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THE MANAGERIAL JUDGE GOES TO TRIAL

Elizabeth G. Thornburg *

I. INTRODUCTION

Scholars have spent a lot of time, and rightly so, discussing the phenomenon of the managerial judge.¹ We worry that trial court judges have transformed themselves from people who apply law to facts and rule on legal issues to people who manage lawsuits. Judges use gigantic discretion during the pretrial period to shape pleadings, schedule and limit disclosure and discovery, require alternative dispute resolution (“ADR”), encourage settlement, and otherwise sculpt the lawsuit. Equity, we fear, has run amuck in the pretrial phase, leaving us without meaningful or consistent limits.² Implicit in some of this concern is a belief that if the focus of litigation shifted back to trial, we would be back to a rule-driven regime where discretion is constrained and judges judge. This article examines that belief, and concludes that the opposite is true: discretion permeates the world of trials, the philosophy underlying managerial judging has expanded into the trial

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1. See, e.g., E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

2. See, e.g., Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 975–91 (1987).

phase,³ and trial-phase managerial decisions are just as resistant to appellate review as pretrial ones.

The procedural rules that govern the actual trial do almost nothing to guide or constrain judicial discretion. There are rules about juries, evidence, and jury instructions, but in substance and application most are almost wholly discretionary. Boiled down to the mandatory elements, the rules require that if a jury is requested in a timely manner, there will be a jury of six to twelve people who must reach a unanimous decision.⁴ There will be some kind of evidence,⁵ mostly in open court.⁶ If there is a jury, the judge will give it some kind of charge, requesting some kind of verdict.⁷ The parties must be treated in a way that is not facially unequal.⁸ But that is about it.

There is so much discretion in the federal rules that beyond these extremely basic limits, a judge can take a wide range of actions without being reversed. From the immediate pretrial period

3. See FED. R. CIV. P. 16(c)(2), (e); JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 77-90 (2001) [hereinafter CLMM], available at [http://www.fjc.gov/public/pdf.nsf/lookup/civlitig01.pdf/\\$file/civlitig01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/civlitig01.pdf/$file/civlitig01.pdf); Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 744 (1989) ("The second and more interesting aspect of case management is the impact it has had on the conduct of the trial itself."). Rule 16 was amended in 1993 to authorize and facilitate the migration of management into the trial itself. FED. R. CIV. P. 16 (1993 amend.). As the Advisory Committee noted,

The primary purposes of the changes in subdivision (c) are to call attention to the opportunities for structuring of trial under Rules 42, 50, and 52 and to eliminate questions that have occasionally been raised regarding the authority of the court to make appropriate orders designed either to facilitate settlement or to provide for an efficient and economical trial. The prefatory language of this subdivision is revised to clarify the court's power to enter appropriate orders at a conference notwithstanding the objection of a party.

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

4. U.S. CONST. amend. VII; FED. R. CIV. P. 38 (stating timing of jury demand); FED. R. CIV. P. 48 (stating number and unanimity requirements).

5. See Marcus, *supra* note 3, at 736 ("[U]nder the Federal Rules it seems to have been assumed that the mode of trial . . . would include opening statements, live testimony of witnesses, and closing arguments."). For a discussion of the discretion inherent in the Federal Rules of Evidence, see generally Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989), and Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U. L. REV. 1097 (1985).

6. See FED. R. CIV. P. 43 (stating rules for taking testimony).

7. See FED. R. CIV. P. 49 (stating procedures for jury verdicts).

8. See *Alston v. West*, 340 F.2d 856, 858 (7th Cir. 1965) (noting that in the context of time limits placed on counsel's arguments, a trial judge must "treat [] both sides substantially alike" and "not give one side a preference or advantage over the other").

through the charge to the jury, the court may schedule the trial;⁹ shape and order the proceedings;¹⁰ construct a trial plan;¹¹ influence the selection of the jury;¹² contract or expand the scope of admissible evidence and control its format;¹³ and limit the time for trial in various ways.¹⁴ The judge also enjoys enormous leeway over the end of the process, including the length and timing of closing argument,¹⁵ the format of the charge to the jury,¹⁶ the format of the jury's verdict,¹⁷ and the power to grant a mistrial or new trial.¹⁸ With very few exceptions, these decisions are governed by rules with little inherent content, and those rules can be deployed in the service of judicial management.

The benefit of such extensive discretion is the power to perfectly tailor the structure of the trial to the needs of a particular case. Ideally, both before and during trial, managerial judges will use their intelligence in light of their experience to rule wisely and well.¹⁹ But managerial judging is not an absolute good and its downside can be significant. The managerial side of these rules requires a balance of perceived importance and probable cost. A judge with a conscious or unconscious bias can string together a

9. FED. R. CIV. P. 40 ("Each court must provide by rule for scheduling trials."). The discretion continues in the grant or denial of continuances. 8 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 40.02[5] (3d ed. 2009) ("A district court's ruling on a motion for continuance will not ordinarily be disturbed . . ."); *see also* *Martel v. County of Los Angeles*, 56 F.3d 993, 995 (9th Cir. 1995) (noting that "[e]ven if the district court had abused its discretion, such an error is not reversible absent the clearest showing of actual and substantial prejudice").

10. *See, e.g.*, FED. R. CIV. P. 16 (governing pretrial conferences and scheduling); FED. R. CIV. P. 42 (governing consolidation and separate trials); FED. R. CIV. P. 50 (governing judges' ability to grant motions for judgment as a matter of law); FED. R. CIV. P. 52 (governing findings and conclusions by court).

11. FED. R. CIV. P. 16(e).

12. *See* FED. R. CIV. P. 47; *see also* text accompanying *supra* note 4.

13. Marcus, *supra* note 3, at 744–45; Mengler, *supra* note 5, at 414–15; *see, e.g.*, *Saverson v. Levitt*, 162 F.R.D. 407, 407, 410 (D.D.C. 1995).

14. FED. R. CIV. P. 16(c)(2). Among other things, the judge may "order[] the presentation of evidence early in the trial on a[n] issue that might . . . be the basis for judgment as a matter of law" and "establish[] a reasonable limit on the time allowed to present evidence." FED. R. CIV. P. 16(c)(2)(N)–(O).

15. *See infra* notes 119–26 and accompanying text.

16. FED. R. CIV. P. 51.

17. FED. R. CIV. P. 49.

18. FED. R. CIV. P. 59.

19. *Cf.* 3 MOORE ET AL., *supra* note 9, ¶ 16.03 (explaining the federal rules' contemplation of judges' "dynamic, active inducement in the pretrial process" in order to ensure "fairness and [] efficiency [at] all stages of civil litigation"). Moore's chapter on case management under Rule 16 was written by influential U.S. Magistrate Judge Wayne D. Brazil. *Id.*

set of procedural rulings that makes it much more difficult to prove or defend certain cases or types of cases. That judge can also cause dramatic shifts in settlement leverage through managerial orders. Even a judge aiming only at efficiency can “manage” in a way that leads to a result that is less reliable in its finding of facts or its application of law to fact.²⁰ Any significant effects on trials can have important consequences, since the few cases that actually go to trial form a body of outcomes that shape everything from settlement values to the development of precedent.²¹

As Judge Patrick Higginbotham, one-time Chair of the Advisory Committee on the Federal Rules of Civil Procedure, emphasized,

We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.²²

Yet an over-managed trial may prevent that trial from serving its normative and educational function.

Actual trials of civil cases are increasingly rare. As Marc Galanter observed,

In 1962, there were 5,802 civil trials in the federal district courts, making up 11.5 percent of all terminations. In 2004, when there were five times as many cases filed, there were only 3,951 trials, making up 1.7 percent of terminations.

Over this forty-two year period the total number of civil cases terminated rose 400 percent while the number of trials fell 32 percent.²³

This might make the issue of managerial trials seem insignificant—it affects only a handful of cases. However, such a conclusion understates the impact of trial management in at least two

20. Cf. Marcus, *supra* note 3, at 767–69 (discussing judges’ use of the procedural technique of trial subdivision and its potential effect on the legal merits of trials).

21. See Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 26–27 (2004).

22. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1423 (2002).

23. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 7–8 (2006) (footnotes omitted).

ways. First, orders entered in the immediate pretrial period that structure the trial are designed, in part, to create settlement pressure, and the tactic often works.²⁴ In that sense, the “management” of trials exacerbates the “vanishing trial” phenomenon. Second, the small number of trials makes the quality and transparency of those that remain extremely important. Cases that settle do so “in the shadow of the law,” and so the outcomes of cases that are tried influence the results of a larger number of cases that are not.²⁵ If judicial management increases settlements and skews outcomes, it affects both the strength of the signal and the message it sends.²⁶

This article explores the ways in which the managerial focus of judges, born in the pretrial stage, has expanded into the actual trial of cases. Part II introduces the theory of the managerial judge and its application to the pretrial phase of litigation. It identifies the motivations behind judicial management as well as the management movement’s underlying assumptions about the comparative roles of judges and lawyers. This section also outlines the scholarly critique of judicial management.

Part III examines the role that discretion plays at the trial phase of litigation. It contends that any nostalgic vision of the trial as the place where judges play a constrained and passive role bears little resemblance to the work of the modern federal trial judge. Instead, the same forces that cause judges to seek efficiency and settlement before trial also cause them to “manage” the actual trial in search of time savings and settled outcomes. This should not be surprising—the judge who exercises detailed hands-on management of a case before trial is unlikely to revert to a wallflower if the case goes to trial—yet the mechanisms and effect of this trial management have not previously been explored.

24. See Rex K. Linder, *What Are the New Rules?*, 61 DEF. COUNS. J. 186, 191 (1994) (explaining that the court has the power to enter orders designed to “facilitate settlement”).

25. See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996) (noting, however, that since the cases that are tried are not typical, this reliance may be misplaced); see also Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1349 (1994) (explaining the relationship between cases tried and cases settled, while noting that the relationship does not imply either method has a greater value as a means of adjudication).

26. Galanter & Cahill, *supra* note 25, at 1349 (“In a forum where most cases settle, legal signals may lose clarity.”).

Part IV considers whether the scholarly critique of pretrial management also applies to management in the trial phase. While the trial process is more transparent and immediately appealable than pretrial decisions, this article argues that trial management is just as ad hoc, just as affected by individual judges' experience and biases, and just as able to grant strategic advantages and disadvantages as its pretrial counterpart. In addition, trial-stage management can interfere with another process value not implicated in pretrial management: the limited, truncated trial created by the managerial orders disrupts the process value of litigation to the parties, the importance of which is well documented in the empirical literature.²⁷ Further, recent empirical research indicating that subtle biases find their way into judicial decision-making, coupled with the politicization of the judicial selection process, make the existence of discretion unguided by standards more worrisome.

Nor does appeal add meaningful regulation that could guide trial judges in their use of managerial techniques. The abuse of discretion standard of review, coupled with the harmless error rule, protect trial-stage management from reversal. The rules themselves do not provide a framework for evaluating trial judges' managerial orders, and the deferential standard of review renders the rules almost vacuous in all but the most egregious cases.

Part V compares pretrial and trial management in terms of their susceptibility to reform. Although in some ways trial management could be guided with less disruption than pretrial management, this article concludes that the adoption of such measures is politically unlikely. In the end, for both pretrial and trial managerial activities, the judiciary's own internal standards will remain the most powerful arbiter of management decisions.

This article concludes by looking at the big picture—what impact do managerial orders have on distributive and procedural justice? It argues that management's myopic focus on speed, inherent lack of standards, inconsistent application, and marked ability to skew the merits threaten important procedural values. While efficiency is important, it is only one piece of the due process calculus. As Rule 1 reminds us, the system should be ad-

27. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 1-6 (1988).

ministered to secure the “just” administration of disputes.²⁸ Consistency, transparency, party participation, and unbiased decision makers are key elements of a just system, and all can be undermined by extensive judicial management. Uncritical enthusiasm for managerial judging needs to be replaced with a more measured and thoughtful approach, so that the competing needs of the court system can return to balance.

II. THE THEORY OF MANAGERIAL JUDGING

The phrase “managerial judges” was coined by Judith Resnik in her classic 1982 article,²⁹ and her terminology has become a standard part of civil procedure vocabulary. She uses it to describe a judge’s hands-on supervision of cases from the outset, using various procedural tools to speed the process of dispute resolution and encourage settlement. Resnik described the evolution of managerial judging like this:

As work load pressures grew, reformers in the 1960’s and 1970’s shifted their attention from procedural to administrative problems. Social scientists and popular writers, investigating trial courts for the first time, described growing backlogs of pending cases and “lazy” judges devoting little time to their work. Commentators, alarmed by delays and the absence of judicial accountability, proclaimed a “crisis in the courts.”

Many saw systems management as the solution. Federal judges met to design procedures for case allocation and to analyze methods of expediting case disposition. Congress created the Federal Judicial Center, which began to train newly appointed trial judges in techniques of docket management. . . . [S]ome district courts promulgated local rules that obliged litigants to submit pretrial plans, to conform to judicial timetables for trial preparation, and to seek permission to engage in extensive discovery.³⁰

The business of managerial judging is accomplished not by applying the law, but by using the judge’s own beliefs about the techniques best suited to lead a case to a quick and efficient end. While it began as a way to handle the “protracted case,” pretrial management expanded to become the norm for ordinary cases.³¹

28. FED. R. CIV. P. 1 (“[These rules] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

29. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371–72 & n.4 (2001) (citing Resnik, *supra* note 1).

30. Resnik, *supra* note 1, at 397–99 (footnotes omitted).

31. JUDICIAL CONFERENCE STUDY GROUP ON PROCEDURE IN PROTRACTED LITIGATION,

Since the 1980s, amendments to Rule 16 of the Federal Rules of Civil Procedure ("Rule 16") have not only blessed judicial management, but also made judicial management a requirement in almost every case. The Advisory Committee's Notes to the 1983 amendments proclaim that

[e]mpirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.³²

The 1993 amendments made explicit the court's power to use "various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation."³³ Settlement is preferred to adjudication both because it is faster and because of the belief that a consensual outcome is preferable to a litigated one.³⁴

With efficiency as the system's predominant value, other assumptions follow. First, as Resnik notes, the quantity of judicial activity—which is measured—becomes more important than the quality of that activity, a much more slippery concept.³⁵ Second, perhaps to reassure us about quality, pro-management writers question whether more process even leads to better outcomes.³⁶ Or, in a less drastic version, they argue that neither the litigants nor society can afford to provide full procedural treatment of every dispute.³⁷ Third, underlying all of this is the assumption

HANDBOOK FOR PROTRACTED CASES, 25 F.R.D. 351, 359 (1960) ("Let it be emphasized this is not the ordinary litigation; our subject is rare in number, the truly complicated, a few hundred amid the tens of thousands of cases on federal court calendars."); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 167 (1997).

32. FED. R. CIV. P. 16 advisory committee's note (1983 amend.) (citing STEVEN FLANDERS, FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17 (1977)). Resnik questioned the conclusion of Flanders and other management proponents. Resnik, *supra* note 1, at 416–24. Flanders wrote a spirited response to *Managerial Judges*. See Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984).

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

34. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 537–38 (1986).

35. Resnik, *supra* note 1, at 421–22.

36. Cf. Elliott, *supra* note 1, at 319–20 (discussing managerial judging proponents' view that discovery sanctions added in 1983 "impos[ed] an additional layer of procedural resources that [ould] be used by lawyers [merely] for tactical purposes").

37. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*,

that the lawyers cannot be trusted to efficiently manage their own cases.³⁸ A combination of self-interest (hourly billing), risk aversion (limited discovery might miss key evidence), strategic actions (promoting better settlement by increasing the opponent's cost), and actual benefit from delay (for the party who profits from the status quo or loss of evidence) is said to lead lawyers to over-work and delay cases in their own and their clients' interests.³⁹ Only the judge, if one buys this argument, is in a position to make decisions in the interest of the lawyers' clients, taxpayers, and the other users of the court system.⁴⁰ Thus, through imposition of costs or actual numerical limits, managerial judges act to restrict the lawyer's options from the full menu of possibilities provided by the Federal Rules of Civil Procedure; they put litigation on a diet.

Academics questioned pretrial managerial judging both empirically and normatively.⁴¹ The normative critique is the focus of this article. Resnik and others argued that managerial judging not only lacks a basis in rules but also is not even guided by

94 YALE L.J. 1643, 1644 (1985); see also Elliott, *supra* note 1, at 321 ("Nourishing the fiction that justice is a pearl beyond price has its own price." (footnote omitted)). Resnik summarizes the critics' attitude:

If outcomes after trial or other forms of adjudication cannot, systematically and in the aggregate, be demonstrated (or at least felt) to be better than outcomes produced with little or no process, if attorney misbehavior and incompetence are widespread, if the adversarial model is applied in settings which render it farcical, why insist upon formal procedure?

Resnik, *supra* note 34, at 529.

38. Rhetorically, the focus on criticizing *lawyers* rather than *clients* is a shrewd move. Greedy, ineffective, or expensive lawyers are culturally an easy target. See STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 38–39 (1995); MARC S. GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* 3–5 (2005). However, it is ultimately the client's autonomy that is threatened when the judge, rather than the lawyer or client's agent, takes control.

39. See generally Melvin M. Belli, *The Law's Delays: Reforming Unnecessary Delay in Civil Litigation*, 8 J. LEGIS. 16 (1981) (discussing the causes and possible solutions of delays in trial procedure).

40. Elliott, *supra* note 1, at 309 ("Managerial judges believe that the system does not work; that *something* must be done to make it work; and that the only plausible solution to the problem is *ad hoc* procedural activism by *judges*.").

41. See, for example, the RAND evaluation of the impact of the Civil Justice Reform Act's required management techniques. JAMES S. KAKALIK ET AL., RAND INST. FOR CIVIL JUSTICE, *AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* (1996) (finding that early case management was associated with shorter time to disposition and significantly increased attorney work hours and that setting an early trial date—by shortening the time to cutoff of discovery—was the only management tool that had a statistically significant decrease on both time to disposition, and cost of litigation, lawyer satisfaction, or perception of fairness).

standards;⁴² that it is ad hoc and thus varies from case to case;⁴³ that it is often done out of the public view and results in sealed private settlements, making it doubly nontransparent;⁴⁴ that it involves judges more directly in interactions with the parties and reveals party strategy in ways that threaten judicial impartiality;⁴⁵ and that a combination of a deferential standard of review, the harmless error rule, and the final judgment rule make it effectively unreviewable.⁴⁶ Worse, managerial decisions have the ability to affect the outcome of litigation, yet vary depending on the identity and attitudes of the individual judge.⁴⁷

One experiment dramatically demonstrated the very different choices that judges might make in the same case—disturbing but not surprising in a context where decisions are ad hoc and the standard is efficiency. At a conference at Yale Law School in 1985, participating judges were presented with a hypothetical case in which thousands of named plaintiffs, all of whom resided within two miles of a hazardous waste disposal site, sued 152 corporate defendants after an EPA study revealed “the presence of high concentrations of pollutants, including several ‘probabl[e] human carcinogens.’”⁴⁸ Judges’ reactions to this case ranged from a judge who recommended establishing a \$60 million settlement fund (designed to “curb litigation energy” up front) to a judge who, because she believed the case lacked merit, recommended forcing each individual plaintiff to file a separate complaint, pleading his or her claim with particularity, or to face dismissal.⁴⁹ This judge noted that she would “use procedural tools at her disposal to stall the litigation in order to promote settlements.”⁵⁰ As

42. Resnik, *supra* note 34, at 548 (“I am deeply skeptical of the capacity of individual judges to craft rules on a case-by-case basis.”).

43. Elliott, *supra* note 1, at 316–17.

44. See, e.g., Laurie Kratky Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 290, 300 (1999); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUD. OF LEGAL ETHICS 115, 117–22 (1999). Compare Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 501–02 (1991), with David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807, 808 (2003).

45. Resnik, *supra* note 1, at 426–27.

46. Peterson, *supra* note 1, at 77.

47. See Elliott, *supra* note 1, at 314–15; Resnik, *supra* note 1, at 426.

48. Deborah Graham, *ADR Conference Airs Hopes—and Some Doubts*, LEGAL TIMES, Oct. 14, 1985, at A2.

49. *Id.*

50. *Id.*

Yale professor E. Donald Elliott, the organizer of the conference, noted,

[A]t least when judges make *legal* decisions, the parties have an opportunity to marshal arguments based on an established body of principles, judges are required to state reasons to justify their decisions, and appellate review is available. None of these safeguards is available when judges make *managerial* decisions.

It seems beyond serious debate, then, that discretionary managerial decisions may influence the outcome of litigation in ways that are arbitrary because judges act without the procedural safeguards that accompany decisions on the merits.⁵¹

The Federal Courts Study Committee agreed: “Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed.”⁵² Each judge is also free to craft whatever combination of managerial techniques appeal to the judge. “The huge range of practices under Rule 16 among sitting federal judges is one of the more unnerving facts of litigation life that confronts the contemporary lawyer.”⁵³ Judges are fully aware of the extent of their discretion. For example, the federal court system’s *Civil Litigation Management Manual* (“CLMM”) finds authority for management, among other places, in Rule 61 of the Federal Rules of Civil Procedure—the harmless error rule.⁵⁴ Management advocates, then, are very aware that they are operating in ways that the rules may not sanction but that are effectively protected from control by appellate courts.

III. MANAGERIAL JUDGING AT TRIAL

A. *Introducing the Model*

In *Managerial Judges*, Resnik constructed two hypothetical cases to illustrate the implementation of pretrial and post-trial management.⁵⁵ This section of the article will take Resnik’s pretrial example, “Paulson v. Danforth, Ltd.,”⁵⁶ update it, and con-

51. Elliott, *supra* note 1, at 317.

52. I JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMM. 55 (1990) (noting, inter alia, that judges do not need to supply a “reasoned justification”). Volume I of the report is reprinted at 22 CONN. L. REV. 733 (1990).

53. 3 MOORE ET AL., *supra* note 9, ¶ 16.04[1][a].

54. CLMM, *supra* note 3, at 1.

55. Resnik, *supra* note 1, at 386–90.

56. *Id.* at 388–90.

sider how the judge's management might continue into the trial phase of the case. The next section will discuss the rules and case law that provide the judge with authority to manage the case in the ways described.

On July 1, 2008, Sarah Paulson bought a "Nano," a small fuel-efficient car manufactured by Prem Kumar Motors, an Indian company. She bought it from Kumar's dealership in the state of Essex. When driving it at the speed limit on an interstate highway on January 23, 2009, she was rear-ended by another vehicle. The gas tank exploded immediately, and Paulson was badly burned. Her lawyer, Danny Boyle, filed *Paulson v. Kumar Motors* in the United States District Court for the District of Essex. Paulson alleged that Kumar was guilty of negligence and gross negligence in the design of the Nano, that the Nano was defectively designed, and that Kumar failed to warn purchasers about the car's dangerous gas tank design. Paulson sought actual damages of \$750,000 and punitive damages of \$1.5 million. Kumar answered, denying liability and also alleging that any defects in the car were not the cause of Paulson's damages.

After holding an initial pretrial conference, entering a scheduling order, referring the case to mediation, and trying repeatedly but unsuccessfully to convince the parties to settle, Judge Kinser summoned the parties for a final pretrial conference. At the conference Judge Kinser sustained most of Kumar's objections to discovery, finding that the need for the information was outweighed by the expense of production and the commercial sensitivity of the information. After he disposed of the pending motions, Judge Kinser once again held separate conferences with each side in an effort to convince them to settle the case.

When settlement efforts did not succeed, Judge Kinser announced that he had decided to consolidate Paulson's case with five other similar cases against Kumar pending in his court (all of the plaintiffs are Essex citizens) and, further, that he intended to bifurcate the proceedings. In Phase I, the parties will present evidence on the issues of causation; Phase II will try fault (including contributory fault). If the jury findings in the first two phases do not preclude recovery, all eligible plaintiffs will go on to Phase III in which their individual damages will be determined. Finally, in Phase IV, if the jury finds gross negligence in Phase II, the jury will hear further evidence and find an appropriate amount for punitive damages, if any. Because Judge Kinser expects each

phase to move quickly, the same jury will hear all phases of the case, thus removing any potential Seventh Amendment problems. At the end of each phase, the jury will be asked to make findings using a special verdict, in which each component of each issue is decided separately. Although no jury demand was filed in a timely way under Rule 38's guidelines,⁵⁷ Judge Kinser has decided to allow the late-filed request and will submit all appropriate issues to the jury.

Judge Kinser scheduled Phase I to begin in three weeks. He also ordered counsel for all parties to confer and to submit no later than a week before trial an agreed pretrial memorandum and proposed order. The submission was required to include (1) a list of uncontested facts; (2) a list of contested facts; (3) a list of all witnesses (with a summary of anticipated testimony and anticipated time required for direct and cross-examination); (4) a list of all testimony to be presented by deposition, together with the actual text or video to be submitted; (5) a copy of all exhibits to be offered by each party (pre-marked for trial); (6) any objections (other than relevance) to any other party's exhibits, failing which the objections will be waived; (7) all motions in limine and accompanying briefs; (8) briefing on any unusual anticipated trial issues; (9) estimated time required for each phase of the trial; and (10) proposed jury instructions for each phase, preferably agreed but otherwise one from each litigant, annotated with supporting authorities.

When Judge Kinser received the parties' requested pretrial order, he convened a telephone conference. Judge Kinser considered the parties' estimate for the trial of Phase I, and informed them that based on his knowledge of the case, he believed that it could be completed in half of the requested time. He himself would do the voir dire questioning of the jury (the parties may request subjects for questioning), and each side would receive three peremptory strikes (with plaintiffs to exercise theirs jointly). He would also present an opening summary of the issues in the case in lieu of party opening statements (which he directed the parties to jointly prepare for him). Judge Kinser informed the parties that he would not allow any questions about the impact of publicity about a "litigation crisis" or "runaway juries" on the jury panel's attitudes about lawsuits. All direct testimony would be presented

57. FED. R. CIV. P. 38(b).

in a narrative in writing and read to the jury, with only cross- and re-direct examination done live. Any deposition testimony to be presented would be by summary rather than by question and answer. Each side would be limited to one expert witness per topic. Sidebar conferences would be allowed only when absolutely essential, and offers of proof, if needed, would be made by narrative statement after the close of all the evidence. Closing argument would be limited to ten minutes per side. At the end of each day's testimony, each party would produce a lawyer and a client with settlement authority to participate in settlement discussions led by Judge Kinser.⁵⁸ The judge went on to impose limits on the number of witnesses, number of exhibits, and total trial time for each phase (a "shot clock" will measure each party's use of time, and time for evidentiary objections will be counted against the loser), although he assured the parties that he may allow more time if developments showed it to be essential.

OR—maybe pretrial events went this way: Judge Kinser granted the plaintiffs' discovery requests, ordered compliance in one week, and set the trial for a month from the date of the pretrial conference. Looking ahead to the trial, Judge Kinser ordered that Phase I would consider the amount of each plaintiff's actual damages, Kumar's liability for punitive damages, and the multiplier to be used to calculate punitive damages. Phase II would try defendant's fault for negligence and product liability, Phase III would try plaintiff's contributory fault, and Phase IV would try causation. Each phase (unless its results would negate plaintiffs' ability to recover) would be followed by short, but intense, settlement talks. Otherwise, however, Judge Kinser did not impose advance limits on the nature or quality of evidence or the time for trial, and indicated that each phase would utilize the broadest form of jury charge feasible for the issues being tried.

OR—maybe pretrial events happened like this: Judge Kinser, who is not a fan of managerial judging, neither consolidated nor bifurcated the trial. He set a firm trial date for Paulson's case two weeks from the conference, assuring the parties that no continuance would be granted. Other than that, he left trial planning and settlement discussions to the parties and their lawyers.

58. The CLMM encourages judges to suggest settlement discussions during trial. "Raising the issue at that time may help the parties gracefully cut their losses." CLMM, *supra* note 3, at 59.

What gives Judge Kinser the right to enter (or not enter) this wide array of orders? The answer is the federal rules' inherent flexibility, the specific management provisions of Rule 16, and a good deal of encouragement from the federal judicial establishment. The trial of a federal civil lawsuit is shot full of discretion. This discretion predates the serious advent of managerial judging, and it puts the real power over procedural decisions firmly in the hands of the trial courts. When judges became more worried about efficiently disposing of their dockets, those who were so inclined adapted the existing power to allow the kind of intense involvement in trials that they had come to expect in pretrial matters.

B. *The Many Layers of Discretion*

1. Shaping the Trial

A judge's decisions about how to structure the trial of a case come into focus in the period immediately preceding trial. Some of these decisions must take substantive law into account, at least indirectly. Others are more purely administrative in nature. But these decisions are made in a context in which neither the rules nor the case law provides much in the way of governing standards against which the judge's exercise of discretion can be measured.

Some of the most managerial forms of discretion to be used in shaping the trial are enabled by Rule 16.⁵⁹ For example, Rule 16 authorizes the judge to set a trial date;⁶⁰ rule in advance on the admissibility of evidence;⁶¹ avoid "unnecessary" proof and "cumulative" evidence;⁶² limit the use of expert testimony;⁶³ order a separate trial of particular claims or issues;⁶⁴ order the presentation at the beginning of trial of evidence on a potentially dispositive

59. See FED. R. CIV. P. 16. These options for shaping the trial dovetail nicely with Rule 26(a)(3) of the Federal Rules of Civil Procedure, which requires pretrial disclosure of witnesses and exhibits (except for rebuttal evidence) and pretrial objections to the exhibits on all bases other than relevance and bases for exclusion under Rule 403 of the Federal Rules of Evidence. See FED. R. CIV. P. 26(a)(3); FED. R. EVID. 403.

60. FED. R. CIV. P. 16(c)(2)(G).

61. FED. R. CIV. P. 16(c)(2)(C).

62. FED. R. CIV. P. 16(c)(2)(D).

63. *Id.*

64. FED. R. CIV. P. 16(c)(2)(M).

issue;⁶⁵ establish a "reasonable" limit on the amount of time to present evidence;⁶⁶ and formulate a trial plan.⁶⁷

In deciding whether to separate or join issues for trial, the court can combine its Rule 16 management powers with the discretion given by other procedure rules to sever claims, order separate trials, and consolidate claims.⁶⁸ The court may also schedule a unitary trial, but make decisions that govern the order in which information will be presented to the jury.⁶⁹

These final pretrial orders have managerial goals in two senses: they aim to encourage settlement and, if the case does not settle, to limit issues and shorten the trial itself. The burden of complying with standard pretrial disclosure requirements substantially frontloads the cost of trial preparation and may itself encourage settlement. "Counsel, to relieve themselves of the burden of furnishing this information, settle many of the[ir] cases"⁷⁰ In addition, final pretrial orders can limit the number of witnesses, number of exhibits, number of experts, use of live testimony, and total trial time for each party.⁷¹

65. FED. R. CIV. P. 16(c)(2)(N).

66. See FED. R. CIV. P. 16(c)(2)(D).

67. FED. R. CIV. P. 16(e). A trial plan may be quite specific, including the precise order of proceeding, time limits for each witness, pre-prepared summaries, pre-admitted exhibits, jury instructions, and more:

A detailed trial plan might specify the following matters: The juncture at which the opening statements will be made (a defendant may elect to give some or all of its opening statement after the plaintiff has presented its case in chief) and how much time will be allotted for the opening statements; t]he order in which each witness will testify (except those called solely for impeachment or rebuttal) or each excerpt from a deposition transcript will be read, and the time allotted for each direct and cross-examination; t]he sequence in which the documentary and other exhibits will be introduced, and which witnesses will sponsor which exhibits; w]hen any demonstrations will be performed or site visits made; t]he junctures, if any, at which interim summarizations or arguments may be presented by counsel; t]he order in which closing arguments will be presented and the time allotted for each.

3 MOORE ET AL., *supra* note 9, ¶ 16.77[4][h].

68. See FED. R. CIV. P. 16, 42. For further discussion of the ways in which the consolidation and bifurcation rules can be used to dramatically shape trials, see *infra* notes 182-87 and accompanying text.

69. The Federal Rules of Evidence expressly provide that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of truth" FED. R. EVID. 611(a).

70. Gus J. Solomon, Address Before the Ninth Judicial District Conference: Techniques for Shortening Trials (Aug. 2, 1974), in 65 F.R.D. 485, 488 (1975).

71. See *infra* notes 95-118 and accompanying text.

2. Jury Issues

Absent settlement, the day for trial will arrive. If a party has made a timely request for a jury under Rule 38 of the Federal Rules of Civil Procedure (“Rule 38”), a jury must decide all issues for which the Seventh Amendment requires a jury.⁷² A judge has no discretion there. However, if a party files a belated jury request, Rule 39 of the Federal Rules of Civil Procedure (“Rule 39”) grants the judge discretion to grant or deny that request.⁷³ Rules giving judges discretion to save litigants from their own errors are not unusual. Nor is it unusual that this discretion is likely to be exercised with managerial goals in mind. Although traditionally the discretion was exercised in favor of allowing a jury,⁷⁴ more recent cases see denying a jury trial as a way to save time:

In what appears to be an ever-increasing number of federal courts . . . it has been held that the district court has no discretion to grant a jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default or, as articulated by some courts, unless there are highly exceptional circumstances, or there is a showing of prejudice. . . . Occasionally a court will articulate what is probably in the minds of many district judges as they deny Rule 39(b) motions—that the court’s docket is overcrowded and it typically takes longer to try a case to a jury.⁷⁵

If there will be a jury, the judge has discretion to use anywhere from six to twelve jurors.⁷⁶ Some districts expressly provide for a specific number of jurors in their local rules (although that number varies), while others provide a range, and others (like Rule 48 of the Federal Rules of Civil Procedure) leave the choice entirely to the discretion of the trial judge.⁷⁷ Despite the existence of considerable evidence that the size of a jury makes a difference in

72. FED. R. CIV. P. 38; *see also* *Tull v. United States*, 481 U.S. 412, 417 (1987) (“The Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to Suits at common law.” (internal quotation marks omitted)).

73. FED. R. CIV. P. 39(b).

74. *See, e.g.*, *Swofford v. B&W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964) (stating that a jury trial should be granted absent “strong and compelling reasons to the contrary”).

75. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2334 (3d ed. 2008) (footnotes omitted); *see also* *BCCI Holdings v. Khalil*, 182 F.R.D. 335, 336, 339 (D.D.C. 1998) (refusing to grant late jury request in interests of other cases that would be delayed by longer jury trial).

76. FED. R. CIV. P. 48; *see also* *Colgrove v. Battin*, 413 U.S. 149, 160 (1973) (rejecting challenges to local rule providing for jury of six).

77. 9B WRIGHT & MILLER, *supra* note 75, § 2491 (citing various district court local rules).

the quality and nature of jury deliberations,⁷⁸ it appears that appellate courts have repeatedly rejected the arguments of litigants seeking reversal based on the number of jurors chosen, so long as the number is between six and twelve and is consistent with the local rules.⁷⁹ A 1995 proposal to remove judges' discretion and require twelve-member juries in all federal civil trials was defeated based on opposition from the trial judges who wanted to retain the discretion to choose a lower number.⁸⁰

The trial judge also has tremendous discretion in shaping the selection process. For voir dire, the judge has discretion as to the form and content of questions,⁸¹ and as to who will actually conduct the questioning.⁸² "Ordinarily, . . . the appellate court will decline to find error regardless of what questions the trial court allowed to be asked of the prospective jurors."⁸³ In ruling on challenges for cause, the court's discretion is also expansive, as case law provides few limits. The court of appeals has not provided guidance, adopting a standard of review that is "deferential, but not completely supine."⁸⁴

78. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 30-31 (1993); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1468-88 (1997).

79. See Resnik, *supra* note 31, at 143, n.27. In fact, trial court judges have been affirmed despite deviating from the number prescribed in local rules. *Id.*

80. Resnik, *supra* note 31, at 146 n.33 (citing Bruce D. Brown, *Judges Kill Plan to Require 12 on Jury*, LEGAL TIMES, Sept. 30, 1996, at 12; Henry J. Reske, *Downward Trends: The Verdict of Most States and the Judicial Conference is . . . Smaller Juries Are More Efficient*, A.B.A. J., Dec. 1996, at 24).

81. *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 884 (8th Cir. 2006) ("District courts have broad discretion to determine the scope of voir dire."). The CLMM lists streamlining voir dire procedures as a management technique. CLMM, *supra* note 3, at 86-87.

82. See 9B WRIGHT & MILLER, *supra* note 75, § 2482. As with the number of jurors, district judges successfully opposed a rule amendment that would have given attorneys the right to participate in voir dire questioning. Resnik, *supra* note 31, at 149 n.42. Judges generally believe that court-conducted voir dire saves time: as long ago as 1975, one judge estimated that he could seat a jury in no more than twenty minutes. Solomon, *supra* note 70, at 492.

83. 9B WRIGHT & MILLER, *supra* note 75, § 2482.

84. *Thompson v. Altheimer & Gray*, 248 F.3d 621, 624-25 (7th Cir. 2001) (Posner, J.) (citations omitted); *cf.* *Patton v. Yount*, 467 U.S. 1025, 1038 (1984) (in a habeas corpus case, holding that the trial court's determination of impartiality is a question of credibility and demeanor and entitled to "special deference"). In some circuits, even a decision that the trial court abused its discretion will not lead to reversal if the complaining party was able to use a peremptory challenge to eliminate the undesirable juror, on the theory that the error was harmless. See, e.g., *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1122-23 (10th Cir. 1995). *But see* *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 151, 170 (3d Cir. 1995) (holding that a "per se reversal" was required because the trial judge's refusal to remove

Treatment of peremptory challenges provides for additional leeway. Although the United States Code provides three peremptories per side, the trial judge has great discretion to change the number and allocation in an effort to achieve a fair balance when there are multiple parties.⁸⁵ Furthermore, there is almost no limit on the *method* the court chooses for the parties to exercise their peremptory strikes.⁸⁶

3. Presenting Evidence

Surely a huge majority of civil cases begin the evidence phase by allowing counsel to make opening statements, with the plaintiff going first. Nevertheless, it appears that federal judges have the discretion to eliminate opening statements, to limit their length, and to determine their order and timing.⁸⁷ There is similarly wide discretion as to the order of proceedings,⁸⁸ and, as noted above, judges are now encouraged to identify severable claims or issues that might eliminate the need to try the rest of the case, or that might promote settlement, and hear those issues first.⁸⁹

The Federal Rules of Evidence themselves allow wide discretion in a number of ways. Some questions, such as the materiality inquiry in a relevance issue, are largely guided by substantive law;⁹⁰ the elements of the claims and defenses will determine what information is logically relevant in the sense that it has

two jurors challenged for causes forced the defendant to waste two peremptory strikes).

85. 28 U.S.C. § 1870 (2006); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1219 (2d Cir. 1995), *modified on other grounds*, 85 F.3d 49 (2d Cir. 1996); *Smith v. Pressed Steel Tank Co.*, 66 F.R.D. 429, 436 (E.D. Pa. 1975). A disproportionate allocation of peremptory strikes, however, can lead to reversal. *See Goldstein v. Kelleher*, 728 F.2d 32, 37 (1st Cir. 1984).

86. 9B WRIGHT & MILLER, *supra* note 75, § 2483.

87. *See United States v. Salovitz*, 701 F.2d 17, 20–21 (2d Cir. 1983) (holding that even in criminal cases, “both the granting and timing of opening statements are matters within the discretion of the trial judge”); *Clark Adver. Agency, Inc. v. Tice*, 490 F.2d 834, 836–37 (5th Cir. 1974); *United States v. 5 Cases*, 179 F.2d 519, 522 (2d Cir. 1950); *see also Chambers Practices of Magistrate Judge Joan G. Margolis*, http://www.ctd.uscourts.gov/practiceof_jgm.html (last visited Apr. 1, 2010) (“Magistrate Judge Margolis generally does not allow opening statements She would [rather] read a neutral statement about the case, prepared jointly by counsel.”).

88. *See, e.g.*, FED. R. CIV. P. 16, 42.

89. *See* FED. R. CIV. P. 16(c)(2); *supra* notes 68–69 and accompanying text.

90. *See, e.g.*, Charles W. Collier & Christopher Slobogin, *Terms of Endearment and Articles of Impeachment*, 51 FLA. L. REV. 615, 624 (“It is an axiom of evidence law that materiality depends upon the legal doctrine at issue.”).

“any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁹¹ However, that is not the only determinant of admissibility. Relevant evidence may be excluded if, among other things, the judge thinks that the probative value of the evidence will be substantially outweighed by considerations of “undue delay, waste of time, or needless presentation of cumulative evidence.”⁹² Similarly, Federal Rule of Evidence 611(a) empowers judges to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time. . . .”⁹³ Managerial decisions, then, are again a component of the way in which the judge is urged to exercise discretion.

In a larger sense, most of the evidence rules provide a bit of guidance but leave the trial judge free to make an ad hoc decision that balances probative value and potential prejudice. The trial judge has so much discretion in making many evidence rulings she effectively has the last word.⁹⁴ The same approach has been applied to managerial decisions made in advance.

Nor does the judge have to allow the parties to fully develop all testimony orally.⁹⁵ The judge may order that each witness's direct testimony be given in writing, with only cross- and re-direct examination being done live.⁹⁶ Some judges recommend this requirement only for witnesses whose “direct testimony will involve considerable expository matter but no significant issues of credibility,”⁹⁷ while others recommend it more widely.⁹⁸ The Central District of California specifically provides in its local rules that

91. FED. R. EVID. 401.

92. FED. R. EVID. 403.

93. FED. R. EVID. 611(a); *see also* FED. R. EVID. 102 (“These rules shall be construed to secure . . . [the] elimination of unjustifiable expense and delay . . .”).

94. *See* Mengler, *supra* note 5, at 413; *see also* Waltz, *supra* note 5, at 1120. On appeal, the need to show that an error in admitting or excluding evidence had a substantial impact on the outcome also insulates evidence rulings from reversal. “By its operation, the harmless error rule consequently takes some of the rulelessness out of the Federal Rules.” Mengler, *supra* note 5, at 457.

95. Charles R. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 72 GEO. L.J. 73, 73 (1983).

96. WILLIAM W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* 142-43 (1982).

97. *Id.* at 435; CLMM *supra* note 3, at 387 (Sample Form 48).

98. *See* Richey, *supra* note 95, at 74 (arguing that judges have inherent power to order written testimony).

“[i]n any matter tried to the Court, the judge may order that the direct testimony of a witness be presented by written narrative statement subject to the witness’ cross-examination at the trial.”⁹⁹ It is more common in bench trials, but can be used in jury trials as well.¹⁰⁰ The United States Court of Appeals for the Ninth Circuit has characterized such orders as “a laudable effort to save trial time” and has upheld criminal contempt sanctions against a lawyer who refused to prepare narrative witness statements in advance of trial.¹⁰¹

The judge’s discretion also extends to the number and form of exhibits. The CLMM admonishes judges that “[l]imiting the number of exhibits and shaping those ultimately presented at trial is an important part of structuring an effective trial”¹⁰² This can include limiting the number of exhibits, forcing the lawyers to redact exhibits, and compelling the lawyers to justify—before trial—each exhibit’s “independent utility with regard to specific issues or proofs.”¹⁰³

While written testimony is an indirect way to bring focus and speed to the trial,¹⁰⁴ other trial management tools go at the task directly by creating explicit time limits.¹⁰⁵ Judges are granted the authority to impose time limits by Rule 16, which itself augments the provisions in Rules 403 and 611 of the Federal Rules of Evi-

99. C.D. CAL. R. 43-1, available at <http://www.cacd.uscourts.gov/CACD/LocRules.nsf> (follow “Local Rules” hyperlink; then follow “Chapter I: Local Civil Rules, Integrated with Titles of Federal Rules of Civil Procedure” hyperlink; then follow “F.R.Civ.P.43” hyperlink).

100. See Harry J. Zelf, *Hurry Up and Wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial*, 28 JUDGES’ J. 18, 21 (1989).

101. See *Chapman v. Pac. Tel. & Tel. Co.*, 613 F.2d 193, 194, 197 (9th Cir. 1979); see also *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 133 (9th Cir. 1987) (“[W]e have encouraged attempts by district courts to simplify trials by requiring the parties to submit proposed testimony.”); *Miller v. Los Angeles County Bd. of Educ.*, 799 F.2d 486, 488 (9th Cir. 1986) (same). *But see* *Obrey v. England*, 215 F. App’x. 621, 623 (9th Cir. 2006) (finding an abuse of discretion when trial judge refused to allow live presentation of three witnesses’ testimony). Judges do, however, have to allow for oral supplementation of the written statement and for live cross-examination and re-direct examination of the witnesses. See *Chapman*, 613 F.2d at 197.

102. CLMM, *supra* note 3, at 82.

103. *Id.* at 83. The Manual also suggests using summaries. *Id.* at 86.

104. These techniques may or may not succeed in shortening trial time. Marcus points out that reading a large amount of written material may actually take longer than listening to testimony. See Marcus, *supra* note 3, at 774.

105. Indeed, judges are encouraged to require lawyers to estimate the number of days required for trial as early as the first pretrial conference. CLMM, *supra* note 3, at 21.

dence, encouraging the judge to avoid unnecessary evidence.¹⁰⁶ Both the CLMM and the *Manual for Complex Litigation* recommend setting limits on trial time “[(1)] by limiting the number of witnesses or exhibits to be offered on a particular issue or in the aggregate; [(2)] by controlling the length of examination and cross-examination of particular witnesses; [and (3)] by limiting the total time allowed to each side for all direct and cross-examination”¹⁰⁷

Setting fixed pretrial limits on the quantity of evidence is a fundamentally different kind of decision from the rulings judges make at trial when a litigant objects to the admission of a particular piece of evidence. Both are discretionary, but the timing and rationales vary. In the trial situation, the judge is applying Rule 403 of the Federal Rules of Evidence to evidence as it is offered in context, balancing marginal probative value against marginal costs such as undue delay.¹⁰⁸ The ruling is fact-dependent and must be made quickly at a time when the impact of the evidence is comparatively clear. A pretrial management order, however, sets overall time limits and then requires the attorneys to prioritize their evidence in order to fit within the prescribed limits.¹⁰⁹ The judge’s decision is thus not based on the way in which a specific piece of offered evidence connects to the elements of a claim or defense, or whether the time saving “substantially outweighs” the probative value of that evidence; it is instead based on the judge’s decision that a certain time period is sufficient for the overall trial of the case. On appeal, it is measured only by whether that overall limit imposed was so miserly or so inflexible that it was an abuse of the trial court’s discretion.¹¹⁰

The discretion accorded to management decisions does not fit neatly within the reasons trial judges are normally given significant discretion in evidentiary rulings. The Federal Rules of Evidence grant great discretion to trial judges in order (1) to allow the admission of reliable evidence that would (under the common

106. FED. R. CIV. P. 16(c)(2)(C)–(D).

107. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.64 (2004); see CLMM, *supra* note 3, at 84–85 (suggesting judges should set time limits “in full consultation with counsel”).

108. See FED. R. EVID. 403.

109. See Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 706 (1993).

110. MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081, 1171 (7th Cir. 1983).

law) have been inadmissible for some technical reason but is thought to be reliable and probative; and (2) to allow contextual snap-judgments that defy a simple set of inflexible rules, in a context in which the judge cannot be expected to be perfect.¹¹¹ When trials are managed for speed, though, the discretion is used to exclude rather than include, and reliability is not even an issue. In addition, the ruling is not a snap judgment made on the fly, but one made at leisure before trial, when there is time for deliberate thought and research.

Additional discretion comes into play in actually measuring each party's use of its time once a limit is imposed, and methods vary. Some courts use a stopwatch (more dignified than a basketball-like shot clock mounted on the wall) to intricately allocate the time taken for direct testimony (if live presentation is allowed), cross-examination, objections, arguments on objections, and rulings.¹¹² Others prefer an "hourglass" method that assesses all time against the party calling a witness.¹¹³ Instead of creating an overall limit, some judges instead limit the time for specific components of the trial, "such as the time that counsel may use for direct or cross-examination of specified expert or percipient witnesses, to present specified tangible evidence, to conduct demonstrations, or to make opening statements or closing arguments."¹¹⁴ And while the time limits must be flexible, the decision whether to grant additional time is again in the hands of the trial judge on a case-by-case basis.¹¹⁵ There are no explicit limits on that discretion in the trial or evidence rules, nor has case law ar-

111. The policy favoring the admission of all relevant evidence pervades the Federal Rules of Evidence. Rule 402 states the policy explicitly. FED. R. EVID. 402. While Rule 403 calls for weighing, it implies that weighing should result in exclusion only if the prejudice substantially outweighs the item's probative value. FED. R. EVID. 403; *see also* FED. R. EVID. 801(a) advisory committee's note (noting that in determining whether nonverbal conduct is assertive, "ambiguous and doubtful cases will be resolved . . . in favor of admissibility"). Members of the Advisory Committee also represented to Congress that the Rules favor admissibility. *See, e.g., Rules of Evidence: Hearings Before the S. Comm. on the Judiciary*, 93d Cong. 27 (1974) (testimony of Edward W. Cleary, Reporter, Advisory Comm.); *id.* at 206 (testimony of Albert E. Jenner, Chairman, Advisory Comm.); *Rules of Evidence: Hearings Before the Subcomm. on Reform of Federal Criminal Laws of the H. Comm. on the Judiciary*, 93d Cong. 77 (1973) (statement of Albert E. Jenner, Chairman, Advisory Comm.).

112. Longan, *supra* note 109, at 714.

113. *Id.*

114. 3 MOORE ET AL., *supra* note 9, § 16.77[4][iii]. The CLMM also recommends that the judge consider limiting the number of expert witnesses. CLMM, *supra* note 3, at 82.

115. Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987); *MCI Commc'ns Corp.*, 708 F.2d at 1171; United States v. Reaves, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986).

articulated a standard that does much to guide managerial discretion. For example, the United States Court of Appeals for the Fifth Circuit has held that “[w]hen the manner of the presentation of information to a jury is judicially restricted to the extent that the *information becomes incomprehensible* then the essence of the trial itself has been destroyed.”¹¹⁶ Since any limit that stays on the “comprehensible” side of short is permissible, case law neither contains discussions that helpfully enunciate standards nor gives enough examples of proper and improper management to fill in the blanks.

Bench trials permit even greater management. The CLMM recommends that trial courts consider requiring the parties to submit, in advance, narrative statements of the direct testimony of all witnesses under a party’s control, and also suggests that the judge consider limiting testimony and exhibits, requiring advance submission of briefs, and controlling the order of witnesses (e.g., hearing opposing experts back-to-back).¹¹⁷ One judge suggested to his colleagues an even more aggressive method for limiting testimony:

I hold pretrial conferences in my chambers. I first ask plaintiff’s counsel to name his witnesses and, unless he has already filed written summaries of the witnesses’ testimony, to tell me what he expects each witness will testify to. In Oregon, most lawyers use a full range of discovery, and they usually depose every adverse witness. After plaintiff’s counsel tells me what a witness will testify to, I ask defendant’s counsel if the statement of the witness’ testimony is accurate. He may say, “yes”, or he may say, “I can’t admit the truth of the witness’ statement, but I have no evidence to contradict him. I will admit that if the witness were called, he would so testify.” In either event, if it is a court case, we usually eliminate that witness. Then we take up the testimony of the other witnesses.¹¹⁸

116. *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996) (emphasis added). That test was met in *Sims*, when a combination of limits was in place. Judge McBryde limited a jury trial to only one day, imposed strict time limits for each segment of trial, refused to permit evidence as to uncontested background facts, refused to read stipulated facts to the jury, ordered presentation of witnesses in specific order, and repeatedly limited direct and cross-examination. *Id.* at 848. The appellate court found that the cumulative restrictions were an abuse of discretion, but nevertheless affirmed based on a conclusion that the plaintiff’s claim was so weak that she would have lost even without the limits. *Id.* at 849–50. For more regarding Judge McBryde, who was at that time out of favor with the Fifth Circuit, see *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 54–55 (D.C. Cir. 2001).

117. CLMM, *supra* note 3, at 88–89.

118. Solomon, *supra* note 70, at 489 (emphasis omitted).

And all this is done not at trial, but as a part of the final pretrial conference.

4. Getting a Decision

When the reception of evidence has been completed, the judge also has a great deal of discretion regarding how the case will be decided. It appears that the lawyers must be afforded at least some time for closing argument, but that time may be limited. This principle was well established in the early days of judicial management. For example, one 1965 case upheld a thirty-minute closing argument in a trial that was tried over parts of five days (eight calendar days including a long weekend), saying “a trial judge in the federal judicial system has wide discretion in such matters as length of counsel’s argument as long as he treats both sides substantially alike, and does not give one side a preference or advantage over the other.”¹¹⁹ Although lamenting the frequent interruptions in the trial (noting that it was “not good trial practice”), the appellate court found no abuse of discretion because “we realize that the trial judges in the Northern District of Illinois are extremely busy.”¹²⁰

As between the parties, it is customary for the party with the burden of proof (usually the plaintiff) to proceed first in opening statements and last in closing arguments, but the court also has discretion here. In fact, some authorities indicate that not only is the decision discretionary, but that it is not reviewable at all.¹²¹ In

119. *Alston v. West*, 340 F.2d 856, 857–58 (7th Cir. 1965); see also *Grey v. First Nat'l Bank in Dallas*, 393 F.2d 371, 386 (5th Cir. 1968) (holding that limiting time for closing argument would be reversed only for “egregious abuse of discretion”). The same is true in state courts:

The time allowed counsel for argument is within the sound discretion of the trial court, the exercise of which will not be interfered with by an appellate tribunal in the absence of a clear showing of abuse of discretion Generally, where each side is given a single opportunity of equal length to address the jury, no abuse of discretion is present.

75A AM. JUR. 2D *Trial* § 456 (2007); see also Michael R. Flaherty, Annotation, *Propriety of Trial Court Order Limiting Time for Opening or Closing Argument in Civil Case—State Cases*, 71 A.L.R. 4th 130, 136 (1989) (“It is well settled that the imposition of time limits on the arguments of counsel is within the sound discretion of the trial court . . .”).

120. See *Alston*, 340 F.2d at 858. Even in criminal cases, review of time limits is very deferential. See, e.g., *United States v. Sotelo*, 97 F.3d 782, 794 (5th Cir. 1996) (holding that limiting closing argument to 10 minutes for each defendant in a case covering a six-year period and involving multiple conspiracies, 40 witnesses, 133 exhibits, a twelve-count indictment, and 22 pages of jury instructions was not an abuse of discretion).

121. See *Moreau v. Oppenheim*, 663 F.2d 1300, 1311 (5th Cir. 1981) (citing *Day v.*

cases involving multiple parties, especially if there is some adversity between coparties, the court's discretion is quite broad.¹²² The order of closing argument may be prescribed in the final pretrial order.¹²³

The court also has discretion about the timing of closing argument with relation to the court's charge to the jury. Rule 51 of the Federal Rules of Civil Procedure provides that the court "may instruct the jury at any time before the jury is discharged."¹²⁴ The rule was amended in 1987 specifically for the purpose of giving the court discretion to instruct the jury either before or after argument,¹²⁵ and again in 2003 to explicitly give permission for interim instructions when issues are being separately tried.¹²⁶

The substantive law does guide the content of the court's instruction to the jury, making management decisions a non-issue. However, the substantive law also dictates that the instructions need not be perfect. "No harmful error is committed if the charge viewed as a whole correctly instructs the jury on the law, even though a portion is technically imperfect. A district judge has wide discretion to select his own words and to charge in his own style"¹²⁷

The actual format of jury instructions has long been recognized as completely within the trial court's discretion.¹²⁸ Rule 49 of the Federal Rules of Civil Procedure merely grants permission to use special verdicts or general verdicts with interrogatories, and does not even mention the most common verdict format—the general

Woodworth, 54 U.S. 363, 370 (1851)); JACOB A. STEIN, CLOSING ARGUMENTS: THE ART AND THE LAW § 1:6 (2d ed. 2009)).

122. See Elaine K. Zipp, Annotation, *Order of Closing Argument in Federal Civil Trials*, 53 A.L.R. FED. 900, 903–04 (1981) (discussing courts' discretion in handling rebuttals between co-defendants).

123. See 3 MOORE ET AL., *supra* note 9, § 16.77[4][h].

124. FED. R. CIV. P. 51(b)(3).

125. FED. R. CIV. P. 51 (amended 1987); FED. R. CIV. P. 51 advisory committee's note (1987 amend.).

126. FED. R. CIV. P. 51 (amended 2003); FED. R. CIV. P. 51 advisory committee's note (2003 amend.).

127. *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 262 (5th Cir. 1985) (citing *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 424–26 (5th Cir. 1985); *Andry v. Farrell Lines, Inc.*, 478 F.2d 758, 759 (5th Cir. 1973)).

128. See 9B WRIGHT & MILLER, *supra* note 75, §§ 2506, 2508; see also Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1840–43 (1998).

verdict.¹²⁹ It neither requires any particular format nor provides any guidance as to the internal format of whatever option is chosen.¹³⁰ If the judge chooses a general verdict with special interrogatories, the judge does not need to include all the issues in the case, but instead has discretion to highlight those he chooses.¹³¹ In fact, the judge can make a format decision “for any reason or no reason whatever” without being reversed.¹³²

Jury charge formats, however, could also be employed by a judge seeking to save time.¹³³ For example, even in a case tried in a unitary manner, a judge could identify a single issue or cluster of issues with the potential to dispose of the case, place questions framing those issues at the beginning of the charge, and instruct the jury that certain answers to those questions mean that no further action is required. The judge could also create a potentially shorter deliberation period by conditioning the need to answer the damages issue on a positive finding of liability. Similarly, Rule 51 of the Federal Rules of Civil Procedure’s explicit permission to give the jury interim instructions¹³⁴ reinforces and enables the court’s decision to use separate trials and bifurcation as management tools.

IV. ASSESSING TRIAL-STAGE MANAGEMENT

Critics of judicial management in the pretrial context have charged that while managerial judging may (or may not) result in a saving of judicial time, it raises substantial concerns: (1) it involves judges so intimately in the parties’ information and strategies that it may compromise the judges’ impartiality; (2) it leads to a loss of transparency as more decisions are made off the

129. FED. R. CIV. P. 49.

130. See 9B WRIGHT & MILLER, *supra* note 75, §§ 2506, 2508, 2512.

131. *Id.*

132. *Skidmore v. Baltimore & Ohio R. Co.*, 167 F.2d 54, 67 (2d Cir. 1948). One broad survey of all the issues arising out of charge format concluded that “[o]n almost every issue that has arisen, the appellate courts have told their colleagues of the trial bench only that the decision rests in their sole discretion. . . . The monotonous regularity [of this recitation has] the flavor of a litany pronounced in lieu of a consideration of the issues involved in an appeal.” Robert Dudnik, Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L. J. 483, 518–19 (1965).

133. See CLMM, *supra* note 3, at 84 (proposing seriatim verdicts, general verdicts with interrogatories, and/or special verdicts as ways to manage the jury more efficiently).

134. FED. R. CIV. P. 51(b)(3). The court “may instruct the jury at any time before the jury is discharged.” *Id.*

record or in chambers; (3) management decisions are not guided by meaningful judicial standards, resulting in inconsistent ad hoc rulings; (4) management decisions can redistribute strategic advantages and disadvantages and even affect case outcomes; and (5) there is often no effective appeal of a trial court's management decision.¹³⁵ This part will consider whether these same critiques apply to managerial trials. It will also examine whether trial-stage management introduces additional process concerns by decreasing party autonomy and participation in the trial itself.

A. *Judges in the Trenches*

The traditional adversary-system judge is passive. Rather than injecting himself into the proceeding, he waits for the lawyers to bring a dispute to him. While it is questionable that this purely reactive role was ever the norm,¹³⁶ the managerial judge clearly is—and is intended to be—far more involved. And what distinguishes the judge as manager from the judge as arbiter of disputes is the nature and purpose of that involvement. In the interest of moving a case along more expeditiously, the managerial judge imposes early deadlines, enters orders limiting use of discovery devices and time for pretrial developments, and uses the many tools at his disposal to try to push the parties toward settlement.¹³⁷ This greater involvement imparts more detailed information about the case. The Federal Courts Study Committee found that most judges agreed that the settlement role, in particular, “effectively requires the judge to obtain a detailed knowledge of the parties’ contentions, the facts in dispute, and the legal theories involved.”¹³⁸ For example, the CLMM suggests, as a settlement tool, that a judge require the parties to “submit confidential memoranda outlining the pivotal issues, the critical evidence, and their settlement positions.”¹³⁹

135. See *supra* notes 41–47 and accompanying text.

136. See Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Attentive Dispute Resolution*, 37 RUTGERS L. REV. 253, 254 (1985). “Judges have long engaged in some form of case and calendar management as well as court administration, mediation, regulation of the bar, and other professional activities.” *Id.* at 261.

137. Resnik, *supra* note 1, at 399; see also Elliott, *supra* note 1, at 309.

138. I JUDICIAL CONFERENCE OF THE U.S., *supra* note 52, at 51.

139. CLMM, *supra* note 3, at 61.

In the pretrial context, this greater involvement comes with the risk of judicial bias about the case, the parties, or the lawyers. As Resnik pointed out,

The extensive information that judges receive during pretrial conferences has not been filtered by the rules of evidence. Some of this information is received *ex parte*, a process that deprives the opposing party of the opportunity to contest the validity of information received. Moreover, judges are in close contact with attorneys during the course of management. Such interactions may become occasions for the development of intense feelings—admiration, friendship, or antipathy. Therefore, management becomes a fertile field for the growth of personal bias.¹⁴⁰

This is not the type of bias, however, that generally leads to disqualification or recusal under judicial ethics codes. Unless a judge finds that her involvement in pretrial management means that her “impartiality might reasonably be questioned,” the judge’s awareness of the parties’ contentions or even their evidence is not thought to constitute prohibited bias or “personal knowledge of disputed evidentiary facts.”¹⁴¹

But does the “over-involvement” critique apply to managerial trials as well? Of course it does. Pretrial and trial are actually parts of a continuum, and a detailed trial plan is the place where pretrial bleeds into trial. The judge may have learned much about the case while managing pretrial, and that knowledge is not magically forgotten when the trial begins. In addition, trial management requires a continuation of the kinds of involvement that marked the pretrial period. In fact, trial management compounds the systemic drawbacks of pretrial management, like bias and arbitrary decisions. In order to choose time limits that are fair and efficient, a judge must fully immerse herself in the issues and evidence in the case.¹⁴² Further, a desire to take over jury se-

140. Resnik, *supra* note 1, at 427. Resnik also suggests that the judge may acquire interests of his own that conflict with those of the litigants: “Further, judges with supervisory obligations may gain stakes in the cases they manage. Their prestige may ride on ‘efficient’ management, as calculated by the speed and number of dispositions. Competition and peer pressure may tempt judges to rush litigants because of reasons unrelated to the merits of disputes.” *Id.*

141. CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 3C(1), 36(1)(a) (2009) [hereinafter CODE OF CONDUCT].

142. See Longan, *supra* note 109, at 711. Longan suggests that judges will have acquired expertise in setting trial time limits from their experience setting time limits for discovery and assigning cases to various time “tracks” in managing pretrial proceedings. *Id.* at 712. The Advisory Committee’s Note to Rule 16 suggest that the court should impose time limits “only after receiving appropriate submissions from the parties outlining

lection and opening statements requires extensive knowledge of the parties' evidence and litigation strategies. For these reasons, the final pretrial conference and its associated disclosure requirements will continue the judge's intimate involvement with the parties and lawyers. For example, a judicial order to file narrative summaries of the testimony of all witnesses would reveal information not normally disclosed until each witness testifies at trial. Judicial pressure to agree, at the conference in chambers, that the opposing side's witness is telling the truth, and to expand the scope of undisputed facts, also expands the judge's knowledge and involvement.

There are no structural limits in place to protect against the judge carrying into the trial any bias that may have resulted from earlier contacts. The ethical rules for federal judges actually allow them to engage in settlement activities, including *ex parte* communications.¹⁴³ And while there is considerable sentiment that a judge who has participated closely in encouraging settlement should not preside over a bench trial on the merits, fewer judges doubt that they may continue to act in a trial to a jury.¹⁴⁴

Once the trial has begun, the judge's information about the case (other than continuing involvement in settlement negotiations) seems more likely to come from evidence offered at trial, in a manner consistent with the traditional role of the judge. Even though the judge will continue to make managerial decisions—about issues such as number of jurors, jury selection methods, deviation from time limits, rulings on evidence, and the format and content of the jury charge—few are accompanied by additional disclosures of otherwise private information.

the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination." FED. R. CIV. P. 16 advisory committee's note (1993 amend.).

143. See CODE OF CONDUCT, *supra* note 141, Canon 3A(4)(d) and commentary (authorizing *ex parte* contact with consent of parties and endorsing judges' participation in settlement efforts so long as no party is coerced into surrendering the right to have the dispute resolved by the courts).

144. WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* 84–85, 88 (1985). *But see* John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 589 (2006). To the extent that district judges react to the criticism of their involvement in pretrial management by referring those duties to magistrate judges, the total pool of persons making unreviewable discretionary decisions has expanded.

In summary, trial management that comes in the immediate pretrial period is subject to the same critique as pretrial management when it comes to the judge's exposure to the intimate details of trial planning and continued efforts to encourage settlement. Once the trial begins, on the other hand, additional danger on this account is limited, though the judge's reactions at trial will be affected by all that came before.

B. *Loss of Transparency*

Critics of pretrial management often note that the judge's involvement in the case is more likely to be in chambers, off the record, and less visible than traditional case processing.¹⁴⁵ This is more often the case with settlement-oriented management, from conferences with the judge to court-annexed ADR techniques. Pretrial conferences are also off the public radar, although orders documenting any decisions made at those conferences will generally be filed in the public record; the CLMM recommends that the judge have a transcript made of the final pretrial conference.¹⁴⁶ Settlement conferences, though, will be just as lacking in transparency as those held before trial, and settlement agreements are often unfiled or sealed in the interests of promoting the parties' willingness to settle.¹⁴⁷

It is important to note that there are three facets to the lack of transparency. One is literal unavailability—conversations about the case that are neither made in open court nor filed in the court's records. Another is non-transparency of reasons—a lack of explanation for the basis of a court's decision. Since many managerial orders are case-specific and not based on concrete standards, those orders often provide no reasoned explanation for the decisions: Why eight jurors? Why thirty minutes of opening statement? Why five days of trial? Why written evidence? Why a special verdict?¹⁴⁸ In that latter sense, trial-based case management orders can be as non-transparent as pretrial ones. Third, there is a lack of big-picture transparency for the purpose of eva-

145. Resnik, *supra* note 1, at 378.

146. CLMM, *supra* note 3, at 78. If never transcribed and filed, however, the public will have little access to the information.

147. See Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 1010–29 (1988).

148. See I JUDICIAL CONFERENCE OF THE U.S., *supra* note 52, at 55 (noting that judges do not need to supply a “reasoned justification” for managerial orders).

luating the systemic effects of managerial decisions. Trial court orders setting out management limits, even if they were more informative, are not apt to be published; settled cases will not be appealed; and there are few appellate decisions evaluating specific examples of implemented management techniques (certainly nothing broad-based enough or representative enough to serve as a basis for policy decisions).¹⁴⁹

The trial itself will, in the overwhelming majority of cases, be open to the public.¹⁵⁰ However, despite Rule 43 of the Federal Rules of Civil Procedure's requirement that the testimony of witnesses "be taken in open court,"¹⁵¹ courts have interpreted Rule 611 of the Federal Rules of Evidence's directive to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence"¹⁵² to authorize a requirement that all direct testimony be presented in writing.¹⁵³ This management technique will result in a loss of orality, and a courtroom spectator might easily hear only the live cross-examination rather than a witness's entire testimony.¹⁵⁴ As Marcus has argued,

[T]here should be concern about whether the in-court activities that remain can be understood. If the proceedings are dispositive but cryptic, they could undermine the values protected by the public's right of access. How does the public evaluate, or even follow, a "trial" in which most of the evidence has been delivered in writing in advance?¹⁵⁵

While the written statements will be admitted into evidence, and thus be part of the record, they are not as accessible to the public as live oral testimony.

149. See Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Cleaner Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 49 (1994).

150. See FED. R. CIV. P. 43(a).

151. FED. R. CIV. P. 43(a).

152. FED. R. EVID. 611(a).

153. *Lee-Benner v. Gergely* (*In re Gergely*), 110 F.3d 1448, 1451 (9th Cir. 1997); *Adair v. Sunwest Bank* (*In re Adair*), 965 F.2d 777, 778 (9th Cir. 1992); *Kuntz v. Sea Eagle Diving Adventures Corp.*, 199 F.R.D. 665, 667 (D. Haw. 2001). To avoid the Rule 43 problem, courts will ask the parties to waive the "open court" requirement in the joint pretrial statement. See CLMM, *supra* note 3, at 362–63 (providing sample stipulation in pretrial order).

154. A sample pretrial order appended to the CLMM, for example, requires that the witness be called to authenticate the statement, that the statement be marked and introduced as an exhibit, after which any live cross-examination or re-direct examination will take place. CLMM, *supra* note 3, at 387.

155. Marcus, *supra* note 3, at 779.

Lack of transparency in terms of lack of explanation remains a problem for trial-stage management. Lack of transparency in terms of inaccessible information also occurs during the trial phase, particularly when final pretrial conferences are not transcribed, when written testimony is used, and when in-chambers settlement efforts by the judge continue into the trial phase. Information not offered into evidence in order to comply with time limits is also lost to public view. Greater public access to an actual trial makes the privacy critique less applicable, however, to trial management that occurs in open court during the trial itself, and the fact that a trial has taken place will make the content of the evidence offered a part of the public record.

C. *Inconsistent, Ad Hoc Decision Making*

Trial court judges have a great deal of discretion in making most of their procedural decisions. In some ways, neither the existence of discretion nor the concern for efficiency is unique to decisions that would be labeled specifically “managerial.”¹⁵⁶ For example, the Federal Rules of Civil Procedure require the judge to consider efficiency (sometimes under the rubric of “prejudice”) when making decisions about issues such as joinder of claims and parties,¹⁵⁷ pleading amendments,¹⁵⁸ intervention,¹⁵⁹ scope of discovery,¹⁶⁰ use of discovery devices,¹⁶¹ extra time to respond to a motion for summary judgment,¹⁶² and late-demanded juries.¹⁶³ In fact, the very first rule posits the efficiency issue, as judges are instructed to interpret the rules to achieve “the just, speedy, and inexpensive determination” of cases.¹⁶⁴ Likewise, the Federal

156. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 673–74 (“Because decisions on pretrial motions are likely to evade appellate review, such decisions also have large doses of the uncontrolled discretion that marks ‘management.’ Seen from a more distant historical perspective, virtually all of modern litigation is more ‘managerial’ than was litigation in earlier periods.”).

157. See FED. R. CIV. P. 13, 14, 18, 20.

158. See FED. R. CIV. P. 15.

159. See FED. R. CIV. P. 24(b).

160. See FED. R. CIV. P. 26(b).

161. See FED. R. CIV. P. 29.

162. See FED. R. CIV. P. 56(c).

163. See FED. R. CIV. P. 14, 18, 39(b).

164. FED. R. CIV. P. 1.

Rules of Evidence make the avoidance of prejudice, including prejudice from delay, a pervasive consideration.¹⁶⁵

Yet some commentators agree that there is something qualitatively different about the kinds of decisions that are managerial in nature and the kind of discretion exercised in more traditional rulings.¹⁶⁶ Even other discretionary procedural decisions differ from those designed solely to manage the litigation. Why? The decisions are different because managerial ones are guided not by substantive law but by the judge's "feel" for what the case deserves, because they focus on the court's benefit more than the parties' comparative needs, and because they ask the court to look beyond the particular lawsuit to consider the needs of other users of the court system. Beyond a generalized desire to be more efficient or speedier, these decisions are not limited by the kind of articulated standards that can actually guide the exercise of discretion.

With regard to pretrial management decisions, Resnik observed in her original article that

no explicit norms or standards guide judges in their decisions about what to demand of litigants. What does "good," "skilled," or "judicious" management entail? Judge Kinser [the judge in Resnik's hypothetical pretrial case] hoped to speed pretrial preparation, because he thought quick preparation was better than slow preparation. Yet he had no guidelines, other than his own intuition, to inform him what was too slow or too fast. Judge Kinser wanted the parties to settle, because he believed that whatever outcomes settlement produced would be better—and less expensive—than those litigation could achieve. But how was he to determine, for the litigants and for the system as a whole, what was "better" or less "expensive"?¹⁶⁷

Elliott noted that management is also not defined by the use of a limited number of devices.¹⁶⁸ "What makes the managerial judging movement coherent is not so much the existence of specific techniques on which all managerial judges agree. Rather, managerial judges are distinguished by common themes in their rhetoric."¹⁶⁹

165. See FED. R. EVID. 403, 611.

166. See, e.g., Elliott, *supra* note 1, at 310–11.

167. Resnik, *supra* note 1, at 426 (footnote omitted).

168. See Elliott, *supra* note 1, at 309.

169. *Id.*

As Charles Yablon argued in his discussion of judicial discretion, one can analyze discretionary decisions according to the way the judge explains those decisions.¹⁷⁰ In some situations, which Yablon describes as the invocation of “discretion as skill,” judges justify decisions based not on the application of a correct rule but on the judge’s skill and experience.¹⁷¹ The judge has a large, but not exhaustive, set of options and will justify her decision by claiming that she is exercising “skillful, practical judgment” to choose the most appropriate result for the case.¹⁷²

The justification of discretion in such cases, the deference to trial court decisions, rests on a claim that the trial judge has special knowledge that enables her to achieve an answer better than any that could be obtained by simply following rules laid down by a higher court or legislature.¹⁷³

While judges entering managerial pretrial orders seldom articulate the basis for their decisions, when they do so they will justify their decisions by a highly fact-based demonstration showing they have made their decision in a skillful way.¹⁷⁴ In the case of decisions based on managerial principles, the decisions will discuss the procedural details of the case and invoke the need to reduce length and expense of litigation.¹⁷⁵

Nor does appellate review provide guidance to trial judges. Most managerial orders never reach the court of appeals, since they are not immediately appealable and most cases settle.¹⁷⁶ Even when they do, appellate courts are extremely deferential to the trial court’s superior “fact competence.”¹⁷⁷ Unless the trial court takes some action that exceeds the court’s power,¹⁷⁸ the ap-

170. Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 235 (1990).

171. *Id.* at 261–62.

172. *Id.* at 262.

173. *Id.*; see also Maureen Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, 751 (1996) (“This unwillingness to justify by any means other than to point to the facts, their discretion and their experience may in fact be one of the more interesting defining characteristics of the courts’ practice.”).

174. “Trial court opinions . . . seek to demonstrate that the decision was made skillfully, carefully, and with attention to all the facts. . . . Thus, the trial court judge justifies her decision not by showing that it is correct, but by demonstrating her superior institutional competence to the appellate court.” Yablon, *supra* note 170, at 267–68.

175. See *id.* at 251.

176. See Peterson, *supra* note 1, at 76–77.

177. See Armour, *supra* note 173, at 748–49.

178. There is, for example, a split over whether district judges have the power to order parties to participate in summary jury trials. One line of cases finds such orders beyond

pellate court will merely recite that the standard of review is “abuse of discretion” and that the court has acted appropriately within the scope of available options. There is no “rule” to apply to compare the judge’s decision with accurate application of the law. For all these reasons, no body of appellate law setting out meaningful standards has developed either to correct individual decisions or to provide substantive content to the balancing of justice and expedience.¹⁷⁹

Does the critique of managerial judging as essentially ad hoc also apply to trial management decisions? The Seventh Amendment and Rule 38 of the Federal Rules of Civil Procedure preserve the right to trial by jury (when a timely request is made).¹⁸⁰ Because the elements of claims and defenses outline the borders of relevance and required findings, the substantive law constrains some decisions about the shape of the lawsuit and the admissibility of evidence.¹⁸¹ But most managerial decisions that attempt to settle the case and govern the order, length, and nature of trial proceedings are as standard-free as those made in the pretrial stage. An imperative for brevity and focus prevails, but with little guidance about how precisely to get there and how to balance those desires against the parties’ desire to fully tell their stories and present their cases.

Decisions that slice and dice the trial—consolidation, separate trial, and bifurcation—require a mixture of law and management. Rule 42 of the Federal Rules of Civil Procedure, which governs both consolidation and separate trial, turns in part on whether claims will overlap and whether issues are separate:

Rule 42. Consolidation; Separate Trials

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or

the power granted by the rules. *See, e.g., Strandell v. Jackson County, Ill.*, 838 F.2d 884, 885–87 (7th Cir. 1988). The authorization became more explicit in the 1993 amendments to Rule 16. *See* FED. R. CIV. P. 16(c)(2)(I). Nevertheless, at least some circuits continue to find mandatory summary jury trials to exceed the power of the court. *See, e.g., In re NLO*, 5 F.3d 154, 157 (6th Cir. 1993).

179. *See* Resnik, *supra* note 1, at 378; *see also* Peterson, *supra* note 1, at 77 (discussing the lack of effective appeal).

180. U.S. CONST. amend. VII; FED. R. CIV. P. 38.

181. *See supra* text accompanying notes 90–91.

(3) issue any other orders to avoid unnecessary cost or delay.

(b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.¹⁸²

The question of whether actions share a “common question of law or fact” and thus may be consolidated turns on whether the evidence sufficiently overlaps or there is some other logical tie that creates a convenient trial package. The question whether distinct claims and issues may be tried separately turns on whether they are “separate.” Both of these determinations depend on what evidence the substantive law makes relevant.¹⁸³ Thus, in our hypothetical case, Judge Kinser would have to conclude that the five cases involving the Nano pending against the defendant car manufacturer would, based on the applicable substantive law, involve enough overlapping evidence that consolidation would be proper. Similarly, in bifurcating the trial of the Nano cases, Judge Kinser would have to find that the issues could be separated without substantial overlap. For this part of the consolidation/ bifurcation analysis, if the judge writes an order justifying his decision, the judge’s reasoning will be based on articulable standards and substantive law.

Yet both decisions also turn on efficiency, and thus directly invite case management. Consolidation is designed to avoid “unnecessary cost or delay,” but the existence of common questions does not require a joint trial.¹⁸⁴ The court must balance the potential savings of time and effort against inconvenience, delay, or expense that might result from consolidation.¹⁸⁵ When considering whether to bifurcate, Rule 42 of the Federal Rules of Civil Procedure expressly directs the judge to consider how to “expedite and

182. FED. R. CIV. P. 42.

183. See, e.g., *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1494–97 (11th Cir. 1985) (consolidating four asbestosis claims); *Kershaw v. Sterling Drug Inc.*, 415 F.2d 1009, 1012 (5th Cir. 1969) (consolidating two claims against drug manufacturer); *Hamre v. Mizra*, No.02Civ.9088(PKL)(HBP), 2005 WL 1083978, at *3–4 (S.D.N.Y. May 9, 2005) (bifurcating liability and damages in medical negligence case); *Corrigan v. Methodist Hosp.*, 160 F.R.D. 55, 57–58 (E.D. Pa. 1995) (denying bifurcation because of substantial evidence overlap). When the bifurcated elements will be tried by separate juries, Seventh Amendment concerns can prevent bifurcation if a finding might be “re-examined” because of overlap. See *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978).

184. FED. R. CIV. P. 42(a).

185. *Rohm & Haas Co. v. Mobil Oil Corp.*, 525 F. Supp. 1298, 1309 (D. Del. 1981).

economize.”¹⁸⁶ When it comes to the management part of the decision, Rule 42 “giv[es] the district court virtually unlimited freedom to try the issues in whatever way trial convenience requires.”¹⁸⁷ The highly contextual nature of these decisions makes it difficult to generalize, and the courts of appeals are extremely deferential to the trial court’s predictions of time saving.¹⁸⁸ Guidance on this part of the balancing calculus remains sparse, and decisions are thus far more likely to be based on excessive overlap of the elements in trial components or strategic prejudice (such as preventing the jury from seeing severely injured plaintiffs) rather than on the estimates of time savings.

This critique of the arbitrary nature of managerial decisions holds even more true for more direct trial-stage time management, as these decisions lack the substantive law element that provides at least some constraints on consolidation and bifurcation. There is the same general feeling that “shorter is better,” but the desire for efficiency should not completely deprive the parties of a fair trial. Similar to pretrial management decisions, there is no established body of legal principles on which the parties can rely when making arguments about litigation timing. There will be no body of case law from which one can conclude that ten minutes is too little but thirty is enough, that two witnesses are too little but five are enough, or that a little settlement pressure is fine but that more is too much.¹⁸⁹

Trial judges tend to enter orders that set a time limit but do not explain the choice of the particular number of days, hours, minutes, witnesses, or exhibits. A fellow judge trying to provide consistency, and thus trying to deduce the basis for other judges’ limits, would have to seek out the pleadings and pretrial orders in a number of cases to begin to see patterns, and even then the connections between that information and the chosen practices

186. FED. R. CIV. P. 42(b).

187. 9A WRIGHT & MILLER, *supra* note 75, § 2387. As Marcus has noted, individual judges may react to proposed consolidation differently: “a given level of joinder might be efficient for Judge A, but not for Judge B.” Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2254 (2008).

188. See, e.g., Huffman v. Merrell Dow Pharms., Inc. (*In re Benedectin Litigation*), 857 F.2d 290, 316–17 (6th Cir. 1988).

189. See *id.* at 317; Peterson, *supra* note 1, at 76 (“The vast majority of all managerial decisions are unwritten and unreported. Thus, there is neither case law nor written rules to guide a judge or to provide parties with arguments to control a judge’s discretion.”).

would be inferential. The orders also rely on information orally conveyed to each judge that will not appear in the record. Ultimately, the rulings are based on what a particular judge, in his own experience, thinks is the time needed for a streamlined trial. The tie between proposed evidence and time limits is even murkier because the managerial judge is not merely balancing the competing needs of the parties to the case before him; he is balancing the needs of this case against the public's interest in giving the court system time to handle *other* cases.¹⁹⁰

Systematic guidance is also rare because the managerial trial decisions are rarely appealed,¹⁹¹ and thus no body of appellate law has developed from which one could infer a range of appropriate actions. The occasional appellate decision that does discuss a managerial order, such as a time limit, tends only to note that the particular decision was within the judge's discretion.¹⁹² The rare cases finding an abuse of discretion often address a collection of techniques, making it difficult to assess the propriety of any single decision.¹⁹³ Most merely find that the use of a particular device was not an abuse of discretion.¹⁹⁴

That leaves judicial training, conferences, and presentations, in which judges recommend management techniques to other judges, as potential sources of standards, consistency, or guidance. The CLMM, designed to help guide judges, tends not to provide guidelines regarding *when* to use particular devices or *what limits* to impose.¹⁹⁵ Instead, the book's format proceeds in the following manner: each book section introduces a stage of the trial process, discusses the general benefits of management, and then suggests actions that the judge should "consider" without providing guidance as to the relevant considerations.¹⁹⁶ With regard to time limits, for example, the manual states, "Counsel

190. See Newman, *supra* note 37, at 1644 ("A broadened concept of fairness—one that includes fairness not only toward litigants in an individual case but also to all who use or wish to use the litigation system and to all who are affected by it—can lead to changes that directly confront the challenges of delay and expense.").

191. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 425–26 (2007).

192. See, e.g., *United States v. Gray*, 105 F.3d 956, 964–65 (5th Cir. 1997).

193. See, e.g., *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996).

194. See, e.g., *Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1452 (9th Cir. 1997) (upholding bankruptcy court's requirement of written testimony); *MCI Comm'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1171–72 (7th Cir. 1983) (discussing time limits); *Alston v. West*, 340 F.2d 856, 858 (7th Cir. 1965) (discussing time limits for closing argument).

195. See CLMM, *supra* note 3, at 1–3.

196. See *id.* at 3, 5–7.

should be forced to estimate, and you can subsequently hone and accede to, time necessary for each major trial event from opening statements through closing arguments.”¹⁹⁷ The manual goes on to list specific elements of trial that can be limited but, other than being clear that limits are beneficial, shares no instruction on how to know how far to go in choosing methods or numbers.¹⁹⁸ The manual then discusses trial management techniques generally.¹⁹⁹ Which ones should judges use? “Not all [of the listed management techniques] will be appropriate for any given trial, but all are worthy of your consideration in the process of arriving at a suitable trial management plan.”²⁰⁰

The result is a hodgepodge of potentially inconsistent rulings that vary from judge to judge and case to case. Some judges who are not managerially inclined will do only the minimum amount of managing required by Rules 16 and 26 of the Federal Rules of Civil Procedure.²⁰¹ Others who are enthusiastic proponents of case management will do their best to incite settlement, control many aspects of the case, and impose strict limits on the lawyers. Most, somewhere in the middle, will do their best to use their own experiences and intuitions and will use some management techniques and impose some limits on the course of litigation and trial.

Whether one views management on the whole as a good idea or a bad one, inconsistency in management has consequences. If managerial trials involved no more than slightly increased paperwork and enforced focus, the variations would be annoying but not very important. At least in some cases, however, decisions labeled as managerial can affect the parties’ strategic advantages and influence the outcome of the case. The next section discusses this possibility.

197. *Id.* at 84.

198. *See id.* at 84–85; *see also* Solomon, *supra* note 70, at 486 (urging other judges to try techniques he describes).

199. *See* CLMM, *supra* note 3, at 86–89.

200. *Id.* at 86. The bulleted list that follows includes limits on voir dire, daily conferences, limits on the volume of exhibits, limits on use of depositions, encouraging stipulations, and minimizing disruptive sidebar conferences. *Id.* at 86–87.

201. *See* FED. R. CIV. P. 16 (governing pretrial conferences, scheduling, and management); FED. R. CIV. P. 26 (governing disclosure and general discovery provisions).

D. *Management and the Merits*

Commentators who have examined pretrial management techniques have noted a variety of ways in which decisions made in the interest of efficiency may shape the outcome of the case.²⁰² Most notably, if restrictions on discovery scope, devices, and time period preclude the party with the burden of proof from pursuing various avenues of information, the court has indirectly limited the issues in the case or created a situation in which the information-poor litigant may fail to discover evidence that would support a claim or defense.²⁰³

Judge Robert Peckham, an early and enthusiastic supporter of case management, conceded that managerial orders could take issues out of the case: "Admittedly, in limiting the scope of discovery, setting schedules, and narrowing issues, the [managerial judge] restricts somewhat the attorneys' freedom to pursue their actions in an unfettered fashion and eliminates entirely some theories or lines of inquiry."²⁰⁴ While the judge has not ruled on the merits, as when he grants a motion for failure to state a claim or motion for summary judgment, the judge has forced the litigant to prioritize within the budgeted time.²⁰⁵ As Elliott points out, the effect of these early managerial orders can be to reintroduce two problems that plagued common law and code pleading—"premature definition of issues, and outcomes based on preliminary procedural skirmishing rather than the legal merit of claims."²⁰⁶ Peterson's assessment, which includes the judge's pressures to settle, is even more critical:

Cases are made and broken by judges at the pretrial stage. A district judge can substantially determine the outcome of a case, including the amount and terms of the settlement, by defining the scope of a claim or permissible defenses, controlling and regulating discovery, and then encouraging and directing settlement negotiations. Without guidelines or appellate review to regulate the pretrial process, similar cases will have decidedly different outcomes.²⁰⁷

202. See, e.g., Peckham, *supra* note 136, at 262.

203. See Elliott, *supra* note 1, at 314–15.

204. See Peckham, *supra* note 136, at 262.

205. See Elliott, *supra* note 1, at 315.

206. *Id.* at 321.

207. Peterson, *supra* note 1, at 81.

Do trial-stage management techniques also have the potential to shape outcomes? Absolutely. While this will not always be true, several trial-stage management techniques can affect the comparative fortunes of the parties. In addition to management techniques imposing pressure to actually drop claims or defenses, some can affect outcome by changing the flow of the case. Empirical studies have shown that the bifurcation of cases can influence outcomes: the breaking apart in and of itself affects juror thought processes,²⁰⁸ and the order of decisions is also important.²⁰⁹ The use of written testimony and summaries can dampen the immediacy of evidence in ways that may disadvantage the party with the burden of proof. Time limits require the same kind of triage as limits on discovery, but by means that are closer in time and impact to the outcome of the case. And jury instruction formats can have the same kind of effects as bifurcation.

Putting things together and taking them apart can provide strategic advantages and disadvantages. Litigants clearly believe this. For example, it is generally defendants who request bifurcation of liability and damages, and researchers report that the defense wins almost twice as often when the issues are separated.²¹⁰ Explanations for those results differ, with some believing that bifurcation prevents the jury from ruling for the plaintiff based solely on sympathy, and others contending that the difference results from bifurcation's disruption of the inherent interrelationship of issues and normal human information processing.²¹¹

208. See, e.g., Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 834 (1961).

209. See Drury Stevenson, *Reverse Bifurcation*, 75 U. CIN. L. REV. 213, 215-16 (2006).

210. See Warren F. Schwartz, *Severance—A Means of Minimizing the Role of Burden and Expense in Determining the Outcome of Litigation*, 20 VAND. L. REV. 1197, 1210 (1967) (citing Charles Alan Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A. J. 742, 747 (1966)); Weinstein, *supra* note 208, at 834-35; Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 tbl.3 (1963) (reporting that bifurcation cut plaintiffs' win rates from 66% to 44%); see also Dan Cytryn, *Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word?*, 26 NOVA. L. REV. 249, 267 (2001) (arguing that bifurcation is highly favorable to the defendant); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury's Role*, 26 U. TOL. L. REV. 505, 513-14 (1995) (arguing the same).

211. See Tom Alan Cunningham & Paula K. Hutchinson, *Bifurcated Trials: Creative Uses of the Moriel Decision*, 46 BAYLOR L. REV. 807, 812 (1994) (discussing bifurcation's impact on jury sympathy); Marcus, *supra* note 3, at 768 (discussing jury comprehension); Thornburg, *supra* note 128, at 1859-60. What matters here, though, is that there is a difference in outcome when different management techniques are chosen, not the reason for the differences.

The results in routine personal injury cases also appear to hold true in more complex litigation. One influential article reported that experiments with sixty-six juries showed that plaintiffs did better significantly more often in unitary trials.²¹² Consolidation, at least when it involves very large numbers of parties and associated management techniques (including bellwether trials and sampling), may also affect the outcome.²¹³ In mass tort cases, some argue that consolidation and transfer by the Judicial Panel on Multidistrict Litigation (“MDL”) has benefitted defendants more than plaintiffs “thanks to several rulings by MDL judges aggressively policing the mass torts transferred to their courtrooms.”²¹⁴

The existence of splitting does not necessarily determine with which party advantage lies. As noted above, conventional wisdom is that defendants will benefit from bifurcation. Hence, in *In re Benedictin Litigation*, when the trial court subdivided the trial into causation, liability, and damages, and excluded from the courtroom in the early phase all visibly deformed plaintiffs, it was the plaintiffs who complained that they had been denied the “right to present to the jury the full atmosphere of their cause of action, including the reality of injury.”²¹⁵

At times, however, courts will shift the order of segments of the bifurcated trial, in a procedure called “reverse bifurcation.”²¹⁶ The purpose of this ordering is often to provide the parties with sufficient certainty about potential damages to facilitate settlement discussions.²¹⁷ Defendants occasionally seek this order as a way to

212. See Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 26 (1989) (reporting, however, that plaintiffs who made it to the damages phase of a bifurcated trial received significantly higher damage awards than the plaintiffs in the unitary trials).

213. See Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967, 967–70 (1995) (discussing the many ways in which consolidation can alter the rights of the litigants).

214. Marcus, *supra* note 187, at 2290 (quoting Alison Frankel, *It's Over, Tort Reformers, Business Interests, and Plaintiffs Lawyers Themselves Have Helped Kill the Mass Torts Bonanza—And It's Not Coming Back*, AM. LAW., Dec. 2006, at 78, 108).

215. *Hoffman v. Merrell Dow Pharms., Inc. (In re Benedictin Litigation)*, 857 F.2d 290, 315–16 (6th Cir. 1988). This is often referred to as the “sterile trial atmosphere” problem. See, e.g., Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 714 (2000) (citing *Hoffman*, 857 F.2d at 215–16; *Kiser v. Bryant Elec. (In re Beverly Hills Fire Litigation)*, 695 F.2d 207, 217 (6th Cir. 1982)).

216. See generally Stevenson, *supra* note 209.

217. See, e.g., Anemona Hartocollis, *Little-Noticed 9/11 Lawsuits Will Get Their Day in*

clarify and limit the plaintiff's actual damages,²¹⁸ or perhaps to end the case if they believe that plaintiff has not been damaged, or that the damages were not caused by defendant's acts. More commonly, however, defendants are appalled by the possibility of beginning the case with the presentation of evidence of the plaintiffs' damages. For example, a coalition of business and insurance interests filed an amicus brief with a Pennsylvania appellate court, arguing that reverse bifurcation "causes substantial prejudice to asbestos defendants."²¹⁹ The Federalist Society published an article condemning two reverse bifurcation plans in which defendant's liability for punitive damages (as well as a "multiplier" to use with later-determined actual damages) would be tried first.²²⁰ Order matters, and even if the judge has only efficiency in mind, the managerial decision to cut and arrange the pieces of the lawsuit pie can have effects on the outcome.

Other decisions about the size and order of proceedings can also provide advantages and disadvantages. Decisions regarding which party gets to open and close evidence, or open and close final argument, allocate the well-documented benefits of primacy and recency.²²¹

Limits on the time and subject matter of voir dire have the potential to make an important difference in the composition of the jury. The voir dire process is intended to provide the attorneys with enough information to identify and eliminate potential jurors whose attitudes make them naturally inclined toward one

Court, N.Y. TIMES, Sept. 4, 2007, at A1 (reporting that damages issue would be tried first). Another "order of trial" technique, used in mass tort cases, is the bellwether trial, where a sampling of individual cases is chosen for early trials to help the parties assess the settlement value of the larger group of cases. See generally R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199 (1999). Clearly the choice of bellwether cases can create advantages and disadvantages for the settlement negotiations that follow.

218. See Steven H. Pollack, *Fen-Phen Trials May Test New Damages System*, LAW.COM, Dec. 1, 2004, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005541385> (on file with author).

219. Application of Coalition for Litigation Justice, Inc. et al. to Join as Amici Curiae in the Application of Hobart Bros. Co. and Lincoln Electric Co. for En Banc Reargument, *Dounghe v. Hobart Bros. Co.*, Nos. 357 & 488 EDA 2006 (Pa. Super. Ct. 2006), at 2.

220. Mark A. Behrens & Christopher E. Appel, "Reverse Bifurcation" Approach to Punitive Damages in West Virginia, CLASS ACTION WATCH, March 2008, at 7-8, available at http://www.fed-soc.org/doclib/20080404_CAW7.1.pdf.

221. See Longan, *supra* note 109, at 705 (citing JEANNE ELLIS ORMROD, HUMAN LEARNING 149 (1990)).

side or the other²²²—either with a challenge for cause, when a panel member is willing to state that he cannot set aside his bias, or with a peremptory challenge when the bias is less pronounced (or when the panelist responds to judicial prompting by stating that he will follow the judge's instructions despite the bias). A more limited opportunity for voir dire provides less information with which to intelligently exercise those challenges.²²³ It is hard to know in advance whether this limited information will cut in any particular direction, but it is logical to assume that the party who is most hurt by pervasive cultural biases will suffer from the inability to raise these issues during voir dire and to identify the potential jurors who hold those views.²²⁴

Management decisions that limit the presentation of evidence—by imposing an overall time limit, by imposing a limit on the number of witnesses or exhibits, or by requiring written statements rather than live testimony—also have the potential to influence case outcomes. Ideally, the limits merely force each party to focus its presentation in a way that is more convincing than a longer presentation. Actually, the limits force the parties to make predictions about the marginal value of evidence: Which questions to which witnesses are most crucially important? Which exhibits are key? What quantity of circumstantial evidence is necessary to support a crucial inference? How many corroborating witnesses are needed to avoid the appearance that a difference in witness testimony is merely a credibility fight? When are two experts better than one? If the omitted evidence would have made no difference, then time limits have sped up the trial without affecting the outcome. If, however, the omitted evidence might have made a difference, then management has

222. Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 732 (1985).

223. 9 MOORE ET AL., *supra* note 9, § 47.10[3][e][ii] (“Many prospective jurors are more candid when counsel questions them than when the court questions them. The judge sits in an elevated position, wrapped in a robe representing authority and integrity. The judge has introduced the prospective jurors to the case and has admonished them that they must be fair and open minded. In these circumstances, it is very difficult for a person to admit to the judge that he or she cannot be fair.”).

224. One example arises out of the “tort reform” debate: should the parties be allowed to question potential jurors about their exposure and reaction to tort reform advertising? See generally Valerie P. Hans and William S. Lofquist, *Perceptions of Civil Justice: The Litigation Crisis Attitudes of Civil Jurors*, 12 BEHAV. SCI. & L. 181 (1994); Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68 (1979); Gary Moran et al., *Attitudes Toward Tort Reform, Scientific Jury Selection, and Juror Bias: Verdict Inclination in Criminal and Civil Trials*, 18 LAW & PSYCHOL. REV. 309 (1994).

tipped the outcome. Although this could affect either party, it is more likely to have an adverse effect on the party with the burden of proof, the one whose role in the adversary process requires the production of evidence—the one who loses when the evidence is in equipoise.

Decisions to require evidence—direct witness testimony, expert witness qualifications or basic testimony, or deposition summaries—in the form of written narratives or summaries also has the potential to disadvantage the party with the burden of proof. It is no accident that novelists are advised to “show, don’t tell”—let the reader experience the story through the characters words, actions, and thoughts rather than the narrator’s exposition and summary.²²⁵ Live testimony in the witness’s own words will often be more vivid and more convincing than a narrative summary—yet when the written statements are used, the witness is first heard live on cross-examination. Written summaries of deposition testimony provide no “voice” for the witness at all. The “bloodless” trial resulting from extensive use of written summaries may save time at the expense of a more holistic presentation to the fact finder: “Here demeanor evidence—the array of sensory impressions about a person that are available to the decider who observes the live in-court trial—could make a difference in a way that matters”²²⁶ A management decision made to save time could again skew case outcomes to the detriment of the party who would have benefited from the more vivid or extended evidence format.

The choice of a granulated format for the jury charge has the potential to affect outcomes in the same way as bifurcation. Some impact can come from the order in which questions are presented. One commentator urged defendants to try to take advantage of this phenomenon: “When using a special-verdict form, pay careful attention to the organization and number of the questions. A de-

225. JANET EVANOVICH, *HOW I WRITE: SECRETS OF A BESTSELLING AUTHOR* 45 (2006).

226. Marcus, *supra* note 3, at 763; *see also id.* at 762–70 (discussing differences in impact of live and written testimony); CLMM, *supra* note 3, at 87 (pointing out that time saved by use of deposition testimony in lieu of live witness should “be balanced against the reasonable desire on the part of counsel to allow a key witness to ‘speak the case’ to the jury”). It is also quite possible that the lawyers play a large role in the actual drafting of the written testimony. And although lawyers will most always prepare friendly witnesses in advance, letting the lawyer draft the written presentation goes a step further in making that “spin” part of the record, and thus may actually change the information presented from what a live question and answer colloquy would have revealed.

fendant will want some of the earliest inquiries to be knockout questions: if the jury can answer 'no' to the question, then it need not proceed to any others."²²⁷ Empirical research supports this lawyer intuition, finding that the order in which issues are presented to a jury can affect the outcome of the case.²²⁸ The other kind of impact comes from separating related issues into distinct questions, making it harder for the plaintiff to achieve the required unanimity and, like bifurcation, increasing the potential for conflicting answers (and hence mistrial), and decreasing the jurors' ability to assess the case in a holistic way.²²⁹

The potential for case-altering impact exists. Some argue that since the possibility of some rogue "activist" judge using the management tools purposely to change case outcomes is slim, we should not let worries about the unlikely bad judge influence the system.²³⁰ The risk that comes from unguided managerial discretion, though, is broader than the possible existence of the occasional venal or corrupt judge deliberately exercising biased discretion. Rather, the problem is that management decisions present unacceptable and unreviewable variations based on individual judges' feelings about the merits and importance of a case—which are then balanced against the need for speed. These decisions to trim procedural options are decisions about how much time a particular case is worth—and the risk is not bad faith, but the impact of each judge's own view of the substantive law, professional experiences, life experiences, social values, political views, and subtle biases. These differing backgrounds also result in different attitudes toward the very project of management.²³¹

227. Norman J. Wiener, *Simple Lessons from a Complex Case*, 12 LITIG. 14, 16 (1986).

228. Bordens, *supra* note 212, at 26 (analyzing the impact of different types of bifurcation on juries).

229. See Thornburg, *supra* note 128, at 1885–89.

230. Cf. Mengler, *supra* note 5, at 465 ("Behind some of the demands for detailed procedural rules and less trial court discretion is the specter of an evil genius, the biased or unprincipled trial judge. The pat, but nonetheless sound, response to these demands is that procedural rules should not be drafted with the most incompetent or evil judge in mind."). And as Mengler correctly notes, "[n]o rules, however detailed, can prevent unethical trial judges from treating litigants unfairly." *Id.*

231. See 3 MOORE ET AL., *supra* note 9, § 16.04[b]. Indeed, some judges' backgrounds may make them more likely to take more of a hands-off approach:

[S]ome civil side litigators who become judges, especially if they have practiced for many years, simply do not agree with the view that it is appropriate for judges to actively intervene in the litigation dynamic. Thus, some judges reject, with varying levels of conviction, the fundamental assumptions on

The lack of limits and ad hoc nature of managerial trial decisions are especially troubling in light of our increasing understanding of the ways in which judges' own experiences with the world affect their decisions. Judges are human beings with the same mental equipment as other people.²³² Sometimes this happens simply because a judge, based on his life encounters with the world, can summon knowledge from a context that is not so familiar for judges who grew up in a different environment.

During the most recent term of the Supreme Court, for example, Justice Ginsburg was able to help her male colleagues understand the impact of a strip search on a thirteen-year-old girl suspected of hiding Advil in her underwear. Consider the oral argument in *Safford Unified School District v. Redding*.²³³

Justice Breyer thinking of his own experience as a boy, and much amused, explained:

I'm trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym

. . . .

. . . [W]hen I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day; we changed for gym, . . . okay? And in my experience, too, people did sometimes stick things in my underwear.²³⁴

which the dominant current case management philosophy is based. These judges believe in the traditional adversary system: giving the lawyers much freer reign to run the case and in letting the chips fall where they may, and limiting the court's role to enforcing procedural and evidentiary rules when a party's demand creates a need for a ruling.

Id.

232. Some prefer to think of judges as umpires, disclaiming any personal component of judging. Senator John Cornyn, commenting on the nomination of Judge Sonia Sotomayor, invoked this image: "The real question is how she views her role as a judge: whether it is to advance causes or groups or whether it is to call balls and strikes." Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July 12, 2009, at WK1. Actual umpires, however, understand that even their job involves the application of discretion and search for the "spirit" of the rules. Commenting on the supposedly fixed strike zone, one umpire said, "It's like the Constitution The strike zone is a living, breathing document." *Id.* (quoting umpire Gary Cedestrom).

233. 557 U.S. ___, 129 S. Ct. 2633 (2009).

234. Transcript of Oral Argument at 45-46, 58-59, *Safford United Sch. Dist. v. Redding*, 129 S. Ct. 2633 (No. 08-479) [hereinafter Oral Argument], available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-49.pdf (scroll to "2008 Term Cases"; then follow "08-479" hyperlink) (last visited Apr. 1, 2010). Justice Breyer's comments were the source of great hilarity among the Justices and the spectators. See D.C. Dicta, Breyer and the Case of the Funny Underwear, <http://lawyersusaonline.com/dcdicta/2009/04/21/breyer-and-the-case-of-the-funny-underwear/> (last visited Apr. 1, 2010).

Justice Ginsburg replied,

I don't think there's any dispute what was done in the case of both of these girls. It wasn't just that they were stripped to their underwear. They were asked to shake their bra out, to—to shake, stretch the top of their pants and shake that out.²³⁵

As Justice Ginsburg later explained to a reporter, “They have never been a 13-year-old girl. It’s a very sensitive age for a girl. I didn’t think that my colleagues, some of them, quite understood.”²³⁶

In the same kind of way, Justice Marshall was able to share with his judicial colleagues an understanding of the way race and racism impact society. When Marshall retired in 1991, Justice O’Connor spoke of the ways in which she had learned from him and of “the experience of listening to his stories during the decade that they served together, stories that ‘would, by and by, perhaps change the way I see the world.’”²³⁷

This phenomenon is not limited to the rarified world of the Supreme Court. Social scientists have analyzed judicial reasoning processes in various ways, and their results tend to show that judges are subject to the same kinds of subtle biases as the rest of us. For example, researchers tested 133 sitting trial judges and found that, for the most part, the judges held the same kind of implicit discriminatory biases that most adults hold.²³⁸ Pat K. Chew and Robert E. Kelley studied 400 workplace racial harassment cases and found that

judges’ race significantly affects outcomes in workplace racial harassment cases. African-American judges rule differently than White judges, even when one takes into account their political affiliation or certain characteristics of the case. Our findings further suggest that

235. Oral Argument, *supra* note 234, at 46.

236. Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at 1A.

237. Linda Greenhouse, Op-Ed, *Every Justice Creates a New Court*, N.Y. TIMES, May 27, 2009, at A27 (quoting Justice O’Connor).

238. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?* 84 NOTRE DAME L. REV. 1195, 1195, 1205 (2009) (“We find that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.”). This study used the implicit association test. *Id.* at 1209. Versions of this test are available at Project Implicit, <https://implicit.harvard.edu/implicit/> (last visited Apr. 1, 2010). See also Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2–3 (2007) (reporting on a study showing that trial judges rely on intuition in making their decisions).

judges of all races are attentive to relevant facts of the cases but may reach different conclusions depending on their races.²³⁹

Nor are issues of race and gender the only areas where a judge's background can subtly influence the way a judge evaluates a case. In 2007 the Supreme Court decided a case in which Victor Harris sued police officers after they ended a high-speed chase by ramming his car (which resulted in Harris becoming, quadriplegic).²⁴⁰ The chase itself, from the perspective of some of the police cars involved, had been captured on videotape.²⁴¹ After watching these videotapes, the Court ruled 8-1 that the tapes demonstrated conclusively that Harris's flight posed a deadly risk to the public.²⁴² To "prove" their point, the majority posted the video on the Court's website.²⁴³ But the Justices' confidence that their viewpoint was universal was incorrect. Kahan, Hoffman, and Braman showed the video to 1350 people with interesting results.²⁴⁴ "Whites and African Americans, high-wage earners and low-wage earners, Northeasterners and Southerners and Westerners, liberals and conservatives, Republicans and Democrats—all varied significantly in their perceptions of the risk that Harris posed"²⁴⁵

What does all this have to do with managerial judging? The potential impact is subtle, but nevertheless worrisome. A decision about case management, including trial management, is not just a time estimate. It is a weighing of the cost in time and expenses that additional process would require against the value of giving

239. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1117, 1156 (2009).

240. See *Scott v. Harris*, 550 U.S. 372, 374–76 (2007).

241. *Id.* at 378.

242. *Id.* at 372, 379–80, 386. Justice Stevens disagreed, and described the videotaped chase in detail. He also reflected on the impact of experience:

I can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slowpoke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.

Id. at 390 n.1 (Stevens, J., dissenting).

243. See *Scott*, 550 U.S. at 378 n.5; Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 840–41 (2009).

244. See Kahan et al., *supra* note 243, at 841.

245. *Id.* at 903.

the case that time. The “value” part of the analysis will reflect the judge’s assessment of the merits of the particular case and of how important it is to society more generally for that type of controversy to be litigated.²⁴⁶ Especially where no standards guide the weighing process, subjective and subconscious value judgments creep in, just as they did in the pretrial management hypothetical posed to the judges at Yale twenty-five years ago.²⁴⁷

The inevitability of different judicial perspectives may be exacerbated by the very politicized process that produces federal judges. While district judgeships are not yet as carefully watched as appointments to appellate courts, the deliberate consideration of politics and attitudes has increasingly affected the process at all levels.²⁴⁸ If Presidents and Senators succeed in choosing judges with congenial attitudes—whether about particular substantive claims (like civil rights cases or antitrust cases) or about the costs of litigation—then the combination of politics, judicial attitude, and the application of ad hoc managerial judging has the potential to systematically, rather than randomly, skew settlements and trial outcomes, especially if a single political party dominates judicial selection for a substantial period of time.²⁴⁹

E. *No Meaningful Appellate Review*

When considering pretrial management, the obstacles to securing appellate review are manifold. The pretrial orders are interlocutory (and only occasionally reviewable as collateral orders, by mandamus, or because a lawyer was willing to be held in contempt to secure an appealable order).²⁵⁰ Substantial time may pass between the entry of the order and an eventual appeal. Some of the judge’s management activity is not on the record and

246. Cf. Peterson, *supra* note 1, at 80 n.158 (reflecting on the ways in which various biases could affect pretrial management decisions and citing federal race and gender bias task force reports).

247. See *supra* notes 48–54 and accompanying text.

248. See generally KEVIN L. LYLES, *THE GATEKEEPERS: FEDERAL DISTRICT COURTS IN THE POLITICAL PROCESS* 37–67 (1997); C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 24–57 (1996).

249. See, e.g., Robert A. Carp et al., *Right On: The Decision-Making Behavior of George W. Bush’s Judicial Appointees*, 92 JUDICATURE 312, 312–13 (2009); Jennifer Segal Diascro & Rorie Spill Solberg, *George W. Bush’s Legacy on the Federal Bench: Policy in the Face of Diversity*, 92 JUDICATURE 289, 289–90 (2009); Sheldon Goldman et al., *W. Bush’s Judicial Legacy: Mission Accomplished*, 92 JUDICATURE 258, 258, 260 (2009).

250. See 3 MOORE ET AL., *supra* note 9, § 16.79.

hence somewhat impervious to review. Some of the judge's management suggestions are agreed to by the parties, in an effort to avoid antagonizing a decisionmaker who will continue to wield substantial discretionary power over the development of the case. If the managerial judge succeeds in convincing the parties to settle, there will be no appeal where a review could otherwise happen.²⁵¹ Even without a settlement, review and reversals will be rare.²⁵²

At first blush, one might expect trial-stage management to escape this particular critique. After all, when a case goes to trial it often is not going to settle (so *that* insulation goes away), the trial will result in a final, appealable judgment, and the appellate court can go to work.²⁵³ For pretrial decisions shaping the trial, though, the unhappy litigant will still have to wait until after the trial is over to assert an appellate complaint.²⁵⁴ Aside from the timing difference, however, the same factors that declaw appellate review of pretrial management do the same for trial-stage decisions.²⁵⁵ Both share the double hurdle of a deferential standard of review and the difficulty of showing harmful error.

The "abuse of discretion" standard of review governs all of these decisions:

- decisions to consolidate or bifurcate;²⁵⁶
- decisions granting or denying continuances;²⁵⁷
- decisions imposing time limits, including limits on opening statements and closing arguments;²⁵⁸
- decisions limiting the number of witnesses or exhibits;²⁵⁹

251. "[W]hen such judicial efforts succeed, they guarantee that appellate courts will play no role in the suit: neither the settlement itself nor any preceding judicial ruling will be appealable." Yeazell, *supra* note 156, at 656.

252. *See id.* at 651-52.

253. Those that do settle in the immediate pretrial period, or even during trial, are as fully insulated from review as those that settle earlier in the process. *See id.* at 659.

254. *See* 3 MOORE ET AL., *supra* note 9, § 16.79[1] (noting that pretrial orders are not final and not generally appealable as collateral orders).

255. "Many matters of pretrial process . . . are reviewed, when they are reviewed at all, under the 'abuse of discretion' standard. As a result trial courts exercise essentially final power on such matters even when the trial decision is appealable." *See* Yeazell, *supra* note 156, at 665.

256. 8 MOORE ET AL., *supra* note 9, § 42.10[2][a] (discussing consolidation); *id.* § 42.20[5][b].

257. 9 WRIGHT & MILLER, *supra* note 75, § 2352.

258. *See, e.g.,* Grey v. First Nat'l Bank in Dallas, 393 F.2d 371, 386 (5th Cir. 1968).

259. *See, e.g.,* MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1171 (7th Cir. 1983).

- decisions about voir dire;²⁶⁰
- decisions about challenges for cause and peremptory challenges;²⁶¹
- decisions about the order of proceeding;²⁶²
- decisions about the format of evidence;²⁶³
- decisions about admitting or excluding relevant evidence;²⁶⁴ and
- decisions about the jury charge format.²⁶⁵

The very deferential nature of this review can be glimpsed in the articulation of the test in cases that specifically challenge scheduling decisions. For example, when the appellant challenges the trial court's enforcement or modification of its pretrial scheduling order, there is no abuse of discretion unless "no reasonable person could take the view adopted by the trial court. If reasonable persons could differ, no abuse of discretion can be found."²⁶⁶ The same is true for any challenge to a scheduling decision—an abuse of discretion will only be found where no reasonable person could agree with the trial judge.²⁶⁷ Reviews of trial limits on time and witnesses are affirmed unless "the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible"²⁶⁸ It is no

260. See, e.g., *Kanekoa v. City and County of Honolulu*, 879 F.2d 607, 614 (9th Cir. 1989) (finding abuse of discretion only when questions are sufficient to test for bias or partiality); *Darbin v. Nourse*, 664 F.2d 1109, 1113–14 (9th Cir. 1981) (applying abuse of discretion standard to voir dire challenge).

261. *Thompson v. Altheimer & Gray*, 248 F.3d 621, 624–25 (7th Cir. 2001) (discussing standard of review for trial court's decision regarding challenge for cause); *Smith v. Pressed Steel Tank Co.*, 66 F.R.D. 429, 436 (E.D. Pa. 1975) (discussing standard of review for trial court's decision regarding peremptory challenges).

262. *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 794 (1st Cir. 1991) ("[The judge] may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion." (quoting *Greders v. United States*, 425 U.S. 80, 86 (1976))).

263. See *Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1452 (9th Cir. 1997) (noting standard of review for bankruptcy's pretrial order regarding written testimony).

264. 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 125 (1985).

265. *Ryther v. KARE 11*, 108 F.3d 832, 845–46 (8th Cir. 1997) (explaining that jury instructions must be read as a whole and reviewed for abuse of district court's broad discretion); see 9C WRIGHT & MILLER, *supra* note 75, § 2556. In fact, so long as the charge is reasonably accurate legally, the format is not reviewable at all.

266. *Gorlikowski v. Tolbert*, 52 F.3d 1439, 1444 (7th Cir. 1995) (quoting *Durr v. Intercounty Title Co. of Ill.*, 14 F.3d 1183, 1187 (7th Cir. 1994)).

267. See, e.g., *Arthur Pierson & Co. v. Provimi Veal Corp.*, 887 F.2d 837, 838–39 (7th Cir. 1989).

268. *Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849–50 (5th Cir. 1996) (finding an

surprise that the entire chapter on Rule 16 in Wright & Miller's *Federal Practice and Procedure* appears to cite no cases in which a trial court was found to have abused its discretion in making a trial management decision,²⁶⁹ or that the Rule 16 coverage in *Moore's Federal Practice* apparently cites only two cases in which an issue related to the trial court's pretrial order was reversed as an abuse of discretion.²⁷⁰ Indications are that no cited cases reversed a trial court based on time limits, witness limits, written testimony requirements, or decisions about the order of proceedings.²⁷¹

Even if the abuse of discretion standard were not so forgiving, appellants complaining about the denial of procedural opportunities face a significant hurdle in the harmless error rule.²⁷² Recent cases indicate that Rule 61 of the Federal Rules of Civil Procedure requires reversal only when "it is 'highly probable' that the error affected the party's rights, that the error 'affected a party's right to a fair trial to a substantial degree,' [or] that the verdict 'more probably than not' was tainted."²⁷³ Often, because they are complaining about things they were *not* allowed to do, appellants are in a position of asking the court of appeals to speculate both about what greater opportunity would have allowed and about the impact of that information.

Tied to this issue is the problem of preserving error. For example, three federal appellate panels have criticized the use of time limits, but found that the appellant had not preserved error. While exclusion of a concrete piece of evidence can be preserved for review by making an offer of proof, the impact of the court's decision to allow only a certain number of hours or a certain

abuse of discretion for a combination of limiting orders, but affirming decision below because error was harmless).

269. See 6A WRIGHT & MILLER, *supra* note 75, §§ 1521-1531.

270. 3 MOORE ET AL., *supra* note 9, §§ 16.77 n.45, 16.90 n.27, 16.92 n.75. The decisions relate to the propriety of allowing testimony of witnesses not listed in the pretrial order and amending judgment based on a theory not included among the prevailing party's contentions witnesses rather than the provisions of the order itself. See *Bradley v. United States*, 866 F.2d 120, 124-27 (5th Cir. 1989); *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 886-87 (9th Cir. 1981).

271. 3 MOORE ET AL., *supra* note 9, §§ 16.77 n.45, 16.90 n.27, 16.92 n.75.

272. See FED. R. CIV. P. 61.

273. 12 MOORE ET AL., *supra* note 9, § 61.02[3] (quoting *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985); *Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (7th Cir. 1985); *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1459 (9th Cir. 1983)).

number of witnesses is more difficult to document.²⁷⁴ Even if more time is belatedly offered, that opportunity may come too late.²⁷⁵ Similarly, the prejudice alleged to result from bifurcation or trifurcation of trial has been resistant to a showing of harm, even when the court is concerned about the potential impact of a first trial phase that excludes the human plaintiffs from the jury's sight and precludes testimony about their damages.²⁷⁶

In summary, although the proximity of trial to appeal makes the final judgment rule slightly less of an obstacle to judicial review of trial-stage managerial judging, the deferential abuse of discretion standard and the difficulty in demonstrating harm from the managerial rulings mean that trial management, like pretrial management, is effectively final in the trial court in the vast majority of cases.

F. *A New Problem: Loss of Party Participation, Control, and Confidence*

In the pretrial phase of civil litigation, there are few opportunities for direct party participation. While ethics rules leave ultimate control in the hands of the parties, attorneys are the primary actors and even have discretion to make various procedural choices.²⁷⁷ The parties may testify by deposition, and may participate in mediation, but on the whole the pretrial period is not the

274. See *McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 115 (7th Cir. 1990) (affirming because GM had only requested thirty additional minutes and had not demonstrated what it would have done with the additional time); *Johnson v. Ashby*, 808 F.2d 676, 678–79 (8th Cir. 1987) (affirming because there was no offer of proof before the close of evidence); *Flaminio v. Honda Motor Co.*, 733 F.2d 473 (7th Cir. 1984) (affirming because “the plaintiffs have failed to indicate what evidence they would have put in, or cross-examination they would have conducted, if they had had more time”). And if counsel were required to make offers of proof in question-and-answer format for any uncalled witness or unasked question, the time saved in imposing the limits in the first place would disappear.

275. As Longan points out, a decision at the end of a party's case comes too late to help a party who has trimmed time from a strong opening witness is not helpful.

A lawyer who wants to finish strong but still meet his limit will leave out the less persuasive evidence first. If, as he approaches the climax of the trial he learns that he has the option to add more evidence, he will have to finish in a weaker manner or forego the opportunity. The court's kindness in being flexible is no blessing.

Longan, *supra* note 109, at 716.

276. *Hoffman v. Merrell Dow Pharms., Inc. (In re Bendectin Litigation)*, 857 F.2d 290, 294, 315–16 (6th Cir. 1988); *Kiser v. Bryant Elec. (In re Beverly Hills Fire Litigation)*, 695 F.2d 207, 216–17 (6th Cir. 1982).

277. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4(a)(2) (2009).

time when litigants personally experience the benefits of process. Probably for this reason, prior critique of pretrial management did not touch extensively on the impact of management techniques on the parties' satisfaction with the process.

At the trial stage, however, these concerns come to the fore. Quite apart from the impact of management decisions on the merits, the managed trial has the potential to decrease significantly the litigants' perception of fairness.²⁷⁸ Researchers have identified four components of procedural justice: (1) voice, (2) neutrality, (3) respectful treatment, and (4) trustworthy authorities.²⁷⁹ "Voice" requires that parties be allowed to participate in the proceedings, express their viewpoints, and tell their stories.²⁸⁰ "Neutrality" requires consistently applied legal principles, unbiased decision makers, and transparent decisions.²⁸¹ "Respect" requires that parties be treated with dignity, politeness, and respect for their rights.²⁸² And "trustworthy" authorities are those who listen carefully to the parties and explain their decisions.²⁸³ In order to try to assure themselves that these values will be respected, litigants tend to prefer procedures in which they retain control over the process.²⁸⁴

Trial management can harm the parties' perceptions of fairness in a number of ways. The most obvious is loss of voice. When a party is required to draft a written statement in advance (probably with a lot of lawyer input), and gets to "speak" to the trier of fact only when being cross-examined, the experience of telling one's own story and confronting opposing parties will be severely diminished. Less dramatically, time limits or limits on number of witnesses that deprive parties of the opportunity to present information that they believe to be important also decrease the litigants' sense of voice. Bruce Winick has suggested that even be-

278. See generally Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63 (2008); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

279. See Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 887 (1997).

280. *Id.* at 887-88.

281. See *id.* at 892.

282. *Id.* at 891.

283. *Id.* at 889.

284. John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 566 (1978).

tween client and lawyer, the client's need for "voice" extends to the content of opening statement and closing argument.²⁸⁵ Consider how much stronger the loss would be when the control comes not from the party's own lawyer, but from the judge.

The neutrality principle is also threatened by extensive management. As explained above, managerial judging does not turn on legal principles, is not consistently applied, and is not at all transparent. This combination means that a party's litigation experience is dependent on the idiosyncratic perspectives of individual judges, undermining the confidence that the system provides equal process for all. Even though the parties to a single lawsuit will probably receive similar limits, those limits will not affect them the same way.²⁸⁶ Moreover, similar lawsuits will receive different treatment because of different judges' different assessments of the managerial needs of the cases.

The "trustworthiness" principle overlaps with voice and neutrality. The loss of voice will detract from the litigant's feeling that she was listened to; the loss of explanation and transparency will also decrease a feeling of trust. In addition, concerns that the judge's deep participation in the development of the case will result in biases about the parties, the lawyers, and the dispute are reasons to fear that certain kinds of management can compromise the trustworthiness principle and, by extension, the parties' confidence in the judicial system.

Managing a trial is not likely to lead to disrespectful treatment of individual litigants in the sense that a judge will be verbally rude or insulting. Nevertheless, techniques that decrease the party's participation—such as limits on testimony and bifurcation that remove or delay the plaintiffs' accounts of their experiences—may be perceived as disrespectful in that they are based on a judicial decision that the excluded information is not worthy or is in some way suspect. Some judges might even communicate the feeling that the right the party is asserting is comparatively unimportant.

Consider the perspective of the parties in the workplace harassment case, *Sims v. ANR Freight System, Inc.*²⁸⁷ Although all

285. Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 118–19 (2000).

286. See *supra* text accompanying notes 214–26.

287. 77 F.3d 846 (5th Cir. 1996).

parties agreed the case would take five to seven days to try, the judge allowed each side five minutes for opening statements, and two-and-a-half hours for the presentation of evidence (the plaintiff's time was divided between two hours for her case-in-chief and thirty minutes for rebuttal).²⁸⁸ The judge determined the order in which Sims could present her witnesses.²⁸⁹ In addition, he "repeatedly limited both direct and cross examination, frequently ordering counsel to 'move on,' and continually reminded counsel of the time limits."²⁹⁰ The judge also refused to allow the parties to read stipulated facts to the jury (although the judge had required the parties to make the stipulations).²⁹¹ It is unlikely that this treatment appeared to any of the parties to be respectful.

Nor was the plaintiff likely to feel that the appellate process corrected the deficiencies in her treatment by the trial court. The Fifth Circuit commended the trial judge for attempting to manage a large docket and praised management generally.²⁹² As to Sims's case specifically, the appellate panel found that "the methodology imposed on this trial by the court and the restrictions that were placed on the lawyers regarding the manner of the presentation of evidence adversely impacted on the comprehensibility of the evidence to the point that Sims was denied a trial"—but it refused to remand for a new trial.²⁹³ Without any explanation, or any analysis of the difference between a three-day presentation and a two-hour presentation, the court found the error harmless: "The evidence is so overwhelming against Sims that there is no reasonable possibility that the outcome would be different if the case were re-tried, even if Sims were allowed to present fully all her evidence in a comprehensible manner."²⁹⁴

The managerial trial by definition involves a loss of litigant control. Important decisions about the structure of the trial, the composition of the jury, the nature and quantity of evidence to be presented to the judge or jury, the order of presentation, and the

288. *Id.* at 848. In response to the court's requirement that the parties file detailed lists of facts they intended to prove at trial, Sims had listed 640 facts from 18 witnesses to be proved for her tort claim and 1510 facts to be proved through 27 witnesses for her Title VII claim. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.* at 849.

294. *Id.*

ultimate questions to be asked all shift from the parties (and their lawyers) to the trial judge. Even if one is convinced that the judge's managerial decisions are empirically superior to those that the lawyers would have made, the loss of control is itself a significant change in the quality of the process.

V. MANAGING THE MANAGERIAL JUDGE

Judicial management, used properly, can improve both process and results in individual cases, but both systemically and in specific situations it poses serious problems. Managerial ideology is here to stay, but it needs to be more thoughtfully cabined and its use more restrained. As with pretrial management, the challenge for critics of the system is to suggest what to do about management's downside.

Identifying the systematic weaknesses in pretrial management did not lead to its demise, or even slow its pace. Pretrial management is more firmly entrenched now than it was in the 1980s.²⁹⁵ Many developments after Resnik's article institutionalized and even required management techniques. Each successive amendment to Rule 16 has expanded the management power.²⁹⁶ In addition, the Civil Justice Reform Act required each district to consider adopting local rules to bolster litigation management and to encourage ADR and settlement.²⁹⁷ The local rules of many district courts incorporate the structures of managerial judging.²⁹⁸

Yet in subtle ways the institutionalization has provided a degree of standardization. For example, changes in the discovery

295. See *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1433 (7th Cir. 1986) (Posner, J.) ("The rise of the 'pro-active' judge, the search for cheap and fast substitutes for the conventional Anglo-American trial, the convergence of the American and Continental systems—all these developments are well under way and are probably irreversible." (citing John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 858-66 (1995); Resnik, *supra* note 1, at 386)).

296. See FED. R. CIV. P. 16 advisory committee's notes (1983 & 1993 amends.). The 1993 amendments in particular explicitly expanded control over trial management. See *id.*

297. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5091 (codified as amended at 28 U.S.C. § 473 (2006)). Sophisticated clients, more aware that lawyers were making procedural choices that increased the cost of litigation, also began to more aggressively manage the lawyers, putting them on budgets and prohibiting certain kinds of expensive litigation behavior. Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 198 (2001) (discussing insurance company constraints on defense budgets).

298. See, e.g., C.D. CAL. R. 43-1, *supra* note 99 (expressly allowing judge to order direct testimony to be presented by written narrative statement in lieu of live testimony).

rules have introduced standard numerical limits on some discovery devices, made automatic initial disclosures mandatory, and made pretrial disclosures of experts, fact witnesses, and exhibits mandatory.²⁹⁹ They have also made an early discovery conference mandatory and specified its timing.³⁰⁰ Changes in Rule 16 itself have brought greater uniformity in terms of the flow of management, requiring and specifying the timing for the initial pretrial conference and the content of the scheduling order, and mandating an order reciting the action taken at any conference.³⁰¹ Nevertheless, pretrial management remains highly discretionary, generally immune from review, and irreversible.

Would trial-stage management be any more susceptible to regulation? It might be in theory, but the political realities of courts and rulemakers make significant changes improbable. While enhanced appeal, specific rulemaking, and enforced transparency could be attempted, each comes with its own costs that are unlikely to outweigh the current enthusiasm for judicial management.

The creation of a more effective system of appellate review is the normal method by which the system itself imposes more control on trial courts. In order to provide for meaningful appellate review, we could create an exception to the final judgment rule,³⁰² adopt a standard of review with teeth, and relax the application of the harmless error rule.³⁰³ The challenge would be to do so

299. See FED. R. CIV. P. 26(a) (1993 amend.), 30(a)(2) (1993 amend.), 33(a) (1993 amend.).

300. See FED. R. CIV. P. 26(f) (1993 amend.).

301. FED. R. CIV. P. 16(b) (1993 amend.), 16(d) (2006 amend.).

302. Since the number of federal civil cases that actually go to trial is relatively small, and since the subset of those cases that involve significant management orders is even smaller, more immediate and less deferential appeals would not risk the same kind of burden on appellate courts as would interlocutory appeal of pretrial orders. For a discussion of the issues raised by interlocutory appeals, see generally Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 SW. L.J. 1045 (1990) (analyzing the advantages and disadvantages of interlocutory review). However, the disruptive nature of appeals immediately before trial militates against this change.

303. The standard for reversal could ratchet all the way up to de novo review, but that is not the only option. Consider, for example, the New York standard of review of damage judgments at issue in *Gasperini v. Center for Humanities, Inc.* (i.e., does the decision in this case deviate materially from other similar cases?), which could be a check on inter-judge consistency. 518 U.S. 415, 418 (1996). Nor does a change in the test for harm require that harm be presumed. See, e.g., *Tamburello v. Welch*, 392 S.W.2d 114, 118 (Tex. 1965) (holding that harm from improper allocation of peremptory challenges should be determined by looking at whether the trial was "materially unfair," based on an examination of the entire record to see whether the trial was hotly contested and the evidence sharply

without creating a system in which appeals would disrupt trials, clog the appellate court system, force appellate courts to immerse themselves in the factual details of trial plans, and require retrials that would add to trial court dockets.³⁰⁴ In addition, appellate courts might be reluctant to add to their workloads to undertake a review of this type of decision, and might doubt that the resulting cases would provide sufficient general guidance to be worth the time and effort required.³⁰⁵

Another way to confine trial-management discretion would be to draft rules that limit managerial discretion.³⁰⁶ Some more recent federal rule amendments do take a more directive approach and take some of the discretion away from previously unregulated orders.³⁰⁷ Certain practices—such as the use of written direct testimony in jury trials—could be prohibited. Other orders—such as those involving certain kinds of bifurcation, orders that require evidence to be summarized rather than presented, and orders that provide insufficient time to communicate clearly—might also be candidates for prohibition or severe limits. However, the process of drafting such rules would involve the same kinds of politicized jockeying for procedural advantage that we have observed in recent proposals to amend the rules.³⁰⁸ In addition, rules that limit judicial discretion are likely to be opposed by the judges themselves. They have fought recent attempts to amend the rules even in moderate ways when their discretion would be limited—as when they prevented amendments that would have restored the twelve-member jury³⁰⁹ and that would have mandated the attorney's right to participate in jury selec-

conflicting) (citing *Cloutd v. Hutcherson*, 175 S.W.2d 643, 649 (Tex. Civ. App. 1943)).

304. See Resnik, *supra* note 1, at 433.

305. See generally William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

306. Resnik, *supra* note 1, at 433.

307. See, e.g., FED. R. CIV. P. 23 (2003 amend.); FED. R. CIV. P. 23 advisory committee's notes (2003 amend.).

308. See Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 260 (1999); see also Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 306–07, 308 (1994) (noting opposition to automatic disclosure rule from products liability defense interests); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1400–24 (1994) (tracing sources and history of groups urging curtailment of discovery).

309. See Marcia Coyle, *Civil Juries Won't Go Back to 12 Seats*, NAT'L L.J., Sept. 30, 1996, at A16.

tion.³¹⁰ It thus seems unlikely that any significant limitations on managerial trials would result from the rulemaking process unless judicial attitudes change dramatically.

The problems of arbitrariness and lack of consistency might be alleviated by a requirement that trial courts provide reasons for their managerial orders and publish those decisions, in hopes that a coherent body of cases might result.³¹¹ One way to make a skill-based discretionary decision depend on something beyond “trust us, we know what we’re doing,” is to require the judges to explicitly exercise that skill by providing a convincing explanation of their decisions.³¹² Unfortunately for either this plan or appeals, each explanation could be so extremely fact-specific that it would require a very large body of cases before one could begin to see any trends.³¹³ In addition, the orders themselves would fail to provide information on how well or how badly the trial plan worked, nor would they provide any way to determine whether trial under a different plan, or an “unmanaged” trial, would have taken more time or resulted in a different judgment.

The least controlling, but possibly most feasible, alternative is to revise the official training given to trial judges, such as judicial seminars and the CLMM, so that they provide less cheerleading and more guidance with regard to trial management. For example, in the CLMM’s current form, it helpfully suggests a wide menu of management options.³¹⁴ It does not, however, provide meaningful advice about how to decide what, if any, tools to use, how to determine the limits imposed, or when *not* to take the decision away from the parties and their lawyers.³¹⁵ Training should

310. See Marcia Coyle, *Rules Would Expend Voir Dire, Civil Jury Size*, NAT’L L.J., Mar. 11, 1996, at A12.

311. Cf. FED. R. CIV. P. 11(c)(6) (“An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.”); Peterson, *supra* note 1, at 92–105 (setting forth plan to control discretion by referring managerial issues to magistrates and having district judges review their decisions through written decisions creating and explaining the relevant standards).

312. See, e.g., Michael M. O’Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. (forthcoming 2010) (manuscript at 13–14, available at <http://ssrn.com/abstract=1427489>) (detailing benefits of requiring trial judges to explain their sentencing decisions).

313. Since trial judges rely on a “discretion as skill” paradigm, explanations would likely cite the specifics of the case rather than any kind of legal rule justifying the decisions structuring trial. See Yablon, *supra* note 170, at 263–64.

314. See *supra* notes 195–200 and accompanying text.

315. See *id.*; see also Longan, *supra* note 109, at 709 (explaining judges should only impose time limits on trials that last more than four days, as the time required to formulate

also sensitize judges to the ways in which their decisions can be subtly affected by their inherent biases, professional experiences, and politics. There is some reason to believe that such efforts could be beneficial; some of the same studies that identify the existence of such biases also indicate that judges may be able to counteract their own biases when the issue is explicitly raised.³¹⁶

For any of the options, the existence of high-quality empirical research would be crucial. “Trust us” is not an adequate basis for a pervasive feature of the judicial system, and both claims of efficiency and fears of arbitrariness would be more convincing if they rested on an evidentiary foundation. In the largest sense, managerial decisions are supported by an argument that the benefits of management outweigh any disadvantages that might come along for the ride. This is essentially an empirical claim that judicially managed trials (1) take less judicial time than attorney-managed trials, (2) save time that is used to benefit other users of the court system, (3) save the litigants time and money, and (4) accomplish all these goals without affecting substantive outcomes or warping settlement leverage. If this is not the case—if, for example, the time needed to manage exceeds the time saved, if the frontloading of attorney time required to comply with management orders generates costs that exceed costs avoided, if management decisions are affecting settlements and verdicts—then the rules should change accordingly.

Other types of research would also be helpful. At the level of individual management devices, research showing the comparative costs and benefits of particular management techniques could aid both judges and rulemakers in decisions about the use and abuse of managerial orders. Researchers could also examine whether the implementation of managerial discretion is significantly inconsistent among different judges so that the lack of standards is in fact a cause for concern.³¹⁷ Research should also include empirical studies of the impact of various management techniques on the parties’ perceptions of process fairness.

careful limits would exceed the time saving at trial).

316. Rachlinski et al., *supra* note 238, at 1223–25.

317. Cf. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) (analyzing empirical study concluding that identity of assigned judge or asylum officer was single most important variable in whether asylum applications were granted).

For those who question whether trial judges, individually or collectively, are striking the right balance, there is little recourse. We are left with the hope that the judiciary will police itself and supply internally the practice, skill, and values needed to exercise restraint in managing lawyers and cases, and that they will somehow supply the consistency, self-restraint, and self-awareness that the rules themselves lack.

VI. CONCLUSION

The Federal Rules of Civil Procedure and the Federal Rules of Evidence that govern trials are consistent with the rules that govern pretrial proceedings. They are designed to create wide leeway to try the issues made possible by the broad rules of pleading and joinder. Just as in the case of pretrial management, trial management is a pushback against the flexibility and inclusiveness of the procedure and evidence rules.³¹⁸ Judges can and do impose the same kind of "less is more and settlement is best" philosophy on trials that they have imposed on the pretrial stage of litigation. And as was true for the pretrial phase, the trimming is governed not by the substantive law, but by an unguided desire for efficiency.

Managing trial, like managing pretrial, is not all bad. In an ideal world, "[w]orking together, the court and counsel can ensure that the trial will be as streamlined, focused, and efficient as possible, thus maximizing the likelihood of a fair result and minimizing the burdens imposed on jurors and witnesses."³¹⁹ Unfortunately, we do not live in that perfect world. Management, spread over hundreds of judges and thousands of cases, threatens important procedural values. With its single-minded focus on speed and efficiency, it can ignore the countervailing importance that the system be "just."

The downside of managerial judging threatens both distributive and procedural justice. Its lack of standards allows an inconsistency that affects outcomes and neutrality. Its lack of transparency deters the development of standards, prevents the monitoring of impact, and undermines the trustworthiness of the judiciary. Its muffling of party voice and removal of party control

318. Cf. Elliott, *supra* note 1, at 310 (commenting on pretrial management).

319. 3 MOORE ET AL., *supra* 9, § 16.77[1].

can distort verdicts and settlements and weaken confidence in the court system. Its deference to the judge's individual view of the resources a case deserves allows unarticulated and potentially biased value judgments to creep into facially quantitative decisions. Its lack of effective review eliminates the kinds of checks on discretion that can improve outcome accuracy and bolster a sense of fairness.

The breadth of uncontrolled discretion allowed by managed trials can strike at the heart of the most basic assumptions of our procedural system—that judicial decisions should be reasoned and explained rather than arbitrary and conclusory; that party autonomy and participation are important to the adversary process; that rules should be consistently applied; and that procedural rulings should minimize their effect on party advantage and case outcomes. Far from overcoming the discretionary excesses of pretrial management, managerial trials exacerbate them. Switching from pretrial to trial is not the answer; the courts' distrust of party control and their automatic resort to judicial management have invaded the trial phase as well. Unfortunately, only a significant change in judicial attitudes toward the value and importance of judges' own processes is likely to slow the management tsunami and ensure that the court system's desire for justice is not swamped by an ocean of cost control.
