

Judicial Case Management: Caught in the Cross-Fire**Steven S. Gensler***

Judging changed thirty years ago, give or take a few years. The active case management approach, originally designed for use in protracted and/or complex cases,¹ became assimilated into everyday federal-court practice.² Amendments from 1983 to the present have formally validated the concept of case management, enshrined it in the Civil Rules, and enabled it by giving district judges an ever-expanding set of case-management tools.³

But even though we are nearly thirty years into the case management era, many practical questions about the real-world efficacy and efficiency of judicial case management remain unanswered, at least in part if not in full. 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?

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¹ See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 938-40 (2000).

² See E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308-09 (1986); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 790-91 (1993); William W. Schwarzer, *Managing Civil Litigation: the Trial Judge's Role*, 61 JUDICATURE 400, 404 (1978).

³ See Arthur R. Miller, *Pleading and Pretrial Motions – What Would Judge Clark Do?*, 2010 Duke Conf. Paper, at 27-28. See *infra* notes 7-21 and accompanying text.

Those 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 gate-keeping role for pleadings – challenge us to re-examine the foundations of our notice-pleading-and-liberal-discovery system.⁴ Many groups have risen to that challenge, commissioning new empirical work and offering reform proposals of varying scope and boldness. This very conference – The 2010 Conference on Civil Litigation – is itself devoted to assessing the performance of the existing civil litigation system and exploring ways in which the system might be improved. 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 does not exist in isolation. It is a part of the larger, interwoven fabric of our dispute resolution system.⁵ It is inextricably bound up with policy debates about the role of judges and with fundamental questions about the proper design of pretrial procedure. As such, one 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. While the list of intersecting foundational questions could no doubt be expanded, here are five that I think all would agree 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”?

⁴ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

⁵ See 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.”); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming 2010) (manuscript at 14).

This paper 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. The commitment is evident not just in the Federal Rules but also in publications issued by the United States Judicial Conference and the Federal Judicial Center.

In Part II, I discuss the five questions listed above. Given the purpose of this Conference, it is not my aim here to propose answers to those questions in any final sense. 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 scheme. Any proposal we might discuss 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 case manage. In other words, we cannot focus narrowly on whether the proposals would improve the ability of federal judges to manage their cases. We must, at the same time, consider whether those proposals might conflict with any of the existing policy debates about the role of judges or with various norms about how best to design a civil litigation system. In other words, 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 cross-fire issuing from these broader-based critiques of the case-management model generally.

I. CASE MANAGEMENT AND THE FEDERAL JUDICIARY.

At a foundational level, the advent of case management in the federal courts probably begins with the shift to individual case assignment.⁶ 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. In today's federal judicial world – where cases are assigned to individual judges *and* where the Administrative Office of the U.S.

⁶ Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 68-69 (1995).

Courts keeps statistics on each judge's docket – judges have a strong incentive to find ways to take control of and manage the cases that appear on their individual dockets.

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. Rule 16 was transformed from a rule principally directed at trial preparation⁷ to one that encouraged – and in some aspects required – trial court judges to take a hands-on approach to managing their cases during the life of the suit.⁸ Amendments to Rule 26 placed explicit duties on both the court and counsel to see that discovery was neither abused nor over-used. The proportionality limit now located at Rule 26(b)(2)(C) first appeared in 1983.⁹ And Rule 26(g) was added in 1983.¹⁰ Modeled after the version of Rule 11 that took effect that year, and founded on the same notion of attorney responsibility, Rule 26(g) 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.¹¹ The Rule 26(g) certification requirement is designed to make lawyers “stop and think” about the legitimacy and reasonableness of their discovery requests, responses, and objections before serving them.¹²

⁷ See Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: 'Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 234 (2010); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1978-81 (1989).

⁸ See FED. R. CIV. P. 16 & advisory committee notes (1983) (“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 generally Shapiro, *supra* note 7, at 1984-87.

⁹ FED. R. CIV. P. 26(b) & advisory committee notes (1983).

¹⁰ FED. R. CIV. P. 26(g).

¹¹ *Id.* & advisory committee's note (1983). See also 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 (March 1983).

¹² See FED. R. CIV. P. 26 advisory committee's note (1983).

The 1983 amendments were the central pieces of the Advisory Committee's plan for combating excessive cost and delay. As Arthur Miller (the Reporter in 1983) explains, the Advisory Committee "made a conscious choice to concentrate on the pretrial phase as the best hope of meaningfully attacking the cost and delay problems."¹³ In doing so, the Advisory 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 guide the parties toward faster and less expensive resolutions.¹⁴

Since 1983, case management has become an even greater part of modern federal civil practice. Several rounds of amendments to the Civil Rules have expanded the trial court's case-management role.¹⁵ In 1993, Rule 16 was amended again to further cement and expand the trial court's case-management authority.¹⁶ Rule 26(b) was amended again in 1993 as well, conferring on trial courts even broader discretion to manage discovery.¹⁷ Another 1993 amendment with major implications for case-management was the amendment to Rule 26(f) that made the discovery planning conference a mandatory event.¹⁸ 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.¹⁹ Rule 26 was amended again in 2000, this time augmenting judicial case

¹³ Miller, *supra* note 3, at 27.

¹⁴ See, e.g., Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 772 (1981); Schwarzer, *supra* note 2, 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.").

¹⁵ Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules – And the Extent of Convergence with Civil-Law Judging*, 37 SW. U. L. REV. 191, 200-02 (2007) (listing case-management rules amendments through the 2006 e-discovery amendments).

¹⁶ FED. R. CIV. P. 16 advisory committee's note (1993).

¹⁷ FED. R. CIV. P. 26(b) & advisory committee's note (1993).

¹⁸ FED. R. CIV. P. 26(f) & advisory committee's note (1993).

¹⁹ See Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 NO. KY. L. REV. 522, 529 (2009). Increasingly, the Rule 26(f) conference is being viewed as a platform for the parties

management over discovery by amending Rule 26(b)(1) to create two tiers of relevance and by adding a redundant cross-reference to the limits set forth in Rule 26(b)(2).²⁰ Finally, the 2006 electronic discovery amendments rely heavily on judicial case management.²¹ Many of the e-discovery amendments – the new Rule 34(b) provisions governing form of production may be the best example – 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 federal judiciary's commitment to case management is not limited to the case-management-oriented provisions of the Civil Rules. According to one observer, it has become a defining policy of the institutional federal judiciary: "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."²² One need not look far for evidence to support that proposition. The CIVIL LITIGATION MANAGEMENT MANUAL published by the U.S. Judicial Conference advises that "[e]stablishing early control over the pretrial process is pivotal in controlling litigation cost and delay."²³ Judicial education programs typically promote the benefits of case management and offer tips for effective

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 (Fall 2009 Supp.).

²⁰ FED. R. CIV. P. 26(b) & advisory committee's note (2000). 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 structure).

²¹ See Rosenthal, *supra* note 7, at 238 ("The 2006 rule amendments continued the trend 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.").

²² John Lande, *The Movement Toward Early Case Handling In Courts and Private Dispute Resolution*, 24 OHIO ST. J. DISP. RES. 81, 91 (2008).

²³ THE JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL LITIGATION MANAGEMENT MANUAL 5 (2001) [hereinafter CIVIL LITIGATION MANAGEMENT MANUAL]. Similar sentiments are found in the abbreviated handbook version. WILLIAM W. SCHWARZER & ALAN HIRSCH, THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES (2d ed. 2006) [hereinafter POCKET GUIDE].

management.²⁴ The Long Range Plan of the Federal Courts recommends that “[t]he district courts should enhance efforts to manage cases effectively.”²⁵

Even Congress took up the cause at one time. Reduction of expense and delay was a central theme of the oft-maligned Civil Justice Reform Act of 1990, which ordered the federal judiciary to experiment with a set of case management techniques.²⁶ The institutional federal judiciary carried out its statutory responsibilities under the CJRA dutifully, though perhaps at times a bit grudgingly. Not all of the components of the CJRA were received with eager enthusiasm. But there was no cold shoulder when it came to the idea of judicial case management. In its Final Report to Congress on the CJRA, the Judicial Conference endorsed early case management as provided in Rule 16, saying “[t]he federal judiciary is committed to, and believes in, sound case management to reduce unnecessary cost and delay in civil litigation.”²⁷

Not everyone has joined in the chorus of praise. As discussed more fully below, various critics have pressed policy objections to judicial case management. At a more pragmatic level, some have expressed doubts about its efficacy as a tonic for undue expense and delay.²⁸ The most pessimistic view suggests that case management *increases* expense, and that it is structurally doomed to do so.²⁹

²⁴ Resnik, *supra* note 1, at 943-49. *See also* THE JUDICIAL CONFERENCE OF THE UNITED STATES, THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 21 (1997) [hereinafter CJRA FINAL REPORT] (noting the judiciary’s “longstanding commitment to judicial and staff education in case management” and recommending that it be extended to the practicing bar).

²⁵ THE JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN OF THE FEDERAL COURTS 70 (1995) [hereinafter LONG RANGE PLAN] (Recommendation #38).

²⁶ Pub. L. No. 101-650, tit. I, 104 Stat. 5089-98 (codified in part at 28 U.S.C. § 471-482).

²⁷ CJRA FINAL Report, *supra* note 24, at 10.

²⁸ *See* Judith Resnik, *Managerial Judges and Court Delay: The Unproven Assumptions*, 23 JUDGES J. 8, 10-11 (1984). *See infra* notes 146-51 & 166-68 and accompanying text.

²⁹ *See* Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 559 (2006).

A first wave of empirical studies from 1997 attempted to determine whether case management techniques really did reduce expense and delay. The results from these studies have been called inconclusive.³⁰ A study by the RAND Institute suggested that early case management might actually increase costs unless it is accompanied by long-term planning and management.³¹ A follow-up report by RAND massaged the point, concluding that while early case management does increase costs up front, it pays dividends later so long as the court follows through and requires a case management plan.³²

The empirical studies of that era, however, showed that *lawyers* remained convinced of the net benefits of judicial case management.³³ In its 1998 study, the Federal Judicial Center 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.³⁴ Moreover, when asked what reform they thought held the most promise for reducing discovery problems, their “clear choice” was increased judicial case management.”³⁵

³⁰ See Rowe, *supra* note 15, at 193; 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).

³¹ JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 54-57 (1996).

³² James S. Kakalik et al., *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 Gensler, *E-volving Duties*, *supra* note 19, at 536-38; CJRA FINAL REPORT, *supra* note 24, at 45-46. While 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.

³³ The demand for case management from the bar goes back even further. See Steven Flanders, *Blind Umpires – A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 519-20 (1984).

³⁴ Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 585-87 (1998).

³⁵ *Id.* at 588.

Today, the message from the institutional federal judiciary remains unambiguously positive.³⁶ The CIVIL LITIGATION MANAGEMENT MANUAL advises trial judges that “[t]he 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.”³⁷ The 2006 FJC Pocket Guide 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 savings 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 techniques.”³⁸

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

³⁶ 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. Civil Procedure Rule 1.4(1) (“The Court must further the overriding objective [of dealing with cases “justly”] by actively managing cases.”), available at http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part03.htm. The recent report on litigation costs by Lord Justice Jackson would suggest that English civil procedure will move even further towards case management as a means of controlling expense and delay. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 394 (2009) (“All the feedback 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 give directions which are focused upon the early resolution of those issues.”).

³⁷ CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 23, at 14.

³⁸ POCKET GUIDE, *supra* note 23, at 1. Nearly identical sentiments can be heard from another prominent advocate of case management, Judge Charles Richey. See Charles R. Richey, *Rule 16 Revisited: Reflections for the Bench and Bar*, 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.”).

application of the existing case management rules.³⁹ In his contribution to this Conference, Magistrate Judge Paul Grimm (a current member of the Advisory Committee on Civil Rules) similarly urges that we make a renewed commitment to better using the existing case management rules before turning to more radical structural changes.⁴⁰ And in his contribution to this 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.⁴¹

Is all that confidence in the benefits to be had from 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 – we will be hearing directly from the sources of that data – 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 than the current levels of case management.⁴² The ABA Section of Litigation Survey respondents overwhelmingly agreed that early intervention by judges helps to narrow the issues and control discovery.⁴³ The ABA Survey also reported that client satisfaction increased when the

³⁹ See Rosenthal, *supra* note 7, at 241.

⁴⁰ See Paul W. Grimm et al., *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?*, 2010 Duke Conf. Paper, at 32.

⁴¹ 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*, 2010 Duke Conf. Paper, at 11-22.

⁴² Emery G. Lee III & Thomas W. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, at 67-68 (Oct. 2009) [hereinafter *Case-Based Survey Preliminary Report*].

⁴³ ABA SECTION OF LITIGATION MEMBER SURVEY ON CIVIL PRACTICE: DETAILED REPORT 124-25 (2009) [hereinafter ABA SURVEY].

judge was actively involved in managing the case.⁴⁴ The IAALS/ACTL Survey showed similarly strong support for active judicial case management among its respondents.⁴⁵

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 overwhelmingly convinced of the benefits of active case management is well worth noting. If the federal civil litigation scheme 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 the judges and the 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 that's not what matters. 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 CROSS-FIRE.

For now, let's assume that we can improve judicial case management. Let's assume that, with the renewed commitment urged by Judge Rosenthal and Judge Grimm,

⁴⁴ *Id.* at 126.

⁴⁵ THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT 18 (2009) [hereinafter ACTL/IAALS FINAL REPORT].

we can improve our usage of the existing case management tools.⁴⁶ Let's further assume that, though the quiver is already well-stocked, we can add even more "managerial arrows" where the need is shown.⁴⁷ In short, let's assume – and I think the assumption is a safe one – that we have not yet perfected the case-management scheme that 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 one cannot have that discussion in isolation. Case management is not a self-contained concept. It does not exist in a vacuum. The question of case management is inextricably intertwined with our vision of what judging should be and 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 towards 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 on 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. The type and degree of case management that we ask of judges greatly depends on the choices we make about the role of judges and the

⁴⁶ 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. *See* Rosenthal, *supra* note 7, 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.*

⁴⁷ *See* Rowe, *supra* note 15, at 196.

design of our system of procedure. Thus, fundamental changes to the *system* do not send mere ripples back to case management, they send a tsunami.

In this Part, I examine five such 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, the tweaking of 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?

For as long as we have had a culture of judicial case management, we have also had critics of that culture.⁴⁸ 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 their cases, they are not spending their time doing what Article III judges were meant to do – try cases. This theme was prevalent in (though not the animating force behind) much of the recent discussion about vanishing trials.⁴⁹ 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.”⁵⁰ The suggestion has

⁴⁸ We have also had staunch defenders. For one well-known defense of case management, see Flanders, *supra* note 33.

⁴⁹ See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STANFORD L. REV. 1255, 1266 (2005) [hereinafter *Hundred-Year Decline*]; 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*, 30 LIT. 1 (2004).

⁵⁰ Patrick E. Higginbotham, *The Present Plight of the United States District Courts: Is the Managerial Judge Part of the Problem or the Solution?*, 2010 Duke Conference Paper, at 1. To be precise, Judge

even been made that case-manager model so distorts the role of the judge as to undermine the basis for job and salary protection.⁵¹ Professor Subrin offers this sobering assessment: “A totally unconstrained adjudication system requires judges to become what they are: managers. This is not what it meant to be a wise judge for the past three millennia.”⁵²

A different criticism of the case management model relates to judicial power and its abuse.⁵³ Professor Resnik has famously criticized the case management model as a potentially new and dangerous form of judicial activism. According to this critique, “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.”⁵⁴ Professor Subrin has expressed similar concerns about the power that federal judges wield via the largely discretionary rules governing case management activities.⁵⁵ Professor Carrington, who once served as Reporter to the Civil Rules Advisory Committee, made this observation: “The hidden

Higginbotham’s criticism is not that Article III judges should allow their cases to grow un-pruned 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 towards trial, and not for the purpose of disposing of the case during the pretrial phase. *Id.* at 18.

⁵¹ See Resnik, *supra* note 1, at 1002-03.

⁵² 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).

⁵³ 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 49, at 1266. Another concern is that the judge who is to try the case should not be involved in the settlement process out of a concern that the parties will feel pressure to conform to the judge’s views on settlement or that the judge will become biased during the course of the settlement process. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 425-31 (1982). This paper does not address the role of trial judges in settlement.

⁵⁴ Resnik, *supra* note 53, at 380; see also Peterson, *supra* note 6, at 45 (arguing that case management gives federal judges too much primary discretion (i.e., standardless) and secondary discretion (i.e., guided but unreviewable)).

⁵⁵ 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 can 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.”).

effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts who would review decisions on the merits when and if rendered.”⁵⁶

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.”⁵⁷ I am inclined to agree. 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 managers provide the parties with an opportunity to be heard *and* with an opportunity to see (and feel) that justice is being done. All of those activities strike me as being every bit as “judicial” as presiding over a trial. But not everyone does, and I certainly respect the views of those who see things differently.

For those who think that case management is proper and important but believe that *Article III* judges should spend their time 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

⁵⁶ Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 62 (1997).

⁵⁷ CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 23, at 1.

merits coercion posed when the Article III judge who will be deciding the merits gets involved in management issues.⁵⁸

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. The Judicial Conference recommended the effective use of magistrate judges to combat cost and delay in its Final Report to Congress on the CJRA.⁵⁹ Similarly, the Judicial Conference's *Long Range Plan for the Federal Courts* promotes the enhanced usage of magistrate judges for civil pretrial matters.⁶⁰ 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 about 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*, the IAALS recommends that “[a] single judge should be assigned to each case at the beginning of litigation and should stay with the case through its disposition.”⁶¹ 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

⁵⁸ See Peterson, *supra* note 6, at 92.

⁵⁹ See CJRA FINAL REPORT, *supra* note 24, at 20.

⁶⁰ See LONG RANGE PLAN, *supra* note 25, at 101-02 (1995) (Recommendation #65).

⁶¹ INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, CIVIL CASEFLOW MANAGEMENT GUIDELINES 5 (2009) (Guideline # 2) [hereinafter IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES]; see also INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, PILOT PROJECT RULES 4 (2009) (Rule 4.1) [hereinafter IAALS PILOT PROJECT RULES]; ACTL/IAALS FINAL REPORT, *supra* note 45, at 18.

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.”⁶²

One of the targets of this recommendation – and perhaps the principal target – is state court systems that still do not assign cases to a single judge for pretrial. 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 the “one judge” principle. The survey respondents strongly supported the general principle of having a single judge “handle a case from start to finish.”⁶³ 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.⁶⁴ And when asked specifically whether it mattered if the trial judge or a magistrate judge handled the pretrial matters, the level of agreement dropped further still, to under 60%.⁶⁵ These data suggest that some of the support for the “one judge” principle extends only to 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 solid majority of the respondents (about 60%) specifically disapprove of delegating pretrial to magistrate judges.

The IAALS and the ACTL are not alone in questioning the wisdom of separating the “case management” and the “merits adjudication” functions. Over 20 years ago, Professor Silberman worried that reflexively referring all discovery matters to magistrate

⁶² IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 8-9.

⁶³ ABA SURVEY, *supra* note 43, at 127.

⁶⁴ *Id.* at 128.

⁶⁵ *Id.* at 129.

judges might actually undercut effective case management.⁶⁶ Judge Easterbrook – who is well-known for his skepticism of case management generally – has argued that assigning discovery to magistrate judges is inefficient because they lack the ability to focus in on potentially-dispositive slices of the case.⁶⁷ In his paper for the 2010 Duke Conference, Judge Higginbotham, while agreeing that some case management was valuable, also criticized the practice of delegating case management to magistrate judges; in his view, it is symptomatic of a disturbing trend of making the trial-court process a paper process of delegable duties.⁶⁸

Ultimately, the question 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 a “judge.” Delegating the 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 the Article III judges nor the magistrate judges should manage federal civil cases, then who? 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.⁶⁹

⁶⁶ See Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2141 (1989). Alternatively, she 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. *Id.*

⁶⁷ See Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 639-40 (1989).

⁶⁸ See Higginbotham, *supra* note 50, at 15.

⁶⁹ FED. R. CIV. P. 1.

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

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.⁷⁰ And there is only one form of action in the district courts – “the civil action.”⁷¹ 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 of the case, dollar amount, complexity, or subject matter. This is no accident.⁷² 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 consciously – deliberately – set out to design a single set of rules that could be applied to each and every case.⁷³

Procedural rules that apply to all types of cases are said to be “trans-substantive.”⁷⁴ The term does not exactly roll off the tongue, but it is descriptive and neutral. A more colorful term is that the Civil Rules are “one size fits all.”⁷⁵ When used, that label usually is offered in the spirit of criticism, not praise. Critics of the trans-substantive 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

⁷⁰ *Id.*

⁷¹ FED. R. CIV. P. 2.

⁷² 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).

⁷³ See 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 29.

⁷⁴ 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).

⁷⁵ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72. See also IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 6.

set of rules.⁷⁶ 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.⁷⁷ 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 ABA Section of Litigation Member Survey respondents agreed with the proposition that one set of rules cannot accommodate every case.⁷⁸

Elsewhere, I have argued that I think the “one size fits all” description of the Civil Rules is inapt.⁷⁹ 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 and in all weather in 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.⁸⁰ 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 General Motors 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 described above requires active and meaningful case management. Without case management, the parties and their lawyers are free to do as they like.⁸¹ One side may want only a Chevy or a light spring jacket but end up driving (and paying for) a Cadillac, or wearing a full-length wool

⁷⁶ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 388-93 (2010); IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 6.

⁷⁷ See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535, 563.

⁷⁸ See ABA SURVEY, *supra* note 43, at 44.

⁷⁹ See *Procedure a la Carte*, presentation delivered at the Section on Civil Procedure Program at the Association of American Law Schools Annual Meeting in New Orleans, January 8, 2010.

⁸⁰ FED. R. CIV. P. 8(a); FED. R. CIV. P. 26(a).

⁸¹ Richard L. Marcus, *Slouching Towards Discretion*, 78 NOTRE DAME L. REV. 1561, 1589-90 (2003).

coat, as a result of the other party's conduct or demands. 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 using the case-management tools they do have often enough or well.⁸² Indeed, one of the topics for this 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 so-called "one size fits all" model suffers from flaws that cannot be fixed by more or better case management.

My sympathies lie with the supporters of case management. I think the case-management model does work, though I agree that it can (and probably must) be improved. At bottom, I think that case-management by judges, custom-fitting the procedure in the case based on the options available under the Civil Rules, remains our best strategy for seeing that cases receive the right type and amount of procedure. However, my purpose here is not to argue that particular debate. Rather, it is to explore *alternative methods* for ensuring that each case receives a type and degree of procedure best suited to its needs. Here, I explore three such options: (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 – to the exclusion of – all forms of case management. Indeed, some reform proposals call for abandoning the "one size

⁸² See Rosenthal, *supra* note 7, at 232; Grimm et al., *supra* note 40, at 8.

fits all” system, adopting specialized schemes, *and* ratcheting up case management within those specialized schemes. Nonetheless, there remains a critical link between case management reform and proposals for differentiated rule schemes. It is this: 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 get us there if our starting point is a single set of rules for all cases.

1. Substance-Specific Rules.

The Rules Enabling Act says surprisingly little about what the structure of the Civil Rules should be.⁸³ The only drafting norm stated in the Rules Enabling Act is that the Civil Rules are to be “general.”⁸⁴ A limited interpretation of that directive might be that Congress intended only that the Rules be geographically uniform – i.e., that they would apply in all districts, rejecting any continuing notion of conformity to state practice.⁸⁵ By and large, that is how the Civil Rules operate.⁸⁶ But the original drafters were not just seeking to displace conformity to state procedure, and they were not just looking to make sure 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 and regardless of substance.⁸⁷ The flexibility provided by modeling this set of

⁸³ 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).

⁸⁴ 28 U.S.C. § 2072(a). The Rules Enabling Act does provide additional guidance, but it is directed more towards 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 substantive rights.” *Id.* § 2072(b).

⁸⁵ See Burbank, *supra* note 77, at 542.

⁸⁶ The Civil Rules do have some geographic variation baked into them. See, e.g., FED. R. CIV. P. 4(e) (incorporating state-law service methods); FED. R. CIV. P. 17(b) (incorporating state-law standards on capacity to sue or be sued); FED. R. CIV. P. 64 (incorporating state prejudgment remedies). A much more significant source of inter-district variation comes from local rules. See Stephen N. Subrin, *Federal Rules, Local Rules and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

⁸⁷ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 381-84.

rules on equity practice would permit the parties and the court to adjust them as needed and as applied.⁸⁸

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.”⁸⁹ In this regard, the IAALS finds itself in the company of some of the most prominent procedure scholars of our time.⁹⁰ Professor Subrin has long called for substance-specific rules on the basis that trans-substantive rules require overly general directions and vague standards that increase expense and decrease consistency.⁹¹ Professor Burbank is also a long-time advocate of substance-specific rules; he argues that substance-specific rules that provide more detailed guidance – and constraints – are preferable to trans-substantive rules that rely on judicial discretion.⁹² Professor Bone has been calling for substance-specific rules on the basis that trans-substantive rules fail to account for differences in substantive priorities.⁹³ Most recently, he has argued that trans-substantive pleading rules misfire because they do not adequately account for substantive areas in which the parties face significant information asymmetries.⁹⁴

⁸⁸ *Id.* at 384-86; *see also* Subrin, *How Equity Conquered Common Law*, *supra* note 73, at 922-25.

⁸⁹ ACTL/IAALS FINAL REPORT, *supra* note 45, at 4.

⁹⁰ *See, e.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333 (2008); Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988); Cover, *supra* note 74, at 731-32; Resnik, *supra* note 1, at 547; Subrin, *The Case for Selective Substance-Specific Procedure*, *supra* note 55, at 45-56; Subrin, *Federal Rules, Local Rules and State Rules*, *supra* note 86, at 2048-51.

⁹¹ *See* Subrin, *The Case for Selective Substance-Specific Procedure*, *supra* note 55, at 45-56; *see also* Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 404-05 (discussing substance-specific protocols).

⁹² *See* Burbank, *supra* note 77, at 556-64; Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1936-37 (1989).

⁹³ *See* Bone, *supra* note 90, at 333-34; *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).

⁹⁴ *See* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 936 (2009).

The debate is hardly one-sided however. An equally prominent group of procedure scholars think that the benefits of trans-substantive rules outweigh their costs.⁹⁵ Professor Hazard urges us to remember that one of the virtues of trans-substantive 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.⁹⁶ 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.⁹⁷ Professor Rick Marcus has embraced both points.⁹⁸

The trans-substantivity debate has important implications for case management. Without the ability to customize pretrial via case management, it is doubtful that a single set of rules could service all cases across all subject areas. Indeed, many advocates of substance-specific rules articulate the relationship in reverse, saying that customized case management by the judge renders the rules trans-substantive in name only.⁹⁹ What is undeniably true is that there is an inverse relationship between substance-specific rules and case management. Defenders of trans-substantivity 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

⁹⁵ See, e.g., Paul A. 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. ____ (forthcoming 2010); Marcus, *Of Babies and Bathwater*, *supra* note 2, at 776-79.

⁹⁶ See Hazard, *supra* note 95, at 2244-47.

⁹⁷ See Carrington, *Politics and Civil Procedure Rulemaking*, 2010 Duke Conf. Paper, at 16, 56; Carrington, *supra* note 95, at 2074-87.

⁹⁸ See Marcus, *Of Babies and Bathwater*, *supra* note 2, at 776-79.

⁹⁹ See Burbank, *Of Rules and Discretion*, *supra* note 90, at 715 (1988); Resnik, *supra* note 1, at 527; Silberman, *supra* note 2176-77.

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 trans-substantivity and substance-based rule balkanization. Fidelity to the principle of trans-substantivity is, for all practical purposes, a question of degree.¹⁰⁰ First, I am not aware that anyone 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.¹⁰¹ Second, we already have abandoned pure trans-substantivity even at the level of court-made rules.¹⁰² Special sets of court-made rules already exist for habeas corpus cases,¹⁰³ for admiralty proceedings,¹⁰⁴ and, most recently, for civil forfeiture.¹⁰⁵ And we already have some substance-specific provisions within the generally trans-substantive Civil Rules. Rule 26 exempts some categories of cases from mandatory disclosures.¹⁰⁶ Rule 9 provides substance-dependent pleading standards.¹⁰⁷ Rule 23.1 is explicitly limited to shareholder derivative actions.¹⁰⁸ Seen in that light, proposals to add a few,

¹⁰⁰ Gensler, *Justness! Speed! Inexpense!*, *supra* note 83, at 267.

¹⁰¹ See Stephen N. Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, 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.”).

¹⁰² Congress, of course, remains free to displace, modify, or embellish the trans-substantive court-made rules with specific statutory provisions. See, e.g., Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(1)(B) (heightened pleading requirements in securities fraud cases).

¹⁰³ Rules Governing Section 2254 Cases in the United States District Court.

¹⁰⁴ Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

¹⁰⁵ *Id.* Rule G.

¹⁰⁶ FED. R. CIV. P. 26(a)(1)(B) (exempting nine types of proceedings).

¹⁰⁷ FED. R. CIV. P. 9(b) (requiring that allegations of fraud be pleaded with particularity).

¹⁰⁸ FED. R. CIV. P. 23.1.

discrete substance-specific rule provision here and there, fitted within the generally trans-substantive rules framework, raise much different questions than would a proposal to adopt wholly separate rule schemes for tort cases, contract cases, civil rights cases, etc.¹⁰⁹

2. Case Tracking.

Another reform proposal that competes, so to speak, with the case management model is tracking. 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, tracks are created with different sets of procedures. Then, it's just 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 have equated tracking schemes with restaurants that provide Kid's Menus.¹¹⁰ The children get to eat (i.e., they 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. Differentiated case management ("DCM") was one of the six case-management principles of the CJRA,¹¹¹ and over three-fourths of the federal districts adopted some form of it in the CJRA plans.¹¹² One way of accomplishing DCM is to establish predetermined tracks. Several districts retain tracking

¹⁰⁹ Burbank, *supra* note 77, at 542.

¹¹⁰ *See Procedure a la Carte*, *supra* note 79.

¹¹¹ *See* James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act*, 49 ALA. L. REV. 17, 19-20 (1997) (providing overview of the case management principles).

¹¹² CJRA FINAL REPORT, *supra* note 24, at 27. *See generally* FEDERAL JUDICIAL CENTER, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 83-103 (1995) (listing DCM plans for all districts).

mechanisms in their local rules.¹¹³ For a comparative perspective, England adopted case tracks as part of the Woolf Reforms. They have three tracks: small claims track, fast track; and multi-track.¹¹⁴ Tracking continues to have supporters back here at home. The IAALS endorses tracking.¹¹⁵ Professor Miller recently indicated interest in exploring tracking.¹¹⁶

While tracking makes eminent sense in theory, it has proved to be problematic in implementation. One enduring difficulty lies in creating tracks that capture significant populations of cases. In particular, it has proved difficult to create meaningful “simple” tracks in federal court because of heated disagreements about how to define a significant population of federal-court cases for a “simple” track. There is little point in creating a “simple” track if we cannot identify very many cases to put on it. The search for candidates for the “simple” 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” track?

One method might be to use the amount in controversy as a proxy for whether a case is simple. Perhaps all cases where the amount in controversy was less than \$50,000 might be assigned to the “simple” track.¹¹⁷ That type of scheme, however, would capture

¹¹³ See, e.g., N.D. Ga. Local Rule 26.2.A (cases assigned to one of three discovery tracks based on subject matter); S.D. Ind. Local Rule 16.1(b) (incorporating Case Management Plan that requires the parties to select from one of four tracks); N.D. & S.D. Miss. Local Rule 1.3 (creating six case management tracks: (1) expedited; (2) Standard; (3) Complex; (4) Administrative; (5) Mass Tort; and (F) Suspension); M.D. N.C. Local Rule 26.1(a) (creating three discovery tracks: standard, complex, and exceptional); N.D. Ohio Local Rule 16.2 (creating five case management tracks: (1) Expedited; (2) Standard; (3) Complex; (4) Administrative; and (5) Mass Torts).

¹¹⁴ Civil Procedure Rule 26.1(2).

¹¹⁵ See IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 7.

¹¹⁶ See Miller, *supra* note 3, at 64-65 (pointing to the tracking system adopted by the English legal system).

¹¹⁷ See Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1805 (2002) (adopting \$50,000 as general threshold for application of “simplified rules”). By way of comparison, the “small claims track” in England is generally limited to claims of less than £5,000, and even the “fast track” is generally for claims of between £5,000 and £25,000. See STUART SIME, A PRACTICAL APPROACH TO CIVIL PROCEDURE 210-12 (12th ed. 2009). Claims for more than £25,000 or where trial is likely to last more than one day generally are slotted for the “multi-track.” *Id.*

no diversity jurisdiction cases given that diversity jurisdiction requires an amount in controversy of more than \$75,000.¹¹⁸ It likely would capture many federal-question cases, since there is no minimum amount in controversy for federal-question jurisdiction.¹¹⁹ But many of those cases might be complex or have a social or policy “value” that exceeds the damages at stake. For that reason, Professor Subrin has endorsed a mechanism 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.”¹²⁰ But if one took out all of the federal-question cases that had multiple damages or fee-shifting, what would be left? Moreover, of the federal-question cases that remained candidates for the “simple” track, how many of those would one say are “over-procedured” under the current scheme? In this regard, note that Rule 26(a)(1)(B) already exempts many of the more simple federal-question cases from the required initial disclosures,¹²¹ Rule 26(f) exempts these same cases from the required discovery planning conference and report requirement,¹²² and Rule 16(b)(1) allows districts to enact local rules exempting categories of cases from the scheduling order requirements.¹²³ Taking all of that together, which federal-question claims (1) are currently saddled with “too much mandatory procedure” by the Civil Rules; and (2) are fair candidates to be relegated to the simple track over the objection of one of the parties? (If the parties actually agreed on how much procedure the case deserved, they could achieve that by cooperation and by communicating their views to the judge via the Rule 26(f) discovery planning report and at the Rule 16 scheduling conference.)

¹¹⁸ 28 U.S.C. § 1332(a).

¹¹⁹ See Cooper, *supra* note 117, at 1797 (examining data from 1989 to 1998 and estimating that there were approximately 250,000 cases during this ten-year period with an amount in controversy of less than \$50,000).

¹²⁰ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 400.

¹²¹ FED. R. CIV. P. 26(a)(1)(B) (exempting “simple” federal-question cases like actions for review of an administrative order and student loan collection suits).

¹²² FED. R. CIV. P. 26(f).

¹²³ FED. R. CIV. P. 16(b)(1). It is my understanding that many districts create exemptions for the types of cases that are exempt from initial disclosures and discovery planning.

We could, of course, expand the population of candidates for the “simple” 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, \$250,000.¹²⁴ 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 non-monetary claims, and what would be the effect of amendments that raise the amount in controversy above the “simple” track threshold. The drafting of such a scheme would require considerable care to not create loopholes that could be exploited or to reward gamesmanship. Our experience with disputes about the amount-in-controversy in the removal context should raise some legitimate concern that lawyers might try to game a tracking system pegged to the amount in controversy. We would also need to consider whether the benefits of providing a “simple” track for those cases (compared to 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 would set for the “simple track”) and leave those cases in state court in the first place.¹²⁵

Finally, the types of objective data typically available at the start of the case – e.g., the stated amount in controversy or the nature of suit as indicated by the plaintiff in the civil cover sheet – often are not very good predictors of how expensive the case will

¹²⁴ Professor Subrin suggests using as a target “realistic damages” of \$500,000. See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, 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.

¹²⁵ 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. 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, in \$5,000 increments, by indexing increases to the Consumer Price Index. See H.R. 4113, sec. 103.

be or how long it will take.¹²⁶ For whatever reason – whether it is because the line-drawing process needed for tracking is very difficult, because the population of cases that are both “simple” and currently “over-procedured” is small, or for some other reason – our experience with tracking seems to be that most cases wind up on the “standard” track.¹²⁷

Another difficulty lies in the fact 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.¹²⁸ This power seems necessary to deal with situations where the allocation criteria would yield a track assignment that was a poor fit for particular cases. But it interjects the trial court back into the process, with the tracking system operating not as a fixed rule but as a default. That raises the question of whether tracking-with-judicial-tailoring works any better than having judges conduct “differential case management” by tailoring their scheduling orders. One answer might be that tracking is better because it replaces a wholly ad hoc process with some standardization.¹²⁹ That begs the question, though, of whether the tracking criteria do a good job of slotting the cases in the first place. It would be a weak endorsement of tracking to say that while the tracking system did a poor job of fitting cases into the tracks, at least it did a poor job consistently.

¹²⁶ See Kakalik et al., *supra* note 111, at 28 (noting that the objective data at the time of filing “are not particularly good predictors of either time to disposition or cost of litigation”).

¹²⁷ See Cooper, *supra* note 117, at 1799; CJRA FINAL REPORT, *supra* note 24, at 27; Kakalik et al., *supra* note 111, at 28 (“[A]lmost all general civil cases to which CJRA procedural principles might be relevant were placed in the standard track, if any track assignment was made.”).

¹²⁸ See Cooper, *supra* note 117, at 1805 (proposed “simplified rules” do not apply “if the court, on motion or on its own, finds good cause to proceed under the regular rules”); Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, 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”); IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 6 (urging the development of automated DCM systems that would require judges only as needed to re-allocate the cases that require it).

¹²⁹ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 401.

Ultimately, the RAND study on the CJRA could not come out for or against tracking, largely because too few districts and judges utilized it often enough to provide a data set large enough to support empirically-valid conclusions.¹³⁰ The Judicial Conference enthusiastically endorsed the notion of differential case management but recommended that the choice between tracking and individual-judge discretion be left to each district.¹³¹ In its Final Report to Congress on the CJRA, the Judicial Conference explained that “[m]any courts found it easier and less bureaucratic for individual judges to establish individual DCM schedules based on the characteristics of the case.”¹³² Of course, the fact that judges *prefer* to tailor cases according 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 preference 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.

3. Simplified Rules.

The final alternative to a single set of trans-substantive rules is to create a set of simplified rules for so-called simple cases. It 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.”¹³³ There does appear to be significant interest in the notion of simplified rules, even at the federal level. Professor Subrin remains a vocal proponent

¹³⁰ *See id.* 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.*

¹³¹ CJRA FINAL REPORT, *supra* note 24, at 28.

¹³² *Id.* at 27.

¹³³ IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 6.

of creating a “simple track” in the federal-court system.¹³⁴ In the FJC’s Civil Rules Survey, over 60% 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.¹³⁵

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 would be more detailed pleading, increased disclosure obligations, and reduced discovery.¹³⁶ Others have suggested that simplified procedure should also have reduced or no judicial case management.¹³⁷

The fate of Simplified Rules is linked closely to the fate of broader tracking systems, at least in the federal system.¹³⁸ How many “Chevy” cases are there in the federal system? What criteria do you use to identify them? Do you 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? As Professor Cooper noted in his article exploring the draft Simplified Rules, “[e]ven if there is reason to fear that general federal procedure should not apply in all it’s sweep to every case in federal court, it is not clear that ‘general federal procedure’ is as procrustean as

¹³⁴ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 398-405.

¹³⁵ See Lee & Willging, *Case-Based Survey Preliminary Report*, *supra* note 42, at 54.

¹³⁶ See Cooper, *supra* note 117, at 1796.

¹³⁷ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 399; Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. St. U. L. Rev. 173, 176 (2007).

¹³⁸ 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.

the champions of simplified procedure may claim. The Civil Rules provide many opportunities for tailoring procedure to the realistic needs of individual actions.”¹³⁹

4. Concluding Thoughts.

I do not know of anyone who thinks that every case should get *exactly* the same pretrial procedure – i.e., 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 the 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). 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 “simple” rules for some set of “simple” cases. All of these options could still include case management for further

¹³⁹ Cooper, *supra* note 117, at 1798.

custom tailoring. The objective of these options, for most, 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 “less,” then some type of departure from the “one set of rules” scheme would seem to be required.

C. Do Federal Judges Wield Too Much Discretion?

“Discretion lay at the heart of Pound’s jurisprudence.”¹⁴⁰ It also lies at the heart of case management. Enamored of the benefits of the equity system, the original drafters opted for a set of rules that relied on flexibility and discretion.¹⁴¹ 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 served to rein in the process.¹⁴² Amendments to Rule 16 (and Rule 26) since then have increased judicial control but have done so flexibly, continuing what Professor Shapiro has called “the tradition of discretion.”¹⁴³

Discretion is a byproduct of both the trans-substantive nature of the Federal 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.¹⁴⁴ As Professor Subrin has pointed out, our commitment to having one set of rules for all cases has caused us to

¹⁴⁰ Tidmarsh, *supra* note 29, at 535.

¹⁴¹ See Subrin, *How Equity Conquered Common Law*, *supra* note 73. 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* and the end of *Swift v. Tyson*. Marcus, *supra* note 81, at 1576-77.

¹⁴² Subrin, *How Equity Conquered Common Law*, *supra* note 73, at 975-82.

¹⁴³ Shapiro, *supra* note 7, at 1985.

¹⁴⁴ Burbank, *supra* note 77, at 543-44.

write them at levels of generality and to delegate the application details to trial judge discretion.¹⁴⁵ 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.¹⁴⁶

Many commentators think the Civil Rules already place too much discretionary power in the hands of federal judges.¹⁴⁷ 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.¹⁴⁸ As she put it, “[t]ransforming the judge from adjudicator to manager substantially expands the opportunities for judges to use – or to abuse – their powers.”¹⁴⁹ Professor Elliott echoed the concern that judicial case management gives judges discretionary power to act without procedural safeguards.¹⁵⁰ Most recently, Professor Tidmarsh joined the debate, raising his own fears about case management and abuse of power.¹⁵¹

Others criticize discretion on more practical grounds. Professor Bone questions the competence of federal trial judges to exercise discretion.¹⁵² In part, he is echoing Judge Easterbrook’s critique of 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

¹⁴⁵ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 391; Subrin, *The Case for Selective Substance-Specific Procedure*, *supra* note 55, at 44.

¹⁴⁶ Cooper, *supra* note 117, at 1795.

¹⁴⁷ See Peterson, *supra* note 6, at 76-78.

¹⁴⁸ Resnik, *Managerial Judges*, *supra* note 53, at 380; *see also* Resnik, *Failing Faith*, *supra* note 1, at 548.

¹⁴⁹ Resnik, *Managerial Judges and Court Delay*, *supra* note 28, at 54 (arguing that case management activities are standardless and effectively unreviewable).

¹⁵⁰ Elliott, *supra* note 2, at 317.

¹⁵¹ Tidmarsh, *supra* note 29, at 559.

¹⁵² Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1963 (2007); Bone, *Improving Rule 1*, *supra* note 93, at 301.

outcomes in the highly strategic environment of litigation.”¹⁵³ He also worries that (as compared to a body of rulemakers providing more detailed guidance) individual judges are at a greater risk of succumbing to cognitive biases.¹⁵⁴

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 of expense, delay, unpredictability, and abuse of power.¹⁵⁵ To put it more plainly, he contends that discretionary case management is counterproductive – that it *causes* expense.¹⁵⁶ In this respect, Professor 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.¹⁵⁷

Critics of discretion see several possible solutions. One solution – already explored above – 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 trans-substantive rules that rely on judicial discretion.¹⁵⁸ Another solution is to demand that the Civil Rules, even if applicable to all cases, provide more detail and guidance. Professor Bone, for example, thinks that the rulemakers use discretion to duck hard choices. He worries that the rulemakers, reluctant to squarely and openly resolve difficult questions, “kick the can down the road” by placing the resolution of those questions within trial court discretion, with the result that the answers ultimately

¹⁵³ Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1170 (2006).

¹⁵⁴ Bone, *Who Decides?*, *supra* note 152, at 1989.

¹⁵⁵ Tidmarsh, *supra* note 29, at 558.

¹⁵⁶ *Id.* at 559.

¹⁵⁷ *Id.* at 521.

¹⁵⁸ *See* Burbank, *supra* note 92, at 1936-37.

emerge from a forum that is less visible, less transparent, and out of the public debate.¹⁵⁹ Professor Bone speculates, perhaps too cynically, that one of the reasons for this is the fact that judges dominate the rulemaking process and discretion maximizes their individual power.¹⁶⁰

But there may be very good reasons for committing matters to trial judge discretion. Reflecting on the use of discretion, Ed Cooper, the Reporter for the Civil Rules Advisory Committee, 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.”¹⁶¹

Professor Rick 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.¹⁶² 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. Professor

¹⁵⁹ See Bone, *Who Decides?*, *supra* note 152, at 1974.

¹⁶⁰ *Id.*

¹⁶¹ Cooper, *supra* note 117, 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).

¹⁶² Marcus, *supra* note 81, at 1607.

Marcus is also skeptical about the alternatives to discretion in case management, saying they are no better, and likely worse.¹⁶³

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.”¹⁶⁴

Of course, 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 explains that there are good reasons and bad reasons for conferring procedural discretion on trial judges.¹⁶⁵ Rulemakers must be careful to only confer discretion for the right reasons.¹⁶⁶ 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.¹⁶⁷

Professor Bone makes much the same point when he says that “[r]ulemakers should treat case-specific discretion as an explicit policy choice rather than an implicit

¹⁶³ *Id.* at 1611-12.

¹⁶⁴ Shapiro, *supra* note 7, at 1995.

¹⁶⁵ 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.*

¹⁶⁶ *Id.* at 667.

¹⁶⁷ *Id.* at 659.

default, evaluate its costs and benefits in each procedural context, and make a considered judgment about how much discretion to grant what controls or guidelines to include.”¹⁶⁸ In other words, before adopting case management practices that turn on judicial discretion, the rulemakers should, first, make an informed choice that discretion is the proper path and, second, determine what boundaries to emplace and what guidance to include in the rule.¹⁶⁹ So viewed, Professor Bone is not arguing against all discretion; rather he just thinks the rulemakers default to discretion too readily and instead need to consider more seriously alternatives that would limit the judge’s options or guide the analysis.¹⁷⁰

Here too, it is not my aim 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.¹⁷¹ For present purposes, the important point is to note that any reform efforts that would address cost or delay issues by placing more discretionary management powers in the hands of trial judges must account for the concerns felt by some that federal judges already exercise a dangerous amount of discretion.

¹⁶⁸ Bone, *Who Decides?*, *supra* note 152, at 2002.

¹⁶⁹ Having had the privilege of serving on the Advisory Committee since 2005, my personal view is that the Advisory Committee already follows Professor Bone’s prescription quite faithfully. I leave it to others who closely observe the rulemaking process to assess whether they would agree or disagree with my assessment.

¹⁷⁰ Bone, *Who Decides?*, *supra* note 152, at 1964-65.

¹⁷¹ In this paper, 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 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 case manage with making pleadings decisions based on their judgment and experience. See Miller, *supra* note 3, at 31-32.

D. Can Case Management Solve the “Cost Problem” By Itself (If At All)?

Over 20 years ago, Judge Easterbrook pronounced that case management cannot work because judges lack the information needed to distinguish between “good” discovery and “bad” discovery.¹⁷² Professor Bone and Professor Redish share Judge Easterbrook’s skepticism.¹⁷³ Professor 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.¹⁷⁴

Obviously, 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.¹⁷⁵ The Judicial Conference’s CIVIL LITIGATION MANAGEMENT MANUAL makes a special point of stating that, while it is true that the lawyers will know more about the case than the judge, that fact “should not deter [them] from management, based on [their] experience and after consultation with counsel.”¹⁷⁶ 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:

“Abandonment is not a rational option The district judge, through his or her control over scheduling and the discovery process probably represents the best – if not the only – hope currently available for containing excessive litigation behavior and the type of attrition activity that breeds cost and delay. Maybe that suggests strengthening it and being more directive about its use.”¹⁷⁷

¹⁷² Easterbrook, *supra* note 67, at 638-39.

¹⁷³ Bone, *Regulation of Court Access*, *supra* note 94, at 899-900; Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603-04 (2001) (proportionality limits are impractical because the trial court is not in a good position to assess whether the information desired is worth the cost).

¹⁷⁴ Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 96-97 (2009).

¹⁷⁵ Elliott, *supra* note 2, at 315-16.

¹⁷⁶ CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 23, at 28.

¹⁷⁷ Miller, *supra* note 3, at 54.

In his critique of Rule 16, which he faults for being too detailed, Professor Tigar nonetheless stressed the importance of case management to (1) prompt settlement before parties incur discovery costs; (2) get control of discovery early to focus and limit and send 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.¹⁷⁸

Debate about the ability of case management to reduce cost and delay is nothing new, 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 turns out to be counterproductive,¹⁷⁹ 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 quite different 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.

One approach might be to pair aggressive case management with aggressive structural reforms to the existing pleading and discovery system. Proponents of 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*, the Supreme Court questioned, for the first time, whether the case management reforms of the past three

¹⁷⁸ Michael E. Tigar, *Pretrial Case Management under the Amended Rules: Too Many Words for a Good Idea*, 14 REV. LITIG. 137, 152-54 (1994).

¹⁷⁹ Tidmarsh, *supra* note 29, at 559.

decades would effectively deal with cost and delay issues.¹⁸⁰ 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 Easterbook'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."¹⁸¹

Twombly represents access-based reform. It operates from the premise that if the pretrial scheme can't control the cost of cases once they get to discovery, then the only way to control cost is to stop them 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 at all. Rather, I take the Supreme Court's meaning to be that case management does not adequately protect defendants from groundless claims. 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.¹⁸² 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 supervision of discovery should

¹⁸⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007). See Bone, *Regulation of Court Access*, *supra* note 94, 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).

¹⁸¹ *Twombly*, 550 U.S. at 559 (citing Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 638 (1989)). The *Twombly* Court's reliance on Judge Easterbrook's article has been criticized. See Burbank, *supra* note 77, at 559 n.108. So too has Judge Easterbrook's article. See Carrington, *supra* note 97, at 27.

¹⁸² *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting).

always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests.”¹⁸³

The IAALS is one of the groups urging structural reform to control the cost of discovery. It advocates fact-based pleading.¹⁸⁴ The stated purpose of this proposed reform is cost control. As explained in the Final Report issued jointly by the IAALS and the ACTL, “[o]ne 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 defense.”¹⁸⁵ 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.¹⁸⁶

The IAALS and the ACTL have taken pains lately to distance themselves from the plausibility test of *Twombly* and *Ashcroft v. Iqbal*¹⁸⁷ 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 a critical distinction, and it is one that I have taken care to recognize in my public work and in private correspondence with the IAALS.¹⁸⁸ At a theoretical level, it ultimately suggests the concept of de-coupling the pleading requirements of Rule 8 from the dismissal standard of Rule 12. In other words, it raises

¹⁸³ *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987).

¹⁸⁴ IAALS PILOT PROJECT RULES, *supra* note 61, Rule 2, 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. . . .”); ACTL/IAALS FINAL REPORT, *supra* note 45, at 5.

¹⁸⁵ ACTL/IAALS FINAL REPORT, *supra* note 45, at 5.

¹⁸⁶ See REPORT FROM THE TASK FORCE ON DISCOVERY AND CIVIL JUSTICE OF THE AMERICAN COLLEGE OF TRIAL LAWYERS AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM TO THE 2010 CIVIL LITIGATION CONFERENCE AT DUKE UNIVERSITY LAW SCHOOL 4-7 (March 26, 2010). See also Rebecca Love Kourlis et al., *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.”).

¹⁸⁷ 129 S. Ct. 1937 (2009).

¹⁸⁸ See *Procedure a la Carte*, *supra* note 79. The private email correspondence is on file with the author.

the possibility that one might require fact-based pleading for case management purposes but still test the sufficiency of pleadings against some lesser metric.¹⁸⁹ That notion is, in many ways, akin to revitalizing Rule 12(e), albeit for case-management purposes rather than for purposes of testing the pleadings.¹⁹⁰ And there may yet be other ways of using “pleadings” to generate valuable case-management inputs without tying them to sufficiency standards or other docket gate-keeping devices.

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 here is that committees composed of lawyers from all sides of the bar, academics, judges, or other interested persons could, for any particular type of case, develop a protocol setting forth non-binding standards regarding discovery, motion practice, scheduling, or other topics. To give one example, a protocol for employment discrimination cases, crafted jointly by both plaintiffs’ and defense lawyers, could address items like what the expected parameters of discovery would be, how long it should take, and what types or sources of information would normally not be inquired into in discovery. These protocols would not be binding unless a judge incorporated them into a case management order. Their value, rather, would be in setting benchmarks that would guide less-experienced practitioners, rein in sometimes unrealistic or counterproductive client

¹⁸⁹ 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 indicate that a party may plead facts on information and belief. See IAALS PILOT PROJECT RULES, *supra* note 61, at 3. 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 pre-complaint discovery. *Id.* But Pilot Project Rule 3.1(a) 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 pre-complaint 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.

¹⁹⁰ 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 MINUTES, CIVIL RULES ADVISORY COMMITTEE 22-24 (September 7-8, 2006), available at <http://www.uscourts.gov/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*.

expectations,¹⁹¹ and help inform judges about how to employ their custom-tailoring tools like the proportionality limits under Rule 26(b)(2).

The idea of subject-specific, lawyer-developed protocols is worth a close look. It was raised at the January 2009 meeting of the Standing Committee on Rules of Practice and Procedure.¹⁹² Professor Subrin raises the issue in his most recent critique of the trans-substantive rules, suggesting them (in conjunction with a “Simple Track”) as a way of providing more detailed norms and guidance than the current rules provide.¹⁹³ The IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES also suggest the development of subject-specific “operational protocols,” though its proposal may entail building the protocols into a rule-based differentiated case management structure rather than having them serve as non-binding guideposts.¹⁹⁴

Structural reforms like changes to the notice-pleading-and-liberal-discovery model 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 scheme in place but to change how judges and lawyers use it. Professor Rowe, himself a former member of the Advisory Committee, has observed that the case management model will inevitably struggle to control cost if the lawyers continue to act like spoiled children such that the judge must provide the

¹⁹¹ 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. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MINUTES OF MEETING OF JANUARY 12-13, 2009, at 32. 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.

¹⁹² *Id.* at 36-37.

¹⁹³ See Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 404-05.

¹⁹⁴ See IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 7.

equivalent of constant adult supervision.¹⁹⁵ Perhaps this suggests that what we need is not new rules but better play.

In July 2008, THE SEDONA CONFERENCE released *The Cooperation Proclamation*, launching a campaign to promote cooperative, non-adversarial discovery.¹⁹⁶ Last fall, THE SEDONA CONFERENCE followed up with *The Case for Cooperation*.¹⁹⁷ 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.¹⁹⁸ Perhaps more critically, *The Case for Cooperation* explores the *benefits* of cooperation for the lawyers and *their clients*.¹⁹⁹ Too often, lawyers simply default to battle mode in discovery, without even asking what they are fighting over, why they are fighting, or whether it is in their clients' best interests to fight over that particular item.²⁰⁰

Getting lawyers to remember to abide by their rules-based and ethical duties will surely help to control cost in discovery. But *real* culture change will come from getting lawyers and clients to appreciate that cooperation can, at times, be the better litigation strategy. *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

¹⁹⁵ Rowe, *supra* note 15, at 213.

¹⁹⁶ THE SEDONA CONFERENCE, *The Cooperation Proclamation*, 10 SEDONA CONF. J. 331 (2009 Supp.).

¹⁹⁷ THE SEDONA CONFERENCE, *The Case for Cooperation*, 10 SEDONA CONF. J. 339 (2009 Supp.).

¹⁹⁸ *Id.* at 345-54. See also Gensler, *Bull's-Eye View*, *supra* note 19, at 365-69 (discussing ways in which the Civil Rules impose duties that can be characterized as duties of cooperation).

¹⁹⁹ THE SEDONA CONFERENCE, *supra* note 197, at 356-62.

²⁰⁰ Gensler, *E-volving Duties*, *supra* note 19, at 555-56.

selectively.²⁰¹ Lawyers repeatedly say that they would prefer “rifle shot” discovery to discovery by “carpet-bombing.” 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.”²⁰²

The Cooperation Proclamation views cooperation as a necessary adjunct to the case management model.²⁰³ 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,²⁰⁴ there does not appear to be any serious push to move to a civil law inquisitorial system. *Lawyers* certainly 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-discovery amendments to find expression of the sense that judges alone cannot manage all of the problems posed by e-discovery.²⁰⁵

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 “scorpions in the bottle” can find ways to cooperate with each other and the judge.²⁰⁶ 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

²⁰¹ See Gensler, *Bull's-Eye View*, *supra* note 19, at 370-72.

²⁰² *Id.* at 372.

²⁰³ The IAALS also endorses cooperation as a means of discovery cost control. See IAALS CIVIL CASEFLOW MANAGEMENT GUIDELINES, *supra* note 61, at 14 (“Cooperation between counsel can greatly reduce the cost and time associated with discovery.”).

²⁰⁴ See, e.g., John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

²⁰⁵ See Gensler, *E-volving Duties*, *supra* note 19, at 535.

²⁰⁶ See Rowe, *supra* note 15, at 213.

zealous advocates, and that they are already capturing some of the benefits of cooperation.²⁰⁷ Cooperation skeptics, however, would argue that the cooperative ideal is unrealistic because lawyers and clients will continue to view it to be to their advantage to demand everything and produce little.²⁰⁸ 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 "scorpions in the bottle." 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 III considered proposals to have multiple sets of rules based on the size of the case, either in the form of a tracking system with multiple tracks or in creating a set of simplified rules for simple cases. In this section, I assume that the system will continue to be trans-substantive and uniform – i.e., that there will continue to be one set of rules for all cases. The question 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 biggest 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,” that means that judges must “manage down” in cases that are not big. If the rules are written for “small cases,” that means that judges must “manage up” in all of the “not small” cases. If the rules are written for the middle range of cases, then judges might either manage up or manage down depending on the circumstances.

²⁰⁷ See Lee & Willging, *Case-Based Survey Preliminary Report*, *supra* note 42, at 31, 63; ABA SURVEY, *supra* note 43, at 152.

²⁰⁸ See Stancil, *supra* note 176, at 99.

Within the rulemaking community, there is probably a general sense that the Civil Rules are targeted for the middle range of cases.²⁰⁹ 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.²¹⁰ 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.²¹¹ Here too, the court can adjust upwards or downwards.²¹² That also might be seen as seeking to chart a middle course.²¹³

But not everyone would agree that the Civil Rules have in fact hit the center. Professor Subrin, for example, has hypothesized that perhaps 5-15 % of civil cases are complex enough to warrant active judicial case management.²¹⁴ 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.²¹⁵ In those cases where

²⁰⁹ See Cooper, *supra* note 117, at 1800.

²¹⁰ FED. R. CIV. P. 26(b)(1) & advisory committee notes (2000).

²¹¹ FED. R. CIV. P. 30(a)(2)(A)(i) & advisory committee notes (1993); FED. R. CIV. P. 33(a)(1) & advisory committee notes (1993).

²¹² FED. R. CIV. P. 26(b)(2); FED. R. CIV. P. 30(a)(2); FED. R. CIV. P. 33(a)(1).

²¹³ The suggestion has been oft-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 court and showing good cause upended the balance. See FED. R. CIV. P. 34 advisory committee's note (1970).

²¹⁴ See Subrin, *Reflections on the Twin Dreams*, *supra* note 137, at 177.

²¹⁵ See *id.* See also Subrin, *The Limitations of Transsubstantive Procedure*, *supra* note 72, at 398-404; Subrin, *The Case for Selective Substance-Specific Procedure*, *supra* note 55, at 45-46.

active case management is needed, the court could move the case into a “complex rules” mode.²¹⁶

The IAALS PILOT PROJECT RULES 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.²¹⁷ Unlike Professor Subrin’s proposal, the PILOT PROJECT RULES still call for active case management.²¹⁸ 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 Federal Rules as establishing the “notion that parties are entitled to discovery all facts, without limit, unless and until a court says otherwise” and that, therefore, “[i]t is the purpose of these [Rules] that the default be changed.”²¹⁹

Implicit (if not explicit) in the Subrin and the IAALS proposals is the idea that, whether intended as such or not, the Federal Rules are in fact designed for the most complex cases. It is the idea that not only are the Federal Rules “one size,” but that they are “Cadillac” size. And in providing only “Cadillac” size rules for all cases, the Federal 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 judge manages the case down to its appropriate size, an occurrence which critics say rarely happens. The remedy, then, 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 over where

²¹⁶ See Subrin, *Reflections on the Twin Dreams*, *supra* note 137, at 177.

²¹⁷ IAALS PILOT PROJECT RULES, *supra* note 161.

²¹⁸ *Id.* at 5-7 (Rule 8 and Rule 9).

²¹⁹ *Id.* at 2 (Comment to Rule 1.2).

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 views discovery as having the defining characteristics of a gas – i.e., 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.

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.²²⁰ What may be needed, though, is empirical proof that discovery actually does exhibit the physical properties of a gas. 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 who were motivated by strategic gains would continue to seek those gains. Thus, we might simply end up trading “motions to limit” for “motions to enlarge.” That suggests that what we need most 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 whether the current Civil Rules hit that target.²²¹

²²⁰ 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 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.

²²¹ 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 Federal Rules was more or less right given the characteristics of the case. *See Lee & Willging, Case-Based Survey Preliminary Report, supra* note 42, at 27-28. Also, survey respondents generally thought that the Civil Rules had about the right amount of case management. *Id.* at 67-68. 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.

III. 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.

For some, though, case management is a cure worse than the disease. Critics lament the role that case management has played in the loss of trials and the shrinking pool of trial lawyers. They express concern about how case management decisions are opaque, standardless, and non-reviewable, 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 where they lack sufficient data, leaving them at risk of substituting their own biases. For others, case management is an important part of the puzzle but insufficient by itself. They urge that the case management scheme be joined to other types of reforms ranging from significant alterations to the pleading scheme to efforts to change 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 such a system necessarily must give to trial judges in order for it to work? Would we be better off with multiple sets of rules, perhaps for different subjects or perhaps 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 say, 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.