS & D. SPILLER, *supra* note 72; Diver, *supra* note 10; Resnik & Shaw, *supra* note 72; Note,

1. Initiation. — I believe, without the benefit of much empirical work,[117] that judges initiate judicial management during the pretrial phase. After trial, judicial intervention generally comes at the parties' request.

Why do judges initiate pretrial management? First, many are dissatisfied with the adversarial process and want to reduce attorneys' control over it.[118] Judges who observe specific instances of attorney misbehavior and dilatory tactics may feel that the remedy is to supervise attorney conduct more closely.[119] Second, judges may believe that their intervention speeds settlement and improves the litigation process.[120] Third, as judicial management becomes a method of control, it creates incentives for its perpetuation. With the individual calendar system, the publication of each judge's case load, and comparative data on judges' performance,[121] judges can learn which of their colleagues dispose of the most cases. When judges who dispose of many cases lecture other judges on how to reduce backlogs, peer pressure tends to generate more vigorous management.[122]

In the posttrial context, different incentives are at work. By making decisions on the merits, judges "dispose of" cases.

Complex Enforcement, *supra* note 9; Note, *Implementation Problems*, *supra* note 9; Note, *The* Wyatt *Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

[117] The Civil Litigation Research Project has collected substantial data on the costs and pace of lawsuits; analysis of the information is only beginning to be reported. *See Dispute Processing and Civil Litigation*, *supra* note 17; Grossman, Kritzer, Bumiller & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86 (1981) [hereinafter cited as Grossman, *Measuring the Pace*]; Grossman, Kritzer, Bumiller, Sarat, McDougal & Miller, *Dimensions of Institutional Participation: Who Uses the Courts, and How?*, 44 J. POL. 86 (1982) [hereinafter cited as Grossman, *Who Uses the Courts?*]; Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (1982). In one of these studies, however, the data were drawn exclusively from 1649 court records that the researchers themselves concluded could be incomplete. *See* Grossman, *Measuring the Pace*, *supra*, at 94–95.

Other reported research is generally restricted to examinations of one or a few aspects of judge-litigant contact. *See, e.g.*, R. RODES, K. RIPPLE & C. MOONEY, SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE (1981) (analyzing use of discovery sanctions but relying solely on reported opinions for nonrandom — and probably unrepresentative — data base).

[118] *See* M. FRANKEL, PARTISAN JUSTICE ch. 6 (1980).

[119] *See, e.g.*, Peckham, *supra* note 14, at 782; Renfrew, *supra* note 110, at 271, 275.

[120] *See* TRAINING SEMINAR, *supra* note 99, at 135 (remarks of Rubin, J.) (judges' discussions of settlement numbers may give "lawyers some illusion of certainty").

[121] *See, e.g.*, P. CONNOLLY & P. LOMBARD, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: MOTIONS (1980).

[122] *See* S. FLANDERS, *supra* note 14, at 13 (individual calendar system fosters "a spirit of competition").

Given the large time investment required for postdecision case management,[123] judges have every reason to avoid returning to "finished" cases. Accordingly, the instigators of posttrial management are usually the "winning" plaintiffs' attorneys, who seek help in implementing decrees. Occasionally, "losing" defense attorneys return hoping to have adverse court orders modified.[124]

Once brought into the enforcement process, however, the judge often uses informal management techniques in an effort to save time and avoid the pressures of public controversy. In *Petite*, Judge Breaux first ordered the parties to negotiate, then joined the discussions herself after the parties' private conferences proved unsuccessful. Further, she instituted reporting requirements as a technique for enforcing compliance — in a sense, initiating contact with the parties.[125]

2. Likelihood, Frequency, and Duration. — Although it is difficult to tally the overall resources devoted to judicial management tasks, some generalizations about pretrial and posttrial management are possible. With respect to the likelihood of management's occurrence, nearly all civil cases would receive pretrial judicial attention under proposed rule 16, and many courts already engage in much of the supervision contemplated by the proposed rule.

In contrast, the occasions for posttrial management are few. Eighty-five to ninety percent of all federal civil suits end by settlement.[126] Of those not settled, some uncalculated number are dismissed because of legal defects.[127] In most of the remaining cases, the parties demand monetary rather than

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[123] *See, e.g.*, M. HARRIS & D. SPILLER, *supra* note 72.

[124] *See, e.g.*, Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981) (en banc); Jordan v. Wolke, 615 F.2d 749 (7th Cir. 1980).

[125] Relying on their recent experience with implementation problems, some judges have required parties to report to them on the progress of cases. *See, e.g.*, Atiyeh v. Capps, 449 U.S. 1312 (1981) (Rehnquist, Circuit Justice) (staying order that required defendants tc report monthly on reduction of prison population).

[126] Of the 160,481 federal civil cases terminated in the year ending June 30, 1980, only 13,191, or 8.2%, were terminated by trial. 1980 DIRECTOR'S REPORT, *supra* note 85, at 3, 109. Some settled cases, however, return to court when the agreement is challenged. *See, e.g.*, Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), *modified*, 343 F. Supp. 279 (E.D. Pa. 1972) (dispute over interpretation of settlement). Nonetheless, the number of such cases is apparently small, presumably because the relationship that enables settlement normally permits the parties to resolve subsequent disputes.

[127] Failure to state a claim under FED. R. CIV. P. 12(b)(6) is an example of such a defect. The Administrative Office tabulates terminations by trial and other means but does not publish data on the reasons for pretrial dismissals.

equitable relief.[128] Postdecision collection problems sometimes arise when damages are awarded. But judges can do little if the debtor is judgment proof, and in any event the judicial time required to order execution of a judgment is minimal. Thus, only a tiny fraction of all civil cases require significant postdecision judicial activity;[129] generally such cases are like *Petite v. Governor*, cases in which equitable orders involving complex institutions have been made.

Unfortunately, little empirical work charts the frequency of judge-litigant contact either before or after decision.[130] Without data, we can only guess how much time judges actually devote to management. But the very nature of the tasks involved suggests that both pretrial and posttrial intervention require large investments of judicial time and energy.[131]

The duration of supervision, both before and after trial, may vary from a single meeting to a decade or more. Yet it is significant that pretrial supervision has a natural stopping point. In *Paulson*, Judge Kinser will relinquish his role as manager when the case is decided, either by settlement or by trial. In fact, the whole point of pretrial management is to end the dispute as rapidly as possible.[132] After decision, on the other hand, judicial management has no clear-cut conclusion. In *Petite*, Judge Breaux may retain her role as manager indefinitely, and the questions whether and when the district court should terminate its jurisdiction may themselves be litigated.[133]

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[128] *Cf.* O. FISS, THE CIVIL RIGHTS INJUNCTION 1 (1978) (injunction is traditionally an "extraordinary" remedy, available only when other relief is unavailable or inadequate).

[129] The small number of cases returning to judges after decision may require a disproportionately large investment of judges' time. *See* sources cited *supra* note 75.

[130] Some recent studies have been undertaken. *See, e.g.*, M. REBELL & A. BLOCK, EDUCATIONAL POLICY MAKING AND THE COURTS (1982); Kritzer, *supra* note 117.

[131] I believe that frequency of contact will depend on several variables, including the following: (1) the number of issues, parties, and attorneys in the case; (2) the relationships between opposing counsel and among cocounsel; (3) the attorneys' assessment of the efficacy of requesting judicial assistance; (4) the attorneys' proximity to the courthouse; and (5) the local district court's custom supporting or discouraging frequent contact with the judge before or after decision.

Once cases are studied and the variables are analyzed, researchers may be able to predict which cases will consume substantial amounts of judges' time. Researchers may also be able to verify the perception that single-claim, two-party cases pose fewer discovery problems. *See* Brazil, *supra* note 91, at 223–25. *But see* ABA REPORT ON DISCOVERY ABUSE, *supra* note 66, at 138 (concluding that it is "not feasible" to identify in advance which cases will be prone to discovery abuse).

[132] *See, e.g.*, Aldisert, *supra* note 18, at 247; Flanders, *supra* note 50, at 149.

[133] *Compare, e.g.*, Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239 (9th Cir. 1979) (district court required to halt supervision because defendants were in

3. Formality of Proceedings. — Managerial meetings both before and after decision are informal and contrast sharply with the highly stylized structure of courtroom interaction. When judges preside at hearings, they evoke the image of Justice: they wear robes and sit stony-faced behind elevated benches; they receive information but rarely impart it.[134] Pretrial and posttrial conferences, on the other hand, are informal events.[135] The parties talk with, rather than at, each other. The conferences often take place in chambers. The participants sit around tables, and the judge wears business dress. But for the title of one of the participants — "judge" — these conferences could be confused with ordinary business meetings.

In public law cases, however, informal posttrial negotiations may fail. Posttrial disputes often lead to formal compliance and contempt hearings. Lawyers' in-chambers arguments are replaced by witnesses' in-court testimony; judicial proposals for compromise give way to formal orders; and the entire proceeding is placed in the public domain and often within reach of the appellate courts. In contrast, most pretrial conferences are not followed by formal adjudication, and judicial acts in the pretrial phase are rarely exposed to public scrutiny.[136]

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substantial compliance with decree and promised continued compliance), *with*, *e.g.*, Booker v. Special School Dist. No. 1, 451 F. Supp. 659 (D. Minn.) (district court need not terminate jurisdiction, because desegregation plans had not been fully implemented), *aff'd*, 585 F.2d 347 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979).

[134] Judges must, however, provide reasons for their factfinding. *See* FED. R. CIV. P. 52(a); *cf.* Fuller, *supra* note 13, at 366 (adjudication "assumes a burden of rationality not borne by any other form of social ordering").

[135] One judge thought that his multiparty, multidistrict case would best be managed in a friendly atmosphere:

> I asked [the lawyers] what their view was of coming in to see whether the court could be of any help. . . . I also suggested that it might be a good idea if we could sort of get together socially before each of these conferences.
>
> Well, I was really surprised at the response I got. . . .
>
> . . . .
>
> [My wife and I gave three parties. The first was] on Sunday and we had about 35 people. The weather was delightful. And these guys were calling each other by their first name.

Will, Merhige & Rubin, *supra* note 115, at 213 (remarks of Merhige, J.).

[136] Without better data, we cannot be certain that a larger percentage of cases subjected to informal posttrial management return for formal adjudication than do cases subjected to pretrial supervision. We do know that fewer than 10% of all cases conclude with a trial; the remainder leave court dockets for a variety of reasons. But we also need information about: (1) the percentage of all cases managed informally; (2) the percentage of cases that, although not tried, end because of formal adjudication; and (3) the percentage of cases that, when returning for postdecision management, move from the informal arena to adjudication. I speculate that proportionately more cases managed posttrial end up in formal adjudication than do those managed pretrial.

4. Scope of Information. — Informal judge-litigant contact provides judges with information beyond that traditionally within their ken. Conference topics are more wide ranging and the judges' concerns are broader than either are when proceedings are conducted in court. The supposedly rigid structure of evidentiary rules, designed to insulate decisionmakers from extraneous and impermissible information,[137] is irrelevant in case management. Managerial judges are not silent auditors of retrospective events retold by first-person storytellers. Instead, judges remove their blindfolds and become part of the sagas themselves.

Consider again some details of the hypothetical *Paulson* case. Assume that Judge Kinser imposed a time limit for naming expert witnesses. Danforth objected: the company needed more time and information to assess the availability and desirability of various experts. Judge Kinser agreed to an extension. At a subsequent conference, Danforth asked for still more time on the ground its first and second choices for experts were "unavailable" to testify on Danforth's behalf "because of prior commitments." Relying on his past experiences as a judge and a litigator, Judge Kinser translated "unavailable" into "unwilling." He gave Danforth another twenty days to find an expert but concluded (to himself) that the company's defense was weak; he therefore redoubled his efforts to pressure Danforth to settle. By being "in" at the planning stages, Judge Kinser made a premature and perhaps ill-founded[138] evaluation of the strength of Danforth's defense.

I believe that cases that have gone through trial, the ordering of a complex decree, enforcement difficulties, and subsequent return to court are unlikely candidates for posttrial settlement. The parties' intransigence forces judges to impose formal decisions.

[137] Rules of evidence are designed to screen extraneous information from decisionmakers, but the rules are often applied less rigorously at bench than at jury trials. *See* McCORMICK ON EVIDENCE, *supra* note 34, at 137. Moreover, in both judge and jury trials, judges necessarily learn some extraneous information before they rule on the admissibility of evidence.

There are at least two differences, however, between judges' receiving information at trial and their receiving information during the pretrial process. First, because most trials are recorded, a reviewing court can determine whether a judge properly admitted or rejected information at trial. Appellate courts infrequently reverse on the basis of evidentiary rulings, but this fact may simply demonstrate the degree to which the public record compels trial judges to ensure that their decisions are supported. Second, ex parte communication is banned at trials; at pretrials, it is often encouraged as a technique for enabling attorneys to "tell the judge what they really have in mind." Aldisert, *supra* note 18, at 248. But some of the impressions that judges form at pretrials may be based on the lawyers' misleading or inaccurate statements. Neither empirical studies nor intuition supports the notion that judges are particularly adept at divining the accuracy of information that has not been subjected to cross-examination.

[138] *See* Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 43 (H.

Similarly, episodes in the *Petite* case demonstrate the effect of the large amounts of information available to a managerial judge. In *Petite,* Judge Breaux learned facts and opinions — information she might not have received in a more formal confrontation — that she could use to encourage settlement and bypass the adjudicatory process. At a meeting to discuss Hadleyville's broken toilets and clogged showers, defendants' attorney promised that the problems would be solved within the week. In a conference two weeks later, plaintiffs' attorney reported the continuing failures of the sanitation systems. The defense attorney was embarrassed and indicated that the governor was having "staff problems." Judge Breaux ordered that the warden attend the next conference.

At the following meeting, Judge Breaux saw what she believed to be animosity between the state's lawyer and the warden. After the meeting, she spoke in private with the attorney. She told him that she guessed the warden was "causing problems." Judge Breaux suggested that the governor might not wish to be held responsible for the health problems resulting from the lack of sanitation. She hoped the governor would see the choices before him: make the warden obey the court, replace the warden, or take the blame for the warden's misconduct.

In sum, in both the pretrial and posttrial contexts, managerial judges can acquire, test, and use knowledge in ways that judges adjudicating under the traditional model cannot.

5. Reach and Visibility. — Pretrial supervision affects fewer people than does posttrial management, and, as a result, tends to be less visible. The *Paulson* pretrial orders were felt primarily by the lawyers, who had to do the work, and by the litigants, who had to pay. Although pretrial orders occasionally affect third parties — such as Danforth's employees (who had to compile requested data) and Danforth's expert and lay witnesses (who had to appear for depositions) — such effects are generally transitory.[139] Accordingly, pretrial judge-litigant

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Berman 2d ed. 1971) (nonadversarial systems are objectionable because the decisionmaker may "reach a conclusion at an early stage and . . . adhere to that conclusion in the face of conflicting considerations later developed").

[139] Of course, in cases like *Paulson* that implicate the standards and practices of an entire industry, the reach of pretrial management is broader. Other plaintiffs, their attorneys, and similarly situated defendants and their insurers may also be affected. If trial preparation is unduly limited, participants in the larger battle may believe that their interests have been jeopardized and may want to join the battle. For example, in the case of *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980), Hitachi, IBM, Sanyo, and Sears, Roebuck filed briefs amici curiae on the issue whether the litigation was too complex to be tried to a jury. Some of the companies commissioned experts to analyze the history of the jury trial right,

contacts are relatively private events. Many judges conduct "pretrials" in their chambers; typically, neither court reporters nor the public attends.[140]

Posttrial management frequently affects many nonparties.[141] For example, Judge Breaux's order to increase the correctional staff at Hadleyville by twelve officers altered the seniority rights of the prison's unionized personnel and reduced the staff resources available to other state prisons; her order to transfer prisoners caused ripples in the federal prison system, which accepted some of the overflow.[142] Such orders, of course, raise important political and constitutional issues. Judicially crafted remedial schemes may require large expenditures of public funds and involve judges in the detailed administration of institutions usually run by other branches of government.

Given the import of such events, posttrial judicial activity is likely to occur with stage lights. After judgment, the call for judicial assistance may herald a breakdown in the parties' negotiations — one side's "going public" with allegations of the other's failure to obey a court order. Reform cases like *Petite* are especially likely to attract public attention. Contempt motions against government officials are newsworthy, and the public, concerned for its institutions and its pocket-

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and several experts published their research in law reviews. *See, e.g.*, Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980).

[140] *See, e.g.*, Schiller & Wall, *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 40 (1981) (settlement conferences offer the advantage of confidentiality); Will, Merhige & Rubin, *supra* note 115 (same). Some conferences are not even entered on court docket sheets. *See* S. FLANDERS, *supra* note 14, at 34. *But cf.* Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982) (denying mandamus that would have required trial judge to permit television cameras at pretrial negotiations because reporters and public were already allowed to attend and take notes); National Farmers' Org. v. Oliver, 530 F.2d 815 (8th Cir. 1976) (granting mandamus requiring judge to hold conferences on the record when parties so requested).

[141] Professor Fuller suggested that the involvement of many people and interests makes a dispute "polycentric" and hence less amenable to traditional forms of adjudication. Fuller, *supra* note 13, at 394–404. Expanding on Fuller's view, Professor Fletcher believes that courts cannot legitimately resolve nonlegal, polycentric disputes unless the political bodies that would ordinarily do so "are in such serious and chronic default that there is realistically no other choice." *See* Fletcher, *supra* note 59, at 696–97.

[142] *See, e.g.*, *Haitian Count Tops 500; Bureau Takes Alabama Prisoners*, Monday Morning Highlights (Federal Prison System, U.S. Dep't of Justice), Sept. 14, 1981, at 1 (discussing prison population reduction order issued in Newman v. Alabama, 466 F. Supp. 628 (M.D. Ala. 1979)).

book, takes note when judges' orders affect schools or prisons.[143]

6. Discretion. — The two hypotheticals demonstrate the broad discretion of the trial judge who assumes a managerial role. Assume, for example, that Judge Kinser imposed a timetable for pretrial preparation and denied Danforth's motion for protection from Ms. Paulson's discovery requests. Danforth's attorney, Ms. Alford, was concerned: she thought that the time Judge Kinser permitted was egregiously short and that he had erred in denying the protective order. Ms. Alford asked Judge Kinser to "certify" an appeal on the ground that the discovery questions were so important that "immediate" review would "materially advance the ultimate termination of the litigation."[144] The judge refused because he thought the discovery rulings raised no novel points of law. Ms. Alford could have requested a writ of mandamus[145] commanding Judge Kinser to issue a protective order and to liberalize his pretrial schedule. But appellate courts rarely issue such writs to district courts.[146] Moreover, Ms. Alford would have risked Judge Kinser's displeasure at being named the respondent in a mandamus petition.[147] Danforth's remaining path to appeal — challenging a final judgment — would open only if Danforth lost at trial or by summary judgment. Absent a final decision, Judge Kinser would enjoy unreviewable discretion.

Litigants dissatisfied with Judge Breaux's postdecision rulings in *Petite* had far greater opportunities to secure appellate review. The underlying decision was tested on appeal, and the affirmance provided some guidance to Judge Breaux on

[143] *See, e.g.*, Fiss, *supra* note 6, at 52–58; Fletcher, *supra* note 59, at 650–52.

[144] 28 U.S.C. § 1292(b) (1976); *see, e.g.*, Pittman v. E.I. duPont de Nemours & Co., 552 F.2d 149 (5th Cir. 1977) (district court struck set of 90 interrogatories on ground of burdensomeness and certified the order for appeal). The federal policy against "piecemeal" appeals, however, makes it unlikely that interlocutory decisions will be certified or reviewed by appellate courts. *See* R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 52–54 (1981).

[145] *See* 28 U.S.C. § 1651 (1976). Section 1651(a), the All Writs Act, provides federal courts with authority to issue "all writs necessary or appropriate in aid of their respective jurisdictions." *Id.* § 1651(a). This section is the basis for appellate courts' authority to issue writs of mandamus to district courts.

[146] Mandamus is a "drastic" and "extraordinary" remedy, available only when no alternative relief exists. *See, e.g.*, Kerr v. United States Dist. Court, 426 U.S. 394, 402–03 (1976) (denying request for mandamus to vacate discovery orders); *see also* Will v. Calvert Fire Ins. Co., 437 U.S. 655, 665 (1978) (denying mandamus and recognizing trial judge's "wide latitude" over calendar).

[147] That mandamus requests are infrequent may be attributable to: (1) attorneys' fear of jeopardizing their reputations and relationships with the local bench by advertising their disagreements with a particular judge, (2) the relatively minor effect of the sanctions imposed, and (3) the broad discretion permitted trial judges by courts imposing such sanctions. Peckham, *supra* note 14, at 790.

the proper scope of relief.[148] Further, many of Judge Breaux's postdecision orders gave injunctive relief and thus were appealable as a matter of right.[149] Finally, even when Judge Breaux issued posttrial orders that were not appealable, public attention, described above, and institutional constraints, discussed below, confined her exercise of discretion.

7. Institutional Constraints. — An array of institutional factors are far more likely to discipline judges' actions during posttrial management than during pretrial supervision. First, a large percentage of posttrial management occurs in public law cases, in which defendants are either federal or state officials. In these cases, federal judges are constrained by the obligation to respect the autonomy of coordinate branches of government and state executives.

Second, federal judges appreciate the limits of their posttrial enforcement powers. Decrees are enforced principally in a negative fashion — by threatening to hold the disobedient in contempt and to levy fines or impose jail terms.[150] Judges understand that, however detailed their decrees, evasion is relatively easy; close monitoring for compliance is expensive and draining. To implement the terms of their decrees, judges need the cooperation not only of administrators and employees in defendant institutions, but also of state executives and the community.[151]

Finally, the fact of decision must be considered. One might expect that, with the issuance of a decree, a judge would be emotionally and intellectually committed to the decree and would insist unrelentingly upon its enforcement.[152] But overreaching and expressions of hostility toward noncomplying defendants are relatively rare.[153] Earlier findings of defendants'

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[148] *Cf.* Ruiz v. Estelle, 666 F.2d 854 (5th Cir. 1982) (detailed appellate review of posttrial orders in suit challenging conditions at Texas prison). For a general discussion of judicial discretion in institutional litigation, see Fletcher, *supra* note 59.

[149] *See* 28 U.S.C. §§ 1291, 1292 (1976).

[150] Disobeying court orders may result in either civil or criminal contempt. *See* 18 U.S.C. § 401 (1976); FED. R. CRIM. P. 42(b). Although defendants in public law cases are often found guilty of noncompliance, judges rarely hold them in contempt. *See* Diver, *supra* note 10, at 100.

[151] Judicial power has long been dependent on voluntary compliance. *Cf.* Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760–1775*, 18 AM. J. LEGAL HIST. 1, 23, 26 (1974) (because officials were unable to exercise power without the consent of the community, support for the law was obtained by giving community juries virtually unlimited power to find the law as well as the facts).

[152] Professor Fiss makes this assumption. *See* O. FISS, *supra* note 128, at 30–32.

[153] In one well-known example, Judge Lord of the District of Minnesota believed that defendants in an antipollution action had deliberately misled him. He said in open court: "I have dispensed with the usual adversary proceeding here, because I

culpability do not translate into unquestioned acceptance of plaintiffs' subsequent requests for assistance.

There are many explanations for this reticence. The issues in public law cases are complex and often depressing. Third parties may impede implementation efforts, and fiscal constraints may limit defendants' flexibility to respond promptly to court decrees. Thus, even if personally sympathetic to plaintiffs' claims, and even if angered by defendants' disobedience, judges find it politic and appropriate to exercise restraint.

In contrast, few institutional contraints inhibit judges during the pretrial phase. First, many of the parties are private individuals or businesses rather than government officials. Second, even when governmental litigants are involved, the pressures of comity are far less when judges supervise pretrial litigation strategies than when they supervise the posttrial implementation of decrees reorienting government programs and facilities. Third, the effective power of judges is considerably greater at the pretrial stage than in postdecision enforcement. During pretrial supervision, judges make many decisions informally and often meet with parties ex parte, and appellate review is virtually unavailable. The judge has vast influence over the course and eventual outcome of the litigation. As a result, litigants have good reason to capitulate to judicial pressure rather than risk the hostility of a judge who, under the individual calendar system, has ongoing responsibility for the case. During pretrial management, judges are restrained only by personal beliefs about the proper role of judge-managers.

D. Some Preliminary Conclusions

Pretrial and posttrial management share certain characteristics. In both, judges interact informally with the litigating parties and receive information that would be considered inadmissible in traditional courtroom proceedings. Management at both ends of the lawsuit takes time and increases judges' responsibilities.

Nevertheless, the two management stages are dissimilar in many respects. Predecision management is initiated usually

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simply do not have time to spend, as I did, nine months in hearing, six months of which was wasted by what I find now . . . to be misrepresentations by Reserve Mining Company." Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976). On the basis of these remarks, inter alia, the Eighth Circuit remanded the case to a different judge. *Id.* at 189. In contrast, most judges muffle their anger. *See, e.g.*, Palmigiano v. Garrahy, 448 F. Supp. 659, 672 (D.R.I. 1978) ("The Court has made no finding of bad faith or willful intent to frustrate [its] mandate . . . . Nevertheless the Court has concluded that a coercive sanction is necessary.").

by the judge; postdecision supervision begins more often at a litigant's request. Pretrial management occurs much more frequently, but posttrial intervention tends to be more far reaching in its effects. Unlike pretrial management, posttrial activity occurs within a framework of appellate oversight, public visibility, and institutional constraints that inhibits overreaching.

Posttrial supervision thus represents a less striking departure from the American judicial tradition than does pretrial management. Because it is party initiated, visible, and reviewable, the judge's role in posttrial management is familiar. Moreover, many techniques of posttrial management, such as retaining jurisdiction and employing special masters, are not novel.[154] In contrast, because pretrial management is judge initiated, invisible, and unreviewable, it breaks sharply from American norms of adjudication.

IV. The Results of Pretrial Management

Having explored the techniques of managerial judging and the reasons for its development, we can now evaluate its accomplishments. In Section A, I assess whether the new procedures have achieved their purported aims. In Section B, I consider the implications of managerial judging for our system of adjudication.

A. The Achievements of Management

1. The Ambitions. — Managerial judging's proponents, blurring organizational theories[155] and utilitarianism,[156] believe that their new system of management will permit improved allocation of judicial resources. Court services, particularly judges' time, have become scarce commodities. A continually expanding number of consumers are seeking access to the courts, but are forced to wait. One (apparent) cause for the wait is the queue[157] — the line created by claimants

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[154] *See* Eisenberg & Yeazell, *supra* note 7, at 481–86.

[155] Managerial judging is, in part, court administration. For a general discussion of court administration, see P. Nejelski & R. Wheeler, Wingspread Conference on Contemporary and Future Issues in the Field of Court Management (1979). For a more comprehensive discussion of organizational theory and its implications, see K. Arrow, The Limits of Organization (1974).

[156] As ordinarily understood, utilitarianism "holds that the moral worth of an action, practice, institution, or law is to be judged by its effect in promoting happiness — 'the surplus of pleasure over pain' — aggregated across all of the inhabitants . . . of 'society.'" R. Posner, The Economics of Justice 48–49 (1981) (citation omitted).

[157] *See* Posner, *An Economic Approach to Legal Procedure and Judicial Admin-*

already waiting for judicial services. A second cause comes from some claimants, already in the courthouse, who appear to abuse their places at the head of the line by monopolizing court time. Attorneys, motivated by their own interests or those of their clients, seem to be the critical actors in the apparent misuse of court resources.[158]

According to proponents of judicial management, judges are the only advocates for the claimants waiting at the end of the queue and for the public, which benefits from and pays for the dispute resolution system.[159] Therefore, judges should take charge of the system and allocate their time in a prudent, coherent, and fair manner.[160] They should speed cases at the head of the line and discipline litigants who waste resources. The result would be an efficient court system, which (like the end of every other utilitarian tale) would in turn produce the greatest good for the greatest number of people.

2. Some Successes. — In large part, the existence of managerial judging depends upon information about case processing. To meet this need, court administrators have developed systems to gather and compile data. The result is unquestion-

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istration, 2 J. LEGAL STUD. 399, 445–48 (1973); *see also* G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978) (in an era of crowded dockets, litigants who intentionally delay discovery deprive other litigants of an opportunity to use the courts).

[158] *See* Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033 (1978) (discussing cases that have criticized attorneys' misbehavior). In Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), the Supreme Court held that a district judge had the power to charge attorneys for expenses related to misbehavior during discovery. *Cf.* Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156 (amending 28 U.S.C. § 1927 (Supp. IV 1980) to provide that courts may charge "excess costs, expenses, and attorneys' fees" to lawyers who "unreasonably and vexatiously" multiply litigation proceedings). In Litton Sys., Inc. v. American Tel. & Tel. Co., 91 F.R.D. 574 (S.D.N.Y. 1981), victorious antitrust plaintiffs were denied attorneys' fees, estimated at "well into the eight-figure range," *id.* at 578, because of their attorneys' "gross negligence" and "intentional misrepresentation" during discovery, *id.* at 575.

[159] The Administrative Office of the United States Courts estimated the fiscal 1982 budget for the federal judiciary at $710.5 million. *See* REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 74 (1981).

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> I cannot emphasize enough that if for one moment our calendars slip from our direct supervision and control, the result will be chaos. . . .
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> . . . Only by maintaining an independent judiciary controlling its own calendars can we hope to achieve the best results, qualitatively or quantitatively, in our endless search for a more perfect justice under law.

Campbell, *Calendar Control and Motions Practice: Judicial Responsibility for Calendar Control*, 28 F.R.D. 63, 65 (1960) (remarks of the Chief Judge of the Northern District of Illinois); *cf.* AMERICAN COLLEGE OF TRIAL LAWYERS, RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION 4–5 (1981) (recommending judicial management in complex cases).

ably beneficial; managerial judging has led to a wealth of new information about the federal courts.

We now know more about the number, type, and disposition of cases.[161] With this information comes enhanced accountability. The Administrative Office of the United States Courts learns how many and which cases belong to each judge, whose case load is growing, and whose is diminishing. With monthly computer printouts, individual judges can no longer "lose" cases or hide behind an uncalculated morass of motions. Dissemination of the new information makes courts more visible; the very counting of cases is an event that the national media report each year. The information also provides a basis for suggestions about how to improve case processing.[162] For example, researchers from the Federal Judicial Center study district courts' local rules and practices to identify ways of increasing judges' productivity.[163] Further, court data may aid the judiciary in persuading Congress to create new judgeships and to augment salaries and support staff.[164]

Managerial judging may also be credited with some increase in attorney accountability. Judicial control of lawsuits

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[161] *See* 1980 DIRECTOR'S REPORT, *supra* note 85. For the advances in record-keeping, compare the *1980 Director's Report*, *id.*, with the ALI's 1934 study, ALI STUDY, *supra* note 85. In 1934, the only available national data on federal courts — other than the ALI's study — were the annual reports of the Attorney General. *Id.* at 19. Before 1904, no nationwide information was kept about the number of civil cases filed in federal court. *See id.* at 32. The ALI study itself gathered information for only 13 federal districts over a one-year period, and not all of these districts had records for all cases, *id.* at 28–29.

The scope and quality of information on the federal courts have improved substantially since the 1930's. For example, during the last 10 years, the Administrative Office of the United States Courts began to publish *Court Management Statistics*, *Juror Utilization Statistics*, and *Reports on the Implementation of the Speedy Trial Act of 1974*. In addition, the Federal Judicial Center periodically publishes studies on discrete issues of federal court management. *See, e.g.*, S. FLANDERS, *supra* note 14.

[162] One benefit of this new information is that it has enabled court administrators to weigh the relative burdens of different kinds of cases and to distribute complex cases more equally among judges. *See generally* Doane, *The Effect of Case Weights on Perceived Court Workload*, 2 JUST. SYS. J. 270 (1977) (providing a model for calculating workload that assigns various "case weights" to different types of cases).

[163] One such suggestion is to minimize the number of written opinions. *See, e.g.*, P. CONNOLLY & P. LOMBARD, *supra* note 121, at 55 (noting faster decision of motions when no opinions written); S. FLANDERS, *supra* note 14, at ix–x (in "fast and/or highly productive courts," "relatively few written opinions are prepared for publication").

[164] The Judicial Conference's requests to Congress for more judgeships and administrative positions is based, in part, upon weighted case studies. *See Additional Judicial Positions: Hearing Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Additional Judgeship Hearings*].

presumably forces attorneys to prepare and manage their clients' cases more rapidly and efficiently. Breaches of judicially imposed schedules could provide clients with consumer information about attorney malfeasance and give bar committees data for disciplinary proceedings.

3. The Limits of Success. — No one can oppose efforts to curtail exploitation of the judicial system, to make dispute resolution quick and inexpensive, or to increase the accountability of judges and attorneys. I do, however, question the extent to which managerial judging contributes to these worthy aims and whether it is wise to rely on judges to achieve these goals.

Proponents of managerial judging typically assume that management enhances efficiency in three respects. They claim that case management decreases delay, produces more dispositions, and reduces litigation costs.[165] But close examination of the currently available information reveals little support for the conclusion that management is responsible for efficiency gains (if any) at the district court level, and strong reason to suspect that many of the purported efficiency gains in the district courts are illusory.

(a) Decreasing Delay. — (i) Application of the Appellate Court Experience to District Courts. — The evidence does suggest that judicial management has reduced delays at the appellate level. Court critics focused early on the circuit courts,[166] some of which were taking more than twelve months after oral argument to render decisions.[167] In response to criticism, most circuit courts have asserted greater control over both litigants and district judges. Circuit court rules now impose strict schedules for attorneys to transmit records, compile appendices, and brief issues.[168] Further, some circuits have won authorization for additional judgeships and support personnel and have streamlined their procedures for assigning

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[165] *See* Brazil, *supra* note 14, at 892; Flanders, *supra* note 50, at 149–50; Peckham, *supra* note 14, at 770–79; Tamm & Reardon, *supra* note 98, at 466–67.

[166] *See, e.g.*, Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Tate, *Relieving the Appellate Court Crisis: Containing the Law Explosion*, 56 JUDICATURE 228 (1973). For a more recent examination of these problems, see *Appellate Courts and Judicial Administration*, 6 JUST. SYS. J. 275 (1981).

[167] The Ninth Circuit reported a backlog of 4618 appeals in 1980. The average time from filing an appeal to a decision was 26.9 months. *See Additional Judgeship Hearings*, *supra* note 164, at 100 (statement of James R. Browning, Chief Judge, United States Court of Appeals, Ninth Circuit). In the circuit courts, the nationwide median time from filing the complete record to final disposition was 8.9 months. *See* 1980 DIRECTOR'S REPORT, *supra* note 85, at 51.

[168] *See, e.g.*, R. STERN, *supra* note 144, ch. 6.

cases and writing opinions.[169] These reforms appear to have been effective. Statistics indicate that the interval from filing to appeal has decreased in most circuits.[170] The chief judge of one circuit proudly described his court as the "fastest" in the country; it decided virtually all appeals within six months of submission.[171]

Encouraged by these gains, proponents of managerial judging may have been unduly optimistic about the prospects for improvement at the trial court level. In their rush to cure the perceived ills of the lower courts, management advocates have blurred the distinctions between the two levels of the judiciary.

Appellate work is amenable to control for several reasons. It can be divided into distinct segments, and the procedural options are few. By the time cases reach the appellate level, their essential untidiness has been reduced, or at least frozen, into a record. Further, cases on appeal often present judges with a single issue to decide. Finally, only two sets of actors must perform in appellate courts: the attorneys, who follow an established ritual in presenting the case, and the judges, who sit in panels of three. Thanks to preplanning — scheduling of arguments carefully, enforcing time limits for the filing of briefs, and asking judges to reach and report dispositions swiftly — this small group of actors has become better coordinated, a result that has enabled appellate judges to decide cases more quickly.[172]

But what works for the courts of appeals cannot simply be transplanted into trial courts. Prompt action in the trial courts depends on the performance not only of judges and attorneys, but also of a large supporting cast: the parties, lay and expert witnesses, and sometimes jurors. These actors do not perform identical roles in every case. Moreover, even in a relatively simple case, the parties may follow any of several procedural routes, attempt to discover sparse or voluminous information,

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[169] *See* Reynolds & Richmond, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807 (experience of the Fourth and Sixth Circuits with plans that effectively reduce the number of written opinions); E. Neisser, Memorandum to Lawyer Representatives to the Ninth Circuit Judicial Conference (Nov. 12, 1981) (on file in Harvard Law School Library) (detailing new procedures for assignment of judges to oral argument, decisions without argument, and publication of fewer case dispositions).

[170] *See Additional Judgeship Hearings*, *supra* note 164, at 60–63 (statement of Wilfred Feinberg, Chief Judge, United States Court of Appeals, Second Circuit).

[171] *Id.* at 62.

[172] Some appellate courts have also reduced the number of oral arguments, *see, e.g.*, 3D CIR. R. 12(6)(a), and written opinions, *see, e.g.*, Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981).

engage in brief or extended pretrial business, and present the court with few or many issues to decide. Thus, no single plan can be devised to comprehend all of the varieties of pretrial preparation.

Appellate court reforms provide an inexact model for trial courts for another reason. We can achieve, with relative ease, a shared perception of the amount of time it "should" take to prepare a record, an appendix, or a brief and the amount of time it "should" take to decide an appeal. We all know that most briefs can be prepared within a few days — weeks at the most — and that opinions can be written within a similar time frame. Moreover, the complexity of a case is unlikely to add more than a few days or weeks to any appellate timetable.

When we turn to the lower courts, however, it is more difficult to determine the "right" amount of time to prepare a case for trial. The scope of issues and the number of actors vary greatly among cases as well as throughout the evolution of any single case. Case complexity at the trial level can reasonably require postponement of deadlines not merely by days or weeks but by months or years. As of 1980, the median time for a case to move from filing to disposition in federal district court was eight months. For cases that were tried, the interval was twenty months.[173] Given the variety of cases comprehended by these figures, I (for one) do not know whether such data should be greeted with pleasure or dismay. It is difficult to decide whether the pace of a given trial court is "wrong" (in some moral sense) or too "slow" (under some utilitarian calculus). And researchers who have studied questions of pace are unable to agree on what pace is appropriate, what pace too slow.[174]

(ii) Difficulties of Evaluation. — If we were to assume that the pace of some civil litigation had been unduly delayed, we would encounter problems in assessing the claim that judicial management speeds case processing. Empirical investigation is hampered because data collection at the trial court level is a relatively new phenomenon and even current techniques are of questionable accuracy.[175] Moreover, valid comparisons

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[173] *See* 1980 DIRECTOR'S REPORT, *supra* note 85, at 81; *cf.* Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503 (1981) (two-year state court proceeding not too long to be characterized as "plain, speedy, and efficient").

[174] *See, e.g.*, J. ADLER, W. FELSTINER, D. HENSLER & M. PETERSON, THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS (1982).

[175] One tool that the Administrative Office of the United States Courts has used since 1975 to compile information is a form called the "Civil Cover Sheet." *See* ANNUAL REPORT OF THE DIRECTOR, PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50 (1974). Plaintiffs' attorneys submit the form when they

among district courts are elusive in light of differences in case loads, local rules, and substantive circuit law. As a result, careful researchers find it difficult to sort out static observations from trends.

Even when we find that some managerial trial courts do have faster dispositions than other trial courts,[176] we have great difficulty identifying the causes of the difference. Cases are filed, withdrawn, settled, or dismissed for a variety of reasons, including changes in legislation, new appellate decisions, shifts in business practices, and fluctuations in the availability of attorneys. Although it is theoretically possible to control for such variables, researchers are hampered by the absence of firsthand, unfiltered information about why cases conclude as they do. The participants are not likely to give frank explanations of what prolonged a case or brought it to a quick close: attorneys must respect client confidences; litigants are caught up in adversarial relationships; judges have an interest in privacy. The reports that are obtained must be discounted by the inaccuracy of memory and the narrowness of each participant's perspective.[177] Consequently, it is difficult to isolate and weigh the actual effect (if any) of managerial judging on the speed of trial court dispositions.[178] Few re-

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file complaints. In 1982, the form required attorneys to provide a brief description of the cause of action and then to check one — and only one — of the form's 82 categories to describe the "nature of the suit." Clerks check the accuracy of the form but do not verify the attorney's description of the suit by comparing that description with the complaint.

The information gathered from these forms is unreliable for several reasons. First, attorneys have not been trained in coding; thus, different attorneys may categorize the same case differently. Second, a lawsuit may include both tort and contract claims, or be filed under both federal question and diversity jurisdiction, yet the form allows attorneys to classify each case in only one category. Finally, the number of categories has grown over the years from 69 to 82. In an informal check of cases filed in one district court in 1980, I found that attorneys had used 1975, 1977, and 1979 cover sheets as well as the then-new 1980 forms.

For discussions of difficulties in interpreting the statistics provided by the Administrative Office, see Hurst, *supra* note 93, at 407–08; *see also* S. FLANDERS, *supra* note 14, at 71–76 (measures of court work load and productivity confusing and difficult to assess); Friedman, *supra* note 85, at 662 ("Judicial statistics, until now, have been absolutely wretched; things have improved a bit in recent years, but there is still a long way to go." (citation omitted)). For a discussion of the even more difficult problem of interpreting state court statistics, see NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1975, at 10, 39 (1979). For an example of a researcher's problems in understanding the import of the data collected, see Grossman, *Who Uses the Courts?*, *supra* note 117, at 111–14.

[176] *See* S. FLANDERS, *supra* note 14, at 19.

[177] *See, e.g.*, Brazil, *supra* note 91, at 221 (noting limited accuracy of partisans' reports, as gathered through interviews, of adversaries' behavior).

[178] In a "controlled" experiment, researchers study the effect of a variable by

searchers have even entered this thicket; management advocates rely instead on anecdote and intuition to support their claims.[179]

(b) Increasing the Number of Dispositions. — As a measure of judicial productivity, the number of dispositions is partly a function of disposition speed. If cases are disposed of quickly, the time saved can be used to consider more cases. Management advocates also claim that judges' efforts to channel litigation into more "efficient" methods of dispute resolution, such as settlement, have improved the administration of justice by increasing the total number of dispositions.[180] But again empirical moorings are wanting; no data firmly support the conclusion that judicial intervention results in more settlements than would otherwise have occurred.[181]

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comparing at least two situations that are virtually identical except that, in one, the variable under consideration is held constant and, in the second, the variable is manipulated. *See* A. EDWARDS, EXPERIMENTAL DESIGN IN PSYCHOLOGICAL RESEARCH ch. 2 (3d ed. 1968). Some researchers have tried to emulate this approach in collecting data on courts. *See* M. ROSENBERG, *supra* note 18; L. SIPES, *supra* note 94. For sample research designs, see Lind, Shapard & Cecil, *Methods for Empirical Evaluation of Innovations in the Justice System*, in EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW app. B (1981).

The literature on the causes of and cures for delay reveals the difficulties of analyzing court data. Several researchers believe the data demonstrate that "local legal culture" is the pivotal reason for lengthy intervals between the filing and disposition of cases. Others, however, believe that such conclusions are premature. *Compare* Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 181 (1978) (both delay and backlog are the result of "local legal culture"), *and* Sherwood & Clark, *Toward an Understanding of "Local Legal Culture,"* 6 JUST. SYS. J. 200, 212–13 (1981) (responses to questionnaire at Detroit Civil Case Delay Symposium supported the notion of "cultural bias" as a cause of delay), *with* Grossman, *Measuring the Pace*, *supra* note 117, at 112 ("local legal culture" is more a convenient restatement than an explanation of the problem). As one commentator concludes, "[w]riting on court delay is voluminous, but much of it might simply be termed inspirational." Luskin, *Building a Theory of Case Processing Time*, 62 JUDICATURE 115, 117 (1978).

[179] *See, e.g.*, Peckham, *supra* note 14, *passim* (relying on S. FLANDERS, *supra* note 14); Rubin, *supra* note 14, at 138.

[180] *See* L. SIPES, *supra* note 94 (settlement rates increased in some courts as a result of case management, but not necessarily as a result of judges' settlement efforts); Rubin, *supra* note 14, at 138 (author's intuition, influenced by his many years as an attorney and judge, suggests that judicial control of cases produces earlier and fairer settlements, focuses the trials in remaining cases, and improves the quality of adjudication); Title, *The Lawyer's Role in Settlement Conferences*, 67 A.B.A. J. 592 (1981) (in one settlement program, 70% of cases that allegedly would have been tried were settled).

[181] *See* Flanders, *supra* note 50, at 161 (study of six federal district courts revealed that the court "with the strongest and most vigorous settlement role has the fewest civil terminations per judgeship per year"); *see also* S. FLANDERS, *supra* note 14, at 37 (data suggest that "a large expenditure of judicial time [attempting to produce settlements] is fruitless"); *cf.* M. ROSENBERG, *supra* note 18, at 47 (New Jersey system

Moreover, the claim that "the more dispositions, the better," raises difficult valuation tasks; decisionmaking must be assessed not only quantitatively, but also qualitatively. On any given day, are four judges who speak with parties to sixteen lawsuits and report that twelve of those cases ended without trial more "productive" than four judges who preside at four trials? Is it relevant to an assessment of "productivity" that three of these four trials are settled after ten days of testimony? Or that, in the one case tried to conclusion, the judge writes a forty-page opinion on a novel point of law that is subsequently affirmed by the Supreme Court and thereafter affects thousands of litigants? Measuring judicial accomplishment is complex. Scales designed to measure achievement in other institutions cannot simply be imported into the courtroom.[182]

(c) Reducing Costs. — Management advocates assume that judicial supervision not only saves time and produces more dispositions, but also limits the ability of litigants to impose unfair financial pressure on their opponents and of attorneys to make excuses for excessive billing. Proponents therefore conclude that managerial judging reduces courts' and litigants'

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of compulsory pretrials "unmistakably" did not achieve a higher proportion of settlements than did system in which attorneys could decide whether cases would be pretried); Church, *supra* note 178, at 176 (study of state courts found that "[t]he most settlement-intensive courts are the slowest courts"). *But see* Kritzer, *supra* note 117, at 35–36 (noting evidence that settlement activities speed case disposition).

[182] Commentators and rulemakers rely heavily on Flanders' work for the proposition that pretrial management techniques actually promote efficiency. Perhaps the most prominent example of this reliance is found in the Advisory Committee's notes to draft rule 16:

> Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

FED. R. CIV. P. 16 advisory committee note 13 (Discussion Draft Sept. 1982) (citing S. FLANDERS, *supra* note 14, at 17). Flanders, however, measured neither parties' costs nor court management costs.

Some commentators also rely on Flanders' data to assert that case management does not "necessarily" diminish quality. Peckham, *supra* note 14, at 783; *see also* Brazil, *supra* note 14, at 892 (citing Peckham and others for proposition that judicial management does not harm quality). But Flanders provides no measurement of quality; instead he assumes a "close positive relationship between speed and quality." S. FLANDERS, *supra* note 14, at 69. He concedes that "no staff member on this project could be considered qualified to attempt a comprehensive evaluation of the quality of justice rendered in the several courts we observed. That evaluation is a task well left to others . . . ." *Id.* at 68. For criticism of the methods used by Flanders and others, see Luskin, *supra* note 178, at 117–26. For research attempting to review the effect of court efficiency programs on quality, see D. NEUBAUER, *supra* note 94, at 177–80, 234 (finding no effect on guilty plea rates or sentences).

costs.[183] But no data exist to support this conclusion.[184] If we rely instead on intuition, it is not obvious that judicial supervision averts costly adversarial decisions or attorney misconduct. First, some lawyers use every occasion for contact with judges to argue their clients' cases. Thus, supervision itself can present further opportunities for vigorous adversarial encounters.[185] Second, as Danforth's response to Ms. Paulson's interrogatories suggests, the line between misconduct and aggressive but ethical representation is difficult to divine.[186] Third, even with judicial oversight, lawyers may be able to hide their misconduct; procedural innovations may simply force attorneys to develop new techniques of obfuscation and avoidance, skills presumably well developed by the bar.

Moreover, judicial management itself imposes costs.[187] The judge's time is the most expensive resource in the courthouse.[188] Rather than concentrate all of their energy deciding motions, charging juries, and drafting opinions, managerial

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[183] *See, e.g.*, FED. R. CIV. P. 16 advisory committee note 16 (Discussion Draft Sept. 1982); Pollack, *Pretrial Conferences*, *supra* note 114 (advocating increased management to reduce "unprofitable expenditures of time, effort, and money").

[184] *See, e.g.*, D. HENSLER, A. LIPSON & E. ROLPH, JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR 62–69 (1981) (unclear that California's mandatory arbitration program conserves judicial resources) [hereinafter cited as D. HENSLER]; M. ROSENBERG, *supra* note 18, at 28 ("At the very least, it seems clear that the efficiency of the court was reduced rather than enhanced by requiring as a compulsory matter that each case go through a pretrial conference . . . .").

[185] *See* Brazil, *Special Masters in the Pretrial Development of Big Cases: Potential and Problems*, 1982 AM. B. FOUND. RESEARCH J. 287, 305–08.

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> [I]t usually is impossible to prove that a party is deliberately holding back material that he is obligated to disclose. A party that is determined to abuse the judicial process can generally do so successfully.
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> . . . .
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> . . . [S]ome kinds of abuse result more often from good faith errors in judgment than from intentional, reckless, or negligent conduct.

Renfrew, *supra* note 110, at 279–80.

[187] Some of the costs of efficiency at the appellate level include the demise of oral argument, *see* Wasby, *Oral Argument in the Ninth Circuit: The View from the Bench and Bar*, 11 GOLDEN GATE L. REV. 21, 63–71 (1981), the reduction in published opinions, *see* Reynolds & Richman, *supra* note 172, at 581, and a diversion of resources from the criminal to the civil appeals docket, *see* Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 JUST. SYS. J. 372, 375–76 (1981). *See generally* Hoffman, *Bureaucratic Spectre: Newest Challenge to the Courts*, 66 JUDICATURE 61 (1982) (expressing concern about increasingly common delegation of adjudicatory tasks to staff); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981) (same).

[188] J. KAKALIK & A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 64 (1982) (annual costs, including salaries, support staff, and other resources, of each federal district judge estimated at $752,000).

judges must meet with parties, develop litigation plans, and compel obedience to their new management rules. Managerial judges have more data sheets to complete, more conferences on new management techniques to attend, and ever more elaborate local procedural rules to draft and debate. Even when some of these tasks are delegated to staff,[189] administrative structures must be put into place and then supervised. And although litigants and judges can contain costs by relying on conference calls and written exchanges,[190] they still spend substantial time and money. Further, because many cases settle without judicial intervention, management may require judges to supervise lawsuits that would have ended of their own accord, lawsuits that would not have consumed any judicial resources.

We are not yet able to reach any firm conclusions on whether and how management reduces costs.[191] Until we have data on the number of judge-hours that management consumes and saves, as well as information regarding the effect of management on parties' costs, we cannot calculate the net costs of managerial judging and thereby learn whether we have conserved resources. And if we include in our calculation the additional costs discussed below — such as the possibility of error, the decline of ceremony, and the loss of public participation — our equation becomes even more complex.

In sum, I am skeptical of claims that management increases judicial productivity at reduced costs. Data are not available to support most of those conclusions, and intuition does not compel them. Moreover, managerial proponents have not even considered the effects of judicial management on the nature of adjudication.

B. The By-products of Judicial Management: The Erosion of Traditional Due Process Safeguards

In the rush to conquer case loads, few proponents of managerial judging have examined its side effects. Judicial man-

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[189] *See* S. FLANDERS, *supra* note 14, at 60–61.

[190] FED. R. CIV. P. 16(b) (Discussion Draft Sept. 1982); Mansfield Letter, *supra* note 110 (transmitting Advisory Committee's proposed changes of rule 16 and other federal rules; clarifying that proposed rule 16 requires pretrial orders, not conferences; suggesting that personal conferences will not always be necessary to develop orders), *reprinted in* Judicial Conference Excerpt, *supra* note 19, at 3.

[191] Although we know how much the public spends to maintain and run federal courts, we do not know which management techniques will save money. *Cf.* D. HENSLER, *supra* note 184, at 62–69 (researchers investigating California's experiment with judicial arbitration could not, based on limited data available, conclude that arbitration saved time or resources). For a comparison of costs in several federal and state courts, see J. KAKALIK & A. ROBYN, *supra* note 188.

agement has its own techniques, goals, and values, which appear to elevate speed over deliberation, impartiality, and fairness. Ironically, the growth of federal judges' interest in management has coincided with their articulation of due process values, their emphasis on the relationship between procedure and just decisionmaking.[192]

1. Vast New Powers. — Judges are very powerful: they decide contested issues, and they alone can compel obedience by the threat of contempt. As a result, those subject to judges' authority may challenge it only at great risk. Under the individual calendar system, a single judge retains control over all phases of a case. Thus, litigants who incur a judge's displeasure may suffer judicial hostility or even vengeance with little hope of relief.[193]

Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use — or abuse — their power. In designing the pretrial schedule in *Paulson*, for example, Judge Kinser did not adjudicate a "case or controversy."[194] Instead, he issued a series of directives before the parties had raised problems or asked for his help. Dissatisfied, the parties tried to convince him to change his procedural blueprint, but they knew that the decisions were ultimately Judge Kinser's alone. In an effort to induce settlement, the judge held separate meetings with the parties, challenged their arguments, and proposed specific settlement figures. Although he could not dictate a compromise, Judge Kinser made full use of his position to convince the parties to capitulate.

In addition to enhancing the power of judges, management tends to undermine traditional constraints on the use of that power. Judge Kinser created rules for the lawsuit, such as discovery timetables, but was not forced to submit his ideas to the discipline of a written justification or to outside scrutiny.

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[192] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (welfare official who was involved in case should not have participated in decision to terminate benefits). For an analysis of the Supreme Court's approach to the level of process required, see Mashaw, *The Supreme Court's Due Process Calculus for Adminstrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[193] For two prominent examples of cases in which litigants attempted unsuccessfully to remove judges, see United States v. IBM, 475 F. Supp. 1372 (S.D.N.Y. 1979); Bradley v. Milliken, 426 F. Supp. 929 (E.D. Mich. 1977), *aff'd*, 620 F.2d 1143 (6th Cir.), *cert. denied*, 449 U.S. 870 (1980).

[194] U.S. CONST. art. III, § 2.

His decisions were made privately, informally, off the record, and beyond the reach of appellate review.

Further, no explicit norms or standards guide judges in their decisions about what to demand of litigants. What does "good," "skilled," or "judicious" management entail? Judge Kinser hoped to speed pretrial preparation, because he thought quick preparation was better than slow preparation. Yet he had no guidelines, other than his own intuition, to inform him what was too slow or too fast. Judge Kinser wanted the parties to settle, because he believed that whatever outcomes settlement produced would be better — and less expensive[195] — than those litigation could achieve. But how was he to determine, for the litigants and for the system as a whole, what was "better" or less "expensive"?

Given the lack of established standards, judges are forced to draw on their own experience. Judges certainly are familiar with the problems of the courts; they were among the first to identify the need for reform. But awareness of the problems does not necessarily qualify judges to design the solutions, especially on an individual, ad hoc basis. As familiar adages discouraging self-medication by doctors and self-representation by lawyers suggest,[196] self-interest often makes professionals less objective, dispassionate, and adept at their work. Moreover, judges may well overestimate the extent of their wisdom. Many have been trial lawyers; they have some appreciation for which litigant tactics are well founded and which are dilatory. But because few have practiced in all of the diverse areas of federal court jurisdiction, they may reach ill-founded conclusions in cases about which they really know very little.

2. The Threat to Impartiality. — Privacy and informality have some genuine advantages; attorneys and judges can discuss discovery schedules and explore settlement proposals

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[195] The larger question is, "Expensive for whom?" Both parties have higher litigation expenses if a case goes to trial. On the other hand, when plaintiff recovers more at trial than defendant offered at settlement and the difference is greater than the various costs of litigation, trial has become profitable for plaintiff — and much more "expensive" for defendant.

If societal resources are included in the calculation, then for taxpayers, who provide the rooms, judges, and support staff, trial is more "expensive" than settlement. *See, e.g.*, J. KAKALIK & A. ROBYN, *supra* note 188, at 87, 89 ("Expenditure differs dramatically, depending on when the case is disposed. . . . [T]rials by either judge or jury cost thousands of dollars."). But to the extent that civil lawsuits enforce public norms, settlement of some claims may be more "expensive" for the public. Of course, the notion that trials result in the vindication of public values depends on a belief that trials yield "correct" results.

[196] H. DAVIDOFF, A WORLD TREASURY OF PROVERBS 102 (2d ed. 1961) ("A man who is his own doctor has a fool for his patient."); *id.* at 236 ("He that is his own lawyer has a fool for his client.").

without the constraints of the formal courtroom environment. But substantial dangers also inhere in such activities. The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received ex parte, a process that deprives the opposing party of the opportunity to contest the validity of information received. Moreover, judges are in close contact with attorneys during the course of management. Such interactions may become occasions for the development of intense feelings — admiration, friendship, or antipathy. Therefore, management becomes a fertile field for the growth of personal bias.[197]

Further, judges with supervisory obligations may gain stakes in the cases they manage. Their prestige may ride on "efficient" management, as calculated by the speed and number of dispositions. Competition and peer pressure may tempt judges to rush litigants because of reasons unrelated to the merits of disputes.[198] For example, Judge Kinser had interests of his own when he was was advising settlement: he wanted *Paulson* off his calendar.

In the past, such exposure to parties and issues and such a comparable interest in the proceedings might have resulted in recusal or disqualification. Despite a flexible approach to the procedural safeguards required to ensure due process,[199]

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[197] The relationship between decisionmakers' prior knowledge about or involvement in controversies and their formation of bias is very complex; we are only beginning to understand the bases for the formation of opinions. *See, e.g.*, R. NISBETT & L. ROSS, HUMAN INFERENCE (1980). For present purposes, I assume the American legal rule, which generally disqualifies judges with extrajudicial knowledge about either the dispute or the disputants. Sorting out the ambivalence displayed by the exceptions to these rules is a subject for future articles.

[198] Judge John Butzner, former Chairman of the Judicial Conference's Subcommittee on Judicial Statistics, testified before Congress that, in evaluating judgeship needs, his subcommittee assumed that judges could "terminate 400 cases per year." *Additional Judgeship Hearings*, *supra* note 164, at 49 (testimony of John Butzner, Judge, United States Court of Appeals, Fourth Circuit). What effect does such an expectation have on trial judges?

Reported opinions reveal some evidence of judges' improperly pressing litigants to dispose of cases. *See, e.g.*, Beary v. City of Rye, 601 F.2d 62 (2d Cir. 1979) (trial judge dismissed lawsuit after denying plaintiff's request for brief continuance; reversed on ground that judge elevated management interests over considerations of fairness).

[199] *Compare* Lassiter v. Department of Social Servs., 452 U.S. 18, 31 (1981) (no absolute right to attorney at child custody termination hearing), *and* Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1, 15 (1979) (parole board need not specify particular "evidence" on which decision to deny release is based), *and* Mathews v. Eldridge, 424 U.S. 319 (1976) (no right to evidentiary hearing before disability benefits terminated), *with* Morrissey v. Brewer, 408 U.S. 471 (1972) (right to hearing at parole revocation), *and* Goldberg v. Kelly, 397 U.S. 254 (1970) (right to evidentiary hearing before welfare benefits terminated).

the Supreme Court has consistently required an "impartial" judge[200] — an individual with no prior involvement or interest in the dispute. Interest is broadly defined; indirect as well as direct benefits suffice to require disqualification.[201] Statutory disqualification rules,[202] recently amended and made more stringent,[203] impose similar limits that disqualify judges with only a minute financial interest in the controversies before them.[204] Nevertheless, neither the Supreme Court, the lower federal courts, nor Congress has considered the effect of judicial management on impartiality.

I recognize that case management is not the only anomaly in the rules governing judicial disqualification and recusal. Many current practices assume that trial judges can compartmentalize their minds, disregard inappropriate evidence, and reconsider past decisions in light of new information.[205] Motions to reconsider, reduce sentences, and vacate convic-

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[200] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972); Goldberg v. Kelly, 397 U.S. 254, 271 (1970); *In re* Murchison, 349 U.S. 133 (1955).

[201] *See* Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (mayor not disinterested trier of traffic offense in court whose collections provided substantial share of village funds). The rules governing the impartiality of administrators are not so exacting. *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 251–52 (1980) (revenue from child labor fines may be used by agency responsible for assessing penalties); Withrow v. Larkin, 421 U.S. 35, 58 (1975) (state examining board may both investigate and adjudicate merits of claims).

[202] Two statutes, 28 U.S.C. § 144 (1976) and 28 U.S.C. § 455 (1976 & Supp. IV 1980), are the basis for judicial disqualification. Under English common law, judges were disqualified if they had a property interest in a proceeding; other grounds, such as relationship with the parties, did not always result in disqualification. Moreover, judges had a "duty to sit," which resulted in narrow interpretations of when disqualification was proper. *See* Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609–12 (1947); Note, *Disqualification of Judges for Prejudice or Bias — Common Law Evolution, Current Status, and the Oregon Experience*, 48 OR. L. REV. 311, 315–32 (1969).

[203] In 1974, Congress amended 28 U.S.C. § 455 to provide explicit standards for disqualification whenever a judge's impartiality might "reasonably be questioned." Act of Dec. 5, 1974, Pub. L. No. 93-512, § 1, 88 Stat. 1609, 1609. The purpose of the amendments was to increase public confidence in judicial impartiality by having judges disqualify themselves in cases in which conflict of interest is a close question. *See* H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5–7, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6351, 6352–53; *see also* Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (amending 28 U.S.C. § 372 to provide a mechanism for persons to complain about judicial disabilities, and to empower the Judicial Council to investigate the charges and act on them). For an examination of the amendments to § 455, see Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978); for a discussion of the Judicial Conduct and Disability Act, see Neisser, *The New Federal Judicial Discipline Act: Some Questions Congress Didn't Answer*, 65 JUDICATURE 143 (1981).

[204] *See* 28 U.S.C. § 455(b)(4), (d)(4) (1976).

[205] Jurors are not assumed to be so agile. *See, e.g.*, Leonard v. United States,

tions,[206] as well as most appellate remands,[207] are decided by the very judges whose prior decisions are being challenged. I find these practices inconsistent with common perceptions of impartial adjudication. Yet reconsideration by the same judge who first heard a case is far less worrisome than factfinding by the judge who *managed* the case. As "repeat adjudicators,"[208] judges are generally confined to the record. They rely upon traditional adversarial exchanges, publicly explain their decisions, and know that their work may be reviewed on appeal. In contrast, as pretrial case managers, judges operate in the freewheeling arena of informal dispute resolution.[209]

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378 U.S. 544 (1964) (per curiam) (government concedes error in case in which jury panel heard announcement of guilty verdict in related prior case); Government of the Virgin Islands v. Parrott, 551 F.2d 553, 554 (3d Cir. 1977) ("[D]efendant had a constitutional right not to be tried before jurors who had sat on the previous panel . . . .").

[206] *See* 28 U.S.C. § 2255 (1976) (postconviction relief for prisoners convicted in federal courts). Before 1977, although § 2255 did not specify that the action be heard by the same judge who presided at trial, such was the practice in most circuits. *See, e.g.*, United States v. Smith, 337 F.2d 49, 53–54 (2d Cir. 1964) (citing cases for the proposition that § 2255 authorizes the sentencing judge to entertain and decide motions filed under that provision); Carvell v. United States, 173 F.2d 348, 348 (4th Cir. 1949) (per curiam) (judge's prior knowledge made it "highly desirable" that he pass on the § 2255 issue). *But see* Halliday v. United States, 380 F.2d 270 (1st Cir. 1967) (a judge other than the trial judge should preside at § 2255 hearings when voluntariness of guilty plea is in question).

The Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. § 2255 (1976 & Supp. IV 1980), became effective in 1977; rule 4(a) provides that § 2255 motions be assigned to the judge "who presided at the movant's trial and sentenced him." *Id.* Rule 4(a) (1976). The theory behind this rule is that the judge who presided at trial has information that should be useful in deciding the motion. In a sense, the judge is a silent witness who is never cross-examined. *See, e.g.*, *Halliday*, 380 F.2d at 273 (arguing that it would be preferable to call judges as witnesses in § 2255 proceedings than to allow them to be triers of fact determining their own credibility); *cf.* Withrow v. Larkin, 421 U.S. 35, 58 (1975) (permissible for state examining board both to investigate and to adjudicate merits of claims).

[207] *Cf.* United States v. Cepeda Penes, 577 F.2d 754, 758 (1st Cir. 1978) ("[T]he judicial system could not function if judges could deal but once in their lifetime with a given defendant, or had to withdraw from a case whenever they had 'presided in a related or companion case or in a separate trial in the same case.'" (emphasis omitted)) (quoting United States v. Cowden, 545 F.2d 257, 266 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977)). For a general discussion of disqualification for prior involvement in the case, see Ratner, *Disqualification of Judges for Prior Judicial Actions*, 3 How. L.J. 228 (1957).

[208] I have derived the term "repeat adjudicators" from Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974) (discussing "repeat players" and "repeat lawyers").

[209] Professor Eisenberg argues that the conventional perception that the world of negotiation is norm free is mistaken because negotiation is limited by rules, principles, and precedents. *See* Eisenberg, *supra* note 17. I believe, however, that the norms that operate in most negotiations are absent when judges sit at the bargaining table.

Having supervised case preparation and pressed for settlement, judges can hardly be considered untainted[210] if they are ultimately asked to find the facts and adjudicate the merits of a dispute.

Unreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the "due process" decisionmaking model.[211] These features do not evoke images of reasoned adjudication,[212] images that form the very basis of both our faith in the judicial process[213] and our enormous grant of power to federal judges. The literature of managerial judging refers only occasionally to the values of due process: the accuracy of decisionmaking, the adequacy of reasoning, and the quality of adjudication.[214] Instead, commentators and the training sessions for district judges emphasize speed, control, and quantity.[215] District court chief judges boast of vast statistics on

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Unlike most parties to negotiations, judges possess the ability to compel the outcome of the "negotiations" should talks break down.

[210] *Cf.* Fuller, *supra* note 138, at 44 ("An adversary presentation seems the only effective means for combating . . . [the] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.").

[211] *See* Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (describing and analyzing the values underlying two models of the criminal process — crime control and due process).

[212] This statement would not hold true, of course, if we changed our imagery to reflect our new interest in efficient management. *See* Daube, *supra* note 40, at 129 ("Recently at Cambridge a statistical laboratory has for the first time been established. Something of this kind is perhaps destined to become the symbol of modern justice in the place of a simple pair of scales.").

[213] These speculations are based on my observations of judges and attorneys engaging in ex parte communication, caucusing in back rooms, emerging with offers of deals, then resubmerging for further negotiations. To my knowledge, however, no systematic research has been done on how litigants and the public perceive these informal procedures. Experimental designs have considered parties' preferences between adversarial and inquisitorial approaches but have not specifically addressed this issue. *See* Walker, Lind & Thibaut, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979) (suggesting that empirical work demonstrates that parties prefer maximum control over their own lawsuits). *But cf.* Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975) (criticizing methodology used by Walker, Lind, and Thibaut in an earlier study).

[214] For examples of references to such values, see Rosenberg, *Devising Procedures that Are Civil to Promote Justice that Is Civilized*, 69 MICH. L. REV. 797 (1971); Ryan, Lipetz, Lustin & Neubauer, *Analyzing Court Delay-Reduction Programs: Why Do Some Succeed?*, 65 JUDICATURE 58, 68–69 (1981).

Other goals of procedural justice are efficacy and dignity. *See* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 1), 1973 DUKE L.J. 1153. *See generally* DUE PROCESS (J. Pennock & J. Chapman eds. 1977) (collecting articles discussing the concept of due process and its relationship to moral and rational theories).

[215] *See, e.g.*, Flanders, *supra* note 50, at 150–55 (asking primarily how fast

the number of cases terminated, the number and type of discrete events (such as trial days and oral arguments) supervised, and the number of motions decided.[216] The accumulation of such data may cause — or reflect — a subtle shift in the values that shape the judiciary's comprehension of its own mission. Case processing is no longer viewed as a means to an end; instead, it appears to have become the desired goal.[217] Quantity has become all important; quality is occasionally mentioned and then ignored. Indeed, some commentators regard deliberation as an obstacle to efficiency.[218]

Proponents of management may be forgetting the quintessential judicial obligations of conducting a reasoned inquiry, articulating the reasons for decision, and subjecting those reasons to appellate review — characteristics that have long defined judging and distinguished it from other tasks.[219] Although the sword remains in place, the blindfold and scales have all but disappeared.

V. THE RELEVANCE OF ROBES

In the preceding discussion, I have argued for reflection before we plunge headlong into judicial management. I do

disposition should be without asking why speed is desirable). *But cf.* Cohn, *supra* note 105, at 268 (although expeditious discovery should be encouraged, "[o]ne cannot say . . . that a prolonged discovery period is bad"). Compare Flanders' orientation with that of Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952), which emphasizes the importance of subtle norms and adjudicators' integrity in limiting trial judges' discretion.

[216] *See Additional Judgeship Hearings*, *supra* note 164, at 49, 55, 63 (statements of chief judges).

[217] *Cf. In re* Jensen, 24 Cal. 3d 72, 593 P.2d 200, 154 Cal. Rptr. 503 (1978) (state judge publicly censured for failure to decide cases within 90 days of submission); *In re* Carstensen, 316 N.W.2d 889 (Iowa 1982) (state judge suspended without pay for persistently disregarding rule requiring monthly reports of matters under advisement for more than 60 days); *Additional Judgeship Hearings*, *supra* note 164, at 55 (statement of Raymond Pettine, Chief Judge, United States District Court, District of Rhode Island) (reporting that District of Rhode Island stood "very high on a national average. We are 12th in standing on a simple caseload per judge, 13th on weighted filings, and 18th on trials completed.").

I am aware of no rigorous empirical work that examines the effect of managerial tasks on judges' attitudes toward adjudication or on their ability to maintain neutrality. Some impressionistic evaluations have been done. *See, e.g.*, Neubauer, *Judicial Role and Case Management*, 4 JUST. SYS. J. 223 (1978) (interviewing unrepresentative sample of federal judges as a "preliminary" review of their attitudes toward managerial tasks).

[218] For example, in Beary v. City of Rye, 601 F.2d 62 (2d Cir. 1979), the circuit court held that the trial court, by requiring plaintiff to rest after one day of trial because of failure to comply with a pretrial order, had erroneously permitted "its zeal for clearing its calendar to overcome the right of a party to a full and fair trial on the merits." *Id.* at 63.

[219] *See* Fuller, *supra* note 13, at 387.

not mean to suggest, however, that adjudication must be frozen into earlier forms or that more efficient decisionmaking is an unworthy aim. Rather, as we reorient the judicial system to accommodate contemporary demands, I believe that we should preserve the core of adjudication. To help judges remain impartial, we should limit the flow of untested information. To ensure that judges have the time and patience for deliberation, we should refrain from giving them too many distracting new responsibilities. To hold judges accountable for the quality — not merely the quantity — of their actions, we should require judges to act in public and to state reasons for their decisions.

With these goals in mind, I outline below some alterations of and alternatives to judicial management. Although I have divided my suggestions into categories for purposes of discussion, the distinctions are not ironclad: many of the proposals share similar purposes and methods. For each of these ideas, I sketch some of the problems that might arise if the idea were to be implemented. My aim is not to provide the "answers" — would that I could — but rather to channel the search for alternatives in potentially productive directions.

A. Management by Judges: Imposing Safeguards

The proposals discussed below are methods for altering management to accommodate my concerns while preserving judges' opportunities to supervise cases.

1. Controlling Discretion. — The desire for speed and early settlement is not unique to the federal civil docket. But even on the busy criminal side, judges are expressly prohibited by rule,[220] case law,[221] and professional standards[222] from participating in settlement — the plea bargaining process — except under carefully controlled circumstances.

Similar mechanisms could be devised to control the discretion of managerial judges in civil litigation. The Federal Rules could be amended to prohibit ex parte communications and to require judges to conduct all meetings with litigants on the

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[220] *See* FED. R. CRIM. P. 11(e) & advisory committee note.

[221] *See, e.g.*, *In re* Werker, 535 F.2d 198 (2d Cir. 1976) (mandamus granted to prohibit judge, who promised a specific sentence in exchange for a guilty plea, from participating in plea bargaining); *cf.* Longval v. Meachum, 651 F.2d 818 (1st Cir. 1981) (judge's attempt to persuade defendant to plead guilty because jury verdict might lead to longer jail term warranted remand and resentencing of the accused), *vacated*, 102 S. Ct. 3475 (1982); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (defendant had right to reinstitute not-guilty plea after judge withdrew promise to give lesser sentence in return for guilty plea).

[222] *See* STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (1968).

record. An authoritative manual[223] could be drafted to provide detailed rules for judges and attorneys concerning the types of management and settlement techniques that are acceptable. In addition, Congress could amend title 28 to permit some form of appellate review of judges' management decisions. Such review not only would enforce the new behaviorial norms, but also would permit refinement of management standards in light of practical experience.[224]

This approach is not a panacea. Drafting rules to circumscribe discretion would reduce the very freedom that proponents of judicial management deem critical to its alleged success.[225] Moreover, the current informal process would be replaced by a more formal one; apparently inexpensive proceedings might become more costly.[226] In addition, this proposal would increase the appellate court work load at a time when the trend is to limit, not expand, appellate review.[227] Finally, the standards for action that exist in other areas, such as the American Bar Association's standards for criminal justice,[228] have never been fully implemented. The mere existence of rules does not automatically result in their enforcement, and the costs of implementation can be high.

2. Preserving Impartiality. — Even if successful, efforts to control judges' discretion would not alter the fact that managerial judges come into close contact with attorneys and, by virtue of that contact, hear opinion, innuendo, and rumor — all of which may affect their findings of fact and their rulings of law. The problem of maintaining impartiality would remain unless we added a second set of reforms, which would prohibit a judge who manages pretrial preparation or attempts unsuc-

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[223] *Cf.* MANUAL FOR COMPLEX LITIGATION (5th ed. 1982) (manual to guide management of complex cases).

[224] The absence of standards is not a problem unique to the world of civil case management. *See* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 75–85 (1972).

[225] Management advocates prefer to rely on control by judges rather than by judges' assistants because judges have greater power than do nonjudicial personnel. *See* Mansfield Letter, *supra* note 110, at 3.

[226] It may be possible, however, to reduce some of the costs associated with a more formal process. *See, e.g.*, UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL COURT REPORTING SYSTEM: OUTDATED AND LOOSELY SEPARATED at i (1982) (costs of court reporting could be reduced by adoption of electronic recording systems).

[227] *See, e.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (no interlocutory appeal of denial of motion to disqualify attorney); Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (no interlocutory appeal of denial of class certification).

[228] STANDARDS FOR CRIMINAL JUSTICE (1980).

cessfully to mediate disputes from later adjudicating contested issues.

One possibility would be to return the federal courts to a master calendar system such as that used by many state courts.[229] Under that system, a new judge is assigned at each successive stage of a lawsuit. Although many localities report successful case processing under a master calendar,[230] the system has its disadvantages. Acquiring knowledge about the voluminous record typical of complex cases is extremely time consuming. To ask more than one judge to learn about a case would lead to substantial duplication of effort. Furthermore, judges familiar with the history and intent behind orders in a particular case may be more willing to modify their own prior orders when appropriate. And judges who understand the litigants' circumstances arguably could produce better trials[231] and more realistic schedules and decrees.

Another problem with a return to the master calendar system stems from the jurisdictional limits on federal district courts. Because district judges are equals, they are not empowered to revise each other's rulings absent an order from an appellate court. If a second district judge were assigned to a case after the first had issued orders, could the second judge change the first judge's rulings? It could be argued that any revision would, in effect, be an appellate decision beyond the jurisdiction of the district courts.[232] Moreover, given the collegiality of some federal benches, a judge assigned to adjudicate a colleague's case might feel constrained to abide by the letter of the first judge's order.

Finally, one of the major perceived advantages of the individual calendar system is that it makes a specific judge responsible for each case; the judge becomes accountable for case progress and, presumably, cases are disposed of more quickly.[233] Many would be loath to abandon a system that has been credited with success.

In an effort to retain the benefits of the individual calendar system while avoiding the pitfalls of judicial overexposure, we

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[229] *See generally* M. SOLOMON, *supra* note 101 (describing various kinds of case processing systems).

[230] *Cf. id.* at 12–13 (describing alleged strengths of master assignment system).

[231] *See* M. ROSENBERG, *supra* note 18, at 29–43; Rubin, *supra* note 14, at 143–44.

[232] *Compare* 28 U.S.C. §§ 1331–1362 (1976 & Supp. IV 1980) (original jurisdiction of district courts) *with id.* §§ 1291–1294 (appellate jurisdiction of circuit courts). *See generally* JAMES & HAZARD, *supra* note 23, § 11.5 (discussing doctrine of "law of the case").

[233] *But cf.* Cunningham, *supra* note 103 (consistent calendar system more important to successful case management than is any particular type of system).

could institute some mixture of the individual and master calendar systems. Both before and after trial, one judge could handle the formal adjudication; a second could be responsible for the informal mediation and settlement work.[234] Under this model, judges rather than surrogates would be in charge of cases. Yet judges who adjudicate would not receive unfiltered information that could bias their decisions. Some district judges have implemented this system in an informal manner by "swapping" cases when settlement is to be discussed.

The success of a mixed system, of course, would require that the "adjudicator" receive no impermissible information from the "mediator" and that the litigants not exploit the potential for manipulation provided by the availability of two judges. Moreover, to preserve the incentives of the individual calendar system, recordkeeping procedures would have to be adopted to hold judges accountable for the aspects of case processing within their bailiwicks.

But there are more serious flaws in this mixed-calendar proposal, which is a compromise between managerial and traditional goals. Because "mediation judges" would be insulated from adjudication, they would be deprived of the very power that supposedly enables managerial judges to increase the number of settlements. Indeed, because "mediation judges" would have to coordinate their schedules with those of the "adjudication judges," they would not even have a free hand in regulating discovery and manipulating case schedules. Finally, coordination between the two sets of judges may require the investment of more time and resources than might be saved by managerial efforts.

B. Nonjudicial Management: Alternative Decisionmakers

Proposals to preserve a modified form of managerial judging ignore the fundamental question whether judges should manage at all. There are few data indicating that management in fact helps parties to settle or litigate cases more quickly than they can through traditional litigation.[235] Perhaps scarce judicial resources should be conserved and employed only when judges' special skill — adjudication — is required. A

[234] The mediator/adjudicator dichotomy is a variation on the "team assignment system" described in M. SOLOMON, *supra* note 101, at 13–14. Others have made similar suggestions. *See, e.g.*, First Wis. Nat'l Bank v. Klapmeier, 526 F.2d 77, 80 n.6 (8th Cir. 1975) ("[W]here the judge sits as trier of fact, the judge should avoid recommending an actual settlement figure before or during trial."); *see also* Will, Merhige & Rubin, *supra* note 115, at 212 (when judges are careful, cases rarely need to be transferred from settlement judge to another judge for trial).

[235] *See supra* pp. 419–22.

decision to return judges to judging, however, does not spell an end to the supervision of litigation. Management tasks could be shifted to other court personnel or taken out of the courthouse altogether.

1. Court Personnel as Case Managers. — Courts could appoint magistrates, arbitrators, specially trained mediators, or even therapists — whoever is effective — to perform the management tasks that judges now undertake.[236] Once appointed, these individuals could devote all of their time to resolving disputes before trial and to implementing decrees after trial. In some cases, magistrates,[237] receivers,[238] and special masters[239] already perform these tasks. Their work

[236] An analogous form of delegation is used in the Second Circuit's Civil Appeals Management Program (CAMP), *see* 2D CIR. R. app., which is authorized by rule 33 of the Federal Rules of Appellate Procedure. *See also* Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094 (1974) (then-chief judge discussing the success of CAMP during its first few months in facilitating settlement and streamlining cases). Similar experimental projects have been instituted in the Ninth Circuit, *see* E. Neisser, Memorandum to Lawyer Representatives to the Ninth Circuit Judicial Conference (Nov. 12, 1981) (on file in Harvard Law School Library), and the Seventh Circuit, *see* J. GOLDMAN, THE SEVENTH CIRCUIT PREAPPEAL PROGRAM 43 (1982). Under the CAMP program, staff lawyers meet with parties' lawyers to facilitate settlement. The lawyers, however, have no authority to impose any kind of settlement or to influence adjudication of the dispute should mediation efforts fail. *See* Lake Utopia Paper v. Connelly Containers, 608 F.2d 928, 930 (2d Cir. 1979) (condemning counsel for including information in brief about discussions at CAMP conference: "staff counsel['s opinions on the merits] are his own, neither influenced by nor communicated to any member of the court"), *cert. denied*, 444 U.S. 1076 (1980). The principle underlying CAMP is that, in some disputes, all that is needed to achieve settlement is the assistance of a neutral third party.

With the CAMP program in effect, 411 appeals were settled and 30 cases were dismissed in 1980. These dispositions accounted for 20% of all appeals terminated in that year. *See Additional Judgeship Hearings*, *supra* note 164, at 63 (statement of Wilfred Feinberg, Chief Judge, United States Court of Appeals, Second Circuit); L. FARMER, APPEALS EXPEDITING SYSTEMS: AN EVALUATION OF SECOND AND EIGHTH CIRCUIT PROCEDURES (1981). Determining the effect of CAMP on settlement or speedy dispositions is complicated by the same problems associated with measuring the effect of pretrial management on settlement and disposition speed. *See supra* pp. 419–22.

[237] Magistrates are full-time court officers who are appointed by federal district judges to serve eight-year terms. Magistrates assist trial judges in a variety of tasks and can preside over civil cases if the parties consent. Generally, they supervise discovery, decide nondispositive matters, and hear habeas corpus applications. *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[238] Receivers are appointed by judges and are empowered to administer property or institutions under court supervision. Judges may appoint receivers on an ad hoc basis pursuant to FED. R. CIV. P. 66.

[239] Special masters are appointed by judges to serve a special role in a single case. Special masters may supervise discovery or develop remedies in complex cases. Judges may appoint special masters, like receivers, on an ad hoc, and possibly part-time, basis. *See* FED. R. CIV. P. 53. For discussions of the role of special masters, see

could be expanded.[240] In addition, judges in civil cases could adopt the practice for implementing court orders that is followed in federal criminal cases: judges do not directly oversee sentences; instead, authority for most postconviction decisions is shifted to the Bureau of Prisons and to the United States Parole Commission.[241] Parallel executive branch agencies could be created to implement judges' civil orders.

One disadvantage of this proposal is that, by creating some set of "others" to perform managerial tasks, it causes yet another transformation of the courts — this time into a "bureaucratic" judiciary. Commentators are already concerned that the proliferation of clerks and the delegation of duties to staff attorneys have changed appellate courts into bureaucracies in which the authority of judges has been diluted.[242] Moreover, the delegation of managerial power provides little assurance that the power will be exercised more fairly or efficiently than it would be if judges retained such authority. If we attempted to constrain staff authority by making staff decisions appealable to trial judges, we would provide litigants with yet another administrative layer to slog through — hardly a step toward greater efficiency. Alternatively, if the decisions of

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Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978); Brakel, *Special Masters in Institutional Litigation*, 1979 AM. B. FOUND. RESEARCH J. 543; Silberman, *Masters and Magistrates — Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 (1975).

[240] Arguably no new statutory authorization would be needed to expand the management role of such nonjudicial personnel. *See* 28 U.S.C. § 636(b)(3) (1976) (magistrate may be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States"); FED. R. CIV. P. 53(a) (definition of "masters" includes numerous roles such as "referee," "auditor," and "examiner"). Because the tasks of receivers are not defined by the Federal Rules, *see* FED. R. CIV. P. 66, the limits of receivers' authority are unclear. For a discussion of constitutional limits on the expansion of magistrates' powers, compare McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. ON LEGIS. 343, 365–79 (1979) (arguing that a magistrate is not a discrete entity but merely a subordinate part of the article III court to whom a judge may constitutionally delegate a wide range of judicial functions), with Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023 (1979) (arguing that delegation of judicial power to magistrates is not sound policy and is inconsistent with article III).

[241] FED. R. CRIM. P. 35 permits judges 120 days to reconsider sentencing decisions. Thereafter, virtually all decisions about a federal inmate's term and place of confinement are decided by the Parole Commission, *see* 18 U.S.C. §§ 4201–4218 (1976), and the Bureau of Prisons, *see id.* §§ 4041–4042. For convicted individuals on probation, federal judges have some role, but daily supervision is left to the United States Probation Office. *See id.* §§ 3651–3656 (1976 & Supp. IV 1980).

[242] *See* Hoffman, *supra* note 187, at 61–64; McCree, *supra* note 187, at 785–93; Vining, *Comment: Justice, Bureaucracy, and Legal Method*, 80 MICH. L. REV. 248, 251–53 (1981). *See generally* J. OAKLEY & R. THOMPSON, LAW CLERKS AND THE JUDICIAL PROCESS (1980) (empirical study of different functions of law clerks).

judicial surrogates were *not* reviewable, the new bureaucracy could become a bastion of great and unchecked power.[243]

2. Beyond the Courthouse. — Congress could establish alternative dispute resolution centers.[244] Workers' compensation boards are a long-standing example of such a reform.[245] More recently, several state legislatures have attempted to reduce state court case loads by creating mandatory arbitration[246] and medical malpractice[247] panels. Although these alternative

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[243] *Cf.* United States v. Raddatz, 447 U.S. 667 (1980) (judge who received written objections to a magistrate's report and was statutorily required to make de novo determination need not hear the oral evidence anew).

Some are concerned that adding a layer of parajudicial officials would eventually create two systems of justice, one for those who can afford to survive the pre-judge phase and the other for those who can afford only the first stage, conducted by non-article-III judges. *See* H.R. REP. NO. 1364, 95th Cong., 2d Sess. 42 (1978) (dissenting remarks of Rep. Holtzman) (discussing drafts of bills later enacted as the Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.)).

[244] *See, e.g.*, Bork, *Dealing with the Overload in Article III Courts*, in THE POUND CONFERENCE, PERSPECTIVES ON JUSTICE IN THE FUTURE 150 (A. Levin & R. Wheeler eds. 1979); Rosenberg, *supra* note 214, at 808–16. Other possibilities include creating special-issue courts, *see, e.g.*, Jordan, *Specialized Courts: A Choice?*, 76 NW. U.L. REV. 745 (1981), lay tribunals, *see, e.g.*, Lasker, *The Court Crunch: A View from the Bench*, 76 F.R.D. 245, 256 (1977), or less formal courts, *see, e.g.*, Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339 (1976). For discussions of the constitutional limits of Congress' power to create alternative, non-article-III courts, compare Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297 (1981), with Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982).

[245] *See generally* W. DITTMAR, STATE WORKMEN'S COMPENSATION LAWS 7 (1959) (first workers' compensation act was enacted in 1908; within 12 years all but eight states had similar statutes).

[246] *See, e.g.*, CAL. CIV. PROC. CODE §§ 1141.10–.32 (West 1982) (mandatory arbitration for specified civil lawsuits when amount in controversy does not exceed $15,000 ($25,000 in some counties)); *see also* Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980) (describing Judge Lambros' court, in which litigants may have their cases briefly argued to advisory or "summary" juries, who then return a nonbinding verdict; arguing that this procedure may enable the parties to contemplate settlement possibilities with more insight).

Many litigation alternatives depend for their constitutionality on the consent of the parties who choose them over traditional trial procedure. *See, e.g.*, 28 U.S.C. § 636(c) (Supp. IV 1980) (permitting judges, with parties' consent, to refer civil trial matters to federal magistrates). Other alternatives provide litigants an opportunity for complete de novo proceedings at the litigants' option. *See* Lambros & Shunk, *supra*, at 46.

For a general discussion of the Justice Department's model arbitration program, see A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (1981).

[247] Pennsylvania, for example, instituted medical malpractice arbitration in 1979. Pennsylvania Health Care Services Malpractice Act, 40 PA. CONS. STAT. ANN. § 1301.101–.1006 (Purdon 1982); *see* Parker v. Children's Hosp., 483 Pa. 106, 394

schemes are sometimes replacements for traditional adjudication,[248] they could also be used as an initial filter for disputes[249] or as a supplement to adjudication.[250] This suggestion would preserve a place for adjudication while augmenting the services available to disputants.

Legislatively developed alternatives to adjudication have some advantages. First, Congress is better equipped than the judiciary to weigh social needs and plan comprehensively for the future; it has the capacity to investigate and refashion systematically the dispute resolution process. Second, when designing litigation alternatives, the legislature typically provides a framework of rules that circumscribes the powers and tasks of new agencies. In contrast to the federal judiciary, which has failed to articulate the rules by which judicial management should work, Congress could at a minimum establish criteria for allocating cases to one dispute-processing scheme or another. This step would provide litigants with notice of the specific procedures affecting them.[251] Third, the legislature provides a forum for debating reforms of the apparatus we use to vindicate our rights.

Of course, like the suggestions described above, this idea has drawbacks. Some will object that certain forms of congressional intervention in managerial judging would result in unconstitutional intrusions on the judiciary.[252] Others will claim that judges have the necessary expertise and that legis-

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A.2d 932 (1978) (upholding Act). *But see* Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (declaring unconstitutional part of Act that gave exclusive jurisdiction to arbitration, after three years of experience with the Act revealed lengthy delays in the arbitration system that burdened the right to jury trial).

[248] *See, e.g.*, Patterson v. United States, 359 U.S. 495 (1959) (when workers' compensation is available, it is typically an exclusive remedy).

[249] *See, e.g.*, CAL. CIV. PROC. CODE §§ 1141.10–.32 (West 1982) (requiring arbitration of claims not exceeding $15,000 ($25,000 in some counties); any party may elect de novo trial after arbitration).

[250] *See, e.g.*, Reynolds & Tonry, *Professional Mediation Services for Prisoners' Complaints*, 67 A.B.A. J. 294 (1981) (describing Maryland Mediation Project, which permits inmates to elect mediation as an alternative to litigation, but permits them to switch to litigation at any point).

[251] *See, e.g.*, 5 U.S.C. §§ 8101–8193 (1976 & Supp. IV 1980) (instructing Secretary of Labor to promulgate rules and regulations of Employees' Compensation Appeals Board).

In contrast, judge-made management schemes contain few standards. *See, e.g.*, Peckham, *supra* note 14, at 796 ("The decision to relax the requirements of the pretrial order has generally been intuitive.").

[252] *See* United States v. Brainer, 515 F. Supp. 627 (D. Md. 1981) (refusing to obey Speedy Trial Act limitations, because such provisions intrude upon judiciary's inherent power to control its docket); Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958).

lative involvement would be unproductive. Finally, all must acknowledge that alternative institutions will not necessarily value accuracy and fairness over speed or perform their assigned tasks well. The closest present-day analogue to alternative dispute centers — agency adjudication — is often mistake ridden and hampered by a variety of institutional and bureaucratic constraints that undercut the quality of deliberation.[253] Nevertheless, commentators and researchers are increasingly interested in experimentation with alternatives such as arbitration.[254] A resumption of federal exploration of similar alternatives may well be in order.

C. Management by Rules

The proposals outlined above all preserve some form of case management. A different approach would be to reorient the rules by which all cases proceed to decrease the need for management.

1. Blueprints for Processing Civil Cases. — Congress could create an external timetable for the civil pretrial process akin to that in the Speedy Trial Act of 1974.[255] Since its enactment, that Act has required that criminal cases be tried within a certain time period. The scheme is designed both to limit judges' discretion to set strict or liberal schedules that could affect case outcomes and to protect defendants' right to a speedy trial.[256]

Yet experience under the Speedy Trial Act reveals that application of such a scheme to civil cases would not only prevent authoritarian excesses, but would also hamper judges' ability to respond to the particular challenges of individual cases. Further, many complain that the Speedy Trial Act has failed to provide faster case disposition,[257] has harmed defen-

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[253] Turning over large numbers of controversies to agencies does not address the issue whether alternative forums are producing correct decisions. *See, e.g.*, Chassman & Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801, 806–08 (1980) (discussing erratic decisions by administrative law judges in the Office of Hearings and Appeals of the Social Security Administration).

[254] *See, e.g.*, D. HENSLER, *supra* note 184, at v; Burger, *Agenda*, *supra* note 76, at 95.

[255] 18 U.S.C. §§ 3152–3156, 3161–3174 (1976 & Supp. IV 1980); 28 *id.* § 604. For a discussion of the Act, see Frase, *Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976).

[256] The sixth amendment provides criminal defendants with "the right to a speedy and public trial." U.S. CONST. amend. VI; *see* Barker v. Wingo, 407 U.S. 514, 515 n.1 (1972).

[257] *See* Bridges, *The Speedy Trial Act of 1974: Effects on Delay in Federal Criminal Litigation*, 73 J. CRIM. L. & CRIMINOLOGY 50 (1982) (no clear evidence that Act has reduced delay).

dants, and has not eliminated management.[258] Thus, although the Act does provide standards and does guide district courts in exercising their authority, it is at best a partial solution.

Moreover, designating speedy-trial rules (or any set of rules) for every type of civil lawsuit would be very difficult, if not impossible. The variety and complexity of the civil docket would invite rulemakers to craft dozens of subrules. Yet the multiplication of subrules would in turn conflict with the Federal Rules' premise that a single framework can form the basis for litigating the myriad claims brought before the federal courts.[259]

It is possible, of course, that the original conception of a single, simple, and unified set of federal rules is no longer compelling. Special — and different — rules for state and federal prisoners' habeas corpus petitions became effective in 1977.[260] The *Manual for Complex Litigation*[261] is becoming the alternative rulebook for multiparty and multidistrict cases. And individual federal district courts are experimenting with local rules to manage cases that they believe are poorly served by the Federal Rules.[262] Unless local rules are crafted with care and coordination, however, the proliferation of hundreds of particularized rules would resurrect the "procedural traps for the unwary" that the uniform Federal Rules were designed to avoid.[263]

2. Economic Disincentives to Litigation. — Congress could create a series of economic sanctions and incentives to make adjudication less attractive. Federal rule 68 currently provides a small incentive for plaintiffs to settle by obliging those who win less at trial than they were offered in writing as settlement to pay a portion of the losing defendant's costs.[264] Congress

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[258] Speedy Trial Act administration is neither problem free nor utterly inflexible. *See* Misner, *District Court Compliance with the Speedy Trial Act of 1974: The Ninth Circuit Experience*, 1977 ARIZ. ST. L.J. 1; Project, *The Speedy Trial Act: An Empirical Study*, 47 FORDHAM L. REV. 713 (1979).

[259] *See generally* Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975) (explaining the tensions between the use of a uniform transsubstantive procedural system and the diverse procedural needs of specific subject matters).

[260] *See* 28 U.S.C. §§ 2254–2255 (1976 & Supp. IV 1980).

[261] MANUAL FOR COMPLEX LITIGATION (5th ed. 1982).

[262] For a discussion of local court rules, see Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A.L. REV. 213 (1981).

[263] *See, e.g.*, Cohn, *supra* note 105, at 295 (experiments in local rules have threatened to create "a kind of procedural Tower of Babel" (citation omitted)).

[264] *See* FED. R. CIV. P. 68; *cf.* Delta Airlines v. August, 450 U.S. 346 (1981) (rule applies only to judgment in favor of plaintiff-offeree). Some states have similar rules. *See, e.g.*, CAL. CIV. PROC. CODE § 998 (West 1980).

could substantially increase the incentives of some litigants to avoid litigation by altering the so-called American rule,[265] under which each side bears its own attorneys' fees; all losing parties could be required to pay winning parties' fees.

The interest in economic penalties is growing,[266] and creative options, such as differential user taxes, could be explored.[267] Using dollars to discourage the use of courts, however, is laden with difficulties. Our society values ready access to courts and jury trials. Indeed, in recent years Congress has used the cost-shifting technique to encourage plaintiffs to bring *more* suits to vindicate important rights.[268] In this context, it would be anomalous to adopt economic incentives that would necessarily impose a heavy burden on parties with fewer financial resources — the very parties who are turning to the courts more now than they have in the past.

D. Minimizing the Need for Management

I have touched on ways to constrain judicial management, to assign managerial tasks to other individuals or fora, and to devise new rules to control litigants' behavior. Another alternative would be simply to abolish all forms of management in all places by taking from judges and judge surrogates the responsibility for both case propulsion and case settlement. As they have done in the past, the parties could run cases themselves. Under this traditional model, judges would enter disputes only if summoned by the parties and would decide contested issues only in the formal adjudicatory fashion.

This approach might be attractive to those who believe that the "crisis in the courts" has been overstated, that problematic uses of the courts are far less frequent than the cries of dismay suggest.[269] Postdecision disputes are rare, and many

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[265] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("[T]he prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.").

[266] Economists have attempted to analyze the effect of fee shifting. *See, e.g.*, Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) (analyzing American and British systems and considering the incentives created by each).

[267] *Cf.* Murillo v. Bambrick, 681 F.2d 898 (3d Cir.) (upholding New Jersey's assessment of higher fees in divorce actions than in other actions), *cert. denied*, 51 U.S.L.W. 3376 (U.S. Nov. 15, 1982); Brazil, *supra* note 185, at 318–28 (parties in complex cases pay fees of special masters appointed to oversee special needs of cases).

[268] *See, e.g.*, 42 U.S.C. § 1988 (Supp. IV 1980) (authorizing attorneys' fees in proceedings brought to vindicate civil rights); *id.* § 2000e-5(k) (1976) (authorizing attorneys' fees in actions brought to vindicate equal employment opportunity).

[269] *See, e.g.*, Friedman, *supra* note 85, at 661.

believe that pretrial disputes are also relatively uncommon. For example, as far as we know, the absolute number of discovery requests is small in most cases,[270] and the demand for judicial assistance in discovery is likewise small.[271] In the occasional case — before or after trial — in which the parties are unable to accommodate each others' needs, the party allegedly injured could seek the court's aid and the court could respond, albeit in a formal manner. And when lawyers misbehave, bar associations and consumer groups, not judges, could control and sanction the misbehavior.

Some observers might reply that this approach would be unwise. Management appears to be an inevitable response to current problems of civil litigation, especially in discovery and in the enforcement of complex decrees.[272] Moreover, the structure of the Federal Rules, with provisions permitting liberal joinder of parties and issues, encourages the problems that in turn invite management.

To be sure, we could change the Rules to mitigate some of the problems that lead to management. We could adopt more restrictive approaches toward multiparty, multi-issue cases in the hope that simplification would decrease managerial pressures. We could streamline and limit discovery rights; if some of the procedural opportunities now afforded litigants were abolished, the need for supervision would decrease, and the courts' work load would diminish.

Redrafting the Rules to limit their liberal premises has obvious drawbacks. Multiparty, multi-issue litigation is presumed to be efficient because related claims can be resolved within a single lawsuit. Limiting discovery poses special problems. Divining which portions of discovery are expendable would not be easy. Moreover, when working well, discovery allegedly enables parties to decide when to settle and ensures that the trials that do occur are fairer and simpler. Because many commentators agree that most cases do not pose discovery problems, limiting a practice that is not the true source of the difficulty would be an unnecessary and perhaps harmful response. Finally, restricting discovery requests to, for example, thirty interrogatories (without court permission to ask more) would be unduly rigid and burdensome. Lawyers would try to imbue the thirty questions permitted with the content

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[270] *See* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 27–35 (1978).

[271] *See id.* at 18–26.

[272] *Cf.* Chayes, *Public Law Litigation and the Burger Court*, *supra* note 5, at 57 ("[T]oday even a conservative Court is reduced, perforce, to practicing public law litigation.").

of 100; parties would argue over the permissible scope of the questions; and judges would have more issues to decide.

VI. CONCLUSION

Ideas about statutory timetables for litigation, diverse procedural rules for different categories of cases, alternative dispute resolution centers, curtailed discovery rights, state-controlled case preparation, limitations on court access, and penalties for those who do not settle lawsuits should give us pause, for these reforms would drastically alter the civil litigation world. But equally far-reaching changes, instituted by the judiciary itself and carried out in the name of increased efficiency, are already under way. Unfortunately, these changes are being carried out piecemeal and with little reflection on their cumulative implications for the adversarial system.

If, as many of their critics assert, the courts cannot meet the demands they face, revamping adjudication may well be appropriate. But if the time to reappraise the process of adjudication has arrived, the work should not be left to the judiciary, its support staff, a handful of academics, or a few American Bar Association committees. Rather, the hard questions about pace (how quickly should lawsuits proceed?), allocation of authority (should the pace be decided by judges, the parties, or Congress?), and the continued existence of the adversary process (who should be responsible for case investigation, preparation, and presentation?) should be subjected to a more searching and free-ranging public debate.

Some may argue that, even if an inquiry into judicial management techniques is necessary, judges — joined by a select group of lawyers and scholars — have all of the expertise necessary to decide how courts should be run.[273] But I join others who advocate a more broad-based investigation of what judges should do and which rules should govern their behavior. Although judges can and should exercise substantial authority over court procedures, the framers of the Constitution foresaw the need for Congress to play a role in structuring the nation's judicial business.[274] The problems raised by managerial judging, problems that implicate the rights of all citi-

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[273] *See, e.g.*, W. BROWN, FEDERAL RULEMAKING PROBLEMS AND POSSIBILITIES ch. 4 (1981); Schwartz, *supra* note 13, at 460–61; Hazard, *Undemocratic Legislation* (Book Review), 87 YALE L.J. 1284, 1294 (1978) (reviewing J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977)).

[274] *See* U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

zens, are simply too important to be left to the discretion of judges alone.

In the debate over appropriate responses to the increasingly heavy work load of the federal courts, I am concerned about preserving the uniqueness of the judicial function. Seduced by controlled calendars, disposition statistics, and other trappings of the efficiency era and the high-tech age, managerial judges are changing the nature of their work. The old judiciary was doing something different from the modern managerial ideal, something quite out of step with the world of time and motion studies. Among all of our official decisionmakers, judges — and judges alone — are required to provide reasoned explanations for their decisions. Judges alone are supposed to rule without concern for the interests of particular constituencies. Judges alone are required to act with deliberation — a steady, slow, unhurried task.

I want to take away trial judges' roving commission and to bring back the blindfold. I want judges to balance the scales, not abandon them altogether in the press to dispose of cases quickly. No one has convincingly discredited the virtues of disinterest and disengagement, virtues that form the bases of the judiciary's authority. Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model.[275] Until we do so, federal judges should remain true to their ancestry and emulate the goddess Justicia. I fear that, as it moves closer to administration, adjudication may be in danger of ceasing to be.

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> Ours is an adversary system of justice. . . . In our system lawyers worry about the whereabouts of witnesses. The court does not. Lawyers worry about proof. The court does not . . . . [The challenged local court rule] subordinates the role of the lawyer to that of the administering magistrate, reducing counsel to the role of clerical assistants . . . .

McCargo v. Hedrick, 545 F.2d 393, 401 (4th Cir. 1976) (striking down local court rules requiring cumbersome pretrial procedure).

The demarcation between inquisitorial and adversarial proceedings appears to be blurring. *See* Merryman, *On the Conversion (and Divergence) of the Civil Law and the Common Law*, 17 STAN. J. INT'L L. 387 (1981); *cf.* Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974) (discussing inquisitorial elements of criminal procedure model). For a discussion of a new entrepreneurialism in trial courts, see Galanter, Palen & Thomas, *The Crusading Judge: Judicial Activism in Trial Courts*, 52 S. CAL. L. REV. 699 (1979).

APPENDIX: THE ICONOGRAPHY OF JUSTICE

Contemporary depictions of Justice consist typically of a large female figure, draped in Greco-Roman robes. She carries scales and sword, and her eyes are covered with a blindfold. Although the sword, scales, and blindfold have been added over the centuries, the personification of justice as a woman dates to the ancient world. The earliest documentation of this image, dated about 2500 B.C.E., comes from Egyptian drawings of the goddess Ma'at. The sleek Ma'at,[276] daughter of the sun god Ra, embodied justice, peace, order, and law.[277] The Greeks, however, fashioned two goddesses as archetypal judges. Themis, whose name may be translated as "order," was the elder goddess of justice; she supervised ceremonies and maintained order on Olympus.[278] Some scholars believe that she is the Greeks' version of Ma'at, altered to reflect the Greek aesthetic. Unlike the slender, highly stylized half-portraits of Ma'at, statues of Themis depict a large, somber, imposing woman.[279] The second goddess of justice was Dyke, Themis' daughter, who lived on earth rather than on Olympus. Some believe that Dyke and Themis represent the division between "earthly justice" and "divine justice."[280]

The Romans consolidated the Greeks' two goddesses into one — Justicia. Like the Greeks' goddesses, Justicia is a hulking figure, and she provides the prototype for today's pictorial image of justice.[281] The idea of justice as a virgin was introduced, apparently, as Dyke merged into Justicia. By the Middle Ages, virginity may have been attributed to Justice as part of the identification of law with religion, and, more specifically, as a reference to the Virgin Mary.[282] In medieval Christian art, Justice — or Righteousness, as she is sometimes called

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[276] *See* W. FORMAN & H. KISCHKEWITZ, EGYPTIAN DRAWINGS plates 48, 51 (1972).

[277] *See* H. FRANKFORT, ANCIENT EGYPTIAN RELIGION 53–56 (1948); S. MORENZ, EGYPTIAN RELIGION 113–27 (A. Keep trans. 1973).

[278] *See* J. HARRISON, THEMIS: A STUDY OF THE SOCIAL ORIGINS OF GREEK RELIGION 198 (1912); *id.* ch. 12; J. JONES, THE LAW AND LEGAL THEORY OF THE GREEKS ch. 2 (1956).

[279] J. BEAZLEY & B. ASHMOLE, GREEK SCULPTURE AND PAINTING TO THE END OF THE HELLENISTIC PERIOD figure 146 (1932).

[280] *See* G. DEL VECCHIO, JUSTICE 6–7, 10–13 (1952).

[281] *See, e.g.*, Raphael's "Justice in the Vatican," in E. GOMBRICH, SYMBOLIC IMAGES plates 70, 71 (1972). For an unconventional rendition of Justice, see Gustav Klimt's "Jurisprudence," in C. SCHORSKE, FIN-DE-SIECLE VIENNA figures 47, 48 (1980).

[282] Alternatively, the original association may have derived from the astral virgin of the zodiac. *See* J. Shaw, Images of Justice in Mediaeval Art 9 (Apr. 10, 1980) (unpublished manuscript on file in Harvard Law School Library).

— maintained her female form as she joined the three other Cardinal Virtues — Prudence, Fortitude, and Temperance, all depicted as women.[283]

The first recorded association of scales with justice is, again, Egyptian. As we understand Egyptian beliefs about the afterlife, at death each person was questioned by forty-two judges, known as the Priests of Ma'at. Thereafter, judges, using scales, balanced the individual's heart against a feather — the symbol of Ma'at. If the heart was lighter than the feather, the individual was eligible for eternal life.[284]

The Greeks maintained the association of scales and justice; both Themis and Dyke are depicted with scales.[285] The scales, however, were not unique to those goddesses; other Greek gods also carried scales.[286] Whether the Roman Justicia carried scales is unclear.[287] In medieval times, the scales were occasionally replaced by a rod,[288] and Justicia was also portrayed with a cornucopia.[289] Over time, the cornucopia and rod disappear, and the sword is shown instead.[290] In today's depiction of Justice, scales and sword are commonplace.

The blindfold is a relatively recent addition to the imagery of Justice. According to Shaw,[291] the blindfold was not a standard element in the depiction of Justice until the sixteenth century.[292] Before then, artists had used the blindfold as a derisive symbol; they had drawn it around pictures of synagogues as an apparent reference to the "blindness" of Judaism to the "insight" of Christianity.[293] Perhaps borrowing this notion, a well-known 1494 woodcut illustrating Brant's *The*

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[283] *See id.* at 8–10.

[284] *See* W. FORMAN & H. KISCHKEWITZ, *supra* note 276, plates 39, 60; S. MORENZ, *supra* note 277, at 125; G. STEINDORFF & K. SEELE, WHEN EGYPT RULED THE EAST 148 (1957).

[285] *See* Daube, *supra* note 40, at 114.

[286] *See, e.g.*, HOMER, THE ILIAD bk. 22, lines 180–88 (A. Murray trans. & ed. 1924–1925) (Zeus balancing fates of Hector and Achilles on scales).

[287] *Compare* J. Shaw, *supra* note 282, at 8 (Justicia usually represented with a balance), *with* Daube, *supra* note 40, at 114 (scales do not "figure among [Justicia's] attributes in any literary work").

[288] *See* J. Shaw, *supra* note 282, at 9.

[289] *Cf.* A. KATZENELLENBOGEN, ALLEGORIES OF THE VIRTUES AND VICES IN MEDIAEVAL ART 28 n.5 (1964) (Righteousness portrayed with cornucopia and balance but without blindfold).

[290] *See* J. Shaw, *supra* note 282, at 9, 14.

[291] *Id.* at 15–17.

[292] *See, e.g.*, "Justice Depicted by the Order of Lorenzo di Niccolo" (circa 1395) (portraying Justice with both scales and sword but no blindfold), *displayed at* De Young Museum, San Francisco; *see also* Simmonds, *The Blindfold of Justice*, 63 A.B.A. J. 1164 (1977); *cf.* E. PANOFSKY, *supra* note 37, at 109 n.48 (Egyptian allegory described a chief justice as "eyeless . . . to illustrate his impartiality").

[293] *See* E. PANOFSKY, *supra* note 37, at 110–11.

Ship of Fools depicts a fool placing a blindfold on the goddess Justice[294] — an image generally interpreted to be sharply critical of ignorant judges, the "blind fools" corrupted by attorneys. By the end of the sixteenth century, the previously derisive interpretation of the blindfold had changed; it became a symbol of impartiality.[295]

A final element in Justice's imagery is her garment, which may have influenced the dress of modern judges. Today's judges wear robes,[296] dress that evokes the garments of clerics and kings. Reacting against these associations, many nineteenth century judges refused to wear robes. In some states, judges did not resume the practice until this century.[297]

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[294] *See* S. BRANT, THE SHIP OF FOOLS 236 (E. Zeydel trans. 1944); J. Shaw, *supra* note 282, at 14–17.

[295] According to Shaw, Justice was first represented with the blindfold as a symbol of impartiality in 1531. J. Shaw, *supra* note 282, at 15. Interpretations of the blindfold since the 16th century have not always described it as an advantage. *See, e.g.*, E. PANOFSKY, *supra* note 37, at 107–08 (Cupid portrayed with blindfold to illustrate love's irrationality).

[296] *See* Clarkson, *The Judicial Robe*, 1980 SUP. CT. HIST. SOC'Y Y.B. 90.

[297] *See, e.g.*, Ferguson, *To Robe or Not to Robe? — A Judicial Dilemma*, 39 JUDICATURE 166 (1956); *The Story of Judicial Robes*, MASS. L.Q., July 1959, at 50.

Other symbols, such as gavels and wigs, are sometimes associated with judges. These accessories, however, have not been depicted exclusively with judges. For discussions of these and other accessories commonly associated with justice, see *Some Notes on the Emblems of Law and Justice*, *Appendix* to A DESCRIPTION OF THE NEW BUILDINGS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW 55 (1926); *Wigs Through the Ages*, 31 N.Z.L.J. 171 (1955).

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