

## University of Oklahoma College of Law

---

From the Selected Works of Steven S. Gensler

---

December, 2010

# Judicial Case Management: Caught in the Crossfire

Steven S. Gensler, *University of Oklahoma Norman Campus*



Available at: [https://works.bepress.com/steven\\_gensler/2/](https://works.bepress.com/steven_gensler/2/)

# HEINONLINE

Citation: 60 Duke L.J. 669 2010-2011

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Tue Mar 27 16:41:43 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0012-7086](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0012-7086)

# JUDICIAL CASE MANAGEMENT: CAUGHT IN THE CROSSFIRE

STEVEN S. GENSLER†

## ABSTRACT

*For thirty years, the Federal Rules of Civil Procedure have relied on active judicial case management to combat undue cost and delay. The complaints about cost and delay have not gone away, but few blame the case-management rules for that. Indeed, lawyers continue to view active judicial case management as one of the best ways of reducing cost and delay, and most of the reforms being urged today seek even greater judicial case management for that reason. But some think the rulemakers took a wrong turn thirty years ago and that each round of rulemaking that places more reliance on case management simply compounds the error.*

*This Article examines the role of case management in the current system, the criticisms of the case-management model, and the implications of those criticisms for the current reform agenda. It is organized around five questions, each exploring a policy or practical issue associated with having a pretrial system that (1) has just one set of rules for all cases, and (2) relies on active judicial case management to ensure that the pretrial process in each case is just, speedy, and inexpensive. The stakes are high. If we, participants in the judicial system, are to continue to rely on active judicial case management to tailor the pretrial process to the needs of individual cases, then we must be sure that we understand the implications of doing so. If we conclude that we do not like those implications, or that there are better ways to tailor the pretrial process, then we need to take a different path than the one we have traversed for the last thirty years. But if we*

---

Copyright © 2010 by Steven S. Gensler.

† Welcome D. & W. DeVier Pierson Professor of Law, University of Oklahoma College of Law. Since 2005, I have been a member of the Advisory Committee on Civil Rules. However, the views expressed herein are mine alone and should not be attributed to the Advisory Committee or its other members. I would like to thank the participants at the 2010 Sedona Conference on Complex Litigation for their many helpful comments on an earlier draft.

*conclude that we have been on the right path, and that federal courts should push even farther down that path, then we must be prepared to meet the crossfire that we will encounter along the way.*

## TABLE OF CONTENTS

Introduction .....	670
I. Case Management and the Federal Judiciary .....	674
II. The Crossfire .....	688
A. How Should Article III Judges Be Spending Their Time? .....	689
B. Should There Be Different Rules for Different Types of Cases? .....	697
1. Transsubstantivity and the One-Size-Fits-All Debate .....	698
2. Proposals for Differentiated Rules .....	701
3. The Path Forward .....	719
C. Do Federal Judges Wield Too Much Discretion? .....	720
D. Can Case Management Solve the “Cost Problem” by Itself (If at All)? .....	726
1. Case Management as a Cure for Undue Cost and Delay .....	727
2. Structural Reform to Facilitate Case Management .....	729
3. Culture Change .....	734
E. Should Judges “Manage Up” or “Manage Down”? .....	738
Conclusion.....	743

## INTRODUCTION

Judging changed thirty years ago. That was when everyday federal pretrial practice evolved to assimilate the active case-management approach<sup>1</sup> originally developed for use in cases that were protracted or complex.<sup>2</sup> No longer do federal judges sit back

---

1. See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308–09 (1986) (describing the development of managerial judging); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 790–91 (1993) (describing the emergence of managerial judging); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge’s Role*, 61 JUDICATURE 400, 404 (1978) (describing courts’ adoption of procedures under the Manual for Complex Litigation premised on active judicial management).

2. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 938–40 (2000) (discussing case management in protracted

passively and let the lawyers manage their cases unless and until they encounter a problem that requires judicial attention. Rather, federal judges now take control of their cases from the start. The process of taking control typically begins with the judge issuing a case-management order that sets a detailed schedule based on the particular needs of the case. As the case goes forward, the federal judge can continue to exercise control by, among other things, closely managing the scope, timing, and sequence of discovery and dispositive motions.<sup>3</sup> Starting in 1983 and continuing into the present era, a series of amendments have enshrined active judicial case management into the Federal Rules of Civil Procedure (Civil Rules), formally validating it as a favored practice while encouraging and

---

cases); *see also* WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 237–41 (1968) (discussing the emerging philosophy of having a single judge assigned to “troublesome” cases with the expectation that the judge would then actively manage the case to expedite the litigation); Study Grp. on Procedure in Protracted Litig., Judicial Conference of the U.S., *Handbook for Protracted Cases*, 25 F.R.D. 351, 359 (1960) (“Let it be emphasized this is not the ordinary litigation; our subject is rare in number, the truly complicated, a few hundred amid the tens of thousands of cases on federal court calendars.”).

3. Judicial case management is also closely associated with the expansion of alternative dispute resolution processes, particularly the increase in judicial involvement in the settlement process. *See* FED. R. CIV. P. 16(c)(2)(I) (“[A]t any pretrial conference, the court may consider . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule.”). The Committee Notes to both the 1983 and the 1993 amendments to Rule 16 sent strong signals to the bench and the bar that alternative dispute resolution processes and settlement were a big part of the case management that the expanded version of Rule 16 contemplated. *See id.* advisory committee’s note to 1983 amendment; *id.* advisory committee’s note to 1993 amendment. That aspect of judicial case management has drawn some of the harshest criticism. *See* Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 75 (1995) (describing the trend toward and criticism of managerial judging); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424–31 (1982) (discussing the side effects of managerial judging). And as a wonderful recent symposium evidences, the debate about the role of settlement (and necessarily the role of judges in promoting settlement) continues to this day. *See* Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009). The focus of this Article, however, is on the case-processing aspects of the judicial case-management movement. That is to say, it focuses on how judges can manage pretrial activities for the purpose of facilitating a trial or other judicial outcome. Admittedly, these different forms of case management do not exist in neatly segregated silos. Management activities can lead to a settlement even if that was not an express goal. And some management activities—such as sequencing discovery or motion practice—can be designed to target threshold issues with the idea that resolving them early might lead to an early dispositive ruling or to an early settlement. That being said, I leave to others, or to another day, the questions raised when federal judges actively and directly seek to resolve cases by settlement or through noncourt dispute-resolution processes.

enabling it by giving district judges an ever-expanding set of case-management tools to be used in its pursuit.<sup>4</sup>

But even though we are nearly thirty years into the case-management era, many practical questions about the real-world effectiveness of judicial case management remain at least partly unanswered. Does judicial case management really work? Does it actually reduce expense and delay? Do judges have the right tools at their disposal? Do judges have the resources they need? Are judges sufficiently and properly using the tools and resources they do have? If judges are not using those tools and resources effectively, why is that occurring and what can be done to change it?

These questions are as important today as they have ever been. Recent Supreme Court musings about the ability of case management to control expense and delay—made in decisions that suggest an enhanced gatekeeping role for pleadings—challenge us to reexamine the foundations of our system of notice pleading and liberal discovery.<sup>5</sup> Many groups have risen to that challenge, commissioning new empirical work and offering reform proposals of varying scope and degrees of boldness.<sup>6</sup> This very conference—the 2010 Civil Litigation Review Conference, held at Duke University School of Law (Duke Conference)—is itself devoted to assessing the performance of the existing civil litigation system and exploring possible improvements to it.<sup>7</sup> In this environment, one cannot overstate the importance of fully understanding what case management can achieve and how it can be improved.

But one cannot discuss the effective use of case management in isolation. Case management is a part of the larger, interwoven fabric

---

4. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18–36 (2010) (discussing the effect of heightened pleading standards on Rules 12(b)(6) and 56); *infra* notes 7–24 and accompanying text.

5. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[T]he success of judicial supervision in checking discovery abuse has been on the modest side.”).

6. This Article references several of these empirical studies. See, e.g., sources cited *infra* notes 77–78, 80, 104, and 281.

7. See *Purpose Statement*, 2010 DUKE CONFERENCE ON CIVIL LITIG., [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h\\_RoomHome/4df38292d748069d0525670800167212/?OpenDocument](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_RoomHome/4df38292d748069d0525670800167212/?OpenDocument) (last visited Nov. 8, 2010); see also Memorandum from Judge Mark R. Kravitz, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Judge Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure, Report of the Civil Rules Advisory Committee 1–2, 7–17 (May 17, 2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV05-2010.pdf> (discussing proposals from the 2010 Duke Conference on how to manage cost and delay in litigation).

of our dispute-resolution system.<sup>8</sup> It is inextricably bound up with policy debates about the role of judges and with fundamental questions about the proper design of pretrial procedure. One therefore cannot discuss changes to judicial case management without considering how those changes might alter the role of judges or whether those changes might conflict with competing norms about the proper design of pretrial procedure. Although the list of intersecting foundational questions could no doubt be expanded, here are five that particularly deserve examination:

1. How should Article III judges be spending their time?
2. Should there be different rules for different types of cases?
3. Do case-management rules give trial judges too much discretion?
4. Can case management alone adequately control cost and delay?
5. Should judges “manage up” or “manage down”?

This Article proceeds in two parts. In Part I, I briefly sketch the role of case management in the current civil pretrial scheme. In particular, I hope to show how deeply the federal judiciary is committed to the case-management model. That commitment is evident not just in the Civil Rules but also in publications issued by the United States Judicial Conference and the Federal Judicial Center (FJC). Despite the various objections that have been raised against active judicial case management, the institutional judiciary’s commitment to the case-management model has, if anything, increased over time.

In Part II, I discuss the five questions listed above. Given the purpose of the Duke Conference, it is not my aim here to propose final answers to those questions. Rather, I examine them to provide context for our deliberations about how we might improve upon the case-management scheme that already exists. These five questions represent existing critiques of the federal court case-management

---

8. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 831 (2010) (summarizing the effect of heightened pleading standards on the civil litigation system); Jay Tidmarsh, *Resolving Cases “On the Merits,”* 87 DENV. U. L. REV. 407, 407 (2010) (“As with a spider’s web, a tug on a single rule can collapse the entire structure.”).

scheme. Moreover, they address features or consequences of the case-management approach generally and are not limited to whether case management is effective. Thus, any proposals that would expand or enhance case management would continue to be subject to these critiques even if it were shown conclusively that the proposal in question would in fact improve the trial judge's ability to manage cases.

Sound case management is the key to the current federal court pretrial scheme. Ultimately, I think our best chance for improving the scheme is to strive for even better case management. And I fully expect that the Duke Conference will stimulate the development of many promising suggestions for doing so. That said, we cannot focus solely and narrowly on whether the proposals that emerge would improve the ability of federal judges to manage their cases. We must, at the same time, consider whether those proposals might conflict with existing policy choices about the role of judges or with various norms about how best to design a civil litigation system. In the end, case-management reform is not just a function of finding better or more effective case-management techniques. It is also a function of navigating the crossfire issuing from these broader-based critiques of the case-management model generally.

## I. CASE MANAGEMENT AND THE FEDERAL JUDICIARY

Today, active judicial case management is a defining characteristic of the federal civil pretrial scheme. It is no stretch to say that active judicial case management has joined the troika of notice pleading, liberal discovery, and summary judgment as one of the core features of the federal pretrial process. It was not always so—and the transition was not without dissent. This Part briefly chronicles the rise of active judicial case management in the federal court system. Proceeding chronologically, it shows how case management evolved from a niche device for dealing with complex and protracted litigation to a ubiquitous practice employed across the civil docket. Along the way, it describes how the case-management movement gained the overwhelming approval of both the bar and the institutional judiciary despite opposition from some of the most prominent legal commentators of our time.

At a foundational level, the story of case management in the federal courts begins with the shift from the so-called master calendar to individual case assignment. For the first several decades of practice



under the Civil Rules, cases were put on the master calendar, which meant that they were not assigned to any particular judge until they were ready for trial. Rather, the judges shared responsibility for resolving pretrial matters; when something came up during the pretrial process that required the attention of a judge, it would be presented to whichever judge was scheduled to perform the type of activity required.<sup>9</sup> But beginning in the late 1960s, most federal district courts switched to the single-assignment model, in which every case is assigned to a particular judge for the life of the suit.<sup>10</sup>

The advent of active case management and the switch to single assignment went hand in hand. Case management is about taking control. Without having “ownership” of a particular case, the judge lacks both the ability and the incentive to exercise control.<sup>11</sup> In today’s federal judicial world, where cases are assigned to individual judges (and where the Administrative Office of the U.S. Courts keeps

---

9. See Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 257 (1985); Peterson, *supra* note 3, at 68–69; see also MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, AM. BAR ASS’N, CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE 33–44 (1987) (discussing the different types of assignment systems in detail).

10. See Peckham, *supra* note 9, at 257.

11. The English experience with case management seems to bear this point out. Prompted by the Woolf Report, England and Wales adopted new Civil Practice Rules that explicitly heralded a transition from a passive judicial role to a role of active case management. See Anthony Clarke, *The Woolf Reforms: A Singular Event or an Ongoing Process?*, in THE CIVIL PROCEDURE RULES TEN YEARS ON 33, 43 (Deirdre Dwyer ed., 2009); Robert Turner, “Actively”: *The Word that Changed the Civil Courts*, in THE CIVIL PROCEDURE RULES TEN YEARS ON, *supra*, at 82–84. Although many of the Woolf Reforms are viewed as a success, there appears to be general agreement that English judges have not embraced active case management. One cause appears to be the lack of a single-assignment system in England. See Adrian Zuckerman, *Litigation Management Under the CPR: A Poorly-Used Management Infrastructure*, in THE CIVIL PROCEDURE RULES TEN YEARS ON, *supra*, at 105. As Professor Zuckerman puts it, “No single judge has a personal interest in bringing the dispute to a successful conclusion with the greatest practicable efficiency.” *Id.* Lord Justice Rupert Jackson reached the same conclusion in his report on litigation costs, leading him to recommend that all cases in the “multi-track” (England’s general track for cases above £25,000) be assigned to a single judge throughout the life of the case. LORD JUSTICE RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 393 (2009). On this side of the Atlantic, reform groups continue to call for single assignment in those state systems that still do not have it, though the emphasis is more on the benefits of continuity. See, e.g., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: CIVIL CASEFLOW MANAGEMENT GUIDELINES 8 (2009) (“A single judge should be assigned to each case at the beginning of the litigation and should stay with the case through its disposition.”).

statistics on each judge's docket<sup>12</sup>), judges have a strong incentive to find ways to take control of and manage the cases that appear on their individual dockets.<sup>13</sup>

If one is looking for a turning point in the history of judicial case management in the federal courts, though, it would be 1983 and the amendments to Rule 16 and Rule 26 that took effect that year. For several decades before then, the trend in discovery rulemaking was toward changes that reduced judicial oversight and involvement. A particularly notable example is the 1970 change to Rule 34 that eliminated the need for parties to seek leave of court and show good cause in order to serve document requests.<sup>14</sup> A less obvious example, also from 1970, is the change to Rule 33 that made objections suffice as a response to interrogatories and put the burden on the party seeking answers to challenge the objections.<sup>15</sup> In both cases, the intent of the change was to reduce court intervention and have the rule operate extrajudicially.<sup>16</sup>

---

12. See 28 U.S.C. § 476(a) (2006) (requiring the Administrative Office to publish reports disclosing for each judge the number of motions that have been pending for more than six months and the number of cases that have not been terminated within three years). These reporting requirements originated as part of the Civil Justice Reform Act of 1990. Civil Justice Reform Act of 1990 (CJRA), Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified in part at 28 U.S.C. §§ 471–482 (2006)); see R. Lawrence Dessem, *Judicial Reporting Under the Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687, 688 (1993) (noting that the Civil Justice Reform Act could have a significant impact upon civil cases in federal courts). Though the reporting requirements were initially set to sunset after seven years, Congress made them permanent in 1997. Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173, 1173 (codified at 28 U.S.C. § 471 note).

13. Peckham, *supra* note 9, at 257; see also 1 FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., WORKING PAPERS AND SUBCOMMITTEE REPORTS 48 (1990), [http://www.fjc.gov/public/pdf.nsf/lookup/fcscvol1.pdf/\\$file/fcscvol1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/fcscvol1.pdf/$file/fcscvol1.pdf) (“Individual calendaring increases a judge’s sense of control and responsibility for a case. More important, individual calendaring makes it possible to track each judge’s disposition rates . . .”); STEVEN FLANDERS, FED. JUDICIAL CTR., FJC-R-77-6-1, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 13–14 (1977) (recounting one judge’s statement that “[t]he individual calendar system . . . is superb in fostering personal motivation”).

14. See FED. R. CIV. P. 34 & advisory committee’s note to 1970 amendment. The original discovery rules also required leave of court to take depositions and to serve interrogatories after the first set. Both of those restrictions were eliminated in 1946. See *id.* 30 & advisory committee’s note to 1946 amendment; *id.* 33 & advisory committee’s note to 1946 amendment. As of 2009, only Rule 35 (Physical and Mental Examinations) requires a court order to compel compliance. See *id.* 35(a) (“The court where action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination . . .”).

15. See *id.* 33 & advisory committee’s note to 1970 amendment.

16. See *id.* advisory committee’s note to 1970 amendment (“The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to

The Advisory Committee seemed to reverse course in 1983. The word “management” made its first appearance in the Civil Rules.<sup>17</sup> Rule 16 was transformed from a rule principally directed at trial preparation<sup>18</sup> to one that encouraged—and in some respects required—trial court judges to take a hands-on approach to managing their cases during the life of the suit.<sup>19</sup> Judicial management was woven directly into the discovery process when the rulemakers amended Rule 26(b) to require judges to limit redundant and disproportionate discovery.<sup>20</sup> As Professor Arthur Miller, then the Reporter to the Advisory Committee, colorfully put it, the 1983 amendment to Rule 26(b) “sold the judges into slavery” by using active case management to curtail discovery abuse.<sup>21</sup>

The case-management provisions of the 1983 amendments were central to the Advisory Committee’s plan for combating excessive

---

reducing court intervention.”); *id.* 34 advisory committee’s note to 1970 amendment (“The revision of Rule 34 to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law practice.”).

17. Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2199 (1989).

18. See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 159 (1997) (describing the original pretrial focus of Rule 16); Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: ‘Twist the Cup and the Lip*, 87 DENV. U. L. REV. 227, 234 (2010) (noting that Rule 16’s original title focused on pretrial procedure); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1978–81 (1989) (describing the limitations of early attempts to encourage judicial case management).

19. See FED. R. CIV. P. 16 advisory committee’s note to 1983 amendment (“Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation.”); *id.* (“The amended rule makes scheduling and case management an express goal of pretrial procedure.”); see also *id.* 16. See generally Richard L. Marcus, *Slouching Towards Discretion*, 78 NOTRE DAME L. REV. 1561, 1588 (2003) (“Beginning in 1983, Rule 16 was amended to *require* case management activity by all judges in most cases, and to encourage more managerial activity than was required.” (emphasis added)); Shapiro, *supra* note 18, at 1984–87 (describing the purposes of the 1983 amendment of Rule 16); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1268 (2010) (stating that amendments to Rule 16 “have not only blessed judicial management, but also made judicial management a requirement in almost every case”).

20. See FED. R. CIV. P. 26(b) & advisory committee’s note to 1983 amendment (establishing limits on discovery); see also ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 30–36 (1984) (discussing the purpose behind the 1983 amendments).

21. MILLER, *supra* note 20, at 32.

cost and delay.<sup>22</sup> As Professor Miller explains, the “Committee consciously chose to concentrate on the pretrial phase as the best hope for meaningfully attacking [the] cost and delay [problems].”<sup>23</sup> The Committee was following the lead of prominent judges who already had been urging their colleagues on the bench to use case-management techniques to pare their cases to what was really at stake and to guide the parties toward faster and less-expensive resolutions.<sup>24</sup>

Not everyone jumped on the bandwagon. Various critics voiced policy objections to judicial case management. The leading critic is Professor Judith Resnik. She questions whether the new model of “managerial judging” is too susceptible to abuse because the case-management activities being advocated tend to be less formal, less visible, and more discretionary than the traditional judicial activities of holding hearings, deciding motions, and conducting trials.<sup>25</sup> According to Professor Resnik’s critique, active case management creates a heightened risk that judges would exert activist or ideological pressures in ways that would elude appellate oversight.<sup>26</sup> More simply stated, the concern is that judges, through unreviewable case-management techniques, could help parties or positions they favor and impede parties or positions they disfavor. At a more pragmatic level, Professor Resnik also questions whether case

---

22. The 1983 amendments were not directed solely at judicial management; some provisions were directed at lawyers’ behavior. Rule 11 was overhauled in 1983, ratcheting up the standard and making sanctions mandatory when a violation occurred. *See* FED. R. CIV. P. 11 advisory committee’s note to 1983 amendment. Rule 26(g) was added at the same time. It requires lawyers to sign discovery requests, responses, and objections certifying that they are consistent with the rules, not interposed for any improper purpose, and neither unreasonable nor unduly burdensome or expensive. *See id.* 26(g). The Rule 26(g) certification requirement was designed to make lawyers stop and think about the legitimacy and reasonableness of their discovery requests, responses, and objections before serving them. *See id.* 26(g) advisory committee’s note to 1983 amendment. The hope was that the more exacting version of Rule 11 and the new duties under Rule 26(g) would curb cost and delay by leading lawyers to act more responsibly. *See* Richard L. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363, 364 (1983) (“Their basic thrust is to remedy problems of expense and delay . . .”).

23. Miller, *supra* note 4, at 55.

24. MILLER, *supra* note 20, at 20–21 (“In a real sense, rule 16 as rewritten, for all of its subclasses, doesn’t say anything new. It is a synthesis of what is existing practice for many, many district judges in the United States.”); *see also* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 772 (1981) (discussing a judge’s role in the pretrial phase); Schwarzer, *supra* note 1, at 408 (“Judicial intervention will help ensure that controversies will be litigated in a manner appropriate to what is truly at issue, and as justly, speedily and inexpensively as possible.”).

25. *See* Resnik, *supra* note 3, at 424–31 (discussing the side effects of managerial judging).

26. *Id.*

management, which had been advanced as a tonic for undue expense and delay, really did reduce cost or speed up the process.<sup>27</sup> As discussed more fully below, other commentators share these doubts and concerns.<sup>28</sup> Perhaps the most influential of them is Judge Frank Easterbrook, who, in a widely cited article, argues that case management cannot work as intended because the judges do not have the information they need to manage effectively.<sup>29</sup>

Despite these objections, case management became an even greater part of modern federal civil practice in the years that followed. Several rounds of amendments to the Civil Rules expanded the trial court's case-management role.<sup>30</sup> The next big year for case-management rule changes was 1993. In that year, Rule 16 was amended again to further cement and enlarge the trial court's case-management authority.<sup>31</sup> Rule 26(b) was amended again as well that year, conferring on trial courts even broader discretion to manage discovery.<sup>32</sup> Another 1993 change with major implications for case management was the amendment to Rule 26(f) making the discovery-planning conference a mandatory event.<sup>33</sup> The animating purpose of that amendment was to facilitate judicial case management by providing meaningful inputs for the court to consider at the Rule 16 stage.<sup>34</sup> Even Rule 1 was amended to embrace the emerging case-management ethos, with the rule now providing that the Civil Rules "should be construed *and administered* to secure the just, speedy, and inexpensive determination of every action and proceeding."<sup>35</sup> The purpose of the revision was "to recognize the affirmative duty of the

---

27. See Judith Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, 23 JUDGES J., Winter 1984, at 8, 10–11 ("Little empirical evidence exists to support the claim that judicial management works."); see also *infra* notes 87–89, 226–27 and accompanying text.

28. See *infra* notes 223–36 and accompanying text.

29. See Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989).

30. Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 200–02 (2007) (listing amendments to the case-management rules through the 2006 electronic discovery amendments).

31. FED. R. CIV. P. 16 advisory committee's note to 1993 amendment.

32. *Id.* 26(b) & advisory committee's note to 1993 amendment.

33. *Id.* 26(f) & advisory committee's note to 1993 amendment.

34. See Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 529 (2009) [hereinafter Gensler, *E-volving Duties*]. Increasingly, the Rule 26(f) conference is being viewed as a platform for the parties to reach agreement on discovery issues, especially those involving electronic discovery. See Steven S. Gensler, *A Bull's-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363, 367 (Supp. 2009) [hereinafter Gensler, *Bull's-Eye View*].

35. FED. R. CIV. P. 1 (emphasis added).

court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay.”<sup>36</sup>

Even Congress took up the cause in the 1990s. Reduction of expense and delay was a central theme of the oft-maligned Civil Justice Reform Act of 1990 (CJRA),<sup>37</sup> which ordered the federal judiciary to experiment with a set of case-management techniques.<sup>38</sup> The federal judiciary carried out its statutory responsibilities under the CJRA dutifully, though perhaps at times a bit grudgingly.<sup>39</sup> Although not all of the components of the CJRA were received with eager enthusiasm,<sup>40</sup> the judiciary embraced the CJRA’s main premise of using case management to reduce expense and delay. In its Final Report to Congress on the CJRA, the Judicial Conference endorsed early case management as provided in Rule 16, saying that “[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation.”<sup>41</sup>

By the mid-1990s, active judicial case management had been a central feature of federal pretrial practice for over a decade. Yet cost and delay—concerns that case management was intended to address—still existed, and may have grown worse, raising again the question of whether the purported benefits of case management were

---

36. *Id.* advisory committee’s note to 1993 amendment.

37. Civil Justice Reform Act of 1990 (CJRA), Pub. L. No. 101-650, tit. I, 104 Stat. 5089 (codified in part at 28 U.S.C. §§ 471–482 (2006)).

38. *Id.* tit. I, 104 Stat. at 5089–98.

39. See JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, RAND INST. FOR CIVIL JUSTICE, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT, at xxi (1996) (finding that although all of the pilot districts technically complied with the CJRA, they sometimes did not engage in the spirit of experimentation contemplated by the act and often let implementation fall short). Congress passed the CJRA despite strong opposition from the federal judiciary. See Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary’s Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1190 (1996) (discussing the social and economic consequences of judicial rulemaking); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1601–02 (1994) (discussing judges’ fear of Congressional micromanagement in the CJRA).

40. See Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 235–39 (1997) (noting the RAND Report’s findings that many of the CJRA principles and techniques were eschewed or halfheartedly implemented and speculating that some of the failure of the CJRA may be attributable to the fact that the federal judges who were implementing the CJRA were not always committed to the enterprise).

41. JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 10 (1997) (noting the judiciary’s commitment to case management).

real. In response, a first wave of empirical studies from 1997 attempted to determine whether case-management techniques really do reduce expense and delay. The results from these studies have been called inconclusive.<sup>42</sup> A study by the RAND Institute suggested that early case management might actually increase costs unless the court also imposes a shortened period for discovery.<sup>43</sup> A follow-up report by RAND massaged the point, concluding that, although early case management does increase costs up front, it pays dividends later so long as the court requires the parties to develop and submit a discovery plan.<sup>44</sup>

The empirical studies of that era, however, showed one thing clearly: that *lawyers* were convinced of the net benefits of judicial case management.<sup>45</sup> In its 1998 study, the FJC found that lawyers strongly believed that additional attention from the judge—via availability to rule on discovery disputes or through discovery management generally—would reduce the expense of discovery.<sup>46</sup> Moreover, when asked what reform they thought held the most promise for reducing discovery problems, their “clear choice [was] increased judicial case management.”<sup>47</sup>

Perhaps bolstered—but at least not deterred—by these findings, the rulemakers continued to employ judicial case management as a primary tool in the quest to control cost and delay, especially in discovery. In 2000, the reference point for the scope of discovery was

---

42. See Rowe, *supra* note 30, at 193 (“[T]he limited empirical evidence on managerial judging’s effectiveness at reducing delay and cost . . . remains . . . fairly inconclusive.”); Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR “Confer and Report” Rule*, 26 JUST. SYS. J. 253, 269 (2005) (summarizing the findings of other studies).

43. KAKALIK ET AL., *supra* note 39, at 54–57.

44. James S. Kakalik, Deborah R. Hensler, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, RAND Inst. for Civil Justice, *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 652–54 (1998). Perhaps the most significant contribution of the RAND data in this regard is to highlight a pervasive risk when adopting rule reforms that front-load effort and expense to the beginning of the case, which is that front-loading can cause an increase in overall expense if taken too far. See JUDICIAL CONFERENCE OF THE U.S., *supra* note 41, at 45–46; Gensler, *E-volving Duties*, *supra* note 34, at 536–38. Although I do not think the current system has passed that tipping point, it is a concern that we must make sure does not slip off the radar screen.

45. The bar’s demand for case management goes back even further. See Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 519–20 (1984).

46. Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 584–87 (1998).

47. *Id.* at 588.

narrowed slightly. Previously, parties could take discovery of matters that were relevant to “the subject matter” of the suit; under the amended rule, relevance was anchored to the parties’ “claims or defenses,” though the court could expand the scope of discovery back to “subject matter” relevance for good cause.<sup>48</sup> At the same time, a redundant cross-reference to the limits set forth in Rule 26(b)(2) was added to the end of Rule 26(b)(1).<sup>49</sup> On the surface, these changes seem targeted at narrowing discovery. But as the accompanying Committee Note explains, their actual purpose was to promote more active case management:

The amendment is designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery. Increasing the availability of judicial officers to resolve discovery disputes and increasing court management of discovery were both strongly endorsed by the attorneys surveyed by the Federal Judicial Center.<sup>50</sup>

Finally, case management has taken a central place in discovery reforms aimed at the problems associated with electronic discovery (e-discovery). The 2006 e-discovery amendments rely heavily on judicial case management.<sup>51</sup> In general, the e-discovery amendments eschew specific requirements or limits, opting instead to create mechanisms designed to flag issues for the parties so they can either resolve them privately or present them to the court early in the case. The most concrete example lies in the way the new Rule 34(b) provisions address the often sticky question of whether parties should produce electronically stored information (ESI) in its native electronic file format or in some other format, like a hard-copy

---

48. FED. R. CIV. P. 26(b)(1) & advisory committee’s note to 2000 amendment. See generally Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery*, 69 TENN. L. REV. 13, 16–18 (2001) (detailing “the two-tier approach retaining subject-matter discovery upon court order granted for good cause”).

49. FED. R. CIV. P. 26(b) & advisory committee’s note to 2000 amendment.

50. *Id.* advisory committee’s note to 2000 amendment.

51. See Rosenthal, *supra* note 18, at 238 (“The 2006 rule amendments continued the trends toward requiring the parties and their lawyers to raise problems early, to try to reach agreement, and to facilitate judicial involvement and supervision when needed. The amendments, and more importantly, the features of electronic discovery that made the amendments necessary in the first place, highlighted the importance of judicial involvement in managing discovery.”).



printout or an electronic image file (for example, a TIFF image or a PDF file). Rather than dictate any particular form of production, the amended rule instead contains several provisions designed to smoke out potential problems before production occurs.<sup>52</sup> At a more general level, changes to Rule 26(f) direct the parties to discuss various e-discovery issues with an eye toward resolving those issues up front, either with or without the court's assistance.<sup>53</sup> Complementary changes to Rule 16 add e-discovery to the list of items to be considered during the case-management conference and addressed in the case-management order.<sup>54</sup> The recently-enacted Federal Rule of Evidence 502 continues the case-management theme. By explicitly providing that court orders regarding waiver are binding in other courts and in cases involving other litigants,<sup>55</sup> it creates an added incentive for parties to work with the judge to craft creative methods for reducing the cost and delay associated with e-discovery.<sup>56</sup>

Over the past thirty years, the federal judiciary's commitment to case management has also manifested itself in the policies and practices promoted by the institutional arms of the federal judiciary. In 1990, the Federal Courts Study Committee gave strong support to active case management, stating, "We endorse the trend toward more vigorous case management by district judges."<sup>57</sup> In 1995, the *Long Range Plan of the Federal Courts*<sup>58</sup> recommended that "[t]he district courts should enhance efforts to manage cases effectively."<sup>59</sup> Both the Federal Courts Study and the *Long Range Plan* stressed the

---

52. See FED. R. CIV. P. 34(b)(1)(C) (permitting the requesting party to specify the form or forms in which ESI is to be produced); *id.* 34(b)(2)(D) (permitting the responding party to object to the requested form and, if not producing ESI in a requested form, state the form or forms it intends to produce).

53. See *id.* 26(f); advisory committee's note to 2006 amendment ("When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.").

54. See *id.* 16(b)(3)(B) & advisory committee's note to 2006 amendment; *id.* 16(c)(2).

55. FED. R. EVID. 502(d).

56. See Rosenthal, *supra* note 18, at 238 ("[Rule 502] provides an additional incentive for parties to seek—and for courts to provide—early involvement to set the terms and limits governing discovery.").

57. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 100 (1990).

58. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN OF THE FEDERAL COURTS (1995).

59. *Id.* at 70.

importance of educating judges in case management.<sup>60</sup> Indeed, the *Long Range Plan* went so far as to say, "In the future, large dockets will test the management abilities of even the best judges. Intensive case management training will be essential."<sup>61</sup> Not surprisingly, judicial education programs have regularly promoted the benefits of case management and offered tips for effective management.<sup>62</sup>

The ascendance of the case-management model during this period also can be seen in the publications that the institutional arms of the federal judiciary wrote for federal judges. As late as 1977, a study published by the FJC urged judges to take early control by setting firm deadlines but to otherwise minimize the amount of time they invested in their cases until discovery was complete.<sup>63</sup> By the time of the 1983 amendments to Rule 16 and Rule 26, however, judges were being told that time spent in active management of discovery would pay rich dividends later.<sup>64</sup> In 1991, the FJC published a pamphlet titled *The Elements of Case Management*.<sup>65</sup> Invoking the goal of achieving the "just, speedy, and inexpensive" administration of justice set forth in Rule 1, the pamphlet begins by stating that "[i]f judges are to achieve this goal in the face of scarce judicial resources and the rising cost of litigation, they must manage the litigation process."<sup>66</sup> And that includes managing discovery.<sup>67</sup>

---

60. See FED. COURTS STUDY COMM., *supra* note 57, at 100 ("The growing importance of case management techniques calls for even more judicial education about the range and implementation of such techniques to eliminate unnecessary cost and delay while maintaining judicial impartiality."); JUDICIAL CONFERENCE OF THE U.S., *supra* note 58, at 71 (recommending that "[t]he Federal Judicial Center should continue to sponsor the requisite training and education for judges").

61. JUDICIAL CONFERENCE OF THE U.S., *supra* note 58, at 110.

62. See Resnik, *supra* note 2, at 948-49 (noting that, as early as 1971, judges teaching seminars for new judges "favored and taught active judicial involvement in settling cases"); see also JUDICIAL CONFERENCE OF THE U.S., *supra* note 41, at 21 (noting the judiciary's "longstanding commitment to judicial and staff education in case management" and recommending that it be extended to the entire legal community).

63. See FLANDERS, *supra* note 13, at 17 ("To handle its case load efficiently, a court must minimize the time judges spend on the initial stages of their cases and require lawyers themselves to resolve the relatively petty disputes (especially discovery questions) in most instances.").

64. MILLER, *supra* note 20, at 34-36 ("Yes, judge, spend the time [managing discovery] up front, and we believe it will save you double time or triple time down the line.").

65. WILLIAM W SCHWARZER & ALAN HIRSCH, FED. JUDICIAL CTR., *THE ELEMENTS OF CASE MANAGEMENT* (1991).

66. *Id.* at 1.

Today, the message from the institutional federal judiciary regarding case management is unambiguously positive.<sup>68</sup> The *Civil Litigation Management Manual*,<sup>69</sup> published by the U.S. Judicial Conference in 2001, advises that “[e]stablishing early control over the pretrial process is pivotal in controlling litigation cost and delay.”<sup>70</sup> The *Civil Litigation Management Manual* later advises trial judges about the importance of the Rule 16 conference:

The Rule 16 conference is generally the first point of significant contact for establishing case management control. You have an unparalleled opportunity to set the pace and scope of all case activities that follow, to look the lawyers and litigants in the eye, and to set the tone of the case.<sup>71</sup>

In 2006, the FJC published a second edition of *The Elements of Case Management*, this time adding to the title the phrase *A Pocket Guide for Judges*.<sup>72</sup> Like the first edition of the pamphlet, the second edition minces no words about the ability of case management to save time and expense:

A small amount of a judge’s time devoted to case management early in a case can save vast amounts of time later on. Saving time also means saving costs, both for the court and for the litigants. Judges who think they are too busy to manage cases are really too busy not to. Indeed, the busiest judges with the heaviest dockets are often the ones most in need of sound case-management practices.<sup>73</sup>

---

67. See *id.* at 11 (“[The power granted under Rule 26] ought to be used to prevent duplication, to require lawyers to use the least expensive way to get necessary information, and to keep discovery costs from becoming disproportionate to what is at stake in the lawsuit.”).

68. As one observer puts it, “The Judicial Conference of the United States, the policymaking body for the administration of the federal courts, promotes a legal culture that encourages judges to actively manage litigation as early and as much as necessary.” John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 90 (2008).

69. COMM. ON COURT ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., *CIVIL LITIGATION MANAGEMENT MANUAL* (2001).

70. *Id.* at 5.

71. *Id.* at 14.

72. WILLIAM W. SCHWARZER & ALAN HIRSCH, FED. JUDICIAL CTR., *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES* (2d ed. 2006).

73. *Id.* at 1. Nearly identical sentiments appeared in the first edition of that publication. See SCHWARZER & HIRSCH, *supra* note 65, at 1 (“Discovery is probably the single greatest source of cost and delay in civil litigation, but judges can do much to mitigate this problem.”). Another prominent advocate of case management, Judge Charles Richey, echoed those sentiments in his writings. See Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*,

At the individual-judge level, some of the most prominent federal judges of our day remain ardent supporters of judicial case management. District Judge Lee Rosenthal, former Chair of the Advisory Committee on Civil Rules and current Chair of the Standing Committee on Rules of Practice and Procedure, recently canvassed the many benefits of judicial case management and explored ways to improve the effective application of the existing case-management rules.<sup>74</sup> In his contribution to the Duke Conference, Magistrate Judge Paul Grimm (a current member of the Advisory Committee on Civil Rules) and Elizabeth Cabraser similarly urge that we make a renewed commitment to better using the existing case-management rules before turning to more radical structural changes.<sup>75</sup> And in his contribution to the Duke Conference, District Judge Michael Baylson (also a current member of the Advisory Committee on Civil Rules) adopts a theme of “missed opportunity” as he explores various shortcomings in how trial judges are currently using the existing case-management provisions.<sup>76</sup>

---

139 F.R.D. 525, 527 (1992) (“[D]evoting a small amount of time to early case management can save a great deal of time as the case proceeds. The judges who believe they do not have time to manage their cases are, in fact, too busy not to manage them.”).

The federal court system is not alone in its enthusiasm for case management. In 1999, the new Civil Procedure Rules in England that grew out of the Woolf Report embraced case management as a means of controlling cost and delay. *See* CPR, (2006) pt. 1.4(1) (U.K.) (“The court must further the overriding objective [of dealing with cases justly] by actively managing cases.”). The recent report on litigation costs by Lord Justice Jackson suggests that English civil procedure will move even further toward case management as a means of controlling expense and delay. *See* JACKSON, *supra* note 11, at 394 (“All the feedback which I have received during the Costs Review indicates that (despite academic scepticism) both costs and time are saved by good case management. By good case management, I mean that a judge of relevant expertise takes a grip on the case, identifies the issues and gives directions which are focused upon the early resolution of those issues.”).

74. *See* Rosenthal, *supra* note 18.

75. *See* Paul W. Grimm & Elizabeth J. Cabraser, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burdens, or Can Significant Improvements Be Achieved Within the Existing Rules?* 32 (2010) (unpublished manuscript), available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/47D6E0CDEF6484DA852576EA004A9FDA/\\$File/Judge Grimm, The State of Discovery Practice in Civil Cases.pdf](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/47D6E0CDEF6484DA852576EA004A9FDA/$File/Judge%20Grimm,%20The%20State%20of%20Discovery%20Practice%20in%20Civil%20Cases.pdf) (“The existing Rules of Civil Procedure . . . are a rich source of principled and cost-effective guidelines for improved case management, which have yet to be fully explored, appreciated, and utilized in civil litigation.”).

76. *See* Michael M. Baylson, *Are Civil Jury Trials Going the Way of the Dodo? Has Excessive Discovery Led to Settlement as an Economic and Cultural Imperative: A Response to Judge Higginbotham and Judge Hornby* 14–22 (Apr. 14, 2010) (unpublished manuscript), available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/D0222A472558384D8525768D00588265/\\$File/Judge Baylson, Are Civil Jury Trials Going the Way of the Dodo.pdf](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/D0222A472558384D8525768D00588265/$File/Judge%20Baylson,%20Are%20Civil%20Jury%20Trials%20Going%20the%20Way%20of%20the%20Dodo.pdf) (“Judge Higginbotham bemoans the lack of personal appearances before a district

Is all that confidence in the benefits of judicial case management warranted? A second wave of empirical studies on discovery and case management has attempted to provide some answers. Though I do not intend to thoroughly canvass or analyze the new data—the sources of that data addressed the Duke Conference directly—I think it fair to say that the results this time around are more consistently and convincingly encouraging. The FJC Survey respondents seemed rather content with the current case-management scheme, wanting neither more nor less case management.<sup>77</sup> The American Bar Association (ABA) Section of Litigation Survey respondents overwhelmingly agreed that early intervention by judges helps to narrow the issues and control discovery.<sup>78</sup> The ABA Survey also reported that client satisfaction increased when the judge was actively involved in managing the case.<sup>79</sup> The joint survey by the Institute for the Advancement of the American Legal System (IAALS) and the American College of Trial Lawyers (ACTL) showed similarly strong support for active judicial case management among its respondents.<sup>80</sup> Any doubts about the bar's craving for case management were erased at the Duke Conference itself. In reporting on the Conference, Judge Mark Kravitz, the current Chair of the Advisory Committee on Civil Rules, remarked, "Pleas for universalized case management achieved virtual, perhaps absolute, unanimity."<sup>81</sup>

Of course, lawyer satisfaction does not prove that case management is working any more than Judge Easterbrook's skepticism proves that it is not. Nonetheless, the fact that lawyers across the board remain convinced of the benefits of active case management is well worth noting. If the federal civil litigation scheme

---

judge, the long time taken for briefing and then ruling on summary judgment, the lack of oral argument on motions, as well as the dearth of trials. These all reflect missed opportunities.").

77. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 67–68 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

78. ABA SECTION OF LITIG., MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 124–25 (2009).

79. *Id.* at 126.

80. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 18–19 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053>.

81. Memorandum from Judge Kravitz to Judge Rosenthal, *supra* note 7, at 8.

is to continue to rely on judicial case management, support from the bar is important, and perhaps critically so. The case-management model probably could not work, and certainly could not work very well, if lawyers and litigants overwhelmingly disliked or distrusted it. Case management works best when judges and parties pursue it willingly and in the spirit of joint enterprise. That does not mean that all lawyers will like the case-management decisions they get in individual cases. But what matters is that lawyers generally support the pursuit of case management *ex ante*. If lawyers resisted the *idea* of case management, chafing against it even before they knew the outcome, it would produce an intolerable friction.

All things considered, the recent survey data give welcome cause for hope that the path we have pursued for the last thirty years has not been one giant misstep and may even have been the right step. Future analysis of those data may also provide sound direction for any next step.

## II. THE CROSSFIRE

For now, let us assume that we can improve judicial case management. Let us assume that, with the renewed commitment urged by Judge Rosenthal and Judge Grimm, and with Judge Baylson's eye toward capitalizing on existing opportunities, we can improve our usage of the existing case-management tools.<sup>82</sup> Let us further assume that, though the quiver is already well-stocked, we can add even more "managerial arrows"<sup>83</sup> when the need is shown. In short, let us assume—and I think the assumption is a safe one—that we have not yet perfected the case-management scheme we first started experimenting with in 1983.

A discussion that focused solely on perfecting the 1983 vision of judicial case management would be well worth having. But any such discussion would be incomplete. Case management is not a self-contained concept. Nor does it exist in a vacuum. The question of

---

82. To cite just one example, Judge Rosenthal explains in detail all that could be accomplished if judges conducted live scheduling conferences, in person, with the lawyers in attendance. Rosenthal, *supra* note 18, at 241. When judges hold perfunctory Rule 16 conferences, or do not hold them at all, there can be no genuine exchange about the needs of the case, no inquiry into whether the parties have taken the appropriate planning steps, and no meaningful opportunity to identify and focus on the issues that are the most critical to resolving the case. *Id.* (listing the benefits of active judicial involvement).

83. Rowe, *supra* note 30, at 196.

case management is inextricably intertwined with our vision of what judging should be and with our beliefs about how the rules of procedure should be structured. Any reforms that seek to improve upon the judicial case-management model cannot help but send ripples back toward those larger policy questions.

The connection between case management and these foundational questions of system design is amplified when the reform comes from the other direction. The 1983 model of judicial case management assumes a particular role for judges and is built on features of the civil pretrial system—most notably, having a single set of rules for all cases and relying on judicial discretion to tailor the procedure to the case—that are a legacy from 1938. The five questions introduced earlier and explored herein highlight differing views about the proper role of judges and challenge our continued fidelity to those legacy features of the current structure of the Civil Rules. Any significant changes to the role that we ask judges to play, or to the general design of the Civil Rules, would have seismic implications for case management. In other words, the type and degree of case management that we ask of judges greatly depend on the choices we make about the role of judges and the design of our system of procedure. Thus, were we to make fundamental changes to the *system*, those changes would not send mere ripples back to case management; they would send a tsunami.

In this Part, I examine five policy and design questions. Many of these questions run together, both with each other and with what I have carved out as the core “efficacy” question of case management. Some of the same general issues pop up in several of the questions. Nevertheless, I think there is value in framing these questions separately because those general issues often take on a different hue when examined in a different light. Moreover, tweaking a case-management issue to alleviate concerns associated with one of those questions may exacerbate concerns raised by another. To return to the metaphor of this Article’s title, in the heat of battle it is rarely enough simply to know that you are being fired at. Survival may depend on clearly identifying all sources of fire, lest an effort to repel one source exposes your back to another.

#### *A. How Should Article III Judges Be Spending Their Time?*

This Section addresses a threshold issue that has divided judges and scholars since the inception of the case-management movement:

even if case management is an effective technique, is it something that judges—and, in particular, Article III judges—should be doing? Or is it a nonjudicial task that erodes the true adjudicative role of the judge while vesting district judges with management powers that can be abused in ways that are hidden from view and unreviewable? This Section also addresses the extent to which, in the federal court system, we can address those concerns by delegating case management to non-Article III magistrate judges.

For as long as we have had a culture of judicial case management, we have also had critics of that culture.<sup>84</sup> One criticism is that case management is simply a misuse of the Article III judiciary. According to this view, when Article III judges spend their time managing cases, they are not spending their time doing what Article III judges were meant to do—trying cases. This theme was prevalent in (though not the animating force behind) much of the recent discussion about vanishing trials.<sup>85</sup> It is also strongly evident in the writings of Judge Patrick Higginbotham, who laments that the case-management model has so removed the trial judge from the courtroom that “we are witnessing the death of an institution whose structure is as old as the Republic.”<sup>86</sup> Professor Resnik worries that “[t]he charge to judges to manage cases competes with and marginalizes the charter to adjudicate,” ultimately depriving the public of the contributions that public adjudication makes to a functioning democracy.<sup>87</sup> In earlier work, these and other concerns led

---

84. We have also had staunch defenders of case management. For one well-known defense, see Flanders, *supra* note 45.

85. See, e.g., Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1274 (2005) (“[I]f we want a legal system in which judges and juries devise public standards and assess accountability, particularly that of powerful actors, we need enough trials to do that job.”) [hereinafter Galanter, *Hundred-Year Decline*]; see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Patricia Lee Refo, *The Vanishing Trial*, LITIGATION, Winter 2004, at 1.

86. Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 747 (2010). To be precise, Judge Higginbotham’s criticism is not that Article III judges should allow their cases to grow, unpruned, according to the whims and extravagances of the litigants. He believes that judges can and should manage discovery. But he believes that they should do so as a means of pushing the case cheaply and quickly toward trial, and not for the purpose of disposing of the case during the pretrial phase. See *id.* at 763 (“[T]he principal work of a district court is to try cases and to offer litigants the opportunity for a reasonably prompt and impartial trial.”).

87. Judith Resnik, *Managerial Judges, Jeremy Bentham and the Privatization of Adjudication*, 49 SUP. CT. L. REV. 2D 205, 211–12 (2010).



Professor Resnik to suggest that the case-manager model so distorts the role of the judge as to undermine the basis for job and salary protection.<sup>88</sup> Professor Stephen Subrin offers this sobering assessment: “A totally unconstrained adjudication system requires judges to become what they became: managers. This is not what it meant to be a wise judge for the past three millenni[a].”<sup>89</sup>

A different criticism of the case-management model relates to judicial power and its abuse.<sup>90</sup> Professor Resnik has famously criticized the case-management model as a potentially new and dangerous form of judicial activism. According to this critique, “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.”<sup>91</sup> Professor Subrin has expressed similar concerns about the power that federal judges wield via the largely discretionary rules governing case management.<sup>92</sup> Professor Paul Carrington, who once served as the Reporter to the Civil Rules Advisory Committee, made this observation: “The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and

---

88. See Resnik, *supra* note 2, at 1002–03 (“The judicial embrace of roles held by other social actors—the homogenization of the various kinds of dispute resolvers—has made more difficult the task of explaining why some judges should be specially protected, insulated, and respected.”).

89. Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 100–01 (1997).

90. The aspect of case management that typically draws the heaviest fire is judicial involvement in settlement. One prominent concern is that judges deplete the universe of tried cases by pushing too hard for settlement. See Galanter, *Hundred-Year Decline*, *supra* note 85, at 1266 (“Th[e] transformation of judicial product involves factors that played at most a minor role in the long-term decline of trials. One such factor is the ascendance of a judicial ideology that commends intensive judicial case management and active promotion of settlements (with settlement seen as a result superior to trial).”). Another concern is that the judge who is to try the case should not be involved in the settlement process, because the parties might feel pressure to conform to the judge’s views on settlement or the judge might become biased during the course of the settlement process. See Resnik, *supra* note 3, 425–31. This Article does not address the role of trial judges in settlement.

91. Resnik, *supra* note 3, at 380; see also Peterson, *supra* note 3, at 45 (arguing that case management gives federal judges too much primary discretion (making case management standardless) and secondary discretion (making case management guided but unreviewable)).

92. See Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 50 (1994) (stating that if we had substance-specific rules, then “[f]inally, judges [could] begin to return to their proper roles—deciding, or facilitating the decision of cases on their merits; making decisions about cases that apply to more than the one case that is in front of them; and having rules to guide them in their future decisions”).

also from juries or appellate courts who would review decisions on the merits when and if rendered.”<sup>93</sup>

So, how should Article III judges spend their time? Deciding merits issues? Managing their cases? The federal judiciary’s answer is “both.” In the *Civil Litigation Management Manual*, the Judicial Conference puts the question and answer this way: “Is a federal judge an adjudicator or a case manager? . . . In fact both functions—adjudication and case management—are critical judicial roles, the second used in service of the first.”<sup>94</sup>

I think that is correct. Good case managers work with the parties and their lawyers to identify the real issues in dispute and to identify how best to proceed to resolve those issues. Good case managers show the parties and their lawyers, through their management activities, that they have taken the time to truly understand what the case is about and that they are willing to invest their time to ensure that the pretrial process remains focused on the real issues. Good case management is not an opaque process that occurs solely behind chambers’ doors. Rather, good case managers interact with the parties and welcome—if not invite or even require—client participation. Practiced that way, case management provides the parties not just with an opportunity to be heard but also with an opportunity to see (and feel) that justice is being done.

Consider the type of Rule 16 conference suggested by Judge Rosenthal.<sup>95</sup> In one of these live conferences, the lawyers (and sometimes also the parties) would be in the same room as the judge. Some or all of the following might take place:

---

93. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 62 (1997). Professor Stephen Yeazell makes the intriguing observation that the shift in power from appellate courts to trial courts is a result of increasing the number of pretrial events that do not produce immediately reviewable judgments. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 660–61. He notes that although the 1938 rules shifted the focus away from pleadings and trial (the front and the back of the case) toward case-development activities that occur in between, they left the final-judgment rule intact. *Id.* Professor Yeazell also suggests that appellate courts, having been displaced by the rulemaking process as the principal producers of rules regulating trial-level activity, have embraced more discretionary review standards because they no longer have a personal interest in the development of those regulations. *Id.* at 666.

94. COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 1.

95. Rosenthal, *supra* note 18, at 241–42.

- The lawyers and the judge might engage in a genuine exchange about the case so that the judge can learn critical information about the needs of the case.
- The judge might learn whether the parties have had a meaningful Rule 26(f) conference or whether they have just gone through the motions and therefore are not truly in a position to discuss their pretrial needs.
- The judge might learn whether there are threshold issues to be resolved and might consider having the parties conduct discovery or make dispositive motions in stages.
- The judge might discuss e-discovery issues with the parties, exploring ways to focus the process and address potential problems before they mushroom.<sup>96</sup>

The overriding theme is that judges who take the time to talk with the lawyers and involve the parties at the Rule 16 stage are in a much better position to tailor the pretrial process to achieve the “just, speedy, and inexpensive” determination of the claims.<sup>97</sup> Moreover, these types of activities, geared toward facilitating a prompt and efficient resolution of the merits, strike me as being just as “judicial” as deciding motions or presiding over a trial.<sup>98</sup> But not everyone agrees, and I certainly respect the views of those who see things differently.

---

96. See *id.* at 241. If the participants at the Duke Conference are any indication, this is also the type of Rule 16 conference that lawyers would like judges to conduct. See Memorandum from Judge Kravitz to Judge Rosenthal, *supra* note 7, at 8 (“The first Rule 16 conference should be a conference. It should be planned carefully by the lawyers, seized as an invaluable opportunity by the judge, and often attended by the parties. The parties should be made aware of the strengths and weaknesses of their positions, the costs of litigating, the means available [for] reducing the costs of litigating, and the availability of alternative dispute resolution methods.”).

97. FED. R. CIV. P. 1.

98. Cf. Alvin H. Rubin, *The Managerial Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 136 (1979) (“The judicial role is not a passive one. ‘A purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done. It is impossible to consider seriously the vital elements of a fair trial without considering that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice.’” (quoting Irving R. Kaufman, *The Philosophy of Effective Judicial Supervision Over Litigation*, 29 F.R.D. 191, 211, 216 (1961))). According to Professor Rosenberg, the 1983 Advisory Committee adopted Judge Rubin’s views. Rosenberg, *supra* note 17, at 2209.

For those who think that case management is proper and important but believe that *Article III* judges should devote their time to making merits decisions, one solution is to delegate the case-management tasks—including scheduling and overseeing discovery—to magistrate judges. Presumably, the Article III judges then would be more able and willing to engage with the parties regarding the merits of the case. Delegating the pretrial case management to magistrate judges is also seen as a way of eliminating the threat of merits coercion posed when the Article III judge who will decide the merits gets involved in management issues.<sup>99</sup>

There is much to be said in favor of the magistrate judge system. The federal judicial system has come to rely increasingly on magistrate judges to assist with civil pretrial matters.<sup>100</sup> The Judicial Conference recommended the effective use of magistrate judges to combat cost and delay in its Final Report to Congress on the CJRA.<sup>101</sup> Similarly, the Judicial Conference's *Long Range Plan* promotes the enhanced use of magistrate judges for civil pretrial matters.<sup>102</sup> Nobody doubts that there are scores of excellent magistrate judges across the country providing exemplary civil case-management service.

But, as is true with so much in the world of civil case management, there is a second side to this story. Some view dividing responsibility between “the merits” and “case management” as an artificial separation that undermines efficiency and fairness. In its recently published *Civil Caseflow Management Guidelines*,<sup>103</sup> the IAALS recommends that “[a] single judge . . . be assigned to each case at the beginning of litigation and . . . stay with the case through

---

99. See Peterson, *supra* note 3, at 92 (“Any effective solution should provide for the division of [magistrate and Article III] powers to prevent the use of substantive decision-making power as a coercive tool in pretrial management.”).

100. On referral from the district judge, magistrate judges may resolve nondispositive matters (subject to district court review for clear error) and may enter findings and recommendations as to dispositive matters. 28 U.S.C. § 636(b)(1) (2006); FED. R. CIV. P. 72. With consent of the parties, magistrate judges may assume full authority over those matters (and also conduct the trial if needed). 28 U.S.C. § 636(c)(1); FED. R. CIV. P. 73.

101. See JUDICIAL CONFERENCE OF THE U.S., *supra* note 41, at 2, 20 (identifying the reduction of cost and delay as an overall goal and recommending the effective use of magistrates).

102. See JUDICIAL CONFERENCE OF THE U.S., *supra* note 58, at 101–02 (“Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy.”).

103. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11.

its disposition.”<sup>104</sup> The *Civil Caseflow Management Guidelines* elaborate on this principle:

The use of a single judge assigned to a case from beginning to end provides the parties in the litigation with a sense of continuity. With respect to discovery issues and disputes, the same judge who handles the pretrial and trial matters is in a better position to resolve discovery matters because of his or her familiarity with the issues, the parties, the history of the case, and the relationship between the parties. For cases that go to trial, the judge who handled all pretrial and discovery matters in a case is in a better position to try the case, based on a familiarity with the issues, the parties, and the history of the case.<sup>105</sup>

Perhaps the principal targets of this recommendation are state court systems that still do not assign cases to a single judge for pretrial matters. But as written—and, I believe, as intended—it is also directed at what some call the *de facto* bifurcated bench in some federal court districts where the Article III district judges routinely delegate all scheduling and discovery management to their magistrate judges.

The results from the recent ABA Section of Litigation Survey offer some useful insights into whether lawyers think that using magistrate judges to handle pretrial matters conflicts with this “single judge” principle. More than 85 percent of the survey respondents supported the general principle of having a single judge “handle a case from start to finish.”<sup>106</sup> But when asked whether it was necessary for the judge who would try the case to also handle all pretrial matters, the level of agreement dropped to below 65 percent.<sup>107</sup> Moreover, when the survey question specifically inquired into using magistrate judges for pretrial matters, nearly 60 percent of the

---

104. *Id.* at 5; see also INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., PILOT PROJECT RULES 4 (2009) (“As soon as the complaint is filed, a judge will be assigned to the case for all purposes, and . . . will remain assigned to the case through trial and post-trial proceedings.”); AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 80, at 18 (“A single judicial officer should be assigned to each case at the beginning of a lawsuit and should stay with the case through its termination.”).

105. INST. FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYS., *supra* note 11, at 8–9.

106. See ABA SECTION OF LITIG., *supra* note 78, at 114 (showing that 85.8 percent of total respondents either “[a]gree[d]” or “[s]trongly [a]gree[d]” that “[o]ne judicial officer should handle a case from start to finish”).

107. See *id.* at 115 (showing that 64.9 percent of total respondents either “[a]gree[d]” or “[s]trongly [a]gree[d]” that “[t]he judge who is going to try the case should handle all pre-trial matters”).

respondents said they believed that it did not matter whether the trial judge or a magistrate judge handled the pretrial matters (so long as the pretrial matters are handled promptly).<sup>108</sup> These data indicate that some of the support for the “one judge” principle extends only to the notion that cases should be assigned to individual judges from the start and not left on the general draw until set for trial. But they also show that a significant percentage of the respondents (more than 40 percent) specifically disapprove of delegating pretrial matters to magistrate judges.

The IAALS and the ACTL are not alone in questioning the wisdom of separating the case-management and merits-adjudication functions. More than twenty years ago, Professor Linda Silberman worried that reflexively referring all discovery matters to magistrate judges might actually undercut effective case management by taking a key aspect of overall case management out of the district judge’s hands.<sup>109</sup> Judge Easterbrook—who is well known for his skepticism of case management generally—has argued that assigning discovery to magistrate judges is inefficient because (in his experience) the assignment typically does not give the magistrate judge the authority to limit discovery to potentially dispositive slices of the case.<sup>110</sup> In his paper for the Duke Conference, Judge Higginbotham, although agreeing that some case management is valuable, also criticized the practice of delegating case management to magistrate judges; in his view, that delegation is symptomatic of a disturbing trend of making the trial court process a paper process of delegable duties.<sup>111</sup>

Ultimately, the issue comes down to this: even if we could all agree that case management *by somebody* is a good thing, we still have to find someone to do it. Any reform efforts that would increase the amount of case management performed by Article III judges must be prepared to meet the criticism that doing so will only further erode our sense of what it means to be an Article III judge. Delegating the

---

108. See *id.* at 116 (showing that 58.5 percent of total respondents either “[a]gree[d]” or “[s]trongly [a]gree[d]” that “[i]t does not matter whether the trial judge or a magistrate judge handles pre-trial matters, so long as they are handled promptly”).

109. Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2141 (1989). Alternatively, Professor Silberman worried that if delegation were successful it would stifle real procedural reform by relieving the symptoms of cost and delay without addressing the root causes. See *id.* (“[T]o take burdensome discovery away from judges . . . place[s] it elsewhere in the system.”).

110. Easterbrook, *supra* note 29, at 639–40.

111. Higginbotham, *supra* note 86, at 759–60.

case-management duties to magistrate judges might address that particular concern, but proponents of true single-assignment schemes object that the bifurcated bench undermines the efficiencies that case management is meant to supply. Something has to give. If we are going to have case management, someone has to do it. If neither Article III judges nor magistrate judges should manage federal civil cases, then who?<sup>112</sup> If neither is acceptable, and there is no other source to provide it, then we cannot rely on case management to achieve the “just, speedy, and inexpensive” determination of actions.<sup>113</sup>

*B. Should There Be Different Rules for Different Types of Cases?*

Properly done, active judicial case management ensures that the pretrial activities in each case are appropriate and proportional to the needs of the case. Judges individually tailor the pretrial process in each case, sometimes by guiding the parties to make better choices, sometimes by working with the parties to help them agree on the size and scope of the pretrial activities, and sometimes by resolving disputes and imposing limits when the parties cannot agree or when the parties both engage in unreasonable behaviors. The notion of tailoring, however, is directly linked to the fact that, for the most part, the Civil Rules are the same for all cases, regardless of their shape or size. If each case starts with the same set of Civil Rules, but the goal is for each case to have a tailored pretrial process, then the task of doing the tailoring must fall to the parties (if they can agree) or to the judge.

But judicial case-tailoring is not the only method available for dealing with differences in the pretrial needs of different cases. This Section focuses on a different approach—having different sets of rules for different types of cases. One possibility might be to have different sets of rules (or special rule provisions) for specific subject areas. Another possibility might be to distinguish between cases

---

112. This is not to concede that “neither” is the correct answer. To the contrary, I think the correct answer is “both.” As discussed above, I think case management is not just an appropriate but a critical aspect of the pretrial process and that it is wholly consistent with the role of the district judge. *See supra* notes 94–98 and accompanying text. But I also think that it is perfectly appropriate for district judges to capitalize on the assistance available from magistrate judges by involving them in the pretrial process. The concerns raised about the loss of efficiency that can result from splitting tasks between the district judge and the magistrate judge are real, but the solution lies not in creating a rigid either-or scheme but in teamwork and communication between the judges when the pretrial activities are shared.

113. FED. R. CIV. P. 1.

based on size or complexity and to have separate “tracks” with different sets of rules geared toward the needs of the cases in those tracks. In the end, the idea is to rely less on individual judges by doing the tailoring at the front end when designing the rules rather than at the back end through case-specific case management. The process of designing differentiated rule schemes, however, raises its own array of tricky problems.

1. *Transsubstantivity and the One-Size-Fits-All Debate.* Before turning to the various proposals for differentiated rules, many of which have been implemented in different forms in different jurisdictions, I start with an overview of the federal Civil Rules system as it currently stands. There is only one set of Federal Rules of Civil Procedure. Subject to a few exceptions, they apply to all civil actions in the U.S. district courts.<sup>114</sup> And there is only one form of action in the district courts—“the civil action.”<sup>115</sup> Add this up, and you get a relatively simple picture: the same set of Civil Rules applies to all civil cases in federal court, regardless of the size, complexity, or subject matter of the case, or the dollar amount in controversy. This is no accident.<sup>116</sup> Rebelling against the headaches and costs caused by the formalism of common law pleading, enamored of the flexibility and simplicity of equity practice, and fortified by their belief that procedure was merely the handmaiden of justice, the original drafters of the Civil Rules consciously and deliberately set out to design a single set of rules that could be applied to every case.<sup>117</sup>

Procedural rules that apply to all types of cases are said to be transsubstantive.<sup>118</sup> The term does not exactly roll off the tongue, but it is descriptive and neutral. A more colorful term is that the Civil

---

114. *Id.*; see also FED. R. CIV. P. 81(a) (stating the rules’ applicability to particular proceedings).

115. FED. R. CIV. P. 2.

116. Indeed, it may even have been inevitable. See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the “One Size Fits All” Assumption*, 87 DENV. U. L. REV. 377, 383 (2010) (noting that the original drafters appear to have assumed, given the nature of their task and the circumstances that led to the Rules Enabling Act, that the rules they would be developing would apply uniformly to all cases).

117. For a history of the Rules Enabling Act, Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006), see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987); Tidmarsh, *supra* note 8.

118. The term “trans-substantive” was coined by Professor Robert Cover. See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975).



Rules are “one size fits all.”<sup>119</sup> When used, that label usually is offered in the spirit of criticism, not praise.

Critics of the transsubstantive design of the Civil Rules contend that the cases that comprise the federal civil docket are too varied in their needs to be handled effectively or efficiently by any single set of rules.<sup>120</sup> By trying to be all things for all cases, the critics argue, the Civil Rules increase costs by imposing “Cadillac” procedures designed for complex litigation on a docket populated mostly by “Chevy” cases.<sup>121</sup> The notion that there should be multiple sets of rules pegged to different types or sizes of cases may be gaining steam with the practicing bar. Nearly one-third of the respondents to the ABA Section of Litigation Member Survey agreed with the proposition that one set of rules cannot accommodate every case.<sup>122</sup>

I think the one-size-fits-all description of the Civil Rules is inapt and potentially misleading. It depicts the Civil Rules as a heavy wool winter coat, size 48 long, that all civil cases are forced to wear regardless of height, weight, or build, in all weather and all seasons. In my mind, if one is to stick with the imagery of haberdashery, it is more accurate to say that the Civil Rules are bespoke. Only pleadings and initial disclosures are required.<sup>123</sup> The rest is custom made. If the parties so choose, or if the court—acting as tailor—so orders, the case can get a breezy linen shirt instead of the heavy winter coat. Or, to pursue the automotive metaphor, the Civil Rules are a showroom of makes and models; it is ultimately up to the parties and the court to determine whether they drive off in a Cadillac or a Chevy.

There lies the connection to case management. The process I just described requires active and meaningful case management. Without case management, the parties and their lawyers are free to do as they

---

119. *E.g.*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 6; Subrin, *supra* note 116, *passim*.

120. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 6 (“Treating all cases in the same way results in under-management of some cases, over-management of others, and in both situations increased costs or delay, or both.”); Subrin, *supra* note 116, at 388–93 (arguing that transsubstantive procedures waste time and money, reduce focus and predictability, and tend to precipitate or force settlement).

121. *See* Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 563 (“The Cadillac process they enshrine helps to drive out of federal court those who can afford only a Ford.”).

122. *See* ABA SECTION OF LITIG., *supra* note 78, at 31 (showing that 38.6 percent of total respondents either “[a]gree[d]” or “[s]trongly [a]gree[d]” that “[o]ne set of Rules cannot accommodate every case type”).

123. *See* FED. R. CIV. P. 8(a), 26(a).

like.<sup>124</sup> Though some fixed limits do exist, the size of the pretrial process is determined principally by how aggressively one or both sides pursue discovery and engage in motion practice.<sup>125</sup> Metaphorically speaking, one side may want only the equivalent of a light spring jacket but, as a result of the other party's conduct or demands, end up wearing a full-length wool coat. (To continue the other metaphor, one side may think the case warrants only Chevy-level treatment but end up litigating it in Cadillac style, at Cadillac prices.) The Civil Rules leave it to the individual judge to custom-fit the procedure to the case. When people criticize the Civil Rules as being one-size-fits-all, they are arguing—either explicitly or implicitly—that federal judges lack the will or the ability to be good case tailors.

Is that critique right? I think most supporters of the case-management approach would say that federal judges already have ample tools to be good tailors, though the search for more and better tools is ongoing. That being said, even the strongest supporters of case management recognize that some judges are simply not making good, or sufficiently frequent, use of the case-management tools they do have.<sup>126</sup> Indeed, one of the topics for the Duke Conference is to see if we can identify ways to improve the effective use of those tools or to identify more or better tools. But critics of the case-management model would argue that the one-size-fits-all model suffers from flaws that cannot be fixed by more or better case management or by an expanded set of case-management tools. My sympathies lie with the supporters of case management. I think the case-management model does work, though I agree it can (and probably must) be improved. At bottom, I think case management by judges, custom-fitting the procedure in the case based on the options available under the Civil

---

124. See Marcus, *supra* note 19, at 1589 (2003) ("Without case management . . . lawyers would be free of substantial constraint . . .").

125. Default numerical limits exist, for example, for depositions and for interrogatories. See FED. R. CIV. P. 30(a)(2)(A)(i) (permitting no more than ten depositions per side); *id.* 30(d)(1) (imposing a seven-hour limit on depositions); *id.* 33(a)(1) (permitting no more than twenty-five interrogatories per pair of parties). While nothing in the Civil Rules limits the frequency or number of dispositive motions, many districts have limitations in their local rules. See, e.g., W.D. OKLA. LCvR 56.1(a) (permitting each party to file only one summary judgment motion without the leave of the court).

126. See Grimm & Cabraser, *supra* note 75, at 11 ("The problem is an absence of will."); Rosenthal, *supra* note 18, at 231–32 (suggesting a need to "increase the use of the rules that are already on the books").

Rules, remains our best strategy for seeing that cases receive the right type and amount of procedure.

The purpose of this Section, however, is not to champion case management as the best method for ensuring that each case receives a type and degree of procedure best suited to its needs. Rather, it is to explore *alternative methods* for doing so, to which I now turn.

*2. Proposals for Differentiated Rules.* This Section explores three proposals for differentiated rules: (1) substance-specific procedures, (2) tracking systems, and (3) simplified procedures. It is important to make clear at the outset that these alternatives and case management are not mutually exclusive. I do not think any of the proponents of these options would urge that they should be adopted in lieu of—or to the exclusion of—all forms of case management. Indeed, some reform proposals call for abandoning the one-size-fits-all system, adopting specialized schemes, *and* ratcheting up case management within those specialized schemes.<sup>127</sup> Nonetheless, there remains a critical link between case-management reform and proposals for differentiated-rule schemes: any proposal to solve cost and delay issues by enhancing the case-management powers of the judge should expect to answer to critics who believe that no amount of case management can solve those issues if our starting point is a single set of rules for all cases.

*a. Substance-Specific Rules.* The Rules Enabling Act<sup>128</sup> says surprisingly little about what the structure of the Civil Rules should be.<sup>129</sup> The only drafting norm stated in the Rules Enabling Act is that the Civil Rules are to be “general.”<sup>130</sup> A limited interpretation of that directive might be that Congress intended only that the Rules be geographically uniform—that is, that they would apply in all districts,

---

127. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 6–9; AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 80, at 4–5, 18–24.

128. Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2006).

129. See Steven S. Gensler, *Justness! Speed! Inexpense! An Introduction to The Revolution of 1938 Revisited: The Role and Future of the Federal Rules*, 61 OKLA. L. REV. 257, 267 (2008) (“The text of the Rules Enabling Act yields no normative directives for drafting the Rules.”).

130. 28 U.S.C. § 2072(a). The Rules Enabling Act does provide additional guidance, but it is directed more toward scope and limits than norms or structure. For example, the rulemaking authority is for rules of “practice and procedure.” *Id.* And, of course, the rules may not “abridge, enlarge or modify any substantive right.” *Id.* § 2072(b).

rejecting any continuing notion of conformity to state practice.<sup>131</sup> By and large, that is how the Civil Rules operate.<sup>132</sup> But the original drafters were not just seeking to displace conformity to state procedure, and they were not just looking to ensure that federal procedure would be geographically uniform. The goal from the start was to develop a single set of rules that would apply to all cases regardless of size or substance.<sup>133</sup> The flexibility provided by modeling this set of rules on equity practice would permit the parties and the court to adjust them as needed and as applied.<sup>134</sup>

Recent reform proposals recommend the creation of substance-specific rules. The IAALS, for example, writes that the “rulemakers should be able to create different sets of rules for different types of cases so they can be resolved more expeditiously and efficiently.”<sup>135</sup> In this regard, the IAALS finds itself in the company of some of the most prominent procedure scholars of our time.<sup>136</sup> Professor Subrin

---

131. See Burbank, *supra* note 121, at 542 (noting that the Advisory Committee seems to have assumed that the Rules Enabling Act carried with it a directive to be transsubstantive and not just geographically uniform).

132. The Civil Rules do incorporate some geographic variation. See, e.g., FED. R. CIV. P. 4(e) (incorporating state-law service methods); *id.* 17(b) (incorporating state-law standards on the capacity to sue or be sued); *id.* 64 (incorporating state prejudgment remedies). A much more significant source of interdistrict variation comes from local rules. See generally Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989). For a recent defense of local rules, at least as compared to standing orders or other judge-specific practices, see Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. (forthcoming 2010).

133. See Subrin, *supra* note 116, at 381–84 (noting the absence of any evidence suggesting that there was any debate “about whether the rules would be uniform in the sense that the same rules would apply to all cases”).

134. See *id.* at 384–86 (noting that scholars at the time of the Rules Enabling Act wanted rules “as permissive and expansive as equity”); Subrin, *supra* note 117, at 922–25 (“The expansive and flexible aspects of equity are all implicit in the Federal Rules.”).

135. AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 80, at 4.

136. See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333 (2008) (“[W]e must bury . . . the thoroughly misguided idea that transsubstantivity is an independent value or ideal for the Federal Rules.”); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988) (“[T]he trend of modern procedural law has been away from rules that make policy choices towards those that confer on trial courts a substantial amount of normative discretion.”); Cover, *supra* note 118, at 731–32 (arguing that, because procedural devices are justified partially in terms of substantive objectives, the failure of the Civil Rules to promote their substantive objectives in many cases is troubling); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 547 (1986) (“We must face that . . . we need to determine what subsets of cases require special kinds of rules, and write

has long called for substance-specific rules on the basis that transsubstantive rules require overly general directions and vague standards that increase expense and decrease consistency.<sup>137</sup> Professor Stephen Burbank is also a longtime advocate of substance-specific rules; he argues that substance-specific rules that provide more detailed guidance—and additional constraints—are preferable to transsubstantive rules that rely on judicial discretion.<sup>138</sup>

Professor Robert Bone advocates substance-specific rules on the basis that transsubstantive rules fail to account for differences in substantive priorities.<sup>139</sup> According to Bone, to promote the “just” adjudication of claims in a world where resource limits make perfect accuracy in all cases impossible, the Civil Rules should be designed to resolve the most important substantive policies with the greatest accuracy.<sup>140</sup> As an example, Bone suggests that, because cases involving constitutional issues or bodily harm are, relatively speaking, more important than cases involving property, special rule provisions might be developed to minimize the risk of error in the former categories of cases.<sup>141</sup> Most recently, he has argued that transsubstantive pleading rules misfire because they do not adequately account for substantive areas in which the parties face

---

rules for those kinds of cases.”); Subrin, *supra* note 92, at 45–56 (making a case for selective substance-specific procedure); Subrin, *supra* note 132, at 2048–51 (“When one begins to define procedures more rigorously, it becomes obvious that some cases need different rules.”).

137. See Subrin, *supra* note 92, at 45–56 (making a case for selective substance-specific procedure); see also Subrin, *supra* note 116, at 404–05 (discussing substance-specific protocols).

138. See Burbank, *supra* note 121, at 556–64 (“Growing awareness that questions of ‘mere procedure’ may implicate important social policy encourages those who cannot make an independent judgment to have only so much confidence in the integrity of the process and the quality of the legal products it produces as they do in the actors who control it.”); see also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1936–37 (1989) (suggesting that empirical data and objective guidance are more likely to lead to “equal justice” than is the discretion of judges).

139. See Bone, *supra* note 136, at 333–34 (“The fact that substantive policy is always part of procedural justification means that trans-substantivity as an independent value or ideal makes no sense at all.”).

140. See *id.* (“[T]he cost as well as the risk of error matters, and error cost is measured in terms of the substantive policies at stake.”); see also Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 302–05 (2010) (arguing that the goal of procedure should be to achieve an optimal distribution of error risks and that an optimal distribution should take into account the substantive interests underlying different subjects of the law).

141. See Bone, *supra* note 140, at 303; Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 936 (1999).

significant information asymmetries.<sup>142</sup> Thus, Bone might propose different pleading standards for antitrust actions than for breach-of-contract actions given that plaintiffs typically have presuit access to the key facts in the latter but not the former.

The debate is hardly one-sided, however. An equally prominent group of procedure scholars think that the benefits of transsubstantive rules outweigh their costs.<sup>143</sup> Professor Geoffrey Hazard urges us to remember that one of the virtues of transsubstantive procedural rules is that developments in a rule from one type of case can be employed in other types of cases, allowing for the development of new types of socially beneficial litigation.<sup>144</sup> Professor Carrington warns against the politics that substance-specific rules would interject into the rulemaking process, concluding that the task of creating special rules for particular types of cases is properly left to Congress.<sup>145</sup> Professor Rick Marcus has embraced both points.<sup>146</sup>

The transsubstantivity debate has important implications for case management. Without the ability to customize the pretrial process via case management, it is doubtful that a single set of rules could service all cases across all subject areas. Indeed, many advocates of

---

142. See Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 936 (2009) (calling for substance-specific rules in the types of cases that most seriously involve meritless filings—such as those with significant informational asymmetries—because transsubstantive rules cannot account for the various cost-benefit tradeoffs at stake in different types of cases).

143. See, e.g., Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2074–87 (1989); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–47 (1989); David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 415–26 (2010); Marcus, *supra* note 1, at 776–79.

144. See Hazard, *supra* note 143, at 2247 (“The Federal Rules have been employed in ‘social justice’ litigation precisely because they are cast in general terms, rather than tailored to specific types of litigation.”).

145. See Carrington, *supra* note 143, at 2074–75 (listing reasons for pursuing the ideal of “perfect neutrality in the rulemaking process [and] in the procedure rules themselves”); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 617, 661 (2010) (asserting that “special rules for a substantive category of cases . . . would be a task for Congress” and that “since the mid-1980s . . . the Supreme Court’s revisions of the Civil Rules have [had] a clearly visible political aim”).

146. See Marcus, *supra* note 1, at 778–79 (noting that “[a] shift away from trans-substantive procedures” would “eliminate the positive effect of applying procedural learning from one substantive area to another” and “constrict[] the focus on the winners and losers in such a way as to magnify the likelihood that those with greater power will be the winners”).

substance-specific rules articulate the relationship in reverse, saying that customized case management by the judge renders the rules transsubstantive in name only.<sup>147</sup> What is undeniably true is that there is an inverse relationship between substance-specific rules and case management. Defenders of transsubstantivity say we do not need substance-specific rules because judges can customize via case management. Advocates of substance-specific rules respond that we would not need so much customized case management if we had more customized rules. Thus, any reform proposal that would give judges more case-management power as a means of allowing for even greater case customization must be prepared to answer to the critics who think that those distinctions should be reduced to rule text.

That being said, we must be careful not to paint this debate as presenting a strictly binary choice between pure rule transsubstantivity and substance-based rule balkanization. Fidelity to the principle of transsubstantivity is, for all practical purposes, a question of degree.<sup>148</sup> I am not aware of any scholar who seriously argues that we should have separate rules for every different subject. The flaws in that approach were made clear under the common-law writ system, which nobody I know of thinks should be revived.<sup>149</sup> Moreover, the court-made rules already depart from pure transsubstantivity in two ways.<sup>150</sup> First, we already have special sets of court-made rules for some categories of proceedings; special rules already exist for habeas corpus cases,<sup>151</sup> for admiralty proceedings,<sup>152</sup>

---

147. See Burbank, *supra* note 136, at 715 (“Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense.” (citing Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1473–74 (1987) (book review))); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 527 (1986) (“[T]he emergence of managerial judging . . . exemplif[ies] ad hoc efforts to tailor rules to individual cases.”); Silberman, *supra* note 109, at 2176 (“[B]y and large the erosion of trans-substantive rules has come via ad hoc informal, customized procedures devised by judges . . .”).

148. Gensler, *supra* note 129, at 267.

149. See Subrin, *supra* note 116, at 388 (“Those who cherish transsubstantive procedure are right that we do not want to return to anything like the writ system, even if we could.”).

150. Congress, of course, remains free to displace, modify, or embellish the transsubstantive, court-made rules with specific statutory provisions. See, e.g., Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(1)(B) (2006) (instituting heightened pleading requirements in securities fraud cases).

151. 28 U.S.C. § 2254 Rules Governing Section 2254 Cases in the United States District Courts (2006) (implementing special rules for cases involving petitions for writs of habeas corpus).

152. FED. R. CIV. P. A–F (providing supplemental Rules for admiralty or maritime claims).

and, most recently, for civil forfeiture cases.<sup>153</sup> Second, we already have some substance-specific provisions within the generally transsubstantive Civil Rules. Rule 26 exempts some categories of cases from mandatory disclosures.<sup>154</sup> Rule 9 provides substance-dependent pleading standards.<sup>155</sup> And Rule 23.1 is explicitly limited to shareholder derivative actions.<sup>156</sup>

As a basic principle, I strongly support having a single set of rules that applies to all cases. In particular, I agree with those commentators who think that the decision whether to have special rules for particular substantive areas (such as special rules for antitrust actions or civil rights actions) is best left to Congress.<sup>157</sup> At the same time, one must acknowledge that some precedent for departures from transsubstantivity does exist. It also must be acknowledged that proposals to add a few discrete substance-specific rule provisions here and there, fitted within the generally transsubstantive rules framework, raise much different questions than would, for example, a proposal to adopt wholly separate rule schemes for tort cases, contract cases, and civil rights cases.<sup>158</sup>

---

153. *Id.* G (providing a supplemental Rule for in rem forfeiture actions).

154. *Id.* 26(a)(1)(B) (exempting nine types of proceedings).

155. *Id.* 9(b) (requiring that allegations of fraud be pleaded with particularity).

156. *Id.* 23.1.

157. This is not to say that I support direct rulemaking by Congress. Court rulemaking through the existing rulemaking process still represents the best method for tapping into the widest range of expertise, for gathering empirical data, and for careful study of the issues. *See* Bone, *supra* note 141, at 938 (“Because the process requires rulemakers to infer general principles from practice, it is much better suited to the courts than to the legislature.”); Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 313–14 (2008) (praising the federal rulemaking process as “institutionalized and highly expert” as well as “independent and relatively apolitical”). Rather, it is simply to say that I do not find in the current Rules Enabling Act scheme any clear warrant to make broad departures from the transsubstantive model or from the normative benchmark of crafting rules to achieve the “just, speedy, and efficient” adjudication of all claims. *See* Gensler, *supra* note 129, at 268 (“[O]ne finds little to suggest that Congress equated the goal of justness in the rules with a rulemaking process driven by normative metrics, the policy values underlying substantive laws, or the distribution of error costs . . .”). Should Congress conclude that departures from the transsubstantive model are warranted, however, Congress can send that signal with legislation that provides more detailed instructions to the rulemakers or by engaging in a cooperative rulemaking process with the goal of producing rule changes that would be enacted legislatively. *See id.* at 262 n.28 (discussing the cooperative process between Congress and the rulemakers that led to the development and enactment of Federal Rule of Evidence 502).

158. *See* Burbank, *supra* note 121, at 542 (distinguishing “wholly different procedural regimes for different bodies of substantive law” from “altering only discrete Federal Rules, or portions thereof, that do not satisfactorily implement the policies underlying a body of substantive law or a particular scheme of substantive rights”).



*b. Case Tracking.* Tracking is another reform proposal that competes, at least in part, with the case-management model. The idea of tracking is simple and sensible. Different cases have different needs. Rather than leaving it up to the judge to tailor the procedure to the needs of the case, the Civil Rules would create tracks with different sets of procedures. Then it would just be a matter of putting each case on the right track. The purpose of tracking is cost control. While tracking schemes may include complex-case tracks that come with extra procedure, the principal focus invariably is to create simple-case tracks (or “fast” tracks) that offer less procedure. For this reason, I like to think of tracking schemes as being akin to kids’ menus at restaurants.<sup>159</sup> The kids get to eat (that is, litigants are not denied access to pretrial procedure). But their options are limited, and the portions are reduced—as is, we expect, the price.

Tracking has a very respectable pedigree. In its 1990 report, the Federal Courts Study Committee expressed interest in case tracking, though it quickly added that “more study is needed to learn whether tracking or much more individualized case management is generally preferable for the federal civil caseload.”<sup>160</sup> When Congress passed the CJRA that same year,<sup>161</sup> one of the six main reform principles to be considered by each district was the “systematic, differential treatment of civil cases.”<sup>162</sup> While many districts opted to continue to rely on individual judges to provide case tailoring, a number of districts adopted tracking systems, at least nominally.<sup>163</sup> Tracking continues to have strong support in some quarters. Several districts

---

159. See Steven S. Gensler, Procedure à la Carte, Presentation at Association of American Law Schools Annual Meeting, Section on Civil Procedure Program (Jan. 8, 2010).

160. FED. COURTS STUDY COMM., *supra* note 57, at 100.

161. CJRA, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

162. 28 U.S.C. § 473(a)(1) (2006). See generally James S. Kakalik, Terence Dunworth, Laural A. Hill, Daniel McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 20 (1997) (listing the case-management principles of the CJRA).

163. See JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 30 (1996) (listing methods of differential case management adopted by pilot and comparison districts); DAVID RAUMA & DONNA STIENSTRA, FED. JUDICIAL CTR., THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 83–103 (1995) (listing differential case-management plans for all districts).

retain tracking mechanisms in their local rules.<sup>164</sup> The IAALS endorses tracking.<sup>165</sup> Professor Miller recently indicated interest in exploring tracking.<sup>166</sup>

For a comparative perspective, we might look to England, which established a case tracking system in 1998 as part of the Woolf Reforms.<sup>167</sup> The English system has three tracks: small-claims track, fast track, and multi-track.<sup>168</sup> The small-claims track is the normal track for most cases in which the value of the claim is less than £5,000.<sup>169</sup> The fast track is the normal track for most cases in which the value of the claim is between £5,000 and £25,000.<sup>170</sup> All other cases normally are placed on the multi-track.<sup>171</sup> But these track-allocation criteria are not determinative. Ultimately, the judge makes the track-allocation decision based on both the general allocation scheme and a list of case-specific factors.<sup>172</sup> The judge may also reallocate a case to a different track at a later time.<sup>173</sup>

While tracking makes sense in theory, in the federal courts it has proven problematic in implementation.<sup>174</sup> It does work at the margins.

---

164. See, e.g., N.D. GA. CIV. R. 26.2.A (assigning cases to one of three discovery tracks based on subject matter); S.D. IND. R. 16.1(b) (incorporating a case-management plan that requires the parties to select from one of four tracks); N.D. & S.D. MISS. CIV. R. 1 (creating six case-management tracks: Expedited, Standard, Complex, Administrative, Mass Tort, and Suspension); M.D.N.C. CIV. R. 26.1(a) (creating three discovery tracks: Standard, Complex, and Exceptional); N.D. OHIO R. 16.2 (creating five case-management tracks: Expedited, Standard, Complex, Administrative, and Mass Torts).

165. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 7 (“Judges should develop a differentiated case management system that includes simplified procedure for some cases and more intricate procedure for other kinds of cases.”).

166. See Miller, *supra* note 4, at 120 (“Tracking—at least in some form—is an idea whose time may have come.”).

167. See LORD WOOLF, ACCESS TO JUSTICE, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 13–102 (1996) (proposing and detailing a system of judicial case management).

168. CPR, (2006) pt. 26.1(2) (U.K.). For a more thorough discussion of England’s tracking scheme, see STUART SIME, A PRACTICAL APPROACH TO CIVIL PROCEDURE 210–13 (12th ed. 2009).

169. CPR 26.6(1)–(3).

170. *Id.* 26.6(4)–(5) (excluding cases in which trial is likely to last more than one day and cases with extensive expert evidence).

171. *Id.* 26.6(6).

172. *Id.* 26.7 (providing the general rule for allocation); *id.* 26.8 (listing matters relevant to track allocation). In cases involving claims with no financial value, the court simply selects the track it considers most suitable. See *id.* 26.7(2).

173. *Id.* 26.10.

174. The development of tracking systems in state courts presents a much different situation because of differences in the cases that populate the state court docket. For example, it is almost

For example, federal courts have long tracked certain types of cases like social security appeals and student loan collections that, for various reasons, either do not fit or do not need the general pretrial scheme.<sup>175</sup> But that is the low-hanging fruit; even without tracking, courts would have (and have had) little trouble determining the proper level of procedure in those contexts. In order to add real value, a tracking system would have to take the *general population* of cases and efficiently sort those cases into separate groups that accurately and fairly reflect the amount of procedure appropriate to the cases in each group. More specifically, because the principal goal of tracking is to reduce cost and delay by identifying “simple” cases that can be processed using downsized or streamlined procedures, the real challenge is to develop a tracking system that can sift the “simple” cases out of the general docket.<sup>176</sup>

Efforts to create simple-case tracks in federal court have not fared well. One of the essential elements of a successful tracking system is that each track must be used with sufficient frequency to justify its existence.<sup>177</sup> In federal court, however, it has proved difficult to create meaningful simple-case tracks because of heated disagreements about how to define a significant population of federal

---

a given that a state will have special rules, if not a special court, for small-claims cases. In addition, some states have had success using tracking techniques in particular subject-matter areas. *See Lande, supra* note 68, at 97–98 (“Studies have found that in family courts using DCM systems, disputes were resolved more quickly, the number of court hearings and the amount of repeat litigation were reduced, and, most importantly, the percentage of highly distressed children was reduced.”).

175. *See* COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 130–31 (“Many districts include an automatic track assignment process for certain types of cases. Administrative or appeals cases, such as Social Security or bankruptcy appeals, are identified by their pleadings and are automatically assigned to the administrative/appeals track.”); KAKALIK ET AL., *supra* note 163, at 45 (noting “special procedures for certain types of cases that have traditionally required only minimal management—typically prisoner petitions, Social Security appeals, government loan recovery cases, and bankruptcy appeals”). Moreover, the Civil Rules perform a form of tracking for these types of cases by excepting them from various pretrial requirements. *See supra* notes 150–56 and accompanying text.

176. Comparatively, it is easier to identify the complex cases. *See* JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL MCCAFFREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VAIANA, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 49 (1996) (“Cases at either extreme of the complexity spectrum are relatively easy to fit into a track.”). But the value of identifying these cases is comparatively less because the result is typically to flag the case for *more* individualized attention, not less.

177. *See* BUREAU OF JUSTICE ASSISTANCE, DIFFERENTIATED CASE MANAGEMENT: IMPLEMENTATION MANUAL 16 (1993) (listing as an assessment criterion that “[e]ach of the DCM tracks is used with sufficient frequency to justify its existence”).

court cases for a simple-case track. There is little point in creating a simple-case track if we cannot identify very many cases to put on it. The search for candidates for the simple-case track in the federal docket raises a critical and difficult question: what features make a case appropriate for the simplified or streamlined procedures associated with the simple-case track?

One method might be to use the amount in controversy as a proxy for whether a case is simple. In England, for example, the small-claims track and the fast track are based principally on the amount in controversy, set at £5,000 and £25,000 respectively. If we take just the fast-track limit and assume a two-dollars-to-one-pound conversion rate, we get an amount in controversy of \$50,000. So, perhaps all cases in which the amount in controversy is less than \$50,000 might be assigned to the simple-case track.<sup>178</sup> That scheme, however, would capture no diversity jurisdiction cases, given that diversity jurisdiction requires an amount in controversy of more than \$75,000.<sup>179</sup> This result illustrates a somewhat obvious but nonetheless critical point: the types of cases placed in simple-case or fast tracks in other systems often do not exist in the federal docket because of the limits of federal subject-matter jurisdiction.

A tracking scheme that allocated cases with an amount in controversy of less than \$50,000 likely would capture many federal question cases, given that there is no minimum amount in controversy for federal question jurisdiction.<sup>180</sup> But many of those low-dollar cases might be complex or have a social or policy value that exceeds the damages at stake. Might not many of those cases warrant access to the standard set of procedures, subject to individual case-tailoring by the judge?<sup>181</sup> For that reason, Professor Subrin has endorsed a mechanism

---

178. Coincidentally (I assume), that was also the amount-in-controversy threshold that Professor Ed Cooper used when he experimented with drafting simplified rules in his capacity as Reporter to the Advisory Committee on Civil Rules. See Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1805 (2002) (adopting \$50,000 as the general threshold for application of “simplified rules”).

179. 28 U.S.C. § 1332(a) (2006).

180. See Cooper, *supra* note 178, at 1797 (“Looking at all cases filed in federal courts from 1989 through 1998 . . . [the FJC] found that information about a stated money demand greater than \$0 was available for only 610,002 [cases], less than 28%. Of this reduced set of cases, 236,212 involved demands from \$1 to \$50,000.”).

181. To continue the comparison to the English tracking scheme, factors relevant to putting a case into a different track include “the likely complexity of the facts, law or evidence” and “the importance of the claim to persons who are not parties to the proceedings.” CPR, (2006) pt. 26.8(1) (U.K.). According to Professor Sime, “cases involving issues of public importance”

that would exempt federal question cases in which “Congress has revealed a desire for energetic enforcement . . . by providing for multiple damages or fee shifting for successful plaintiffs.”<sup>182</sup> But if one took out all of the federal question cases that had multiple damages or fee-shifting, what would be left for the simple-case track?

Moreover, of the federal question cases that remained candidates for the simple-case track, how many of those would one consider “over-procedured” under the current federal pretrial scheme? Rule 26(a)(1)(B) already exempts many of the more simple federal question cases from the required initial disclosures.<sup>183</sup> Rule 26(f) exempts these same cases from the discovery-planning conference and report requirements.<sup>184</sup> And Rule 16(b)(1) allows districts to enact local rules exempting categories of cases from the scheduling-order requirements.<sup>185</sup> In sum, the Civil Rules already take steps to relieve a wide range of cases from various pretrial burdens, further shrinking the universe of federal question cases that are in need of a simple-case track to unsaddle them from the demands of the federal pretrial scheme.

If we redefine the target population as federal question cases that (1) have a low amount in controversy, (2) are currently subject to the full range of the federal pretrial process, and (3) do not otherwise present social or policy matters justifying the full pretrial process, we would then need to ask at least three questions. First, what types of cases comprise that population? Second, do we have solid empirical data to show that *this* population of cases is associated with high levels of discovery or motion practice? And third, even if those levels are high, are they *unduly* high or are they warranted? In each such case, at least one of the parties must think the discovery or motion practice is warranted.<sup>186</sup> Returning to the overarching question of

---

are usually allocated to the multi-track even if the amount in controversy is below £25,000. SIME, *supra* note 168, at 212–13.

182. Subrin, *supra* note 116, at 400 (footnote omitted).

183. FED. R. CIV. P. 26(a)(1)(B) (exempting “simple” federal question cases like “an action for review on an administrative record” and “an action . . . to collect on a student loan”).

184. *Id.* 26(f)(1).

185. *Id.* 16(b)(1). It is my understanding that many districts create scheduling-order exemptions for the types of cases that are exempt from initial disclosures and discovery planning.

186. It is possible, of course, for the parties to engage in excessive pretrial activities even if neither thinks it is necessary. On the other hand, if the parties agree that the case needs only minimal pretrial activities, they can achieve that without being placed in a restricted track. They can restrain themselves individually, they can communicate and cooperatively agree to conduct

what gains can be made by formal case-tracking, is the population of cases that fit the three criteria above large enough to warrant developing and operating a system-wide tracking system as opposed to relying on individual case management?

Alternatively, we could expand the population of candidates for the simple-case track by including diversity cases with an amount in controversy of some amount between \$75,000 and some not-too-high figure—say, for example, \$250,000.<sup>187</sup> I assume that such a scheme would capture a significant number of diversity suits, though it would trigger inevitable application questions, such as whether to include the value of counterclaims, how to value nonmonetary claims, and the effect of amendments that raise the amount in controversy above the simple-case-track threshold.<sup>188</sup> The drafting of such a scheme would require considerable care to avoid rewarding gamesmanship or creating loopholes that could be exploited. Our experience with amount-in-controversy disputes in the removal context should raise some legitimate concern that lawyers might try to game a tracking system pegged to the amount in controversy.<sup>189</sup> We would also need to consider whether the benefits of providing a simple-case track for those cases (compared with the benefits of case-tailoring) justify the inevitable costs of creating the scheme and superintending the allocation of cases to the tracks. And, as a final policy alternative, one might even question whether it would be better to raise the amount-in-controversy requirement to \$250,000 (or whatever threshold we

---

minimal pretrial activities, and, if they want the court's force behind their views (to prevent defection), they can communicate their views to the judge (via the Rule 26(f) discovery planning report and at the Rule 16 scheduling conference if there is one) and have the judge incorporate those limits into the case-management order. *Id.* 16, 26(f).

187. Professor Subrin suggests using as a target “realistic damages of over \$500,000.” Subrin, *supra* note 116, at 400. I have no trouble with the figure he uses; any figure would draw an artificial line. It is not immediately clear to me, however, how a clerk of court, or even a judge, would determine what damages were “realistic” at the start of the suit or without communication with the parties, which then would cross back into the realm of judge-driven, differentiated case management.

188. *See, e.g.,* Cooper, *supra* note 178, at 1805–08 (elaborating a scheme that attempts to address many of these issues).

189. *See* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined from the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 MO. L. REV. 681, 686 (1997) (“Jurisdictional dilemmas arise in removal cases under two basic scenarios: (1) cases involving an indeterminate complaint...and (2) cases involving a ‘lowball’ complaint...”).

would set for the simple-case track) and leave those “simple” cases in state court in the first place.<sup>190</sup>

Even if there were sufficient numbers of “simple” cases in the federal system to justify a system-wide case-tracking scheme, that scheme would require effective allocation criteria. “The success of [tracking] is based in large measure on whether cases are correctly evaluated and assigned to the case-management tracks.”<sup>191</sup> Experience has shown, however, that the types of objective data typically available at the start of the case—such as the stated amount in controversy or the nature of the suit as indicated by the plaintiff in the civil cover sheet—often are not very good predictors of how expensive the case will be or how long it will take.<sup>192</sup> This does not make a tracking system inherently nonviable, but it does mean that informed tracking decisions will require court personnel (probably, but not necessarily, a judge) to elicit and consider additional information about the case.<sup>193</sup> To the extent a judge performs this task, one might question the value of the tracking system. It would seem to require essentially the same level of judicial resources as

---

190. The policy questions about whether to retain diversity jurisdiction and, if so, where to set the amount-in-controversy requirement are well-known to this group and beyond the scope of this Article. Several authors have suggested specific reforms. See JUDICIAL CONFERENCE OF THE U.S., *supra* note 58, at 29–32 (recommending measures “to seek reduction in the number of federal court proceedings in which jurisdiction is based on diversity of citizenship”); 1 FED. COURTS STUDY COMM., *supra* note 13, at 454–58 (recommending “abolition of general diversity jurisdiction” with three exceptions: suits involving aliens, interpleader, and complex multistate litigation); AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 12–14 (1969) (proposing amendments that would restrict diversity jurisdiction). For an overview of the arguments for and against diversity jurisdiction, see Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 101–21 (providing an overview of the arguments for and against diversity jurisdiction). I do note that a proposal developed by the Federal-State Jurisdiction Committee is the subject of a bill pending in Congress that would provide for automatic increases to the amount-in-controversy requirement, in \$5,000 increments, by indexing increases to the Consumer Price Index. See Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 103.

191. COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 130; see also BUREAU OF JUSTICE ASSISTANCE, *supra* note 177, at 16–17 (listing “[t]rack assignment” as a “Critical DCM Function[]”).

192. See KAKALIK ET AL., *supra* note 163, at 46 (acknowledging “the difficulty in determining the correct track assignment for most civil litigation cases using data available at or soon after case filing”); Kakalik et al., *supra* note 162, at 28 (noting that “there was little actual ‘differential’ tracking of general civil cases in most districts that adopted a track model in their CJRA plan”).

193. See KAKALIK ET AL., *supra* note 163, at 49 (noting that even among the districts that adopted tracking systems, the majority of cases were tracked the same way, possibly alleviating very little judge involvement).

individual case-tailoring, thereby undermining one of the purposes of a systematic tracking scheme.<sup>194</sup> But if the judge did no more than assign the case to a track, which still treats cases on a modified wholesale basis, the payoff would be less than if the judge had entered a custom-tailored case-management order.

That point raises the more general point that tracking systems typically do not eliminate the need for judges to make case-by-case decisions about the needs of any particular case. Tracking system proposals typically either place the tracking decision with the judge initially or give the court authority to move cases from one track to another.<sup>195</sup> They also typically allow the judge to alter the procedural restrictions applicable to a particular track.<sup>196</sup> These powers would seem appropriate—if not necessary—to deal with situations in which the allocation criteria would yield a track assignment that was a poor fit for the particular case. But it interjects the trial court back into the process, with the tracking system operating not as a fixed rule but as a default. As Professor Maurice Rosenberg has noted, the success of tracking systems comes to depend on “skillful judicial case management.”<sup>197</sup> That, in turn, raises the question of whether tracking with judicial tailoring works any better than having judges conduct differential case management (DCM) on a discretionary case-by-case basis by tailoring their scheduling orders.

Proponents of tracking have suggested two reasons why tracking is beneficial even if it requires significant judicial involvement.<sup>198</sup>

---

194. See COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 130 (“[U]nlike case management approaches that treat each case on an entirely individual basis, [tracking] provides systematic recognition of differences in case types and thus tries to conserve court resources by systematically tailoring their application.”).

195. See *id.* at 130–31 (detailing several common options for DCM track-assignment procedures); see also INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 6 (noting that DCM systems with automated screening processes still require judges for reallocation); Cooper, *supra* note 178, at 1805 (noting that “simplified rules” do not apply “if the court, on motion or on its own, finds good cause to proceed under the regular rules”); Subrin, *supra* note 116, at 400 (including in his “simple track” proposal “a provision that for very good cause shown a party could move to be removed from the simple track”).

196. COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 131 (“[A]ll DCM systems preserve the discretion of the assigned judge to alter the previously chosen track or any of its predefined management controls as individual case needs evolve.”).

197. Rosenberg, *supra* note 17, at 2212.

198. In the past, tracking systems were also said to promote the ability of courts to automatically track case progress to ensure that cases did not “fall through the cracks” of individualized case management. COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 130. With the introduction of the Case Management/Electronic Case Filing (CM/ECF) system



Professor Subrin argues that tracking is better because it replaces a wholly ad hoc process with some standardization.<sup>199</sup> Professor John Lande makes a similar point, saying that tracking provides structure to the differential case-management process.<sup>200</sup> He also suggests that tracking sends a special signal to the parties about the court's expectations for the case.<sup>201</sup>

One could hardly contest the idea that like cases should be handled in like fashion, or that it is good for judges to clearly communicate their expectations to the litigants. The proposition that tracking achieves these virtues better than individual case management is, for me, not an obvious one. I can think of no clearer way for a judge to communicate his or her expectations of the parties than to hold a meaningful case-management conference and issue a detailed, custom-tailored case-management order. The standardization argument is harder to assess. It is no doubt true that judges vary in their case management. A tracking scheme, if it were consistently followed, would likely increase uniformity. But the main purpose of a tracking system is to match cases with their real procedural needs. If the system is to be limited to a manageable number of tracks, the match will always be a rough one because cases that are not exactly the same will be lumped together. Thus, the benefit of uniformity that comes from the standardized treatment of similar cases comes at the price of ignoring differences between the cases that individual case-tailoring could address. In other words, in the effort to stop the mismatches and disparities that might result from what Professor Subrin calls ad hoc case-tailoring, we might

---

in federal courts, however, I assume that districts or individual judges have ample tools at their disposal to monitor case progress across the docket.

199. Subrin, *supra* note 116, at 401.

200. Lande, *supra* note 68, at 95 ("DCM builds on the process of individual case management by providing structure and expectations for the courts, attorneys, and litigants."); *see also* DONNA STIENSTRA, MOLLY JOHNSON & PATRICIA LOMBARD, FED. JUDICIAL CTR., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at iii, 14–15 (1997) (discussing survey results from districts selected by Congress as demonstration districts due to their receptivity to case management and alternative dispute resolution and instructed to demonstrate how to make the techniques listed in the CJRA work).

201. Lande, *supra* note 68, at 95; *see also* STIENSTRA ET AL., *supra* note 200, at 14 ("[DCM] informs the attorneys about the judges' expectations for cases of various types, and consequently attorneys are better prepared to discuss the case realistically at the first case management conference.").

sacrifice the perfect matches that custom case-tailoring delivers when done well.

In the end, the CJRA experiment failed to provide much meaningful data on whether tracking systems could efficiently, fairly, or uniformly perform the differential case management of civil cases in federal court. In large part, this is because too few districts and judges utilized it often enough to provide a data set sufficient to support empirically valid conclusions.<sup>202</sup> Of the ten pilot districts that were required to implement DCM, four of them rejected tracking and continued to rely on individual case management.<sup>203</sup> Of the six pilot districts that adopted tracking systems, most of them either failed to use them or assigned virtually all of their cases to the “standard” track.<sup>204</sup>

Because of the paucity of data, the RAND report declined to draw any conclusions about the potential for tracking to reduce cost and delay in the federal courts.<sup>205</sup> We are left, then, to speculate about why the CJRA tracking experiment failed. One conclusion might be that, outside of the easy pickings like administrative appeals and student loan cases, there simply are not many cases that both qualify for federal subject-matter jurisdiction and do not warrant the application of general procedure. Alternatively, it may be that we just cannot identify these cases based on the information available at or near the time of filing. Either of these reasons would severely undermine the value of a tracking system in federal court. On the other hand, the results of the CJRA experiment may simply show that the federal judiciary, which did not like being told by Congress how to do its job, simply dug in its heels and never gave tracking a fighting chance.<sup>206</sup>

In its Final Report to Congress on the CJRA, the Judicial Conference enthusiastically endorsed the notion of DCM but recommended that the choice between tracking and individual-judge

---

202. See Subrin, *supra* note 116, at 402. Professor Subrin raises this point to deflect the argument that case tracking under the CJRA was not validated empirically, concluding that it was “[t]he failure of Federal District Court Judges to permit empirical study of tracking” that caused the data gap. *Id.*

203. KAKALIK ET AL., *supra* note 163, at 45.

204. *Id.* at 49.

205. *Id.* at 45–46.

206. See Subrin, *supra* note 116, at 402 (“The failure of Federal District Court Judges to permit empirical study of tracking makes the argument of adopting a simple track system only after empirical study all the more hollow.”).

discretion be left to each district.<sup>207</sup> The Judicial Conference explained that “[m]any courts found that it is easier and less bureaucratic for individual judges to establish individual DCM schedules based on the characteristics of cases.”<sup>208</sup> Of course, the fact that judges *prefer* to tailor cases according to their own judging styles or according to their own views of the needs of those cases does not prove that tracking is an inferior method of differentiating cases. One might view the preferences of judges as reflecting a valid but as-yet-unconfirmed intuition that tailoring is better done *ex post* by judges than *ex ante* by committees. A less charitable view might be that it evidences nothing more than that judges prefer doing things their own way whenever they can.

*c. Simplified Rules.* The final alternative to a single set of transsubstantive rules is to create a set of simplified rules for “simple” cases. This alternative is essentially a variant of the tracking system reduced to two tracks. It responds most directly to the “Cadillac/Chevy” problem, operating on the premise that we can keep the Cadillac rules so long as we also have a set of Chevy rules for all of the “simple” cases. As the IAALS put it, the one-size-fits-all approach of the Civil Rules “is bloated and has no scaled-down version for cases demanding less expenditure.”<sup>209</sup> There does appear to be significant interest in the notion of simplified rules, including at the federal level. Professor Subrin remains a vocal proponent of creating a simple-case track in the federal court system.<sup>210</sup> In the FJC’s Civil Rules Survey, over 60 percent of the respondents either agreed or strongly agreed with the proposition that the federal courts should test simplified rules (with party consent) in a few select districts.<sup>211</sup>

Several years ago, Professor Ed Cooper, Reporter for the Advisory Committee on Civil Rules, prepared a draft of what a set of simplified rules might look like. In his version, the hallmarks of simplified procedure were more-detailed pleading, increased disclosure obligations, and reduced discovery.<sup>212</sup> Others have

---

207. JUDICIAL CONFERENCE OF THE U.S., *supra* note 41, at 28 (recommending that each district select either “the more rigid track model or the judicial discretion model”).

208. *Id.* at 27.

209. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 6.

210. Subrin, *supra* note 116, at 398–405.

211. LEE & WILLGING, *supra* note 77, at 54.

212. See Cooper, *supra* note 178, at 1796 (“The draft proposes more detailed pleading, enhanced disclosure obligations, and restricted discovery opportunities.”).

suggested that simplified procedure should also reduce or eliminate judicial case management.<sup>213</sup>

The fate of simplified rules is linked closely to the fate of broader tracking systems, at least in the federal system.<sup>214</sup> How many “Chevy” cases are there in the federal system? What criteria do we use to identify them?<sup>215</sup> Do we create a mechanism to opt back into the “Cadillac” rules? Can a party do that unilaterally? Is judicial action required? And, ultimately, is there any reason to think that, in the aggregate, we can get a better fit at a better price by implementing a slotting mechanism than we can get by bespoke tailoring from a single set of rules via individual case management? Professor Cooper notes this issue in his article exploring the draft simplified rules:

Even if there is reason to fear that general federal procedure should not apply in all its sweep to every case in federal court, it is not clear that “general federal procedure” is as procrustean as the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions.<sup>216</sup>

---

213. See Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 176 (2007) (suggesting “more detailed pleading, mandatory disclosure, reduced discovery, reduced or no judicial case management (including conferences), time limits on discovery and motions, and firm trial dates”); Subrin, *supra* note 116, at 399 (advocating limiting discovery, eliminating multiple pretrial conferences, and setting a firm trial date).

214. The story in the state court systems might be much different. First, states already employ this technique with small claims courts. Second, state courts of general jurisdiction presumably will have a large number of cases that have lower monetary stakes and that do not implicate civil rights or present other policy issues that might justify litigation under the full set of rules.

215. One way of eliminating the problem of selecting cases for a “fast track” is to have an optional system that the parties must opt for if they wish to use it. See Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431, 431 (1985) (calling for “a faster track judicial system—which takes the basic principles of the ADR movement, i.e., that parties can voluntarily agree to much less costly procedures for resolving disputes if given the opportunity, and applies such principles to traditional court-supervised litigation”). One might fairly question the need for an optional “fast track”; the parties can create their own “fast track” by simply agreeing to limit their pretrial activities and to move quickly. As McMillan and Siegel note, however, that process requires the parties to agree on many things over a long period of time, whereas an optional “fast track” would only require them to agree once. *Id.* at 439 (“They need not negotiate the procedures by which that compromise will be achieved; judicial rules are already in place.”).

216. Cooper, *supra* note 178, at 1798.

3. *The Path Forward.* I do not know of anyone who thinks that every case should get *exactly* the same pretrial procedure—that is, that every case warrants the same amount of time for discovery, the same amount and range of discovery, and so on. Put another way, nobody thinks that the Advisory Committee should develop a single, fixed playbook of scripted procedures to be applied mechanically and without alteration to all cases, from the most complex antitrust class action to the most pedestrian slip-and-fall diversity case. Different cases will continue to have different pretrial needs.

The current Civil Rules scheme attempts to achieve that kind of differentiation. It does so, despite having the same general set of rules for all cases, by providing options for the parties and by empowering trial courts to custom-fit the pretrial process to the needs of the case. In that respect, I reject the “one-size-fits-all” label, which fails to account for the tailoring that judges do. “One set of rules” does not mean “one size fits all” when the set of rules in question provides ample management options.

That being said, there is nothing in the Rules Enabling Act that dictates that we have only one set of rules in federal court. We can have different rules for different subjects (though subject-specific rules would present their own questions under the Rules Enabling Act and certainly would interject a new dimension of politics into the rulemaking process).<sup>217</sup> We can create different tracks for cases with different characteristics. Some districts already have them under their local rules. We can adopt the lesser form of tracking by creating a separate set of simplified rules for some set of “simple” cases. All of these options could still include case management for further custom tailoring. The objective of these options is not to eliminate case management completely but to become less dependent on it.

I think it is fair to say that everyone agrees that federal judges could do a better job of utilizing their current case-management powers. But before asking (or demanding) that they do so, we must first pause to consider, again, whether the system should rely *less* on case management, not more. If the answer is that the system should be less dependent on case management, then some type of departure from the “one set of rules” scheme would seem to be required. At the same time, I think the burden is squarely on those who would depart from the “one set of rules” model to show that the structures they

---

217. See *supra* notes 128–34, 145–46 and accompanying text.

would emplace would do a better job of fitting the procedure to the case than judges currently can do with their tailors' tools.

*C. Do Federal Judges Wield Too Much Discretion?*

In general, the Civil Rules rely heavily on judicial discretion, and the case-management rules are no exception. This is particularly true with respect to discovery management, in which district judges wield wide discretionary power to regulate the scope, sequence, timing, and methods of discovery. This Section addresses the concern raised by some that the combination of the transsubstantive rules scheme and the case-management ethos has resulted in too many important matters being left to the trial court's discretion.

"Discretion lay at the heart of Pound's jurisprudence."<sup>218</sup> It also lies at the heart of case management. Enamored of the benefits of the equity system, the original drafters of the Civil Rules opted for a set of rules that relied on flexibility and discretion.<sup>219</sup> The members of the original Advisory Committee knew that an equity-based system would require a strong judicial hand but nonetheless rejected many proposals that would have reined in the process.<sup>220</sup> Amendments to Rules 16 and 26 since then have increased judicial control but have done so flexibly, continuing what Professor David Shapiro has called "the tradition of discretion."<sup>221</sup>

Discretion is a byproduct of both the transsubstantive nature of the Civil Rules and the fact that the chief architects of the original rules were reacting to the costs of inflexibility that manifested in prior procedural schemes.<sup>222</sup> As Professor Subrin has pointed out, our commitment to having one set of rules for all cases has caused us to write the Civil Rules with a large degree of generality and to delegate

---

218. Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 521 (2006).

219. See Subrin, *supra* note 117, at 943–75 (detailing the judicial philosophies of the drafters). Ironically, if 1938 marked the beginning of the era of procedural discretion, it also marked the end of the era of substantive discretion with *Erie Railroad. Co. v. Tompkins*, 304 U.S. 64 (1938), and the end of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). See Marcus, *supra* note 19, at 1576–77 (noting that federal courts could no longer decide for themselves which substantive rules to apply in diversity cases).

220. Subrin, *supra* note 117, at 975–82 (noting several proposals rejected by the Advisory Committee that would have put constraints in place).

221. Shapiro, *supra* note 18, at 1985.

222. See Burbank, *supra* note 121, at 543–44 ("[T]he chief architects of the original 1938 Federal Rules were steeped in knowledge of the costs of inflexibility associated with common law and code procedure . . .").

the details of their application to the trial judge's discretion.<sup>223</sup> In other words, the Civil Rules often eschew detailed controls in favor of general policies that guide discretionary application on a case-by-case basis.<sup>224</sup>

Many commentators think the Civil Rules already place too much discretionary power in the hands of federal judges.<sup>225</sup> Professor Resnik was one of the first to sound the cautionary note that case management often entails activities that, being less visible and often unreviewable, carry greater risks of abuse of authority.<sup>226</sup> As she puts it, "Transforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or to abuse—their powers."<sup>227</sup> Professor Donald Elliott echoes this concern that judicial case management gives judges discretionary power to act without procedural safeguards.<sup>228</sup> Most recently, Professor Jay Tidmarsh has raised his own fears about case management and abuse of power.<sup>229</sup>

Others criticize discretion on more practical grounds. Professor Bone questions the competence of federal trial judges to exercise discretion.<sup>230</sup> In part, he is echoing Judge Easterbrook's critique of

---

223. Subrin, *supra* note 92, at 44; Subrin, *supra* note 116, at 391.

224. See Cooper, *supra* note 178, at 1795 ("The effort is less to provide detailed controls and more to establish general policies that guide discretionary application on a case-specific basis.").

225. See, e.g., Peterson, *supra* note 3, at 76 ("Unconstrained by precedent, unreviewed by appellate judges, and unchecked by the involvement of juries, district judges are free to manage cases as they wish."). Another author has offered a similar critique of the English procedural reforms implemented in the wake of the Woolf Report. See Michael Zander, *The Woolf Reforms: What's the Verdict?*, in *THE CIVIL PROCEDURE RULES TEN YEARS ON*, *supra* note 11, at 417, 429 ("The inevitable price of giving the court a wide discretion is that one loses the advantage of predictability upon which so much in a legal system depends.").

226. Resnik, *supra* note 3, at 380; see also Resnik, *supra* note 136, at 548 ("I am deeply skeptical of the capacity of individual judges to craft rules on a case-by-case basis.").

227. Resnik, *supra* note 27, at 54 (arguing that case-management activities are standardless and effectively unreviewable); see also Resnik, *supra* note 87, at 221 (arguing for public judging activities as a check on state power).

228. Elliott, *supra* note 1, at 317 ("It seems beyond serious debate, then, that discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without the procedural safeguards that accompany decisions on the merits.").

229. See Tidmarsh, *supra* note 218, at 559 ("Customizing rules for each case also raises a concern of great significance in a democratic society: the fear that judges will use their discretionary power, consciously or subconsciously, to tailor rules in a way that influences the outcome of individual litigation.").

230. Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1963 (2007) ("The pervasive assumption that expert trial judges can do a good job of tailoring procedures to individual cases is empirically unsupported and at best highly questionable."); Bone, *supra* note 140, at 301 ("This degree of trial judge subjectivity and decisional variance is highly undesirable.").

case management, writing: “I am skeptical about the value of broad discretion because I have grave doubts that trial judges can gather and process the information necessary to craft case-specific procedures that produce good outcomes in the highly strategic environment of litigation.”<sup>231</sup> He also worries that individual judges are at risk of succumbing to cognitive biases.<sup>232</sup> According to Bone, a more detailed scheme of rules would force the rulemakers to grapple in advance with many of the issues now left to individual judges; as a group, Bone contends, the rulemakers would be less susceptible to cognitive biases when addressing those issues.<sup>233</sup>

Professor Tidmarsh is even more pessimistic in his assessment of the practical benefits of discretionary case management. According to him, reliance on discretion has predictable consequences: expense, delay, unpredictability, and abuse of power.<sup>234</sup> To put it more plainly, he contends that discretionary case management is counterproductive—that it *causes* expense.<sup>235</sup> In this respect, Tidmarsh associates expense and delay with the adversarial litigation culture, and he thinks that a scheme that leaves matters to discretionary resolution by the judge simply creates yet another level of gamesmanship.<sup>236</sup>

Critics of discretion see several possible solutions. One solution—already explored in Section B.2—is to have more than one set of rules. Professor Burbank, for example, has long argued that substance-specific rules that provide more detailed guidance—and constraints—are preferable to transsubstantive rules that rely on judicial discretion.<sup>237</sup>

Another proposed solution is to demand that the Civil Rules, even if applicable to all cases, provide more detail and guidance.

---

231. Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006).

232. Bone, *supra* note 230, at 1989 (“These predictions too are prone to cognitive bias.”).

233. *Id.*

234. Tidmarsh, *supra* note 218, at 558.

235. *Id.* at 559 (“The savings or reductions in delay that case management achieves in one case were often offset by increased expenses or greater delays of additional customized procedures in another.”).

236. *Id.* at 535 (“[D]iscretionary procedure creates a new level of gamesmanship—arguing not only over questions of compliance with procedural rules but also over the very rules to apply.”).

237. See Burbank, *supra* note 138, at 1936–37 (criticizing a system where “substance-specific procedures and empirical investigation of supposedly neutral rules are anathema” and citing evidence that “furnishes reasons to be concerned about discretionary justice”).



Professor Bone, for example, thinks that the rulemakers use discretion to duck hard choices. He thinks the rulemakers have been reluctant to squarely and openly resolve difficult questions, and as a result have “kicked the can down the road” by placing the resolution of those questions within trial courts’ discretion.<sup>238</sup> The result, according to Bone, is that those difficult questions get answered not through the public rulemaking process but through individual case adjudication, a forum that is less visible, less transparent, and not subject to public debate.<sup>239</sup> Bone speculates, perhaps too cynically, that one reason for this is that judges dominate the rulemaking process and discretion maximizes their individual power.<sup>240</sup>

But there may be very good reasons for committing matters to trial judges’ discretion. Reflecting on the use of discretion, Professor Cooper observed,

Discretion is a useful rulemaking technique when it is difficult—as it almost always is—to foresee even the most important problems and to determine their wise resolution. Reliance on discretion is vindicated only when district judges and magistrate judges use it wisely most of the time and in most cases. The ongoing revisions of the Civil Rules time and again reflect an implicit judgment that confidence is well placed in the discretionary exercise of power by federal trial judges.<sup>241</sup>

---

238. See Bone, *supra* note 230, at 1974 (“[D]elegating discretion allows rulemakers to dodge difficult and controversial normative choices by handing them to trial judges in individual cases, where they are less transparent and less likely to trigger public debate.”).

239. *Id.* (“It is much easier for rulemakers to compromise on a general rule that leaves the controversial issues to the discretion of the trial judge than to resolve the disagreement at the level of drafting the general rule itself.”).

240. See *id.* (“[J]udges have come to dominate membership on the Civil Rules Advisory Committee in recent years and judges tend to favor broad discretion. Discretion gives them more control over their own courtrooms and cases, and makes judging more interesting and potentially more rewarding.” (footnotes omitted)). Other scholars have further addressed this hypothesis. Compare Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627 (1994) (“[T]he rules of procedure are formulated by judges. If the self-interest of those judges conflicts with the efficiency criterion, it would seem plausible that the judges will formulate procedural rules that further their own interests rather than the interests of efficiency.”), with Janet Cooper Alexander, *Judges’ Self-Interest and Procedural Rules*, 23 J. LEGAL STUD. 647, 647 (1994) (disputing the hypothesis).

241. Cooper, *supra* note 178, at 1795. I am indebted to Judge Rosenthal for tipping me off to this quote about whether federal judges are worthy of the discretion they have: “Procedures for effective judicial administration presuppose a federal judiciary composed of judges well-equipped and of sturdy character in whom may safely be vested, as is already, a wide range of judicial discretion, subject to appropriate review on appeal.” *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959) (discussing discretion in the context of abstention).

Professor Marcus, a longtime consultant to the Advisory Committee and now the Co-Reporter, also defends the use of discretion in the Civil Rules. While he agrees that there is a theoretical possibility that trial judges will use their discretion to promote individual substantive agendas, he notes that there is little real evidence that trial judges have been doing so.<sup>242</sup> Indeed, he supposes, the fact that discretionary case management continues to enjoy strong support from lawyers from all parts of the bar suggests that the theoretical possibility of agenda pushing is not being felt on the ground.<sup>243</sup> Professor Marcus is also skeptical about the alternatives to discretion in case management, saying that proposed remedies, such as added appellate review or making the pretrial rules more rigid, are no better, and are likely worse.<sup>244</sup>

It is not just current rulemaking “insiders” who find value in discretion. In his article assessing Rule 16, Professor Shapiro wrote,

[T]he rulemakers were right in believing that significant discretion should be delegated—that the frequent use of ‘may’ was a wise decision. This is so not only because the Rule was an innovative one, but because cases vary in ways that are difficult to spell out in advance, because judges vary in their ability and willingness to make effective use of such techniques, and because ‘local legal cultures’ vary in their receptiveness to certain techniques and practices.<sup>245</sup>

Ultimately, one cannot say in any categorical sense that discretion in the rules is “good” or “bad.” Judgments like that depend on issues of degree and context. In his seminal analysis of procedural discretion, Professor Rosenberg explained that there are good reasons and bad reasons for conferring procedural discretion on trial judges.<sup>246</sup> In the context of rule formulation, building discretion into a rule is proper if the subject cannot be helpfully reduced to more

---

242. Marcus, *supra* note 1, at 1607.

243. *Id.* at 1611 (“[L]awyers’ enthusiasm for giving [judges] more [discretion] suggests that we have not reached a point where that discretion is abused with great frequency.”).

244. *Id.* at 1611–12 (pointing to experiences with the Federal Sentencing Guidelines as cautioning against efforts to use rigid schedules to combat the allegedly inconsistent application of discretionary rules).

245. Shapiro, *supra* note 18, at 1995.

246. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 660–65 (1971). In this article, Professor Rosenberg distinguishes between primary discretion, which involves the power to create the governing standard, and secondary, or “limited review,” discretion, in which the trial court follows existing standards with limited appellate review of the trial judge’s choices. *Id.* at 637.

particularized guidance because it would be impracticable—if not impossible—to anticipate and address all of the situations that might arise under the rule.<sup>247</sup> In contrast, neither the drive for efficiency or finality, nor a desire to boost trial-judge morale, would properly warrant giving trial judges discretionary power.<sup>248</sup> Professor Rosenberg stresses that rulemakers must be careful only to confer discretion for the right reasons.<sup>249</sup> And even when discretion is appropriate, the rulemakers should, to the extent possible, state the degree of discretion given, set some boundaries, or at least articulate some guiding principles.<sup>250</sup>

I take Professor Bone to be making essentially the same points when he says that “[r]ulemakers should treat case-specific discretion as an explicit policy choice rather than an implicit default, evaluate its costs and benefits in each procedural context, and make a considered judgment about how much discretion to grant and what controls or guidelines to include.”<sup>251</sup> I wholeheartedly agree with those views. Moreover, my personal view, contrary to Bone’s assessment,<sup>252</sup> is that the Advisory Committee has, at least in modern times, followed that prescription quite faithfully. Nonetheless, the point remains an important one, and the rulemakers must be sure to keep it in mind as they consider new proposals that would rely even more on discretionary judgment to resolve cases fairly and efficiently.

But it is not my aim here to propose a definitive answer to whether the Civil Rules already have too much discretion built into them, or to whether the discretion that does exist in case management alleviates or exacerbates the cost and delay issues to which they are addressed.<sup>253</sup> For present purposes, the important point is simply to

---

247. *Id.* at 662–63. A second “good” reason for discretion recognized by Professor Rosenberg was that the trial judge, by virtue of “being there” at the time and having the benefit of seeing a fuller picture of the events, would be in better position than a reviewing court to decide the issue. *Id.* at 663. This reason for discretion, however, speaks more to appellate review standards than to the level of detail with which the trial court rules should be written.

248. *Id.* at 660–62.

249. *Id.* at 667.

250. *Id.* at 659.

251. Bone, *supra* note 230, at 2002.

252. See *id.* at 1964–65 (“I propose that the Advisory Committee justify in explicit terms how much discretion to delegate and in what form. In that regard, the Committee should review the various methods for limiting or channeling discretion.”).

253. In this Article, I am not addressing whether it is appropriate to give trial judges discretion to determine whether a claim has been adequately pleaded, even though that can be said to be a form of case management. There certainly may be areas where judicial *discretion* (as

emphasize that any reform efforts that would lean even more heavily on case management must account for the concerns of some that federal judges already exercise a dangerous amount of discretion. Many—including, it seems, the majority of the practicing bar—see increased case management as a key part of solving the problems of excess cost and delay. That might mean giving federal judges more discretionary case-management powers. It certainly means getting federal judges to more actively use the discretionary case-management powers they already have. Given the highly discretionary nature of case management under the Civil Rules, either would result in more discretionary decisionmaking. For the critics of the current model, that would mean more of a bad thing.

*D. Can Case Management Solve the “Cost Problem” by Itself (If at All)?*

The previous Sections addressed objections to the case-management model, ranging from the concern that managerial judging is eroding the nature of judging to the criticism that our reliance on case management is a symptom of a critical flaw in our one-size-fits-all rules scheme—that by trying to do too much it fails to meaningfully answer policy questions and therefore must submerge those questions by punting them to ad hoc decisionmaking by individual judges. In this Section, I assume that the case-management model is sound procedural policy and ask whether *other* aspects of the federal pretrial scheme must change for it to succeed. I begin with a quick review of the competing views regarding the effectiveness of case management generally. I then consider two types of reforms to the federal pretrial scheme that might improve the effectiveness of case management. The first type is structural reform. Are there ways to change or add to the existing pretrial scheme to facilitate effective case management? The second type of reform is cultural. Is the answer to the problem of excess cost and delay to have more or

---

opposed to judgment) is not warranted, and one of those areas is at the stage of determining the sufficiency of the pleadings. As Professor Miller points out in his paper for the Duke Conference, there is no small irony that the Supreme Court seems to have entrusted the same trial judges who reportedly cannot use their judgment and discretion to manage cases with making pleadings decisions based on their judgment and experience. See Miller, *supra* note 4, at 59–60 (“It is curious that, in the same opinions, the Court entrusted district judges with the freedom to use judicial experience and common sense to dismiss a claim at genesis for noncompliance with a plausibility-pleading requirement, but . . . denied them the freedom to manage the early phases of their cases . . . .” (footnote omitted)).

different rules, or is it to change the overly adversarial culture of litigation, particularly in discovery?

1. *Case Management as a Cure for Undue Cost and Delay.* Depending on who one asks, case management is either an effective tonic for undue cost and delay or a snake-oil solution that is doomed to leave the patient sick. Over twenty years ago, Judge Easterbrook pronounced that case management cannot work because judges lack the information needed to distinguish between “good” discovery and “bad” discovery.<sup>254</sup> Professor Bone and Professor Martin Redish share Judge Easterbrook’s skepticism.<sup>255</sup> Professor Paul Stancil offers a different kind of law-and-economics critique, arguing that case-management solutions are doomed to fail because judges have incentives to minimize their workloads by leaving discovery to the parties.<sup>256</sup> Based on the oral argument in *Ashcroft v. Iqbal*,<sup>257</sup> it would seem that some of the Justices are skeptical of case management as a cost-control scheme because it places too much reliance on the wise exercise of discretion by hundreds of different trial-level judges.<sup>258</sup>

---

254. Easterbrook, *supra* note 29, at 638–39.

255. Bone, *supra* note 142, at 899–900 (“The *Twombly* Court’s skepticism is in fact well justified. Serious litigation problems should not be left to trial judge discretion as much as they are today. Judges face information and other constraints that impair their ability to manage optimally, especially in the highly strategic environment of litigation.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603–04 (2001) (arguing that proportionality limits are impractical because the trial court is not in a good position to assess whether the desired information is worth the cost).

256. Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96–97 (2009). McMillan and Siegel offer a similar, though less cynical, view:

These problems cannot be solved merely by asking our judicial system to “try harder.” Recent amendments to the Civil Rules have tended to fall short because they merely permit rather than require better case management by judges. Judges have been too easily diverted from exercising their new discretionary authority. As a result, quicker and cheaper justice continues to be dispensed erratically, if at all, in many jurisdictions. This is an institutional problem, which no amount of well-intentioned exhortation is likely to correct.

McMillan & Siegel, *supra* note 215, at 437–38.

257. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

258. See Oral Argument at 34:34, *Ashcroft v. Iqbal*, 2008 WL 5168391 (U.S. Dec. 10, 2008) (No. 07-1015) (Scalia, J.), available at [http://www.oyez.org/cases/2000-2009/2008/2008\\_07\\_1015/argument](http://www.oyez.org/cases/2000-2009/2008/2008_07_1015/argument) (“Well, I mean, that’s lovely: That the ability of the Attorney General and the Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge. I mean, I thought that the protection of qualified immunity gave them—gave them more than that.”). In response to the idea that high-level federal officials could be protected from excessive discovery by trial court orders staying discovery as to them while other aspects of the case proceeded, Justice Alito remarked, “How many district judges are there in the country? Over 600. One of the district judges has a very

But not everyone views case management as a failure. Though Professor Elliott viewed the *need* for case management as proof that the Civil Rules suffered from a design flaw, he nonetheless was persuaded that case management could in fact reduce delay and expense.<sup>259</sup> The Judicial Conference's *Civil Litigation Management Manual* makes a special point of stating that, although it is true that the lawyers will know more about the case than the judge, that fact "should not deter [judges] . . . from management, based on [their] experience and after consultation with counsel."<sup>260</sup> And Professor Miller, though interested in pursuing supplemental reforms and not wholly satisfied with the current state of affairs, remains committed to the case-management model:

Abandoning what has been developed over the years is not a rational option, and nothing in the Federal Judicial Center's empirical work referred to earlier suggests it should be. A district or magistrate judge, through his or her control over scheduling and the discovery process, represents the best—if not the only—hope in the procedural arsenal for containing excessive litigation behavior and the type of attrition activity that breeds cost and delay, especially in large-scale cases.<sup>261</sup>

In his critique of Rule 16, which he faults for being too detailed,<sup>262</sup> Professor Michael Tigar nonetheless stresses the importance of case management to (1) prompt settlement before parties incur discovery costs, (2) get control of discovery early to focus and limit discovery and to send the message to parties to "quit messing around," and (3) structure an iterative process that looks to resolve critical issues first when possible and holds off on discovery of the rest until those are resolved.<sup>263</sup>

---

aggressive idea about what the discovery should be. What's the protection there?" *Id.* at 49:05 (Alito, J.).

259. Elliott, *supra* note 1, at 315–16.

260. COMM. ON COURT ADMIN. & CASE MGMT., *supra* note 69, at 28.

261. Miller, *supra* note 4, at 115.

262. Michael E. Tigar, *Pretrial Case Management under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 138 (1994) ("[T]here has been, particularly in the past decade, such tinkering and fiddling with the Federal Rules of Civil Procedure that the rulemakers themselves are defeating the objective of a 'just, speedy, and inexpensive determination of every action.' The 1993 amendment to Federal Rule of Civil Procedure 16 . . . is a symptom of this meddling." (footnote omitted)).

263. *Id.* at 152–54.

Debate about the ability of case management to reduce cost and delay is nothing new, nor is it unique to the United States.<sup>264</sup> But it remains critically important. One of the focuses of the latest wave of empirical studies is to determine whether case management has fulfilled its promise. If case management does not help at all, or, as Professor Tidmarsh recently suggested, it turns out to be counterproductive,<sup>265</sup> then we need to quickly start taking steps to turn around the battleship. But even if we assume that case management works, that does not end the reform debate. One can be a supporter of case management and still advocate other reforms. It is one thing to say that case management *helps*; it is a quite different thing to say that case management is enough by itself. Thus, even some of the staunchest supporters of the case-management model believe that complementary reforms are needed.

2. *Structural Reforms to Facilitate Case Management.* In this Section, I explore various proposals for enhancing case management by altering the existing pretrial structure. One approach might be to pair aggressive case management with aggressive structural reforms to the existing pleading and discovery system. Proponents of the more aggressive structural reforms can draw strength from signs that the Supreme Court has lost faith in the ability of case management, by itself, to control cost and delay. In its now legendary decision in *Bell Atlantic Corp. v. Twombly*,<sup>266</sup> the Supreme Court questioned, for the first time, whether the case-management reforms of the past three

---

264. Professor Zander, the most vocal critic of the 1998 English Civil Practice Rules adopted in the wake of the Woolf Report, has opposed those reforms on the basis that their increased reliance on case management will increase cost and delay, rather than reduce it. See Zander, *supra* note 225, at 420–21, 424–28 (relying in part on the 1996 RAND Study). In general, though, English reformers seem to take the other side of the debate and continue to support case management. Lord Jackson gave a particularly strong endorsement of the benefits of case management in his 2009 review of civil litigation costs, saying,

All the feedback which I have received during the Costs Review indicates that (despite academic skepticism) both costs and time are saved by good case management. By good case management, I mean that a judge of relevant expertise takes a grip on the case, identifies the issues and gives directions which are focused upon the early resolution of those issues. I accept that this evidence is anecdotal, although it is supported by my own experience both as a barrister and as a judge.

LORD JUSTICE JACKSON, *supra* note 11, at 394.

265. Tidmarsh, *supra* note 218, at 559.

266. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

decades would effectively deal with cost and delay issues.<sup>267</sup> As partial justification for holding that pleadings must include plausible grounds for inferring the required elements of the claims in question, Justice Souter parroted Judge Easterbrook's skepticism:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management" given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.<sup>268</sup>

*Twombly* represents access-based reform.<sup>269</sup> It operates from the premise that if the pretrial scheme cannot control the cost of cases once they get to discovery, then the only way to control cost is to stop cases from getting to discovery in the first place. But while *Twombly* certainly appears to opt for access-based cost control over case management, I do not read the case as asserting categorically that case management does not work. Rather, I take the Supreme Court's meaning to be that case management does not adequately protect defendants from groundless claims. But what about claims that the Court thinks should survive the pleadings stage? I find nothing in *Twombly* to suggest that the Court has lost faith in the ability of judicial case management to find the right balance of pretrial activities and costs in those cases. Indeed, in that context, the Court may well subscribe to the view, voiced in dissent by Justice Stevens in *Twombly*, that federal judges have a vast "case-management arsenal" to combat "sprawling, costly, and hugely time-consuming" discovery.<sup>270</sup> After all, it was not that long ago—1987 to be precise—when the Supreme Court seemed to express greater faith in the ability of case management to control cost, remarking that "[j]udicial

---

267. *Id.* at 559; see also Bone, *supra* note 142, at 898–99 (stating that *Twombly* was the first case in which the Supreme Court had questioned the effectiveness of the case-management approach to dealing with cost and delay issues); *supra* note 258.

268. *Twombly*, 550 U.S. at 559 (citing Easterbrook, *supra* note 29, at 638 (citation omitted)). The *Twombly* Court's reliance on Judge Easterbrook's article has been criticized. See Burbank, *supra* note 121, at 559 n.108. So too has Judge Easterbrook's article. See Carrington, *supra* note 145, at 628.

269. See Bone, *supra* note 142, at 876 ("[This article] views *Twombly* not so much as a pleading decision but rather as a court access decision, one that addresses a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system."); see also Burbank, *supra* note 121, at 561 (discussing *Twombly*'s effect on court access); A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368 (2010) (locating *Twombly* as part of a larger movement to restrict access to justice).

270. *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting).



supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests.”<sup>271</sup>

The IAALS is one of the groups urging structural reform to control the cost of discovery. It advocates fact-based pleading.<sup>272</sup> The stated purpose of this proposed reform is cost control. As explained in the *Final Report* issued jointly by the IAALS and the ACTL, “One of the primary criticisms of notice pleading is that it leads to more discovery than is necessary to identify and prepare for a valid legal dispute.”<sup>273</sup> In principle, the notion that more detailed pleading can help focus discovery seems self-evident and is worth serious consideration. It seeks to *build upon* case management by providing judges with better information to do the job.<sup>274</sup>

The IAALS and the ACTL have taken pains lately to distance themselves from the plausibility test of *Twombly*<sup>275</sup> and *Iqbal*<sup>276</sup> and also to emphasize that the point of their proposal urging fact-based pleading is not to limit court access but to control discovery. This is an important distinction. At a theoretical level, it ultimately suggests the concept of decoupling the pleading requirements of Rule 8 from the dismissal standard of Rule 12. In other words, it raises the possibility that one might require fact-based pleading for case-management purposes but still test the sufficiency of pleadings against some lesser metric.<sup>277</sup> That notion is, in many ways, akin to revitalizing practice

---

271. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 546 (1987).

272. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 80, at 5; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 104, at 3 (“The party that bears the burden of proof . . . must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought . . .”).

273. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 80, at 5.

274. See AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE 4–7 (2010) (“[E]arly disclosure of known material facts should not be difficult . . . and should result in early narrowing of the issues . . . . [O]ur Principles are meant to encourage use of our civil justice system by those who . . . are foreclosed due to excessive delay and expense.”); see also Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 279 (2010) (“The introduction of facts at the pleading stage will help the judge identify the specific issues in dispute, which in turn will increase the judge’s ability to make comprehensive and informed decisions about the scope of discovery and pretrial practice.”).

275. *Twombly*, 550 U.S. at 560–61.

276. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944, 1949 (2009).

277. Although the IAALS disclaims any intent to restrict court access based on the pleadings, their main pleading-reform proposal may in fact result in additional dismissals at the

under Rule 12(e), which allows a party who must respond to a pleading to ask that the pleader be required to provide a “more definite statement,”<sup>278</sup> but with a critical twist. In this context, the reason for requiring additional detail is not to enable the other party to answer or to file a motion testing the pleadings but to generate inputs for effective case management.<sup>279</sup>

A different type of structural reform designed to complement case management would be to create case-management protocols for different types of cases. The idea is that committees composed of judges, academics, lawyers from all sides of the bar, and other interested persons could, for any particular type of case, develop a protocol setting forth nonbinding standards regarding discovery, motion practice, scheduling, or other topics.<sup>280</sup> Building on this theme, it has also been suggested that pattern discovery requests might be developed for use either on their own or in conjunction with these

---

pleading stage. Specifically, it is not fully clear to me what a court would do under the IAALS proposal if it found that a party had failed to plead its facts with particularity. Proposed Pilot Project Rule 2.1 and the accompanying Comment states that a party may plead facts on information and belief. *See* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 104, at 3 (“As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief.”). The Comment adds, however, that “information and belief” pleading should not be used to evade “the intent of the rule”; rather, parties who lack information should resort to Pilot Project Rule 3 to undertake precomplaint discovery. *Id.* But Pilot Project Rule 3.1(b) conditions precomplaint discovery on the judge determining that “the moving party has probable cause to believe that the information sought by the discovery will enable preparation of a legally sufficient complaint.” *Id.* at 4. Taking all of this together, it is not clear to me what result would obtain if a plaintiff could not plead a particular fact and could not persuade the judge that good cause existed for precomplaint discovery as to that fact. If the answer is that the complaint would be dismissed, then the requirement of fact-based pleading would seem to have force beyond providing additional inputs for discovery control and case management.

278. FED. R. CIV. P. 12(e) (“A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.”).

279. In 2006, before *Twombly* and *Iqbal*, the Advisory Committee discussed the idea of amending Rule 12(e) as a means of generating additional information for case-management purposes. *See* CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MEETING OF SEPTEMBER 7–8, 2006, DRAFT MINUTES 22–24, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV09-2006-min.pdf>. Those discussions did not lead to any concrete rule proposal then, though it is possible that the subject might resurface should the Advisory Committee undertake efforts to revisit pleading standards in the wake of *Twombly* and *Iqbal*.

280. *See* Subrin, *supra* note 116, at 404–05 (noting that it would be helpful to judges and lawyers to provide norms through suggested standards or protocols for certain types of repetitive, time-consuming, and expensive litigation).

protocols.<sup>281</sup> The pattern requests would streamline discovery because parties would know that the requests were not objectionable. On the other hand, parties that served discovery beyond the pattern requests would, in the event of a particularized objection, bear the burden of showing that the discovery was relevant and proportional. These types of standardized protocols would not be binding on their own, though a judge could make them binding by incorporating them into a case-management order. Their principal value, rather, would be in setting benchmarks that would guide less-experienced practitioners and help inform judges about how best to employ their custom-tailoring tools, like the proportionality limits under Rule 26(b)(2).<sup>282</sup>

Case-management protocols (or pattern discovery protocols) might also deliver a valuable secondary benefit—they might help lawyers deal with the sometimes unrealistic or even counterproductive expectations of their clients. At the January 2009 meeting of the Standing Committee on Rules of Practice and Procedure, the Committee invited various individuals to participate in a Panel Discussion on Problems in Civil Litigation.<sup>283</sup> At that discussion, several lawyers were asked why protocols were needed given that lawyers could already achieve the same outcome by cooperation and agreement. One answer was that a restrained and sensible approach would be easier to justify to their clients if it came from a court-sponsored and generally applicable protocol. In other words, the protocols would provide “cover” to the lawyers who followed them.<sup>284</sup>

The idea of subject-specific, lawyer-developed protocols is worth a close look. It was raised at the January 2009 meeting of the Standing

---

281. See Joseph Garrison, A Proposal to Implement a Cost-Effective and Efficient Procedural Tool into Federal Litigation Practice (n.d.) (unpublished manuscript) (on file with the *Duke Law Journal*) (suggesting that courts adopt pattern interrogatories, pattern requests to produce documents, and a pattern protective order in cases that routinely appear in federal courts).

282. See Subrin, *supra* note 116, at 405 (stating that substance-specific protocols “would aid lawyers in advising their clients, and aid judges, by providing suggested standards to help inform their procedural decisions” (footnote omitted)).

283. See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., MEETING OF JANUARY 12–13, 2009, DRAFT MINUTES 32, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-2009.pdf>.

284. Cf. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 14 (“Court-imposed limits provide lawyers with the ‘cover’ they need to practice limited discovery.”).

Committee on Rules of Practice and Procedure.<sup>285</sup> Professor Subrin once again raises the issue in his most recent critique of the transsubstantive rules, suggesting protocols (in conjunction with a simple-case track) as a way of providing more detailed norms and guidance than the current rules provide.<sup>286</sup> The IAALS *Civil Caseflow Management Guidelines* also suggest that judges develop subject-based case-management protocols by “categorizing cases by type in a way that would presume a certain level of judicial involvement for certain types of cases.”<sup>287</sup> Even the British are taking a hard look at adding case-management protocols to their pretrial scheme. In his recent report on litigation costs, Lord Justice Jackson recommended the following:

In my view, a menu of standard paragraphs for case management directions should be prepared for each type of case of common occurrence and made available to all district judges both in hard copy and online. These standard directions should then be used by district judges as their *starting point* in formulating initial case management directions.<sup>288</sup>

3. *Culture Change.* Structural reforms—like changes to the system of notice pleading and liberal discovery, or the addition of subject-specific protocols—are not the only types of reforms that could be paired with the case-management model to leverage its effectiveness. A very different approach might be to leave the case-management scheme in place but to change how judges and lawyers use it. Professor Thomas Rowe, himself a former member of the Advisory Committee, has observed that the case-management model will inevitably struggle to control costs if lawyers continue to act like spoiled children, requiring judges to provide the equivalent of constant adult supervision.<sup>289</sup> Perhaps this suggests that what we need is not new rules but better play.

---

285. COMM. ON RULES OF PRACTICE & PROCEDURE, *supra* note 283, at 36–37.

286. See Subrin, *supra* note 116, at 404–05 (“[S]ubstance-specific protocols may be in order for some types of litigation that have been excluded from the simple track. Such protocols would be suggestive and not binding, until a judge chose to mandate them or portions of them.” (footnote omitted)).

287. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 7.

288. LORD JUSTICE JACKSON, *supra* note 11, at 393 (emphasis added).

289. See Rowe, *supra* note 30, at 213 (noting that litigators occasionally require judicial “adult supervision” to foster pretrial cooperation).

In July 2008, the Sedona Conference released *The Sedona Conference Cooperation Proclamation* (*The Cooperation Proclamation*), launching a campaign to promote cooperative, nonadversarial discovery.<sup>290</sup> Last fall, the Sedona Conference followed up with *The Case for Cooperation*.<sup>291</sup> That document represents the second stage of the Sedona Conference's campaign to promote cooperation. It explores the relationship of cooperation to the discovery rules and the ethics rules, showing that those rules either assume or require certain forms of cooperation.<sup>292</sup> Perhaps more critically, *The Case for Cooperation* explores the *benefits* of cooperation for lawyers and clients.<sup>293</sup> Too often, lawyers simply default to battle mode in discovery, without even considering what they are fighting over, why they are fighting, or whether it is in their clients' best interests to fight over that particular item.<sup>294</sup>

A sure first step in using culture change to control costs in discovery would be simply to get lawyers to abide by their existing rules-based and ethical duties. One of the best ways for lawyers to control discovery costs is to start talking to each other early. The discovery-planning conference required under Rule 26(f) provides an ideal, built-in opportunity for the lawyers to do that.<sup>295</sup> The Advisory Committee note to the 2006 amendment to Rule 26(f) emphasizes the importance of early planning to address a wide range of e-discovery issues, from preservation to form of production to methods of privilege review, in an attempt to control the cost and burden of e-discovery.<sup>296</sup> Yet lawyers still admit that they often do not have meaningful Rule 26(f) conferences.<sup>297</sup> Lawyers clamor for judges to

---

290. The Sedona Conference, *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 331 (Supp. 2009) ("The Sedona Conference launches a coordinated effort to promote cooperation by all parties to the discovery process to achieve the goal of a 'just, speedy, and inexpensive determination of every action.'").

291. The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (Supp. 2009).

292. *Id.* at 345–54; see also Gensler, *Bull's-Eye View*, *supra* note 34, at 365–69 (discussing ways in which the Civil Rules impose duties that can be characterized as duties of cooperation).

293. The Sedona Conference, *supra* note 291, at 356–62.

294. See Gensler, *E-volving Duties*, *supra* note 34, at 555–56 (asserting that lawyers should "stop and think" about whether cooperation would serve their clients' best interests).

295. FED. R. CIV. P. 26(f).

296. *Id.* 26(f) advisory committee's note to 2006 amendment.

297. See LEE & WILLING, *supra* note 77, at 15 (noting that more than half of all survey respondents admitted that they did not discuss e-discovery at their discovery planning conference); see also Grimm & Cabraser, *supra* note 75, at 9 ("Anecdotal evidence from the judges' perspective indicates that courts seldom receive proposed discovery plans from the

take a more active role in case management,<sup>298</sup> but if the lawyers do not make the effort to know their own case needs, how can they expect the judges to enter thoughtful, case-specific case-management orders? More to the point, if lawyers want judges to hold the types of Rule 16 conferences described by Judge Rosenthal, then they need to have laid the groundwork to have that type of detailed conversation.<sup>299</sup> Perfunctory Rule 26(f) conferences and bare-bones Rule 26(f) reports deprive judges of the very information they need in order to perform the active case-management functions that lawyers seem to crave.

Fidelity to the text and spirit of Rule 26(g) would also help control discovery cost and delay. Added as part of the discovery-containment package of amendments in 1983, Rule 26(g) requires lawyers to provide Rule 11-like certifications for their discovery requests and responses.<sup>300</sup> Among other things, lawyers must certify that their requests are proportional to the needs of the case and that their responses—including objections—are warranted and not interposed for an improper purpose.<sup>301</sup> As Judge Grimm recently wrote in *Mancia v. Mayflower Textile Services Co.*,<sup>302</sup> lawyers regularly violate Rule 26(g) by serving excessive and thoughtlessly broad discovery requests and by responding with blanket objections.<sup>303</sup> In effect, lawyers look to judicial case management (including through discovery motions) to perform the type of case customization that Rule 26(g) requires them to perform. To be sure, judges will always be needed to resolve legitimate discovery disputes. But there would be far fewer discovery disputes, and the issues they raised would be much more focused, if lawyers abided by their duties under Rule 26(g) and stopped taking a blunderbuss approach to discovery.

If culture change is to complement judicial case management, however, it cannot stop with fidelity to the rules. The greatest gains may depend on getting lawyers and clients to appreciate that

---

parties that reflect meaningful efforts to drill down on the issues they are supposed to discuss at the Rule 26(f) conference.”).

298. See *supra* notes 45–47 and accompanying text.

299. See Rosenthal, *supra* note 18, at 241 (suggesting that district judges require lawyers to be present for Rule 16 conferences and engage in a genuine exchange about the case).

300. FED. R. CIV. P. 26(g).

301. *Id.*

302. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

303. *Id.* at 362. For more from Judge Grimm on what lawyers must do (and stop doing) to comply with Rule 26(g), see Grimm & Cabraser, *supra* note 75, at 11–14.

cooperation can, at times, be the better litigation strategy.<sup>304</sup> *Real* culture change will arrive when clients expect their lawyers to make thoughtful decisions about when to cooperate and when to fight in discovery. *Real* culture change will take hold when lawyers, backed by their clients, view their rules-based obligations, their ethical obligations, and their strategic choices as part of an integrated process that works most effectively when the lawyers talk to each other, cooperate to reach agreement when possible, and pick their fights more thoughtfully and selectively.<sup>305</sup> Lawyers say that they would prefer “rifle shot” discovery to discovery by “carpet-bombing.”<sup>306</sup> Defaulting to battle mode will not get us there. But if those lawyers “learned to work together—by communicating and by developing agreed plans that took an iterative approach—then they would be in a much better position to trade in their cannon for rifles.”<sup>307</sup>

*The Cooperation Proclamation* views cooperation as a necessary adjunct to the case-management model.<sup>308</sup> Our system leaves the development of the facts in the hands of the parties. Despite claims by some that it is preferable to put fact development in the hands of the judge,<sup>309</sup> there does not appear to be any serious push to move to a civil law inquisitorial system. Lawyers still seem to want to be the ones driving discovery. But the reality is that, given the current structure of the rules, even the best judicial case managers cannot fulfill that role if the parties insist on fighting over everything they could possibly fight about. One need look no further than the 2006 e-

---

304. See Grimm & Cabraser, *supra* note 75, at 18 (“The challenge is to convince clients that it is in their economic interest to cooperate with the adverse party to reduce costs so as to focus on what really matters.”).

305. See Gensler, *Bull's-Eye View*, *supra* note 34, at 370–72 (describing a method of discovery in which parties work together and pursue a discovery process based on reason and efficiency).

306. *Id.* at 372.

307. *Id.*

308. The IAALS also endorses cooperation as a means of discovery-cost control. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 14 (“Cooperation between counsel can greatly reduce the cost and time associated with discovery.”).

309. See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985) (asserting that the West German civil procedure system’s requirement that judges rather than lawyers investigate facts is better than the United States’ civil procedure system).

discovery amendments to find an expression of the sense that judges alone cannot manage all of the problems posed by e-discovery.<sup>310</sup>

In the end, how one feels about the prospects of the case-management model to address cost and delay issues may depend in large part on whether one thinks that the litigants and their lawyers—or as Professor Rowe once called them, “the adversarial scorpions in [the] litigation bottle”—can find ways to cooperate with each other and the judge.<sup>311</sup> Perhaps it is true that the rules are just fine—that all we need is better play. In that event, case management can proceed without significant structural reforms. Recent survey results suggest that lawyers are beginning to realize that they can cooperate and still be zealous advocates, and that they are already capturing some of the benefits of cooperation.<sup>312</sup> Cooperation skeptics, however, would argue that the cooperative ideal is unrealistic because lawyers and clients will continue to view it as advantageous to demand everything and produce little.<sup>313</sup> If that is true, then we are effectively left, at best, with Professor Rowe’s spoiled children in need of constant “adult supervision,” and at worst with his “adversarial scorpions in [the] litigation bottle.”<sup>314</sup> In that event, the case-management model may well need to be paired with something else—perhaps significant structural reforms—if it is to succeed.

#### *E. Should Judges “Manage Up” or “Manage Down”?*

In this last Section, I return to the question of how “big” or “small” the Civil Rules should be. Section B.2 considered proposals to have multiple sets of rules based on the size of the case, either by a tracking system with multiple tracks or by creating a set of simplified rules for simple cases. In this Section, I assume that the system will continue to be transsubstantive and uniform—that is, that there will

---

310. See Gensler, *E-volving Duties*, *supra* note 34, at 535 (“The 2006 version of Rule 26(f) still contemplates a strong role for judicial case management, but . . . it is directed as much, if not more, at the party level.”).

311. Rowe, *supra* note 30, at 213 (“[Pretrial managerial judging] requires that the adversarial scorpions in their litigation bottle seek ways to cooperate, at least as to pretrial procedural management, with each other and the judge.”).

312. See ABA SECTION OF LITIG., *supra* note 78, at 139 (noting that 95 percent of attorneys surveyed agreed that a case costs less when all counsel are collaborative and professional); LEE & WILLING, *supra* note 77, at 31, 63.

313. See Stancil, *supra* note 256, at 99 (“The adversary system . . . understandably magnifies the impact of systemic distrust between the parties.”).

314. Rowe, *supra* note 30, at 213.



continue to be one set of rules for all cases. The task that remains is to determine what the default dimensions of that single set of rules should be.

Roughly speaking, there are three possible targets for the size of the rules. We can write rules that target the larger cases, we can write rules that target the middle cases, or we can write rules that target the smaller cases. The choice determines the direction in which trial judges depart by case management. If the rules are written for “big cases,” judges must “manage down” in cases that are not big. If the rules are written for “small cases,” judges must “manage up” in all of the cases that are not small. If the rules are written for the middle range of cases, then judges may need to manage either up or down depending on the circumstances.

Within the rulemaking community, there is probably a general sense that the Civil Rules are targeted for the middle range of cases.<sup>315</sup> In 2000, the scope of discovery was redefined according to relevance to the parties’ claims and defenses, subject to expanding discovery to subject-matter relevance upon a showing of good cause and to limiting discovery based on proportionality.<sup>316</sup> Some might view that as seeking to chart a middle course. In 1993, presumptive limits were placed on the number of depositions that could be taken and the number of interrogatories that could be served.<sup>317</sup> Here too, the court can adjust upward or downward.<sup>318</sup> That also might be seen as seeking to chart a middle course.<sup>319</sup>

---

315. See Cooper, *supra* note 178, at 1800 (“It has been common to wonder whether the inevitable compromises have produced rules that work well for most litigation in the middle range, but do not work as well for cases at the extremes.”).

316. FED. R. CIV. P. 26(b)(1) & advisory committee’s note to 2000 amendment.

317. *Id.* 30(a)(2)(A)(i) & advisory committee’s note to 1993 amendment; *id.* 33(a)(1) & advisory committee’s note to 1993 amendment.

318. See *id.* 26(b)(2) (“[T]he court may alter the limits in these rules on the number of depositions and interrogatories . . .”); *id.* 30(a)(2) (requiring a party to obtain leave of the court, and the court to grant leave to the extent consistent with Rule 26(b)(2), if a deposition would result in more than ten depositions being taken under Rule 31); *id.* 33(a)(1) (“Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).”).

319. The suggestion has often been made that there should be a similar presumptive limit on the number of document requests that may be served under Rule 34. A variation on that theme, inspired by the growing importance of e-discovery, is that there should be a presumptive limit on the number of *sources* that a party can be required to search. These proposals warrant serious consideration. It may be that, in the absence of presumptive limits, the 1970 amendment that allowed parties to serve document requests directly without seeking leave of the court and showing good cause upended the balance. See *id.* 34 advisory committee’s note to 1970 amendment.

But not everyone would agree that the Civil Rules have in fact hit the center. Professor Subrin, for example, has hypothesized that perhaps 5 to 15 percent of civil cases are complex enough to warrant active judicial case management.<sup>320</sup> He suggests that the standard rules are simply too big and costly for most cases. His proposed remedy is to have simplified standard rules with detailed pleading, mandatory disclosures, reduced discovery, little or no case management, and firm trial dates.<sup>321</sup> In those cases in which active case management is needed, the court could move the case into a “complex rules” mode.<sup>322</sup>

The IAALS *Pilot Project Rules*<sup>323</sup> share the view that the existing Civil Rules create a default structure that is too big and costly. Like Professor Subrin’s proposal, the *Pilot Project Rules* provide for detailed pleading, mandatory disclosures, and limited discovery.<sup>324</sup> Unlike Professor Subrin’s proposal, the *Pilot Project Rules* still call for active case management.<sup>325</sup> What is most important, though, is that the animating principle of the *Pilot Project Rules* is to re-set the “standard” track of procedure to a set of simplified rules. Indeed, the Comment to Pilot Project Rule 1 criticizes the Civil Rules as establishing the “notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise” and adds that, therefore, “[i]t is the purpose of these [Rules] that the default be changed.”<sup>326</sup>

Implicit (if not explicit) in the Subrin and IAALS proposals is the idea that, whether intended as such or not, the Civil Rules are in fact designed for the most complex cases. Thus, Subrin and the IAALS would say that not only are the Civil Rules one size, they are Cadillac size. And by providing only Cadillac-size rules for all cases, Subrin and the IAALS would say that the Civil Rules drive up cost and delay by turning small cases into big ones. This occurs because the presumption is that all cases will be litigated as big cases until the

---

320. See Subrin, *supra* note 213, at 177.

321. *Id.* at 176; see also Subrin, *supra* note 116, at 398–405 (proposing a “simple track” for cases that generally do not involve the full array of federal procedure); Subrin, *supra* note 92, at 45–46 (“[W]e should provide a more constricted presumptive amount of discovery and a short period to a certain trial date in the vast majority of cases.”).

322. See Subrin, *supra* note 213, at 177 (“[T]here is a subset of complex cases . . . that will require active judicial case management and should not be subject to severe limitations on discovery.”).

323. IAALS, *supra* note 103.

324. *Id.* at 3–4.

325. See *id.* at 5–7 (detailing the rules for governing pretrial conferences).

326. *Id.* at 2 (commenting on Rule 1.2).

judge manages the case down to its appropriate size, an occurrence which critics say rarely happens.<sup>327</sup> The remedy, they say, is to flip the default and adopt Chevy-size rules for all cases, leaving it to the judge to manage the case up to its appropriate size.

Two things are undeniably true. The first is that, if we are going to have a single set of rules for all cases, we must make—we cannot help but make—a choice about where to set the default. The second is that the location of that default will determine how judges manage. Do they manage up, manage down, or manage from the middle? I take very seriously the notion that we should pick the right default. But does the current system fail to do that?

I understand the critics of the current system to make two claims. The first is that the default limits for discovery should be reduced because many litigants view the limits not as a flexible cap, as they were intended, but as a target pinpointing the appropriate amount of discovery to be taken.<sup>328</sup> This claim views discovery as having the defining characteristics of a gas—that is, it has no definite shape and will expand to fill the size of its container. Thus, if the scope of discovery is *X*, then the parties will take discovery to reach the limits of *X*. Similarly, if the default rules allow ten depositions, then the lawyers will reflexively take ten depositions whether they need them or not, and so on. The second claim is that, for various strategic and tactical reasons, lawyers are making deliberate choices to seek more discovery than they need.<sup>329</sup>

Lowering the default levels of discovery would respond to the first claim. By shrinking the size of the container, the gas—discovery—would contract accordingly.<sup>330</sup> What may be needed,

---

327. *Id.* (“The Federal Rules of Civil Procedure and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely if ever applied . . .”).

328. See AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 80, at 7 (“Unfortunately, many lawyers believe that they should—or must—take advantage of the full range of discovery options offered by the rules. They believe that zealous advocacy (or fear of malpractice claims) demands no less and the current rules certainly do not dissuade them from that view.”); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 11, at 14 (“[M]any lawyers are hesitant to limit the scope and tools of discovery on their own accord, based in part on fears of malpractice claims.”).

329. See, e.g., John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549, 570–72, 594–96 (2010) (noting that attorneys use the discovery system, including e-discovery, to burden opponents with costly information requests and to force settlement).

330. Note, however, that Boyle’s Law holds that the volume and pressure of a gas are inversely proportional assuming a constant temperature. One necessary corollary of Boyle’s

though, is empirical proof that discovery actually does exhibit the physical properties of a gas. Rule 33 presumptively allows each party to serve twenty-five interrogatories on any other party.<sup>331</sup> If discovery expands to the size of its container, we should expect each party to serve their full quota of interrogatories in every case. Yet the data from the latest FJC survey found that over 20 percent of plaintiffs and defendants served no interrogatories at all.<sup>332</sup> Similarly, Rule 30 presumptively allows each side ten depositions.<sup>333</sup> Yet nearly half of the respondents to the recent FJC survey reported taking no nonexpert depositions.<sup>334</sup> And in the cases in which nonexpert depositions were taken, the average taken was 3.8 for plaintiffs and 2.8 for defendants, well below the ten per side we would expect to find if lawyers were reflexively taking as much discovery as the rules allowed.<sup>335</sup>

As to the second claim, it is open to question whether lowering the default level of discovery would make much of a difference. Presumably, litigants motivated by strategic gains would continue to seek those gains. For those litigants, a reform that flips the default to require motions for permission to take discovery might simply end up substituting “motions to enlarge” for “motions to limit.” Moreover, there is good reason to think that opportunistic behavior in discovery is a two-way street. Lowering the default limits would do little to respond to the complaint that *producing* parties also engage in discovery abuse for strategic gain.<sup>336</sup>

What we need is to find the right balance—a default standard that is neither overly generous nor overly restrictive. That, I think, augurs for targeting the middle. I leave it to readers to decide

---

Law is that, if you shrink the size of the container, you increase the pressure the gas exerts on the walls of the container unless you find a way to take heat out of the system at the same time.

331. FED. R. CIV. P. 33(a)(1).

332. LEE & WILLING, *supra* note 77, at 9. The survey did not track the number of interrogatories served in those cases in which they were used.

333. See FED. R. CIV. P. 30(a)(2)(A)(i) (stating that a party must obtain leave of the court if a deposition would result in more than ten depositions being taken).

334. LEE & WILLING, *supra* note 77, at 10. Expert depositions were a comparative rarity, with fewer than one in seven respondents reporting taking them in their closed cases. *Id.* at 9.

335. *Id.* at 10.

336. Elizabeth J. Cabraser, Uncovering Discovery 5–6 (2010) (unpublished manuscript), available at [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/12C00D75EEE2711D8525764800454561/\\$File/Elizabeth Cabraser, Uncovering Discovery.pdf](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/12C00D75EEE2711D8525764800454561/$File/Elizabeth%20Cabraser,%20Uncovering%20Discovery.pdf).

whether the current Civil Rules hit that target.<sup>337</sup> And if we are off target, I also urge readers to consider whether the reform proposals being circulated would put us in the middle or simply skew the imbalance in a different direction. It may be that we need to correct course in some fashion. But if we do that, we must be careful not to oversteer.

### CONCLUSION

For nearly thirty years, the Civil Rules have looked to judicial case management as the principal means for controlling excessive cost and delay in civil cases. Trial court judges have broad managerial powers, particularly in defining the contours of discovery. We expect trial court judges to use those powers aggressively, to take control of cases early on, and to head off problems before they have a chance to occur. Trial judges are consistently told that the best way to control cost and delay is to intervene early, before things get out of hand. Case management is the proverbial ounce of prevention.

Some, though, see case management as a cure worse than the disease. Critics lament the role that case management has played in the decline of trials and the shrinking pool of trial lawyers. They express concern about how case-management decisions are opaque, standardless, and unreviewable, heightening the risk that judges will abuse their power. They see case management itself as a symptom of a larger and more foundational flaw in the Civil Rules—the fact that the rules are one-size-fits-all. They urge that what we need is not more case management but new sets of rules that apply to different categories of cases; being tailored to the needs of the cases in those categories, these rules would not require so much ad hoc customization by judges. They worry that case management is inherently flawed in that it requires judges to make rational decisions in contexts in which they lack sufficient data, leaving them at risk of substituting their own biases.

---

337. If the results from the FJC's Civil Rules survey are an accurate indication, the Civil Rules may already strike the right balance. Survey respondents generally thought that the amount of discovery under the Civil Rules was more or less right given the characteristics of the case. *See* LEE & WILLING, *supra* note 77, at 27–28. Also, survey respondents generally thought that the Civil Rules had about the right amount of case management. *Id.* at 67. It is certainly true, however, that some of the other empirical studies do not evidence that level of satisfaction with discovery or with existing norms of judicial case management.

Others see case management as an important part of the puzzle but insufficient by itself. They urge that the case-management scheme be joined to other types of reforms to make it work effectively. Some proposals would alter the structure of the existing rules scheme, such as by altering the pleading requirements. Others would augment the existing scheme with subject-specific protocols developed by the bar. Still others would leave the existing scheme as it is but get it to work better by changing the culture of adversarial discovery.

Rulemakers and outside reformers alike must appreciate that case-management reform is not just a function of finding better case-management techniques or even of getting the relevant actors to use the existing techniques more effectively. Case-management reform necessarily entails revisiting the policy choices that underlie our reliance on case management. How should judges be spending their time? Does it still make sense to have (generally) one set of rules that applies to all cases? Are we comfortable with the amount of discretion that such a system necessarily must give to trial judges for it to work? Would we be better off with multiple sets of rules, perhaps for different subjects or for cases of different sizes? If we are going to have just one set of rules, should we downsize those rules and require judges to manage up instead of, as some perceive the current situation, having rules built for the most complex cases such that judges must manage down in the simple cases? The choices we eventually make regarding how best to utilize case management must ultimately depend on the degree to which we continue to believe that the benefits of a system that relies on judicial case management outweigh the costs.