Notre Dame Law Review

Volume 78 | Issue 5 Article 5

8-1-2003

Slouching toward Discretion

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SLOUCHING TOWARD DISCRETION†

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> I love judicial discretion. I know some judges on the Courts of Appeal—we won't use names—want to rein that discretion in, but I think one of the beauties of the United States District Judge is his or her discretion. We have to give that judge some elbow room, objectively, individualistically, and contextually.
>
> Professor Arthur Miller[1]

> Discretion is a vehicle of good far more than of evil. It is the only means by which the intelligence and good will of a society can be brought to bear directly upon the solution of hitherto unsolved problems.
>
> Professors Henry Hart and Albert Sacks[2]

It is a pleasure to be allowed to contribute to the *Federal Courts, Practice & Procedure* issue. My topic was prompted by the 2000 conference of the International Association of Procedural Law, held in Ghent, Belgium, which focused on judicial discretion worldwide. I served as National Reporter for the United States for that conference and prepared a paper for an international audience.[3] Because procedural discretion has lately excited considerable interest domestically

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† With apologies to Joan Didion. *See* JOAN DIDION, SLOUCHING TOWARD BETHLEHEM (1981). Didion, in turn, adapted the phrase from Yeats's poem, *The Second Coming*, which ends with the couplet: "And what rough beast, its hour come round at last / Slouches towards Bethlehem to be born?" W.B. Yeats, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS 187 (Richard J. Finneran ed., 1996).

1 Arthur Miller, Remarks at the Public Hearings of the Third Circuit Task Force on the Selection of Class Counsel (June 1, 2001) (transcript on file with author).

2 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 158 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

3 *See* Richard L. Marcus, *Discretion Über Alles?*, *in* THE DISCRETIONARY POWER OF THE JUDGE (Burkhard Hess & Marcel Storme eds., forthcoming 2003).

as well, I concluded that a parallel examination of the topic would be most suitable for this issue.

In many ways, one might say that discretion is the antithesis of law. Indeed, it has been said to embody the "right to be wrong," or to reflect a view that each of several possible options is equally "right."[4] At the same time, discretion is an inescapable aspect of legal decisionmaking,[5] and as a result it will be difficult to draw an absolute line between behavior that is discretionary and that which is not.[6] Moreover, we must be cautious about overemphasizing the role of rules as limitations on discretion; there is a significant risk of tightening the fetters on judges too much.[7]

The most prominent American study of discretion focused on administrative law.[8] Regarding procedure, until recently U.S. attention focused mainly on the "abuse of discretion" standard used by Ameri-

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4 *See* Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 236 (1990) (suggesting that "in virtually every case the legal decisionmaker, in the paradigmatic case the trial judge, was free to decide the case in directly contradictory ways").

Uneasiness about discretion may be more common among those who are legally trained; sociologists may say that lawyers are too prone to think only of confining discretion with rules. *See* Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, *in* THE USES OF DISCRETION 11, 16–17 (Keith Hawkins ed., 1992).

5 "It is . . . difficult to contemplate the making of a legal decision that does not have at least a measure of discretion." Hawkins, *supra* note 4, at 11–12. Hawkins explains that "[d]iscretion is heavily implicated in the use of rules: interpretive behavior is involved in making sense of rules, and in making choices about the relevance and use of rules." *Id.* at 13. Nonetheless, it may be that discretion is much less prominent in legal decisionmaking in the United States than in actions of the Executive. Thus, Professor Rubin says that, in the age of the administrative state, the judiciary "does not seem to have undergone the transformation experienced by other parts of our government." Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1303–04 (1997).

6 "In reality it is impossible to treat rules and discretion as discrete or opposing entities. Discretion suffuses the interpretation of rules, as well as their application." Hawkins, *supra* note 4, at 35.

7 Thus, Professor Davis, in his pathbreaking work on the ambit of discretion under American law, warns against circumscribing discretion too much:

> Turning all discretion into law would destroy the individualizing element of equity and of discretion. Binding precedents may make for undue rigidity. . . . Precedents have greater force in English courts than in American courts, and my opinion is that we would lose much if our courts were to imitate the English courts . . . .

KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 107 (1969).

8 *See id. passim.*

can courts in reviewing decisions on a variety of topics.[9] The standard of review is, of course, an important measure of discretion in the trial court. In the American system it is a rather distant one, however, because ordinarily appellate review is not available until all proceedings in the trial court are completed, due to the final judgment rule.[10] By that time, most procedural matters will seem a distant memory, and ordinarily procedural objections would be rejected as grounds for reversal under the doctrine of harmless error.[11]

The procedural rules themselves could emphasize limiting discretion. But the Federal Rules of Civil Procedure, adopted in 1938, do not. Instead, they draw their essence more from the relaxed and discretionary background of equity than the confining orientation of the common law.[12] Until the 1970s, however, district judges' discretion was constrained by the traditional reticence of the judge during the pretrial period, leaving developments during that period to be controlled almost entirely by the lawyers. At trial, the judge's discretion was usually circumscribed by the American reliance on the jury trial, which required the judge to leave the decision to the jury (subject to the judge's rulings on admissibility of evidence and under the judge's instructions) unless the evidence was so obvious as to support entry of judgment as a matter of law.[13]

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9 The leading treatments are Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982), and Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971). *See also* Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645 (1988) (examining the deferential "clearly erroneous" standard for trial court factfinding).

10 *See, e.g.*, 28 U.S.C. § 1291 (2000) ("The Courts of Appeal . . . shall have jurisdiction of appeals from all final judgments . . . .").

11 *E.g.*, FED. R. CIV. P. 61 (stating that errors are not a ground for disturbing a judgment unless refusal to change the result "appears to the court inconsistent with substantial justice," and directing the court to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties").

12 The seminal work is Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987) (arguing that the Federal Rules are modeled, in critical ways, on the flexible and discretionary features of equity rather than the confining system of common law).

13 Current assumptions about the former limits on the judge's ability to alter the jury's decision may not sufficiently appreciate the latitude the judge had to do so in the more distant past. *See* Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 592 (2001) (arguing that "pre-modern federal control of juries by the elaboration of law, the direction of verdicts, and the liberal use of commentary on the evidence along with new trials likely exceeded the overall level of modern judicial controls").

Starting in the 1970s, these tethers on pretrial judicial discretion loosened, and a number of American scholars have decried the decline in structural or rule-based limits on the latitude American judges—or at least American federal district court judges—exercise over civil cases pending before them.[14] Although there have been some academic voices strongly supporting discretion,[15] the trend has been toward condemnation, or at least toward viewing these developments with alarm.[16]

In this Article, I do not attempt a complete examination of this multi-headed and challenging problem. Rather than focus primarily on appellate review, I begin by trying to set out a typology of legal discretion against which the present reality of American federal courts can be measured. To provide a general context, the Article then sketches the trends of procedural evolution in the United States during the twentieth century, without undertaking anything approaching a comprehensive treatment, and finds that they have indeed inclined in general toward increased judicial discretion.

Against this general background it turns to several recent "hot spots" of procedural controversy and assesses them in terms of the degree of discretionary activity. Although this examination confirms the views of the critics that discretionary activity has indeed increased, I view these developments with less alarm than some others. For one thing, there *have* been legal reactions—by appellate courts, Congress, and the rulemakers—that respond to the concerns raised by certain kinds of procedural discretion. I conclude that, even if the current activity holds risks, it is not clear that these risks have been realized often, or that any alternative measures to deal with the forces that stimulated these changes are likely to present themselves. Indeed, it is noteworthy that increased judicial supervision of litigation—the feature of recent American development that sparks most controversy among academics—appears to be an international phenomenon, and not just an American one.[17]

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14 *See generally* Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493 (1997); 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); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

15 Perhaps the leading example is Dean Mengler's analysis of the Federal Rules of Evidence, which is directed at somewhat different topics because it looks to the handling of trials of both civil and criminal matters. *See* Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989).

16 *See* sources cited *supra* note 14.

17 For example, England has recently embarked on a revised procedure for civil cases based on a 1995–1996 study by Lord Woolf. In his Final Report on that study,

I. A ROUGH TYPOLOGY OF JUDICIAL DISCRETION

Speaking of discretion as a unitary characteristic seems too broad, so the starting point should be to break the concept into some constituent parts.

1. Primary vs. secondary discretion. In American analyses, a central distinction is between "primary" and "secondary" discretion. In his classic articulation of American procedural discretion, Professor Rosenberg explained the idea as follows:

> When an adjudicator has the primary type, he has decision-making discretion, a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process. When the law accords primary discretion in the highest degree in a particular area, it says in effect that the court is free to render the decision it chooses; that decision-constraining rules do not exist here; and that even looser principles or guidelines have not been formulated. In such an area, the court can do no wrong, legally speaking, for there is no officially right or wrong answer.[18]

Lord Woolf devoted his first substantive section to case management. *See* LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 13–102 (1996). He began by declaring that "the introduction of case management [is] crucial to the changes which are necessary in our civil justice system." *Id.* at 14.

Although the Hess & Storme book of essays from the Ghent Conference, THE DISCRETIONARY POWER OF THE JUDGE (Burkhard Hess & Marcel Storme eds., forthcoming 2003), has not yet appeared, the manuscripts of several of the chapters confirm this broad trend toward managerial judging. Professor Hess, the reporter for the event, referred to "the worldwide trend toward managerial judging." *See* Burkhard Hess, *Judicial Discretion: General Co-Report for the Ghent Conference 2000, in* THE DISCRETIONARY POWER OF THE JUDGE (manuscript at 15, on file with author). He added that "one can assume a current trend of enlarging judicial flexibility and discretion in most civil procedures all over the world." *Id.* (manuscript at 2, on file with author). Two South African professors reported that "in recent years the idea has, therefore, gradually gained acceptance world-wide—as part of the access to justice philosophy—that it would be in the interests of effective access to justice to provide for a certain degree of judicial control over the proceedings." Wouter de Vos & Roshana Kelbrick, *Discretionary Powers of the Judge in South Africa, in* THE DISCRETIONARY POWER OF THE JUDGE (manuscript at 18, on file with author). In her regional report for the Ghent Conference, a Belgian professor traced the growing inclination toward judicial management of the proceedings in Belgium, the Netherlands, and France. Karen Broeckx, *The Discretionary Power of the Judge: Regional Report: Belgium, France, Italy, Netherlands, in* THE DISCRETIONARY POWER OF THE JUDGE (manuscript at 27–31, on file with author).

18 Rosenberg, *supra* note 9, at 637.

Put differently, one could say that the subject of decision is one that defies the development of legal "rules," and simply calls for a decision by somebody.

"Secondary" legal discretion does not embody any authority for the decisionmaker to select governing rules, but rather recognizes that the hierarchical arrangement of the judicial system sensibly implies limitations on second-guessing. Often the best person to make a certain decision is the official on the ground, and second-guessing by others later would be disruptive. The reviewing court is accordingly constrained to uphold the decisionmaker's resolution even though it is confident it would have gone a different way. In a judicial system like ours, which reposes primary authority in the trial court judge and allows the appellate court to intervene only after all the trial judge's work is done, it would wreak havoc to have appellate courts second-guess the multitude of rulings made by the trial judge.[19] Hence the harmless error rule; secondary discretion is pervasive in American law.

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19 This is not the only way one could organize a legal system. Greater authority to alter first level decisions does exist in some systems. Consider the report of Professor Damaška regarding the handling of appellate review in what he terms the "activist state":

> [T]he reviewing stage is conceived not as an extraordinary event but as a sequel to original adjudication to be expected in the normal run of events. In well-integrated judicial hierarchies, such as the Soviet, supervision by higher-ups need not be conditioned—as it is in classical Continental systems—upon an appeal by a disaffected party; it can also take place as part of the official duty of higher judicial authorities. Far Eastern systems have been known to go even further: original decisions were treated as mere drafts of judgments that could be announced in definitive form only by superiors. . . .
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> Hierarchical review is not only regular, it is also comprehensive. There are few aspects of lower authority's decision making that are accorded immunity from supervision: fact, law, and logic are all fair game for scrutiny and possible correction. Where reconsideration by superiors is so pervasive, it makes sense to require lower authority to make clear exactly what it has determined and why. Perfunctory and conclusory statements of grounds, so prevalent among trial judges in common-law jurisdictions, invite rebuke and reversal in a hierarchical judicial system.
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> . . . [R]eversal or modification of a decision does not necessitate a finding that the subordinate decision maker had erred or committed a fault; even if impeccable at the time of rendition, a judgment can be changed by superiors. Thus if new evidence is discovered pending an appeal (casting doubts on the propriety of a decision, but no blame on the decision maker), it must be submitted to the reviewing authority rather than to the original adjudicator.

MIRJAN DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 48–49 (1986) (footnotes omitted).

These two categories are not hermetically sealed, for it is difficult to imagine any topic on which a decision by an American trial court could not be so unreasonable as to justify appellate efforts to cure. Consider, for example, the question of when a trial should be scheduled to begin. That would seem to embody "primary" discretion, because there is ordinarily no legal rule on when the trial should be held. Although there may be some principles of priority for certain types of cases, and even time limits for getting cases to trial,[20] a decision that did not transgress these sorts of limits might nonetheless warrant reversal. Should the trial judge require, for example, that the trial begin the day after the complaint is served on the defendant, and continue sixteen hours per day, seven days a week, until completed, an appellate court would be likely to find this directive to be an abuse of discretion.

2. *Substantive discretion.* The precise dividing line between substance and procedure is sometimes in doubt, but one anxious to appreciate the importance of procedural discretion should start with some appreciation of the possibility of substantive discretion. At least in the abstract, this sort of discretion would seem more unsettling.

(a) Complete primary discretion for individual judges in resolution of cases. Ad hoc decisionmaking would give the adjudicator complete discretion to resolve each case any way she saw fit. One is reminded, for instance, of the Biblical tale of King Solomon's judgment when presented with competing claims of motherhood of a child.[21] Per-

20 American federal courts operate under "speedy trial" legislation requiring that criminal cases be brought to trial within a certain time unless the requirements are waived. *See* 18 U.S.C. §§ 3161–3174 (2000). There is no such legislation about civil cases in federal court. The Civil Justice Reform Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990), did require each district to develop a plan to reduce delay in civil litigation before it, but it did not prescribe the content of such a plan. *See generally* Richard Marcus, *Malaise of the Litigation Superpower, in* CIVIL JUSTICE IN CRISIS 71, 102–08 (Adrian A.S. Zuckerman ed., 1999) (contrasting the federal approach to case management with the approach of the California state courts, which operate under a "Fast Track" system).

21 *See* 1 *Kings* 3:16–28. Solomon directed that the child be divided, with half given to each woman. One accepted this "solution," but the other urged Solomon to give the child to her opponent and not slay it. Solomon awarded the child to the woman who sought to save its life. In American evidence classes, this example is used to illustrate the variety of grounds for decision of disputed matters. *See* JON R. WALTZ & ROGER C. PARK, EVIDENCE 64 (9th ed. 1999). In 1992, Ann Althouse wrote that "[t]here is a tradition of beginning the law school course on evidence with the Judgment of Solomon." Ann Althouse, *Beyond King Solomon's Harlots: Women in Evidence*, 65 S. CAL. L. REV. 1265, 1265 (1992). Besides the Waltz & Park casebook, Althouse listed

haps there was a time when that sort of discretion actually obtained in Anglo-American jurisprudence; a millennium ago, when a lord "held court" to resolve disputes he might have exercised such complete latitude. Obviously any such primary discretion has passed from the scene, and the common-law system of precedent introduces considerable restraints on the power of trial court judges (who must follow the legal rules announced by appellate courts).

(b) Primary judicial discretion to announce substantive rules. "The common law is, in a sense, a formalized means of dealing with gaps in the existing regulation of behavior by creating law out of a vacuum."[22] But "[e]ven in cases of first impression, judges do not purport to have unconstrained discretion to enforce whatever rules they please."[23] Thus, the common law method constrains judicial discretion.[24]

From the birth of the republic, this constraint reassured those worried about excessive substantive judicial discretion.[25] But there

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three others that also used the tale. *See id.* at 1265 n.1. Ensuing editions of the other books no longer use the tale.

Was Solomon awarding the child based on his conclusion that the real mother would rather see it raised by another than see it slain, or on the ground that the woman who tried to save its life would make a "better" mother whether or not she bore the child? The former would seem a version of "secondary" discretion; in the American view it would be said to be immune to review because the factfinder saw the evidence and heard the witnesses and did not have to rely on a "cold record." *See, e.g.*, FED. R. CIV. P. 52(a) ("Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."). The latter might be an example of "primary" discretion, because we are not told that there was some legal "rule" applicable at the time that the "better" mother should be given custody.

22 Ronald Allen & Ross Rosenberg, *Legal Phenomena, Knowledge and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 685 (2002).

23 Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4 (2001).

24 *See generally* MELVIN A. EISENBERG, THE NATURE OF THE COMMON LAW (1988) (exploring the ways in which the common-law method channels and limits decision-making by judges). For a variety of views on whether American judges should or do continue to wield substantive latitude on questions of tort law comparable to the mid-twentieth century, see Symposium, *Judges as Tort Lawmakers*, 49 DEPAUL L. REV. 275 (1999).

25 "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." THE FEDERALIST No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

The extent of this restraint may now be overstated. Consider the current debate among federal courts of appeals about unpublished decisions. A panel of the Eighth Circuit ruled that refusing litigants the opportunity to cite unpublished decisions violated the Constitution because exercise of "judicial power" precludes federal courts

are varying levels of constraint: "despite the doctrine of *stare decisis* . . . judges often have real discretion in shaping and reshaping legal doctrines."[26] English judges also operate under a common-law system, but they are much more constrained than American judges, a circumstance that even Americans critical of excessive discretion applaud.[27] Particularly in comparison to a codified system like that in much of continental Europe, heightening the discretion-constraining role of the legislature, the common-law method can thus be seen as an example of primary discretion exercised by the judiciary. At its high-water point, this represented in essence a view that judges, and only judges, could discern and announce legal rules.[28] That attitude underlies the eighteenth and nineteenth century judicial skepticism about legislation, sometimes verging on judicial antagonism toward legislative "intrusion" into lawmaking. This background is pertinent to the American handling of procedural discretion because it is reflected in an ongoing debate about who should be making procedural rules.

(c) Secondary judicial discretion to apply substantive rules. As noted above, the content of the rule has a major effect on the existence of secondary judicial discretion in connection with enforcement of the rule. Contrast a rule declaring that anyone who drives over sixty-five miles per hour commits an infraction to one that declares it to be an infraction to drive at "an unsafe speed."[29] In one view, the latter is

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from making rulings that are not binding on future cases. *See* Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir.), *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). In reaction, the Ninth Circuit has ruled that there is no such constitutional requirement, pointing out that in the eighteenth century many decisions were not reported, and that currently the decisions of district courts are not binding, and the decisions of courts of appeals are only binding within their circuits. *See* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001). Accordingly, "judicial power" could be constitutionally exercised in a way that did not always create a judicial precedent that other courts had to follow.

26 Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, *in* THE USES OF DISCRETION, *supra* note 4, at 47–56.

27 Thus, Professor Davis notes that "[p]recedents have greater force in English courts than American courts, and my opinion is that we would lose much if our courts were to imitate the English courts." *See* DAVIS, *supra* note 7, at 107. Some argue nevertheless that U.S. courts adhere too slavishly to precedent. *See* Nelson, *supra* note 23 *passim* (arguing that the American reluctance to overrule "demonstrably erroneous" precedents should be relaxed).

28 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 403–04 (2d ed. 1985) (describing opposition to codification movements in the mid-nineteenth century).

29 California legislation contains both sorts of rules. There are posted speed limits in many places that forbid driving above a certain speed. *See* CAL. VEH. CODE § 22,352 (West 2000) (describing presumptive speed limits if there is no posted speed

more a "standard" than a "rule," because it gives considerable latitude to the decider to determine the correct outcome based on the circumstances of the individual case.[30]

Whether the discretion resulting from open-textured legal standards should be characterized as primary or secondary could be debated. In the American system, decisions at trial are usually left to juries, which are said to have considerable latitude in determining for themselves what rate of driving is "unsafe," making this seem primary. Some academics in the United States even applaud the old concept of jury nullification, by which the jury decides not to apply substantive rules because it finds them distasteful.[31] But ultimately, this discretion seems more of a secondary nature; the judge does instruct the jury, and can reject some decisions by the jury. Similarly, in a court trial the district judge would have considerable latitude in applying an open-textured legal rule. The appellate function would be limited because of the superior vantage point of the trial judge,[32] but the appellate power to reverse for clear error does exist. In form, at least, this is secondary discretion.

Although the prominent role of juries can be viewed as a limit on the discretion exercised by judges,[33] that constraint only works in cases that are tried, and as a smaller percentage of civil cases go to trial the discretion of the jury becomes a less important counterweight

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limit). But there is also the "basic speed law," which forbids driving at a speed that is unsafe under the circumstances. *See* CAL. VEH. CODE § 22530 (West 2000) (forbidding driving "at a speed greater than is reasonable or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway"). Because driving at a speed greater than the posted or presumptive speed limit is an infraction, this provision only comes into play if the driver is proceeding at a speed below the speed limit.

30 For a general discussion of the difference between rules and standards, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

31 *See generally* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (exploring the refusal of African-American jurors to convict guilty African-American defendants); Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601 (2001) (surveying arguments for and against nullification in criminal trials, and their application to the civil context).

32 *See* FED. R. CIV. P. 52 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."); *see also* Cooper, *supra* note 9, at 647–57 (reviewing the evolution of appellate deference to trial-court factfinding in American federal courts).

33 *See* Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 (1977) ("The jury serves as a check upon the judge's power in each case.").

to the discretion of the trial judge. This trend is one of the things lamented by those who decry the current gravitation toward discretion.[34] From the perspective of one concerned about curtailing discretion, this may seem a strange lament, particularly since some still talk approvingly of jury nullification. Indeed, the role of the jury in civil cases in this country is virtually unique; from the perspective of the rest of the world it is likely to appear a singularly peculiar way of constraining judicial discretion.

(d) Legislative adoption of substantive rules. Outside the common-law countries, the notion of substantive judicial discretion may appear perplexing, given the prevalence of legislatively decreed substantive codes. But because the common-law background exists until supplanted in the common-law countries, legislative intervention is properly understood as a limitation on judicial discretion. Sometimes abolition of judicial discretion is a very conscious purpose. In the United States, common-law crimes have been supplanted by legislation in almost all jurisdictions due to a conscious legislative decision that judges should not have the power to declare conduct criminal. A pertinent example is the federal contempt statute, which was passed expressly to supersede any free-roving judicial power to declare conduct contempt.[35]

3. Procedural discretion. Substantive discretion and procedural discretion need not go hand in hand. Indeed, as we shall see, in some ways they have been decoupled for most of the life of the American federal courts. Procedure—and therefore procedural discretion—may be conceived as dedicated to accomplishing the purposes of the substantive law. In American parlance, this means that procedure should be seen as the "Handmaid of Justice."[36] The current concern about procedural discretion is whether unconstrained discretion about procedure could subvert substantive justice.

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34 *See, e.g.*, Peterson, *supra* note 14, at 76–84; Yeazell, *supra* note 14, at 660–66.

35 *See* 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 701 n.2 (2d ed. 1982).

36 This phrase was quite popular with Charles Clark, chief drafter of the Federal Rules of Civil Procedure. *See* Charles Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) (presenting the view of the chief drafter of the Federal Rules at the time that those rules appeared). It may be taken as expressing a certain attitude about the role of procedure in enforcing legal norms. *See* DAMAŠKA, *supra* note 19, at 148 (asserting that in the "activist state," "procedure is basically a handmaiden of substantive law").

(a) Ad hoc procedure. Individual judges might have authority to design procedures case-by-case on an ad hoc basis. Perhaps this latitude once existed in Anglo-American law. It does seem reflected in the fable of Solomon, who employed an innovative experiment (proposing that the child be divided between the contending parties to see how they reacted) to determine which "mother" should get the contested child.[37] But that sort of free-form exercise seemingly passed from the scene rather early. We are told that, before American courts came into existence, the English law first congealed around procedures and that the substantive law was "secreted in the interstices of procedure."[38] It is perhaps understandable that even in the absence of a defined substantive law one would find some certitude about procedures. Like religious ritual, procedure tells people what to do to address certain problems. For this, one needs announced procedural rules rather than ad hoc methods.

(b) Judicial discretion to announce procedural rules by decision. A prescribed set of procedures might emerge from decisions, in keeping with the common-law tradition. This seems to have been the early English model, and to some extent it was pursued in this country. Of course, this approach affords trial courts limited room for innovation, because lower courts must operate within the latitude afforded by higher courts, and higher courts would not often be in a position to develop new practices. Moreover, there is generally an interrelationship between procedures so that it is best to modify related procedures in a coordinated way instead of adjusting them one at a time as cases come up. Accordingly, a procedural code might have benefits whatever one's views on discretion, but it would be hard to create one as a whole and integrated item by judicial decision.

(c) Judicial discretion to adopt a procedural code. Proceeding from maximum individualized discretion to least individualized discretion, one might find a variety of regimes. Recent American experience requires inclusion of a number of models:

(i) Rulemaking by each judge. Each judge might be free to announce his or her own procedures. It is not hard to imagine the difficulties this technique would present for the lawyers, who would not know which procedures to use until they found out which judge was handling the case. Moreover, if the case was shifted to another judge,

37 *See supra* note 21 and accompanying text.

38 HENRY SUMNER MAINE, EARLY LAW AND CUSTOM 389 (London, John Murray 1890).

they would then have to switch procedures. No doubt this arrangement could make life more difficult in the clerk's office as well.

(ii) Rulemaking by each multi-judge court. Each court, acting as a whole, might have authority to promulgate a procedural code. Although individual judges might find their latitude infringed by this arrangement, they would still have an opportunity to urge their procedural visions on their fellows. Presumably, the court would attempt to curtail procedural free-lancing by individual judges. Unless each court is sufficiently segmented from the other courts of the given judicial system, however, considerable complications could ensue as cases shifted from one court to another (or were appealed).

(iii) Rulemaking by the entire judicial branch. This model would solve the problem of shifting cases from one court to another within the judicial system. As with individual free-lancing in the whole court rulemaking model, it would be important that this approach constrict the ability of local courts to innovate, and thereby to deviate. There is some indication in early American experience that the Framers of the Constitution had little uneasiness with delegating this task to the judiciary,[39] although the later adoption of the Conformity Act[40] required federal judges to apply state-court procedures.

(d) Legislative enactment of a procedure code. Rather than leave the development of a procedural code to the judges, the legislative branch might adopt one. This sort of legislative activity raises issues about whether some aspects of procedure are the sole preserve of the judiciary. In the United States, some have suggested that there are areas of "inherent" judicial authority over procedure.[41] It may well be

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39 Indeed, as Professor Davis recognized,

> The first Congress, made up largely of the same men who wrote the Constitution, did not bother with standards when it delegated to the courts the power "to make and establish all necessary rules for the orderly conducting of business in said courts provided such rules [were] not repugnant to the laws of the United States."

DAVIS, *supra* note 7, at 47–48 (quoting Judiciary Act of 1789, ch. 20, 1 Stat. 83). When the Rules Enabling Act was adopted in 1934, it did limit the rulemaking authority to promulgating rules of "practice and procedure." Rules Enabling Act, ch. 646, 62 Stat. 961 (1934).

40 Act of June 1, 1872, ch. 255, §§ 5–6, 17 Stat. 196, 197.

41 *See, e.g.*, A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958) ("There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*.").

that some sorts of legislative directives could transgress the authority of an independent judiciary. For example, if the legislature insisted that all disputed matters be decided in a very short time—say thirty minutes—that might be seen to infringe upon the judiciary's right to have adequate time to reflect on difficult issues before deciding them.

But recognizing that limited sphere of the judiciary's immunity from legislative dictates leaves much room for a legislative code. Assuming that the legislature exercised its procedural authority, it would often be anxious to prevent judicial innovation and deviation on a local level. The constraint on local innovation would then serve not only to ensure consistency throughout courts, but also to preserve the legislature's primary discretion over the contents of the code.

(e) Nature of the rules. As with substantive rules, the procedural code could be oriented towards a "rule" or a "standard" model, leaving more or less secondary discretion to individual judges as they apply the code.

(f) Tension between judicial discretion and attorney discretion. Finally, for the American experience it is important to highlight the contrast between attorney discretion and judge discretion. As we shall see, a basic choice can be between directing judges to play an active role in the development and orientation of litigation and leaving that entirely to attorneys. Limiting this sort of judicial discretion need not take the form of judicial review of judges' actions or legislative constriction of their latitude; it might mean that attorneys are simply left to do whatever they want to do.

II. AMERICA'S TWENTIETH CENTURY DRIFT TOWARD PROCEDURAL DISCRETION

In England, pervasive procedural reform was a project that began in the nineteenth century, culminating in a way with the Judiciary Acts in the 1870s. The eventual legislative action reflected Parliament's impatience with judicial reform, perhaps most vividly illustrated by the failings of the Rules at Hilary Term adopted in the 1830s.[42]

Although the genesis of modern American procedure will be familiar to many readers, it seems useful to sketch some features of it that bear on the question at hand. During the nineteenth century in the United States, there was an extensive codification movement designed to embody in legislation much that had previously been gov-

42 *See* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 324–27 (1926) (describing the emergence and drawbacks of the Rules of Hilary term).

erned only by judicial decision. In California, for example, a great deal of contract law is contained in the Civil Code.[43] The chief proponent of American codification was David Dudley Field of New York, and the centerpiece of his effort was a procedural code that came to be known as the Field Code.[44] Like the English effort, the Field Code sought to escape the arcane rigidities of common-law procedure that stood in the way of resolution of cases on their merits. In this sense, the shift sought by codification supplants overtechnical constraints on efforts by judges to adapt procedure to achieve substantive justice.

As with any other legislative intervention into court procedure, however, the Field Code also sought to constrain judicial discretion over procedure by intruding into the domain previously controlled by judges. Some judges, at least, resisted this effort. In 1910, for example, the Wisconsin Supreme Court remarked on "[t]he cold, not to say inhuman, treatment which the infant [Field] Code received from the New York judges."[45] Beyond preempting judicial control over the content of procedural rules (one form of primary judicial discretion), the Field Code also sought to constrain judicial discretion in the application of its new directives (secondary discretion).[46] Thus, at the end of the nineteenth century one might say that judicial discretion over procedure was at something of a low point.

Twentieth century American procedural reform originated in a real sense in the speech given by Roscoe Pound at the 1906 conven-

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43 *See, e.g.*, CAL. CIV. CODE § 1550 (West 1982) (setting forth the essential elements of a contract); *id.* §§ 1605–1615 (providing definitions on what is sufficient consideration); CAL. CIV. CODE §§ 1619–1621 (West 1985) (defining express and implied contracts); CAL. CIV. CODE §§ 1635–1656 (West 1985 & Supp. 2002) (setting forth rules for interpretation of contracts); CAL. CIV. CODE § 1689 (West 1985) (providing grounds for rescission of a contract); *id.* §§ 1697–1698 (setting forth methods for modifying contracts).

44 *See* CHARLES A. WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 458 (6th ed. 2002) (referring to "[t]he Field Code, adopted in New York in 1848 and widely imitated").

45 McArthur v. Moffett, 128 N.W. 445, 446 (Wis. 1910).

46 *See* Stephen N. Subrin, *David Dudley Field and the Field Code: An Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 313 (1988) (distinguishing modern procedure, which "embraces flexibility and discretion," from the "bedrocks of Field's thought and work," which were "constancy in law and its application, predictability, and judicial fidelity to carefully defined rights and obligations"); *see also id.* at 333 ("Field feared the potential tyranny of unrestrained judges."); Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989) (exploring shifting views of joinder rules during the nineteenth and twentieth centuries).

tion of the American Bar Association.[47] Pound was a lifelong proponent of judicial discretion.[48] After his speech, there began a long effort to persuade Congress to provide for a single national procedure in the federal courts. At the time, federal courts were directed by the Conformity Act to apply state law—whether the Field Code or otherwise—to cases in federal court unless there were a federal statute that provided otherwise. Though peculiarities of the Conformity Act made innovative state procedures unavailable in federal court in many instances, the Act clearly foreclosed federal judicial discretion over procedure.

In 1934, Congress passed the Rules Enabling Act, authorizing the Supreme Court to promulgate rules of practice and procedure for the federal courts, but providing that these rules should not modify or abridge any substantive rights.[49] Thus, Congress gave the judicial branch as a whole primary discretion to devise rules for procedural matters. Nothing much was said during the long congressional consideration of the Act about what the code should look like, however. The framers of the federal rules—to whom the Supreme Court delegated its discretion—had the broad discretion of starting from scratch.

The year 1938 marked a double watershed in judicial discretion for American federal judges. On the substantive side, the famous *Erie* decision[50] declared that federal courts did not have any right to declare rules of "general common law." Under the pre-*Erie* regime they had taken it upon themselves—in the common law tradition—to discern "correct" rules to apply to cases in federal court on grounds of diversity of citizenship. Trial courts engaged in this effort were, of course, subject to review by the higher federal courts. But systemically this represented primary discretion of the judicial branch over rules of substantive law. The *Erie* decision put an end to that by declaring that this represented "an unconstitutional assumption of powers by the Courts of the United States," because "[e]xcept in matters governed

47 Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906). Dean Wigmore recalled thirty years later that the speech "struck the spark that kindled the white flame of high endeavor, now spreading through the entire legal profession." John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUDICATURE SOC'Y 176, 176 (1936).

48 *See* Subrin, *supra* note 12, at 944–48 (describing Pound's efforts to fortify judicial discretion).

49 *See* 28 U.S.C. § 2072 (2000).

50 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[51]

There remained important areas in which the federal courts exercised a form of primary substantive discretion within the adjudicatory process. As enforcers of the Constitution, they had to discern its commands; as one commentator noted, in some important respects ours could be seen as a "discretionary Constitution."[52] In other areas, there remained federal common law that had to be developed by the courts themselves under implicit, not explicit, warrant from Congress.[53] Sometimes Congress even wrote procedural rules to call for this activity.[54]

The other watershed was the adoption of the Federal Rules of Civil Procedure, which went into effect in 1938. Although the content of these rules was not addressed during the debates leading up to adoption of the Rules Enabling Act, a committee of practitioners and law professors—no sitting judges—produced a complete set rather quickly. As Professor Subrin has shown,[55] the pervasive orientation of that initial set of rules was toward Equity rather than common law. Throughout, the rules eschewed the narrowing features of the common-law system and embraced instead the somewhat formless orientation of Equity. The amendment rule, for example, granted great

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51 *Id.* at 78.

52 William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 641–48 (1982) (exploring the "remedial discretion" wielded by federal judges in institutional reform suits).

53 For example, in *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), the Supreme Court held that a provision of the Labor Management Relations Act that granted federal courts jurisdiction to enforce collective bargaining agreements also gave them authority to fashion rules for the construction of those contracts: "[w]e conclude that the substantive law to apply in suits under [the Act] is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456.

54 *See, e.g.*, FED. R. EVID. 501 (providing that rules of privilege for cases governed by federal law "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience"). This directive was adopted by Congress in place of proposed rules of privilege that had been submitted by the Supreme Court's rulemakers. *See* 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5421 (1980) (chronicling the congressional reaction to the rulemakers' proposals to adopt privilege rules). Thus, Congress was in some ways more comfortable with the latitude afforded judges to develop rules under the common law tradition, as much as that might be said to depend on judicial discretion, than with conferring authority to address the same area on the rulemakers. At the same time, it must be appreciated that the rulemakers had taken a much more aggressive approach to privilege than judicial decisions were likely to do.

55 Subrin, *supra* note 12 *passim*.

latitude to district judges to permit parties to amend their pleadings before trial subject to the direction that leave to amend should "be freely given when justice so requires."[56] Similarly, courts were given authority to combine separate cases, or to subdivide single cases for separate trials of different aspects, when the judge deemed that treatment desirable.[57] And Rule 1 further endorsed latitude in interpretation of the new rules by urging that they be construed "to secure the just, speedy, and inexpensive determination of every action."[58] Overall, the rules were infused with latitude for judges, perhaps not accidentally given the views of Dean Charles Clark of Yale Law School, the chief drafter.[59]

As with the Code reforms,[60] the innovations of the Federal Rules encountered some entrenched judicial resistance. In Charles Clark's words, there was for awhile "something bordering on a revolt" against the relaxed pleading regime of the new rules.[61] The Ninth Circuit, in what has been described as a "guerrilla attack[ ]" on simplified pleading,[62] proposed changing the pleading rule.[63] But the proposal was rebuffed,[64] and the controversy died when the Supreme Court threw its weight behind an elastic interpretation of the new rule in 1957.[65]

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56 FED. R. CIV. P. 15(a).

57 *See id.* 42.

58 *Id.* 1

59 "Clark distrusted lawyers and trusted judges. Indeed, recent procedural reforms that grant judges additional power to shape and control litigation are consonant with Clark's outlook." Stephen N. Subrin, *Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules*, *in* JUDGE CHARLES EDWARD CLARK 115, 116 (Peninah Petruck ed., 1991).

60 *See supra* note 45 and accompanying text.

61 Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 49 (1957).

62 RICHARD FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 524 (7th ed. 1997).

63 *See* Judicial Conference of the Judges of the Ninth Circuit, *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253 (1952).

64 *See* ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18–19 (1955) (explaining the decision not to propose modification of Rule 8(a)(2)).

65 *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (stating that dismissal for failure to state a claim is only warranted when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). Since 1957, the question of demanding more at the pleading stage has recurred. For discussion, see Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998) [hereinafter Marcus, *Puzzling Persistence*] (examining experience since 1986 with demanding pleading standards); and Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986)

Revisions of other rules shifted even more to a "functionalist" orientation. Thus, in 1966, the joinder rules were revised to jettison some legal constructs of the past and replace them with sometimes overlapping instructions about important topics such as determining whether a class action should be allowed.[66] The 1970 amendments removed the requirement that document discovery forays be undertaken only with prior judicial approval.[67]

In the 1970s, the Federal Rules of Evidence were also adopted, further cementing the authority of trial judges to make case-specific determinations about handling of cases. Before these rules were adopted, the reported orientation of traditional American evidence law had been to limit the judge's discretion. Writing in 1930, Professor McCormick noted that "the present system in vogue in the United States" was typified by "sharply defined rules prohibiting the admission of many rigidly classified types of evidence,"[68] and he hypothesized that one orientation for reform "might lean toward vesting a large discretion in the trial judge to admit or exclude, guided only by certain general canons and standards."[69] A decade later, the American Law Institute debated the form for the Model Code of Evidence it was preparing. Wigmore, the giant of American evidence law, urged a detailed catalog, while Judge Charles Clark—who drafted the Federal Rules of Civil Procedure as an academic before appointment to the bench—urged adoption of "one broad rule of admissibility of relevant evidence," with a few subordinate clarifying rules.[70] Ultimately, the federal evidence rules went beyond Clark's minimalist approach, but left broad areas subject mainly to the control of the trial judge in light of the circumstances of the case.[71]

(chronicling and examining tendency of federal courts to demand more specific pleading in some cases).

66 The reporter, Professor Benjamin Kaplan, explained that the old rule was "a text burdened with a categorization of rights at a high pitch of abstraction." Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure I*, 81 HARV. L. REV. 356, 377 (1967).

67 *See* Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748 (1998) (describing the elimination of the requirement for a motion supported by good cause in order to obtain document production).

68 Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 503 (1930).

69 *Id.*

70 *See* Mengler, *supra* note 15, at 432–34.

71 *E.g.*, FED. R. EVID. 403 (authorizing the court to exclude relevant evidence if its potential prejudicial effect substantially outweighs its probative value); *id.* 611 (directing the court to exercise "reasonable control over the mode and order of interrogating witnesses").

In sum, the rules depended heavily on judicial discretion of at least the secondary variety. Only the trial judge was in a position to determine whether an amendment was in the interest of justice, or whether the case should be tried all at once or in stages. Once the trial began, the trial judge was expected repeatedly to compare the probative value and prejudicial effects of proffered evidence. Because of that judge's familiarity with the evidence, appellate courts would rarely reconsider such decisions.[72]

These developments produced another consequence already mentioned—they greatly expanded the discretion of lawyers. Before this procedural "revolution," lawyers were confronted with relatively demanding Code pleading or common-law pleading rules that commanded them to set out their claims or defenses with the sort of precision now required in most of the rest of the world. According to contemporary observers, under English common-law pleading rules many cases were sunk at this stage.[73] Lawyers who got beyond the

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Some have chafed at remaining limits on the power of the trial court judge to make such evaluative decisions. Thus, in *United States v. Scheffer*, 523 U.S. 303 (1998), which upheld a rule that absolutely forbade receipt of polygraph evidence in military trials, Justice Stevens objected, "Over the years, with respect to category after [evidentiary] category, strict rules of exclusion have been replaced by rules that broaden the discretion of trial judges to admit potentially unreliable evidence and to allow properly instructed juries to evaluate its weight." *Id.* at 328 (Stevens, J., dissenting). But some academics have argued that the evidence rules allow too much discretion. *See* Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 CAL. L. REV. 2439, 2476 (2000) (arguing that "we are currently experiencing an *excess* of trial court discretion in the application of evidence rules").

72 For example, in *United States v. Beasley*, 809 F.2d 1273 (7th Cir. 1987), the court explained the handling of evidence involving issues of "character" (governed by FED. R. EVID. 404(b)) precisely in terms of whether there really were rules or just standards:

> [T]he district judge has great discretion. There are no bright line rules; it is easy to identify polar cases but impossible to draw a line of demarcation. Appellate courts can contribute only modestly to the making of the best decision case by case. The decision must be made on the scene, and once the imponderables have been weighed there is little to be gained from weighing them again on appellate scales. . . .
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> The objective is not to enforce "rules"; Rules 403 and 404(b) [of the Federal Rules of Evidence] establish standards rather than rules. It is to ensure that standards not be applied as if they were rules, as if they established mechanical indicia . . . .

Id. at 1278–79.

73 *See, e.g.*, GEORGE HAYES, CROGATE'S CASE: A DIALOGUE IN YE SHADES ON SPECIAL PLEADING REFORM (1854), *reprinted in* 9 HOLDSWORTH, *supra* note 42, at 417–31. This popular spoof attacked the effect of the Rules at Hilary Term. *See supra* text accom-

pleadings were ordinarily held to those pleadings and provided few tools for amplifying the claims or their knowledge of the case as trial approached, and they had limited discovery tools to gather evidence for use at trial.

By the 1970s, the role of the litigating lawyer had been transformed. No longer did the pleadings have to be precise, and great freedom was allowed in revising them. Moreover, extremely broad discovery—almost without judicial limitation—was available to facilitate exploration of alternative theories and to seek damning evidence. Meanwhile, a large variety of new claims had been recognized—both enacted by legislatures and developed by judicial action—so lawyers had a much greater array of issues to litigate, and many of those issues turned on questions of intent or knowledge of defendants that are inherently difficult to resolve short of trial. Judges would usually become involved only when a motion was filed by the lawyers, and then only to resolve the motion. Of all the actors involved in American litigation, then, as of the 1970s it might be said that the ones who had enjoyed the greatest increase in procedural discretion were the lawyers. That situation contributed to the shift toward judicial regulation of much litigation activity over the past thirty years.

III. Discretion and Procedural Pressure Points in Contemporary Federal Courts

In different judicial systems, the focus of evolution of procedural discretion may vary. From an American perspective, there are many areas in which there has been significant development in the last thirty years, and it seems most profitable to focus on several of these. This effort is not intended to capture all details but to detail certain trends. In the process, it is possible to invoke the typology of discretion sketched in Part I.

A. Local Rules and "Bottom Up" Procedural Innovation

One form of primary procedural discretion is for each judge or each court to be able to design a personalized set of local procedural rules. At least in the American federal courts, the original indifference to this sort of thing reportedly yielded to congressional opposi-

panying note 42; *see also* Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 Harv. L. Rev. 725, 728–29 (1926) (asserting that the strictures and intricacies of the writ system created a "crisis" that was "viewed by the [English] public with serious concern").

tion a century and a quarter ago.[74] Nonetheless, that activity has become increasingly pronounced. As Professor Carrington has put it, "localism in federal procedural matters has had something of the tenacity of original sin."[75] Moreover, as Professor Hazard has pointed out, "local rules can best be described as measurements of the chancellors' feet."[76] Although Rule 83 of the Federal Rules of Civil Procedure forbade local rules inconsistent with the national rules,[77] a 1940 study showed that there were already a lot of them two years after the new Federal Rules went into effect.[78]

By the 1970s, these local liberties with the national scheme had become striking in some instances. Initially, the Supreme Court had indicated that "basic procedural innovations" should not be introduced in local rules.[79] But this restraint seemed to evaporate in the controversy surrounding reducing the size of the civil jury. In 1970 the Supreme Court ruled that the Constitution allowed conviction by a jury of fewer than twelve,[80] opening the possibility that a federal civil jury could also have fewer than twelve jurors. After studying the question, however, the Judicial Conference of the United States concluded that this delicate issue should be left to Congress.[81] Undeterred, many districts went ahead and adopted local rules providing for six-

74 *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2012 (1989) ("District court local rulemaking had been explicitly granted to the trial courts from their birth in 1789 to 1872. The Conformity Act of 1872 [Act of June 1, 1872, ch. 255, 17 Stat. 196] reflected Congress's desire to severely limit this power." (footnote omitted)).

75 Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 949 (1996).

76 Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 YALE L.J. 1284, 1286 (1978).

77 Original Rule 83 provided that "[e]ach district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules." *See* 12 CHARLES WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3151 n.1 (2d ed. 1997).

78 The committee was known as the Knox Committee, after its chair, Judge Knox. *See* REPORT ON LOCAL DISTRICT COURT RULES, 4 Fed. R. Serv. (Callaghan) 969 (1940).

79 Miner v. Atlass, 363 U.S. 641, 650 (1960) (holding that a local rule could not introduce depositions into admiralty practice, and observing that "basic procedural innovations" should only be undertaken through the "mature consideration of informed opinion" that attends the national rulemaking process).

80 Williams v. Florida, 399 U.S. 78 (1970).

81 *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., JUDICIAL CONFERENCE REPORT 60 (1971), *quoted in* 12 WRIGHT ET AL., *supra* note 77, § 3153, at 520 (adopting a report from the Standing Committee on Rules of Practice and Procedure that stated that "the better method of effectuating the proposals [to reduce the size of the civil jury] would be by statute").

member juries,[82] and the Supreme Court held they could do so.[83] The difference between six and twelve jurors can be important in some cases, and this decision delegated primary judicial discretion on this topic to each district court.

Beginning in the 1980s, a counter-effort regarding local rules began. The Judicial Conference inaugurated a Local Rules Project to compile information on the extent of local rules in each district and the frequency of local rules that seemingly violated the limitations of Rule 83,[84] and the rule was amended in 1985 to fortify its limitations. Concerned about these forays into local rulemaking, and unsatisfied with the Judicial Conference's efforts to restrain them, Congress in 1988 overhauled the statutory provisions on local rules and directed that each federal appellate court police the local rules of district courts within its circuit through its Judicial Council.[85] The problems seemed to persist.[86] In 1995, Rule 83 was amended another time to strengthen its limitations.[87] Meanwhile, the Judicial Conference commanded that all local rules should be organized in accordance with the national rules to ease the task of locating them.[88] Very recently, the Standing Committee has also initiated a further review by its Local Rules Project.[89]

But these countertendencies have been partially offset by others. At the rulemaking level, the reality has been that several deviant local

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82 *See* Cooley v. Strickland Transp. Co., 459 F.2d 779, 786–88 (5th Cir. 1972) (listing rules from thirty-one districts providing for fewer than twelve jurors in civil cases).

83 Colgrove v. Battin, 413 U.S. 149, 159–60 (1973) (upholding a local rule that reduced the size of the civil jury from twelve to six).

84 *See* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT 1–7 (1988) (finding that there were approximately 5000 local rules, not counting separate parts of individual rules, and concluding that many of them conflicted with national rules).

85 *See* 28 U.S.C. § 2071(c) (1988).

86 Thus, a former Director of the Federal Judicial Center referred to "rampant inconsistency between local and national rules" in a 1991 article. A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1572 (1991); *see also* Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN'S L. REV. 1, 2 (1994) (asserting that individual tailoring of procedures subverts the national rule scheme).

87 *See* 12 WRIGHT ET AL., *supra* note 77, § 3152, at 502–04 (describing 1995 amendment).

88 *See* 12 *id.* (describing the results of the Local Rules Project of the Standing Committee on Rules of Practice and Procedure, and the ensuing adoption of the 1995 amendments to Rule 83).

89 *See* COMM. ON RULES OF PRACTICE & PROCEDURE, AGENDA, JAN. 10–11, 2002, pt. 12 (describing the work of the new Local Rules Project).

provisions have ultimately found favor and been enshrined in the national rules. The six-member jury was eventually added to the Federal Rules of Civil Procedure.[90] So also have other provisions been added that began as innovations in the local rules—numerical limitations on interrogatories and depositions,[91] the requirement that parties meet and confer to attempt to resolve their differences before filing discovery motions,[92] and the requirement that they meet and confer on a discovery plan before embarking on formal discovery.[93] Most recently, Federal Rule of Civil Procedure 5(d) was amended in 2000 to direct that discovery materials be filed only if used in the case, a provision prompted by the pervasive adoption of local rules to that effect even though the national rules did not authorize such local rules.[94] So the last twenty years of national rulemaking has tended fairly often to endorse the innovation that results from giving district courts primary discretion to devise procedures via local rules.[95]

Congress adopted a comparable stimulus to local innovation in 1990, ironically only two years after it tightened up the statutory limitations on local rules, in the Civil Justice Reform Act (CJRA).[96] Explicitly promoted as an effort at "bottom up" procedural reform,[97] the CJRA required each district court to develop its own plan for reducing

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90 *See* FED. R. CIV. P. 48.

91 *See id.* 30(a)(2)(A) (ten depositions per side); *id.* 33(a) (twenty-five interrogatories).

92 *See id.* 37(a)(2)(B), 37(d).

93 *See id.* 26(f).

94 *See* CIVIL RULES ADVISORY COMM., DRAFT MINUTES, MAR. 1998, at 40–41 (describing consideration of amendment to Rule 5(d)).

95 Indeed, there were two formal proposals to amend Rule 83 to permit local experimentation that were withdrawn. *See* Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence, reprinted in* 137 F.R.D. 53, 152 (1991) (allowing adoption of an "experimental local rule" inconsistent with the national rules with the approval of the Judicial Conference); Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments of the Federal Rules of Civil Procedure, reprinted in* 98 F.R.D. 337, 370 (1983) (allowing districts to adopt rules that could not be challenged as inconsistent with national rules "on an experimental basis for no longer than two years").

96 Pub. L. No. 101–650, 104 Stat. 5089 (1990) (repealed 1997). For discussion, see Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993).

97 This phrase was used by Sen. Joseph Biden, the chief proponent of the CJRA. *See Hearing on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong. 212 (1990); *see also* Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 105, 109–10 (explaining Sen. Biden's "bottom up" reform philosophy).

cost and delay. Probably it should not have been interpreted to authorize local initiatives that contravened the national rules,[98] but such initiatives did occur. In any event, the resulting devolution of authority to generate new procedures surely enhanced the procedural discretion of district courts. Some academics even thought the legislation loosed "ninety-four amateur rulemaking groups. . . . [to] foment[ ] . . . a nationwide procedural revolution that is probably unparalleled since the enactment of the Federal Rules of Civil Procedure in 1938."[99]

In 1993, the national rules process itself embraced local innovation, or at least deviation. The stimulus was the highly controversial proposal that parties be required to provide initial disclosure of certain relevant materials without a formal discovery request having been made.[100] In order to gain acceptance for this proposal, the rulemakers built in "opt-out" provisions that authorized districts to secede from the national rules scheme on several points, and to devise their own procedures in place of the ones prescribed in the national rules.[101] The result was a crazy quilt of procedures that varied not only district by district, but judge by judge. Each year the Federal Judicial Center published a study listing the prevailing practices on initial disclosure in each district as best they could be discerned,[102] but the bar often found it quite difficult to determine what procedures applied before a given federal judge.

By the mid-1990s, one could say that local procedural discretion was approaching a high-water mark. But the tide has somewhat turned. The CJRA reached its statutory sunset in 1997 and has passed

98 *See* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1449–70 (1994) (arguing that the CJRA did not confer authority on districts to adopt plans that contravened the national rules).

99 Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 376–77 (1992).

100 For discussion of the controversy, see Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 805–12 (1993).

101 The 1993 version of FED. R. CIV. P. 26(a)(1) provided that initial disclosure would not apply in a district court that was so directed by local rule. Other directives of the national rules that could be deleted by local rule included the moratorium on formal discovery pending design of a discovery plan (Rule 26(d)), the requirement that the parties meet to formulate a discovery plan (Rule 26(f)), the ten-deposition limit (Rule 30(a)(2)(A)), and the 25-interrogatory limit (Rule 33(a)). In 2000, the authorization for local rules nullifying all these national rules was removed. For discussion, see *infra* note 103.

102 *See* DONNA STIENSTRA, FED. JUDICIAL CTR., IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE 26 (1998) (enumerating local variations on a number of topics).

from the scene. Largely in an effort to restore national uniformity, the Advisory Committee in 1998 circulated a proposed amendment adopting narrowed disclosure provisions (requiring only that a party disclose witnesses or documents it might use to support its case), and at the same time rescinding almost all the opt-out authorizations that accompanied the adoption of the disclosure requirement in 1993.[103] This proposal drew the vehement opposition of a substantial number of federal judges,[104] but was adopted by the Supreme Court and went into effect in 2000. In the wake of this development, at least some district courts that had resisted implementing national rules moved to do so.[105]

What should be clear is that, until national uniformity is restored, local districts will continue to exercise considerable primary procedural discretion. It seems likely that this discretion is often used to produce rules that fortify the judge's secondary discretion to vary procedures in light of the circumstances of a given case. But that discretion has existed in the national rules for at least twenty years.

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103 These changes were effected by deleting rule provisions that, from 1993 to 2000, provided that a district court could by local rule direct that a national rule not apply in that district. Provisions of this sort that formerly existed in Rules 26(a)(1), 26(b)(2), 26(d), 26(f), and 30(d)(2) were deleted by the 2000 amendments. *See* AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE, 192 F.R.D. 341, 382–83 (2000) (Rule 26(a)(1)); *id.* at 390 (Rule 26(b)(2)); *id.* at 391–92 (Rules 26(d) and 26(f)); *id.* at 393–94 (Rule 30(d)(2)). These amendments were explained in the Committee Note to the amendments to Rule 26(a):

> The Committee has discerned widespread support for national uniformity. Many lawyers have experienced difficulty in coping with divergent disclosure and other practices as they move from one district to another. . . .
>
> These amendments restore national uniformity to disclosure practice. Uniformity is also restored to other aspects of discovery by deleting most of the provisions authorizing local rules that vary the number of permitted discovery events or the length of depositions.

Id. at 385.

104 As Special Reporter to the Advisory Committee on Civil Rules in connection with revision of the discovery rules, I prepared a summary of the comments received on the proposed amendments, which included objections from a number of federal judges to the removal of the local option to opt out of national discovery rules. For a sampler of judicial reactions, see Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 915 (2002) (quoting several written comments from district judges opposed to national uniformity).

105 For example, in late 2000, I had a telephone conversation with a district judge who was working on revision of local rules for her district that would finally implement the 1983 changes to Federal Rule of Civil Procedure 16, evidently previously unapplied in that district. The stimulus for this belated action was the adoption of the 2000 amendments, with their stress on national uniformity.

B. Case Management

Case management was surely the most successful "bottom up" effort at procedural innovation in the United States in the last 30 years. Because Rule 16 of the Federal Rules of Civil Procedure broadly authorized pretrial hearings from the outset, this development did not involve forbidden local innovation. As amended in 1983, Rule 16 explicitly required some early judicial involvement in all cases, but empowered district courts to exclude categories of cases from the judicial management directed by the national rule.[106] The most salient discretionary element in this instance, however, is that case management inherently calls for ad hoc judgments. It might even be criticized as resembling the most extreme form of procedural discretion—ad hoc invention of procedures afresh for each case. Although the reality does not seem often to reach such extremes, it cannot be gainsaid that case management activities rely heavily on discretion.

These practices can be traced to the decision by some metropolitan courts, in the late 1960s, to assign cases to a single judge for all purposes upon filing. Given responsibility from start to finish, judges in these cities began to call the lawyers in for conferences early in the case to plan the handling of the case.[107] In large measure, this planning looked to questions of chronology—when certain types of discovery or motions would occur, and when the trial should be scheduled—but it could also focus on more substantive questions such as whether certain claims or defenses were being seriously advanced. That inquiry might incline the judge to form a tentative opinion about the strength of the claim or defense.

This activity involved procedural discretion of both the primary and secondary variety. Subject to very broad limitations, the chronological directives could not be wrong or right. There are many "right" answers to questions such as how long discovery should remain open, when the trial should occur, or when various motions would best be presented to the court. Admittedly an exceptionally unreasonable directive on these subjects might be beyond the pale, but this exercise

106 *See* FED. R. CIV. P. 16(b). Contrast FED. R. CIV. P. 26(a)(1)(E), adopted in 2000, that enumerates the categories of cases exempt from initial disclosure rather than leaving this to local option, exhibiting a constrained attitude toward delegating primary procedural discretion to district courts.

107 For a judge's description of this process as it operated in a metropolitan court in the 1970s, see Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981). It is worth noting that this activity occurred without any change in the Federal Rules of Civil Procedure to stimulate or authorize it.

involves nearly primary discretion.[108] Even regarding determinations that could be said to be "wrong," such as whether to allow the belated demand for jury trial, or to authorize amendment to assert additional claims or defenses, or to permit intervention of right, there remained considerable elements of secondary discretion. And as to other important subjects, such as whether to certify a case as a class action[109] or to consolidate separate cases, the rules themselves contemplated discretion from the start. These decisions were often entwined with details about the case and its procedural evolution, so that an appellate court would be likely to defer to the trial judge's resolution of these competing considerations.

Early case-management activities were judge-centered, and depended little on rule authorization, although the practices might be embodied in local rules. In this regard, the national rules process served more as a stimulus to discretionary procedural activity than as a constraint on it. Beginning in 1983, Rule 16 was amended to require case management activity by all judges in most cases,[110] and to encourage more managerial activity than was required. Local rules could exempt categories of cases in which this activity was not warranted, and considerable judicial education efforts were invested in persuading judges to do more rather than less. The CJRA magnified this stimulus in at least two ways. First, Congress itself went on record

108 For an illustration, consider *Otero v. Buslee*, 695 F.2d 1244 (10th Cir. 1982), in which both plaintiff and defendant had made summary judgment motions and, as a result, did not initiate discovery. *Id.* at 1247. When the district court did not resolve the summary judgment motions, defendant filed a motion asking the court to extend the cutoff date for discovery until the summary judgment motions were decided, but the district court did not decide that motion either before the discovery cutoff passed. It then denied all motions, and defendant objected to being denied discovery after losing at trial. *Id.* The appellate court held that defendant could not complain about being denied "belated" discovery. *Id.* One might argue that this conjunction of developments made the district court's actions so unreasonable as to constitute an abuse of discretion, but the appellate court's attitude was that defendant took its chances by failing to initiate its discovery before the discovery cutoff even though that discovery would be wasted if the summary judgment motion were granted. *Id.* at 1247–48.

109 *See also infra* text accompanying notes 171–87.

110 *See* FED. R. CIV. P. 16(b) (requiring the judge to set time limits for certain events in all cases except those exempted by local rule).

as favoring case management.[111] Second, expense and delay plans were supposed to include elements of case management.[112]

As a number of academics have noted disapprovingly, these developments worked a substantial expansion of the ambit, or at least operating importance, of judicial discretion.[113] The reforms effected by the original Federal Rules of Civil Procedure—relaxed pleading standards, broad discovery without court supervision and broad joinder of claims and parties—greatly expanded the moves available before trial. At the same time (and perhaps partly because of these innovations—broad discovery was intended in part to promote pretrial settlement), the rate of trial in civil cases declined. As a consequence, the pretrial phase became the main event in civil litigation, and the only event in most civil litigation.

Without case management, the growing centrality of the pretrial phase meant that the lawyers would be free of substantial constraint from anyone in their use of the very substantial powers—most notably in discovery—that modern American procedure conferred on them. When cases went to trial, judges would take control of them, and the lawyers' activities, subject to the factfinding role of the jury. But trials

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111 The Senate Judiciary Committee, which originated the CJRA, explained in its official report that the legislation sought to implement the "benefits of enhanced case management" because "greater and earlier judicial control over civil cases yields faster rates of disposition." S. REP. No. 101-416, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6819.

112 It was a given that the plans were to include case management provisions. As pointed out in the previous footnote, the objective of the legislation was to prompt districts to pursue case management. The RAND Corporation was commissioned to study the effects of these programs, and issued a report on case management under the Act that was more than 300 pages long. This report began by noting that:

> The new legislation, the CJRA, required each federal district court to conduct a self-study with the aid of an advisory group, and to develop a plan for civil case management to reduce costs and delay. It created a pilot program requiring ten districts to incorporate six principles of pretrial case management into their plans and to consider incorporating six other case management techniques. Ten other districts, although they were left free to develop their own plans that did not have to contain any of the CJRA principles or techniques, were included in the program to permit comparisons.
>
> To generate reliable information about the effects of the case management principles and techniques, Congress provided for an independent evaluation of the activities in these 20 pilot and comparison districts. The Judicial Conference and the Administrative Office of the U.S. Courts asked RAND's Institute for Civil Justice to evaluate the implementation and the effects of the CJRA in these 20 districts.

JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 3 (1996).

113 *See, e.g.*, Peterson, *supra* note 14, at 69–84; Resnik, *supra* note 14, at 424–26.

were less frequent under the new regime, and previously district judges had usually not often gotten involved until trial loomed. Lawyers could involve judges by making motions, but motions were time-consuming and judges told to interpret the rules liberally were likely to give lawyers substantial latitude. As case managers, however, the judges did not await motions, and their directives curtailed lawyer discretion. Viewed in this light, case management might be seen not just as an increase in judicial discretion, but also as a consequence of the increased lawyer discretion provided under the new rules. Of necessity case management escaped frequent oversight by appellate courts, but a laissez-faire attitude toward lawyer latitude hardly seems preferable.[114]

C. *Settlement Promotion*

Settlement is not a new phenomenon in American courts,[115] and judges have long taken some interest in fostering it.[116] But as caseloads grew over the last twenty years, judges' settlement promotion efforts accelerated considerably. Some courts, for example, developed a practice of holding "settlement weeks" during which judges who would usually be trying cases or doing other decisionmaking work were relieved of those duties to concentrate on settlement conferences.[117] Perhaps this activity should not prompt concern; in the eyes of one political scientist, "efforts by judges to expedite the settlement of cases [is] seemingly one of the most innocuous of all the anti-litigation schemes."[118]

This acceleration of judicial settlement promotion proceeded at the same time there was broad growth of interest in alternative dispute resolution (ADR). One reflection of this growth is curricular: in

114 *See* Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternate Dispute Resolution*, 37 RUTGERS L. REV. 253, 265 (1985) (characterizing objections to case management as premised on a laissez-faire attitude).

115 "There have always been a lot of settlements in American civil courts. It remains unclear whether the percentage of cases terminated by settlement has increased in recent years." Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 256, 257 (1986).

116 *See generally id.* at 257–61 (describing the growing popularity of promotion settlement among American judges beginning before World War I).

117 *See, e.g.*, Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 583–85 (1988) (describing settlement week practices); James G. Woodward, *Settlement Week: Measuring the Promise*, 11 N. ILL. U. L. REV. 1, 3 (1990) (same).

118 THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 45 (2002).

1975, virtually no American law school offered a course in ADR, while it is hard to believe that any law school in the United States presently lacks multiple ADR offerings. These courses include and emphasize practical training as well as academic examination of the topic. Particularly in its practical orientation, this burst of academic offerings reflects the evolution of the legal marketplace. ADR has moved beyond being a cottage industry toward being the norm in some kinds of cases. There are competing providers of services, and also concern that they may supplant the public court system. At least some judges in the public court system find it financially attractive to retire from that system and pursue careers in private judging.

The increase in settlement promotion may substantially enhance judicial discretion. At least certain breeds of private ADR display elements of primary substantive discretion. Some mediators, for instance, view legal rules as obstacles to "creative" solutions, and they may strive to wean the parties from reliance on them.[119] Procedurally, the discretion of the mediator is virtually unlimited; usually there is no appeal from a resolution that is based on an agreement of the parties. Indeed, mediation "procedure" might better be conceived as "strategy." It is seemingly measured by its success in producing the desired agreement. The whole concept of the ADR "win-win" outcome exists as an alternative to the "win-lose" orientation of public adjudication.

The mediation process just described is *not* in formal courts, and the identified features of mediation are not true of all forms of ADR. Arbitration, for example, is a private process that may have many of the attributes of formal adjudication. The principal function of the arbitrators is deciding the case, rather than pursuing an agreement. Perhaps in part for this reason, the public courts have increasingly enforced agreements to arbitrate and refused to hear cases even

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119 Consider the following explanation of divorce mediation:

> Divorce mediation rejects the idea that legal rules should be used as weapons to improve one party's position at the expense of the other. Similarly, it rejects the idea that these legal rules and principles embody any necessary wisdom or logic. In fact, it views them as being arbitrary principles, having little to do with the realities of a couple's life and not superior to the judgments that the couple could make on their own.

Lenard Marlow, *The Rule of Law in Divorce Mediation*, 9 MEDIATION Q. 5, 10 (1985). Marlow explains further that legal rules nevertheless create expectations in the parties that may produce an agreement that is not fair. Because in certain instances "the law is an obstacle to a fair agreement," the mediator tries the overcome the expectations created by the substantive law "to effect a fairer agreement than the law would provide." *Id.* at 10–11.

though one of the parties resists arbitration.[120] The courts are directed by statute in enforcing arbitration agreements,[121] and increasingly are without discretion to decline to do so.

The public courts have also offered an increasing variety of ADR programs of their own, presenting potentially troubling questions about the discretion these efforts confer for influencing agreed outcomes. Here again, the activity that originated in judicial innovation has been embraced by Congress.[122] At their simplest, settlement conferences with a judge afford the parties the insights of an experienced outsider about the strengths and weaknesses of a case. There is limited overt discretion but considerable judicial latitude in making that evaluation. Indeed, a core question is whether the judge ought to exercise an independent judgment about what is a "good" or "just" settlement, or simply pursue a deal that will be accepted by the parties.

In promoting settlement, the judge exercises considerable procedural discretion. Although there are books of advice for judges on how to achieve success, there are few "rules" that limit what the judge may do. The canons of judicial discipline preclude ex parte communications about the case absent agreement of the parties,[123] but the judge often gets the parties' agreement for such contacts to assist in a form of shuttle diplomacy. Moreover, at least in some instances judges have seemingly used some rather firm techniques of persuasion to obtain agreements. Furthermore, the judge's procedural discretion in handling case management can play an important role; by setting an early trial date and holding to it, a judge can exert considerable pressure on the parties to settle without doing anything more.

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120 *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 331 (criticizing recent Supreme Court decisions enforcing arbitration agreements that have "rewritten the law governing commercial and employment arbitration in the United States").

121 *See* 9 U.S.C. § 2 (2000) (stating that agreements to arbitration are enforceable in court).

122 *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651–658) (directing every district court to develop a plan for ADR).

123 *See* MODEL CODE OF JUD. CONDUCT Canon 3B(7) (1990) (providing that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding"). Subsection (d) of that provision provides an exception to the general rule: "A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge."

There is little, if any, appellate constraint on these tactics; if a settlement is reached there is nothing to appeal, and if one is not, there is also nothing to appeal. So the substantive preferences or instincts of the judge could assume great importance. Usually a judge has no explicit authority to pass on the fairness or desirability of a settlement,[124] but it is difficult to know when or whether judges have given effect to their substantive preferences in molding the parties' agreement or in using the procedural tools available to them to prod parties toward settlements. There are at least some instances in which American judges authorized to approve settlements have used their influence to achieve a settlement they felt was proper.[125] So settlement promotion presently affords judges potentially enormous procedural, and perhaps substantive, discretion.

D. Rule 11 Sanctions

Few episodes have been more wrenching for American procedure in the last two decades than the controversy over enhanced sanction power under Rule 11 of the Federal Rules of Civil Procedure. The basic problem is not new. Field included a "strong verification requirement" in his 1848 Code,[126] and many states continue to attach significance to verification of the allegations of a complaint.[127] The framers of the original Federal Rules of Civil Procedure considered, but did not adopt, such a provision.[128] They did, however, provide in Rule 11 that the attorney's signature on a pleading signified that it was asserted in good faith, and they authorized striking pleadings signed in violation of the rule. Whatever the apparent or intended importance of this provision, it was a paper tiger, and sanctions were almost never employed.[129] Whether or not the framers' intention was to

124 Note that FED. R. CIV. P. 23(e) makes an exception to this general rule for class actions, requiring a judicial determination that the settlement is fair and adequate.

125 Perhaps the most famous instance was in the class action claiming that Agent Orange, a defoliant used during the war in Vietnam, caused a variety of serious health problems. The judge there not only appointed special masters to foster settlement negotiations, he also vetoed a deal that his special master thought could be made because he felt plaintiffs' case was too weak to justify settlement at such a figure. For a description, see PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN COURT 143–67 (1986); and Richard L. Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267, 1293–94 (1987).

126 Subrin, *supra* note 12, at 936.

127 *See, e.g.*, CAL. CIV. PROC. CODE § 431.30(d) (West 1973) (providing that, unless complaint is verified, defendant may file a general answer).

128 Subrin, *supra* note 12, at 977.

129 *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34–37 (1976) (find-

grant judges discretion to overlook violations of the rule, there was a widespread suspicion that judges were choosing not to sanction lawyers.[130]

Whether this reticence led to the frequent assertion of groundless claims or defenses is debatable, but it is clear that if sanctions were to make a difference, the de facto discretion of judges who would not impose them had to be curbed. In 1983, Rule 11 was amended to accomplish that purpose. The amendments altered the nature of the certification by treating the lawyer's signature as certifying that there were good grounds in law and fact for the claims asserted. More significantly for our purposes, the amendment took away the court's discretion to decline to sanction if there were a violation of that certification requirement by directing that the court "shall" impose a sanction on finding a violation. This imperative was regarded as important to the scheme.[131]

It is hard to say with certainty what consequences the framers expected, or should have expected, this limitation on discretion to have. At least some lawyers critical of the change asserted that the amendments would "emasculate" the rule by taking away the power to strike

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ing only one reported case of striking a complaint under Rule 11 since the rule was adopted).

130 This view was even more pronounced in relation to discovery violations, particularly situations in which, under FED. R. CIV. P. 37(c)(4), it seemed that the courts were obligated to shift the cost of discovery motions. Consider the following views of a prominent federal district judge:

> A lawyer who wants the option to abuse discovery when it is to his client's advantage will hesitate to seek sanctions when his client is the victim of such practices—especially if the sanctions are imposed on the attorney instead of, or in addition to, the client. As a result, a kind of gentlemen's agreement is reached, with the tacit approval of the bench, which is extremely convenient for the attorneys who avoid the just imposition of sanctions and extremely unfair to the litigants who pay more and wait longer for the vindication of their rights than they should.

Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CAL. L. REV. 264, 272 (1979).

131 *See Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401 (1993). Thus, when the rule was further amended in 1993, the Advisory Committee on Civil Rules believed that it should still say that the court "shall" impose sanctions, but the Standing Committee on Rules of Practice and Procedure changed the verb to "may." *Compare* Attachment B (Issues and Changes) to Letter from Sam C. Pointer, Chair of the Advisory Committee on Civil Rules, to Robert Keeton, Chair of the Standing Committee on Rules of Practice and Procedure (May 1, 1992), *reprinted in* 146 F.R.D. 521, 524 (1993) (explaining that a majority of the Advisory Committee favored retaining "shall"), *with* Rule 11(c) as transmitted to the Supreme Court, 146 F.R.D. 580 (1993) (specifying that the court "may" impose sanctions on finding a violation of the rule).

the pleading.[132] Perhaps these lawyers believed that judges would continue to refuse to sanction other lawyers. But that did not happen, and the rule assumed great importance in federal civil litigation.[133] Early reports indicated that judges were imposing Rule 11 sanctions right and left, and inflicting them particularly on civil rights plaintiffs.[134] Some spoke of the "transformation" of American procedure wrought by the change to Rule 11.[135] The removal of discretion, in particular, was given effect by appellate courts that held that district judges could not fail to impose sanctions if there were a violation of the certification requirement.[136]

A second wave of research took a more measured view, finding that the imposition of Rule 11 sanctions was still a relatively rare occurrence, although it did seem that civil rights plaintiffs were more likely to be sanctioned than others.[137] Despite these less alarmist results, in 1990 the Advisory Committee on Civil Rules issued an unprecedented "call" for comment on whether and how to change the rule[138] and, after receiving this input, it circulated proposed revisions that were adopted in 1993. The amendments provided a "safe harbor," during which a challenged paper could be withdrawn without penalty,[139] and they removed incentives to filing such motions.[140] But the Advisory Committee did not recommend returning discretion to

132 *See* Jonathan J. Lerner & Seth M. Schwartz, *Why Rule 11 Shouldn't Be Changed: The Proposed Cure Might Exacerbate the Disease*, NAT'L L.J., May 9, 1983, at 13.

133 *See* William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1013 (1988) ("Rule 11 has become a significant factor in civil litigation, with an impact that has likely exceeded its drafters' expectations.").

134 *See* Marcus, *supra* note 100, at 796–97 (describing the controversy about the 1983 amendment to Rule 11).

135 *See* Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989).

136 *E.g.*, Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986) (holding that the district judge improperly failed to impose sanctions because "[r]ule 11 expressly mandates the imposition of sanctions once a violation is found").

137 *See* AM. JUDICATURE SOC'Y, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 60 (Stephen B. Burbank rep., 1989) (in the Third Circuit, a careful study of all sanctions imposed over a one-year period showed that Rule 11 was raised by motion in only one-half of one percent of civil cases); THOMAS E. WILLGING, THE RULE 11 SANCTIONING PROCESS 9–10 (Federal Judicial Center 1988) (finding widespread support for the amendments to Rule 11 among attorneys, but also noting that there were particular types of cases in which the risk of sanctions was higher—securities, antitrust, commercial, RICO, employment discrimination, mass torts and class actions).

138 *See* Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, reprinted in* 131 F.R.D. 335 (1990).

139 *See* FED. R. CIV. P. 11(c)(1)(A).

the district judge about whether to impose sanctions on violators, and proposed that the rule still say that on finding a violation the court "shall" impose sanctions. The Standing Committee on Rules of Practice and Procedure, however, changed "shall" to "may," explicitly providing discretion to the district court to decline to impose any sanctions even if a violation were found.[141] Over the dissent of Justice Scalia—who asserted that "[t]he proposed revision would render the Rule toothless"[142]—the amendments went into effect.

It does seem that these changes have had an effect, and the prior tumult over the rule has abated. Perhaps the tumult was always somewhat overstated, but the Rule 11 experience provides an object lesson for those opposed to discretion of the consequences of removing it altogether. Perhaps—at least with regard to the power to punish—secondary (and perhaps primary) discretion for the district judge is preferable to a rule with an inflexible command.

E. Attorneys' Fee Awards

Everyone knows that the United States operates under the "American Rule" that each litigant must pay his or her own lawyer, win or lose. Whether the issues that bear on handling fee-award questions should be deemed substantive or procedural is sometimes debated. Including attorneys' fee awards in this Article's catalogue may therefore seem surprising. Clearly, the Supreme Court's 1975 decision in *Alyeska*[143] foreclosed substantive discretion for judges to expand the list of cases in which fee shifting would be allowed. Increasingly, legislatures have changed the American Rule for specific types of cases by directing that the prevailing party, or a successful plaintiff, may recover attorneys' fees.[144] Perhaps the most significant was the Civil Rights Attorney Fees Act of 1976,[145] enacted in response to the *Alyeska*

140 *See id.* 11(c)(2) (providing that sanctions should ordinarily not be paid to the opposing party, and that sanctions be limited to the amount needed to deter repetitions of the misbehavior).

141 *See supra* note 131 and accompanying text.

142 *Amendments to Federal Rules of Civil Procedure*, 146 F.R.D. 401, 507 (1993) (Scalia, J., dissenting).

143 Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 (1975) (holding that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted").

144 *See* Marek v. Chesny, 473 U.S. 1, 44–51 (1985) (Brennan, J., dissenting) (listing over one hundred federal statutes with fee-shifting provisions); Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS., Winter 1984, at 320, 321.

145 42 U.S.C. § 1988 (2000).

decision. In addition, American law will permit a fee recovery by the lawyer who produces a "common fund" benefit.[146] The frequency and size of such fee awards have increased markedly over the past two decades.

Usually, the pertinent directive is that the attorney should receive a "reasonable" fee, a standard which has meant that some official will wield considerable discretion. Whether this is considered procedural or substantive discretion could be debated; perhaps the technique used for arriving at a fee award would best be labeled procedural, while the standards employed to set the "reasonable" fee should be viewed as more substantive. In the American view, the availability of a fee award has generally been regarded as substantive, and controlled by the source of law that governs the substantive claim. As a consequence, some suggestions that the procedural rules include provisions for fee shifting have been opposed on grounds that they exceed the "procedural" rule-making power.[147] In general, the American view has been that the determination is so entwined in the details of the individual litigation that only the official closest to the contest—the trial judge—can reliably make it. Hence the discretion could properly be called secondary.

At first, that discretion was exercised in an almost free-form way. Some courts directed that district judges determine the fee by considering a laundry list of considerations.[148] Another court adopted the somewhat more-focused "lodestar" approach, which directed the district court to determine the number of hours the lawyer properly spent on the case and multiply that number by the lawyer's customary billing rate to determine the "lodestar" award. This figure could then be modified by "multipliers"—usually multiplying the lodestar by

146 *See* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1606–07 (1974).

147 *See* Stephen B. Burbank, *Proposals To Amend Rule 68—Time To Abandon Ship*, 19 U. MICH. J.L. REFORM. 425, 433–40 (1986) (arguing that proposals to add fee shifting to the FED. R. CIV. P. 68 "offer of judgment" procedure exceeded the statutory authority of the rulemakers to devise "rules of practice and procedure").

148 *See* Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974). Borrowing from rules of professional responsibility, the court indicated that the determination should take account of (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of employment by the attorney due to the acceptance of this case, (5) the customary fee, (6) whether the fee was fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Id.*

some amount—in light of a number of factors such as whether the outcome was uncertain and whether the lawyer performed at a very high level of skill.[149]

The lodestar method seemed less discretionary than the multifactor approach preferred elsewhere, but it still produced the sorts of problems one might expect where discretion played such a large role. By the late 1970s, observers were complaining that under the lodestar method results also seemed haphazard. Attorneys would receive very different hourly rates from different judges on the same court. Even more troublingly, there seemed to be a "public interest discount" under which lawyers in securities fraud, antitrust and other commercial cases would be paid much more handsomely than those who brought civil rights or similar cases.[150] Perhaps de facto substantive discretion was at work.

Beginning in the mid-1980s, the Supreme Court provided guidance. It announced that the lodestar method was "the guiding light of our fee-shifting jurisprudence."[151] But it denounced multipliers as improper. Enhancing the lodestar fee to take account of high quality work was "double counting" because that high quality should be reflected in the hourly fee,[152] and enhancement for contingency was similarly inappropriate because the difficulty of the case will be reflected in the number of hours worked by the lawyer.[153] At the same time, it seemed to cut back on substantive discretion by rejecting arguments favoring cut-rate payments for public interest lawyers,[154] and some lower courts went a considerable distance toward equalization between the rates of public interest lawyers and the expensive private

149 Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 168–69 (3d Cir. 1973).

150 *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is Reasonable?*, 126 U. PA. L. REV. 281, 310 (1977) (reporting 1975 study showing that in antitrust cases lawyers received $181 per hour but that in civil rights cases they received only $40 per hour); *see also* THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES, *reprinted in* 108 F.R.D. 237, 246–49 (1985). This report noted that the lodestar method was insufficiently objective and had led to wide variations in awards, that billing rates for the same lawyer varied widely from judge to judge, that judges could manipulate the lodestar to arrive at a result that really represented a favored percentage of the overall recovery, that the method had worked to the disadvantage of the public interest bar, which tended to receive lower awards, and that the method was too unpredictable in operation. *Id.*

151 City of Burlington v. Dague, 505 U.S. 557, 562 (1992).

152 Blum v. Stenson, 465 U.S. 886, 898–900 (1984).

153 *Dague*, 505 U.S. at 562–63.

154 *See Blum*, 465 U.S. at 892–93 (rejecting defendant's argument that the award for work done by lawyers employed by a legal aid organization should be based on the cost to the organization, instead of using prevailing market rates).

bar.[155] In addition, the Civil Rules were amended to take account of the rising importance of attorneys' fee awards by providing procedures for handling them,[156] and the Supreme Court recently adopted an amendment to the class-action rule regarding attorney fee awards.[157]

It is unclear how successful these refinements have been in removing the discretionary elements associated with fee awards. Despite the Supreme Court's directions, lower courts still allow multipliers on occasion.[158] More significantly, another fee-measurement device has gained popularity with many judges. In "common-fund" cases, judges increasingly have preferred to use a percentage of the overall recovery to determine the fee rather than looking to lawyer hours and billing rates.[159] Under this approach, the judge must sometimes undertake a difficult task in determining the actual value of a settlement for something other than money.[160] Even if that task is straightforward, the judge must select a percentage figure. One court has observed that "25 percent has been a proper benchmark figure,"[161] but an academic

155 *See, e.g.*, N.Y. State Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1142–43 (2d Cir. 1983) (awarding fees to public interest group based on a fee schedule used by Cravath, Swain & Moore for associate time).

156 *See* FED. R. CIV. P. 54(d)(2)(A), (D) (directing that attorneys' fee awards shall be handled by motion, and authorizing local rules to establish special procedures for resolving issues raised by such motions without extensive evidentiary hearings). The accompanying Committee Note explained that this provision was added "to provide for a frequently recurring form of litigation not initially contemplated by the rules—disputes over the amount of attorneys' fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards." *Id.* advisory committee's note (1993).

157 *See* AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, H.R. DOC. NO. 108–56 (2003). Under 28 U.S.C. § 2074(a) (2000), this amendment goes into effect on December 1, 2003, unless Congress takes action to alter it or to delay its effective date.

158 *See, e.g.*, Wing v. Asarco, Inc., 114 F.3d 986, 988–89 (9th Cir. 1997) (multiplier of two due to class counsel's continuing obligations under the decree); Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691, 697 (9th Cir. 1996) (enhancement for extreme undesirability of case).

159 *See, e.g.*, Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (adopting the percentage approach for common-fund cases).

160 *See, e.g.*, *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993), in which the proposed settlements called for airlines to provide discount coupons to class members. *Id.* at 308. For purposes of fee measurement, plaintiffs' lawyers contended that the proper figure was the aggregate face value of the coupons, regardless of whether they were ever redeemed or could be sold or transferred. *Id.* at 320–21. The judge determined, after some effort, that the real value was considerably less. *Id.* at 321–23.

161 Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 273 (9th Cir. 1989).

review in the 1970s found "wild variations, ranging up and down the scale from two and one-half to forty-nine percent."[162] Given the significance of a variance of a few percentage points in a large-value case, it should be apparent that judges retain considerable discretion in setting fees. Moreover, a number of appellate courts give district courts discretion to choose between the percentage and the lodestar measures in setting attorney fee awards.[163] Beyond that, some judges unsatisfied with the ex post nature of passing on fee motions, and anxious to introduce market competition into the selection of counsel in class actions, have employed bidding or auction practices.[164]

But legislative action has curtailed the discretion of judges in securities fraud actions in a way that bears on the fee award. The Private Securities Litigation Reform Act of 1995[165] responded to concerns that in some cases district judges were approving settlement deals in which the only ones to profit significantly were the lawyers. One method it employs for doing so is to prescribe that the fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class."[166] Another, possibly more significant, intrusion on the discretion of the district judge is the provision for appointment of a lead plaintiff, presumed to be the plaintiff with the largest claim,[167] who in turn is to select the lawyer to represent the class.

Ordinarily the judge enjoys great discretion in choosing the class representative, if multiple potential representatives present themselves, but this statutory presumption curtails that discretion in securities fraud class actions. Indeed, some suggest much broader potential for the "empowered" lead plaintiff.[168] The salient point for attorney fee awards is that the lead plaintiff has the main authority to determine the financial arrangements with the lawyers, rather than the judge. But the judge does have to approve and appoint the lead plaintiff, so perhaps the judge should have broad latitude to reject the stat-

162 John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 876 (1975).

163 *See, e.g.*, Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000); Johnston v. Comerica Mortgage Corp., 83 F.3d 241 (8th Cir. 1996).

164 For a description, see Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, 209 F.R.D. 519 (2001).

165 Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

166 15 U.S.C. §§ 77z-1(a)(6), 78u-4(a)(6) (2000).

167 *See id.* § 78u-4(a)(3)(B)(iii)(1) (providing that the "most adequate plaintiff" is the one who "has the largest financial interest by the relief sought in the case").

168 *See* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 721–27 (2002) (exploring the use of lead counsel techniques in other kinds of class actions).

utory presumptive choice if the financial arrangements with counsel appear unsuitable. Some judges anxious to avoid inflated fee awards rejected proposed lead plaintiffs on this ground, but the most prominent of those efforts has been struck down under the Act.[169]

Thus, legislative action has begun to intrude into the court's remaining discretion to control fee awards. And appellate courts have begun to insist on detailed indications from district judges about the grounds for their fee award decisions.[170] So the latitude district judges formerly enjoyed in this arena appears to be shrinking.

F. Mass Tort Class-Action Settlements

A final area of highly important but largely discretionary activity by American judges in the 1990s has been their role in approving class-action settlements, particularly in mass tort class actions. The rule-based possibility that such settlements might occur originated in the 1966 amendments to the class-action rule, which added a provision for binding class actions in situations involving common questions.[171] At the time this expanded class-action activity was introduced, the rulemakers did not think that it would be used in mass tort cases.[172] But from the start, the rule was heavily laden with discretionary elements. Besides determining whether common-questions "predominate," a judge asked to certify a common-questions class action was also to determine whether a class action would be "superior" to individual litigation, using a variety of factors.[173] District

169 See *In re* Cavanaugh, 306 F.3d 726 (9th Cir. 2002), which holds that the district judge violated the Act in refusing to appoint the presumptive lead plaintiff on the ground that the fee arrangements allowed counsel to be paid too much. *Id.* at 736. But the court also pointed out that class counsel had to be appointed by the court and that the actual fees to be paid class counsel would be scrutinized by the judge. *See id.* at 733.

170 *E.g.*, Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 196 (3d Cir. 2000) ("[I]t is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion.").

171 FED. R. CIV. P. 23(b)(3).

172 The advisory committee's note accompanying this change to the rule observed,

> A "mass accident," resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but also of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Id. 23 advisory committee's note.

173 *See id.* 23(b)(3)(A)–(D).

judge resolutions of this question were regularly said to be within the discretion of the court,[174] and subjected to limited review. So the entire orientation of the rule reflected secondary procedural discretion.

Widespread anxiety about mass tort litigation introduced substantive concerns as well.[175] Particularly in asbestos litigation, it began to seem that individual litigation resembled a lottery.[176] Seriously injured plaintiffs sometimes recovered small amounts while others who suffered no current impairment reaped windfall awards. Even more troubling, some plaintiffs also recovered large punitive damages, raising the possibility that later there might be no money to pay compensation to seriously injured claimants. Substantial variations in state law on pertinent matters seemed sometimes to produce illogical and unfair differences in treatment.

Judges (and litigants) moved by these concerns increasingly turned to class actions as devices for improving matters. Particularly in instances where class-action settlements included a payment schedule, they could replace the haphazard results of litigation with what seemed to be a cheaper, fairer alternative. Sometimes the judges went beyond even the common-question class-action device (which at least formally allows class members to opt out) and used mandatory class actions based on the limited fund principle to cement these settlements without any leave for the claimants to absent themselves. One difficulty with this activity, however, was that it seemed to subvert the limitation *Erie* placed on the substantive discretion of federal judges.[177] Another was that there were no meaningful guidelines or limitations on this sort of activity if it could be justified in the abstract.[178]

The reaction to these developments has been gradual, but largely negative. At the rulemaking level, an initial idea was to relax further the provisions of the class-action rule so that the "superiority" crite-

174 *See* 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785 (2d ed. 1986) (noting that "[a] court has broad discretion in deciding whether to allow the maintenance of a class action" (citation omitted)).

175 I have developed this argument in detail in Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 859–71 (1995), and will not repeat it here.

176 *See, e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d 996, 1001 n.3 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986) (quoting judge who said that divergent results in individual asbestos cases "made this litigation more like roulette than jurisprudence").

177 *See* Marcus, *supra* note 175, at 859–66 (arguing that federal judges appeared to have used Rule 23 to implement their substantive tort law preferences).

178 *See, e.g.*, William W Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837 (1995) (bemoaning the lack of standards in the rule for handling these questions).

rion would be the only directive to the judge, and the rule would refer the judge to a multitude of factors.[179] This sort of revision, of course, would have simply compounded the procedural discretion of the judge, and it was never officially circulated as a proposal. In 1996, the Advisory Committee did circulate more modest proposed amendments to refine the criteria pertinent in mass torts cases,[180] but these changes have not been made.[181]

The appellate courts, meanwhile, have repeatedly overturned mass tort class certifications. In 1999, the Supreme Court invalidated a limited fund asbestos personal injury class settlement, indicating that very severe limitations exist for the use of this device.[182] Two years before, in *Amchem Products, Inc. v. Windsor*, it had disallowed a common questions settlement class certification on the ground that the "sprawling class" exhibited too few common questions, and that there were multiple potential conflicts of interest among class members.[183] In *Amchem*, the Court emphasized the process by which the Federal Rules of Civil Procedure are promulgated, and observed that "[t]he text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'"[184] The federal courts of appeals have similarly overturned many class certifications, both in the settlement and the litigation context.[185]

Rule changes have begun to provide means for confining district judge discretion in this area. Effective since December 1, 1998, Rule 23(f) has authorized interlocutory appellate review in the discretion of the appellate court of any order granting or denying class-action status.[186] One purpose for making this change was to facilitate prompt appellate court intervention when it appears that a district

179 *See* Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79 (1994) (describing and evaluating this proposal).

180 *See Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559, 559–60 (1996).

181 As noted below, a proposal for immediate appellate review of class certification decisions has been adopted.

182 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

183 Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

184 *Id.* at 620 (quoting 28 U.S.C. § 2072(b) (2000)).

185 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995); *cf.* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) (overturning class certification but declining to rule that certification of a nationwide class is never appropriate).

186 *See* FED. R. CIV. P. 23(f).

judge has overstepped the limits of the class action, intervention that can prove very significant in some mass tort class actions. Recently, the Supreme Court amended Rule 23(e) to amplify and focus the provisions regulating judicial approval of class-action settlements.[187] Because mass tort class actions are rarely tried, this change is likely to be quite important for them. Each of these changes is incremental, and the pending amendment to Rule 23(e) is based largely on "best practices" developed by district judges. But collectively they are pertinent to the present inquiry because both illustrate ways in which district judge latitude is being curtailed and focused.

IV. Reflections on American Discretion at Century's End

This review of the central role discretion plays in many of the most contentious developments in American procedure in the last twenty years suggests that there may be much reason for alarm. Certainly most of the academics who have discussed these developments speak in alarmed tones.[188] Viewed entirely in the abstract, these developments do suggest that trial court judges are less tethered than they were a generation ago. And one could conclude that the process of amending the procedural rules has in recent years often favored provisions that leave important questions to the district court's discretion. That might be the consequence one would expect due to the prominence of judges on the rules committee.[189]

Even academics may react in more measured ways, however. A quarter century ago, for example, Professor Chayes catalogued the ways in which the American phenomenon of public law litigation diverged from the venerated norms of ordinary civil litigation, and he foresaw that most civil litigation in federal courts might take on the new coloration. Rather than decry this prospect, however, he approached it sympathetically.[190] More recently, Professor Shapiro reflected on the growing prominence of judicial case management, concluding: "[t]he history of Rule 16, I believe, suggests both the inevitability and the desirability of significant discretion in areas such as

187 *See supra* note 157.

188 *See* sources cited *supra* note 14.

189 *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. Legal Stud. 627 (1994) (using a public choice analysis that assumes that judges will seek to enhance their latitude as a way of serving their self-interest); *cf.* Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 33 J. Legal Stud. 647 (1994) (questioning the application of public choice analysis to procedural rulemaking).

190 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

pretrial management."[191] To this observer, the trends described above—at least regarding procedural discretion—justify a similar attitude of guarded optimism. Several reasons can be sketched.

In approaching this question, one must take account of aspects of the American experience that are unusual and may be unique to it. The first is the vibrancy of its federal system, at least in terms of lawmaking for most civil cases. Because that activity is primarily the preserve of the states, one important concern is the extent to which action of the federal courts might erode the lawmaking power of the states. It is not clear that this sort of diffusion of substantive lawmaking operates with similar importance within other countries. The second peculiar aspect of the U.S. system is the high degree of procedural diffusion. Not only do the states devise their own procedures, but regionalism—or local differentiation in procedures—also has characterized the federal courts. It does not seem that most other countries experience a similar level of local autonomy. A third distinctive feature of the U.S. system is the independence and activism of its judges.[192] Under these circumstances, one would expect that there would be fewer tethers on American judges than on those in other systems.

Accordingly, one may express guarded optimism about the United States' slouch toward procedural discretion for a number of reasons:

1. Substantive discretion is more troubling than procedural discretion. Any common-law system accords some substantive discretion to the judicial branch; even after the codification movement of the nineteenth century that remained true of the American judiciary. At least from the perspective of the federal courts, however, since 1938 that substantive discretion has been curtailed, if not abolished, by the need

191 David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1994 (1989).

192 Consider, for example, the recent explanation for American reliance on litigation offered by a lawyer-political scientist:

> Compared to most national judiciaries, American judges are less constrained by legal formalisms; they are more policy-oriented, more attentive to the equities (and inequities) of the particular situation. In the decentralized American legal system, if one judge closes the door on a novel legal argument, claimants can often find a more receptive judge in another court. Adversarial legalism makes the judiciary and lawyers more fully part of the governing process and more fully democratic in character.

ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 16 (2001); *see also* Schneider, *supra* note 26, at 56 (noting that "despite the doctrine of *stare decisis*, . . . judges often have real discretion in shaping and reshaping legal doctrines").

to follow the dictates of state law on issues not governed by federal law. So in this sense, the twentieth century saw a move away from discretion in the most significant area.[193]

Of course, the exercise of procedural discretion can be colored by substantive concerns. Sometimes that orientation is overt. The increasing vigor of the federal courts in tailoring the class action and other procedures to handle mass tort litigation[194] has done little to disguise the substantive objective. In other instances, there seems to be an explicit invitation to engage in such substantive tailoring of procedural discretion. The federal discovery rules, for example, sometimes direct judges to calibrate discovery with reference to "the importance of the issues at stake in the litigation."[195] Sometimes the seeming substantive agenda is not overt. The "public interest discount" in attorney fees awards might be an example.[196] Settlement promotion might also conceal a substantive orientation.

By and large, the sorts of determinations that come within procedural discretion are less freighted with substantive overtones than in the situations just mentioned. The very reason that timing decisions such as setting the trial date involve primary procedural discretion is that they are largely divorced from the underlying substance of the case. To the extent most cases of a certain type—patent infringement suits for example—take a long time to prepare, one might expect similar scheduling for all of them. But there is not always likely to be such an intrinsic relationship between the substantive claim being as-

193 This movement stands in stark contrast to the expanding roles of the Executive and Congress in the substantive regulation of Americans' affairs:

> Although the framers may have intended that the federal government would be a government of limited powers, in the years since *Erie* the Supreme Court has permitted those powers to expand so much that today the federal government has authority to regulate in virtually any area it chooses. . . .
>
> . . . [T]he federalism principle identified by *Erie* still exists but has been silently transformed from a general constraint on the powers of the federal government into an attenuated constraint that applies principally to one branch of that government—the federal judiciary.

Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14–15 (1985).

194 *See supra* text accompanying notes 171–88.

195 FED. R. CIV. P. 26(b)(2)(iii).

196 *See supra* note 150 and accompanying text. There is actually a plausible explanation for significant variation, however. There simply is not a market for civil rights attorney services comparable to the market for commercial litigation. Given that the measure is market-based, the fact that there are consistent differences does not necessarily show a substantive evaluation by the judge.

serted and these sorts of determinations. Product liability cases may come in many different sizes, as may breach of contract cases.

There is limited ground for concluding that procedural discretion has been wielded to serve judges' substantive agendas with much frequency.[197] There hardly seems a widespread uprising of lawyers asserting that federal judges as a group are regularly using their procedural discretion to advance their substantive preferences.[198] As a consequence, although the theoretical potential exists for such activity, presently that potential need not lead one to endorse aggressive solutions.

2. Appellate courts do police district judges. It is certainly true that appellate review is less common and much less intrusive in American procedure than it is reported to be in certain other systems.[199] Yet on the issues that seem most prominent today, there are indications that such review has been occurring with significant frequency.

A prime example of that activity is the increasing intervention of federal appellate courts into the use of class actions in mass tort cases.[200] Some have seen that as spelling the doom of this district-court activity.[201] Indeed, an ironic side effect of this vigorous appellate intervention may have been the reported shift of many nationwide class actions to the state courts,[202] where in some places judges

197 *See* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 362 (1975) (asserting that "it is not at all obvious that judges who think they have discretion will give freer rein to their personal preferences than those who do not").

198 Indeed, it may be that individual ideological differences make less difference than other factors. Researchers who used psychological techniques to design and evaluate a survey of U.S. magistrate judges reported "a more fundamental source of systematic judicial error: wholly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations." Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780 (2001).

199 *See supra* note 19.

200 *See supra* text accompanying notes 182–87.

201 *See, e.g.*, Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1712 (2000) (noting that "in [1995 and 1996] a series of federal appellate court decisions handed down in rapid succession sent definitive signals to class action practitioners that federal courts, at least, were not hospitable forums to pursue large nationwide mass tort or products liability class actions").

202 *See, e.g.*, John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143 (2001) (exploring the reported difficulties caused by the inability to remove nationwide class actions from state court to federal court).

are viewed as more pliable and appellate courts as less vigilant. In order to accomplish this intervention, the American appellate courts have sometimes stretched or bent the rules governing interlocutory appeals in class actions. But the adoption of Rule 23(f) has overcome that obstacle by allowing immediate appeal (at the discretion of the appellate court) whenever a district judge certifies a class action or refuses to do so.[203] It may seem mildly ironic that the antidote to district court discretion is appellate court discretion, but that antidote may work.

Moreover, the scope of district court discretion may contract in the typical common-law manner as appellate decisions on such things as class actions multiply. The class-action rule itself is very open-textured, but as Judge Friendly noted twenty years ago, with the passage of time the appellate courts stake out limits on the exercise of trial court discretion.[204] Besides class actions, the emergence of a considerable body of appellate court law with regard to attorneys' fee awards may indicate that this process is ongoing and healthy as a confining measure for district court discretion on that subject. Increasingly, the appellate courts are also insisting on a full record on which to base this review.[205] So there seems some basis for taking solace in the common-law evolution toward greater appellate court supervision, and accordingly less district court discretion.

Inevitably, however, a number of sorts of decisions will ordinarily be immune to effective appellate scrutiny under our system. One could, of course, devise a system in which any party unhappy with routine scheduling orders could insist on a second opinion of a higher

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203 *See* FED. R. CIV. P. 23(f).

204 *See* Abrams v. Interco, Inc., 719 F.2d 23 (2d Cir. 1983). The *Abrams* court stated,

> Abuse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance. The courts have built a body of case law with respect to class action status. While no two cases will be exactly alike, a court of appeals can no more tolerate divergence by a district judge from the principles it has developed on this subject than it would under a standard of full review.

Id. at 28 (citations omitted). *Accord* Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) (observing that "abuse of discretion can be found more readily on appeals from the denial of class status than in other areas, for the courts have built a body of case law with respect to class action status").

205 *See, e.g.*, Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 196 (3d Cir. 2000) ("[I]t is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion.").

court. It may be that in some countries that sort of supervision of first-level judicial officers occurs.[206] But it is likely that, in those systems, first-level judicial officers are performing very different functions from the ordinary trial court judge in this country, for an American judge is not just compiling a dossier for the higher level judges' use. Given the absence of that reason for appellate scrutiny, it is difficult to arouse much enthusiasm for appellate review of the sorts of determinations a judicial case manager makes every day. At some point the trial court judge may insist on something so unreasonable that the appellate court must override it,[207] but intervention in any but the most extreme instance would probably do more harm than good.

3. Curtailing lawyer discretion with judge discretion is not inherently undesirable. True, lawyers are representatives of their clients, and in that sense their freedom of movement is an aspect of the litigation autonomy accorded the parties. But lawyer latitude expanded so much under the 1938 Federal Rules that it could itself legitimately be questioned. Certainly this expanded latitude for lawyers did not necessarily translate into enhanced autonomy for clients; indeed, concerns about lawyers who do not listen to their clients abound.[208] As

206 *See supra* note 19.

207 For example, in *Sims v. A.N.R. Freight Sys., Inc.*, 77 F.3d 846 (5th Cir. 1996), all parties agreed that the trial should take five to seven days, but the judge insisted that it be completed in one day. The appellate court found that this effort was "too much of a good thing":

> A trial is a proceeding designed to be a search for the truth. . . . Essential to the endeavor is an opportunity for the parties through their lawyers to present information in a manner that is comprehensible to a judge or jury. In this respect, the role played by lawyers in a trial is paramount. When 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.

Id. at 849 (citations omitted).

208 For a quick survey of research on attorney-client relations, see Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–97. *See also* Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231 (1991):

> The term "litigant autonomy" properly refers to both party and attorney as the "litigant" entity. In fact, the term "attorney autonomy" sometimes better describes the true interest at stake. Parties give up a great deal of their own autonomy when they select an attorney. Often the convenience of the attorney, rather than the party, dictates decisions about party structure and the forum for filing. Indeed, when parties in individual suits resist consolidation or class-action status, their counsel's fear of a loss of control or loss of fees is often a significant factor. This is not to say that the interests of the party and the attorney may not coincide in opposing aggregate treatment,

one of the strongest judicial proponents of case management observed, the laissez-faire character of our adversarial system is not so essential as to preclude all judicial oversight.[209]

So long as that oversight is not tinged with a substantive bias, the fact that it involves substantial primary and secondary procedural discretion for the trial court judge is not inherently too disturbing. It is certainly true that lawyers who find themselves under the hand of a firm judge are more likely than others to object that the judge has not given them enough time or latitude to complete their preparation. But it must be true that most of these attitudes flow actually from concerns quite different from substantive bias. And it must be confessed that judicial intervention can have adverse results, requiring extra effort that provides no advantages.[210] So it is not necessarily such a good thing as the proponents urge. But that is not because it is discretionary; in California the rigid "Fast Track" procedures caused a louder outcry among lawyers than the tailored federal version.[211] In a number of ways, individual tailoring (judicial discretion) may be superior to across-the-board timetables administered by clerks who lack discretion to modify the prescribed schedules.

4. A large number of American lawyers want more discretionary judicial involvement, not less. Any generalization about the preferences of lawyers will oversimplify. But it is striking how often lawyers beseech judges to provide more "adult supervision" of their cases. That sort of involvement, by definition, is discretionary. Yet when the Federal Judicial Center surveyed lawyers in 1997, asking them what sorts of changes in the federal discovery rules would be most helpful, enhanced judicial intervention was at the top of the list.[212] Similarly,

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but that attorneys often have distinctive interests in maintaining the individualized structure of a suit.

Id. at 246–47.

209 *See* Peckham, *supra* note 114, at 264–66.

210 Thus, the RAND study of the Civil Justice Reform Act found that early deadlines actually increased overall litigation expenditure. The RAND researchers concluded that "[t]hese results debunk the myth that reducing time to disposition will necessarily reduce litigation costs." JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 14 (1996).

211 *See* Marcus, *supra* note 20, at 106–08 (describing complaints by lawyers in California).

212 Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 587 (1998) (finding increased case management was favored by 47% of respondents as a way of dealing with discovery problems).

access to judges is one of the prime desires of American lawyers across a wide array of practice fields. This desire may be even more pointed in connection with settlement promotion.[213] And in the last ten years, Congress certainly has weighed in on the side of enhancing judges' discretionary powers both in case management and district court latitude to design programs for settlement promotion.[214]

Besides academics concerned about abstract issues of limiting unchecked discretion, the group chiefly opposed to such increased involvement of judges is judges themselves. Many of them see "adult supervision" of lawyers as distasteful and an unproductive use of their time. Their distaste for this activity does not mean that giving them discretionary power is untroubling, but the lawyers' enthusiasm for giving them more suggests that we have not reached a point where that discretion is abused with great frequency.

5. The alternatives to enhanced discretion create more problems than they solve. To say that there is too much procedural discretion in the United States today leaves open the question of alternatives. Regarding case management, for example, the critics have not offered many attractive options. Indeed, some seem to concede that the systemic changes that have led to the current situation do not admit of ready cures.[215]

The alternatives that come to mind have substantial drawbacks. To involve a second level of judges in case management would be likely to lead to unacceptable delays without promising significant improvements. To prescribe a rigid schedule for case management that individual judges could not modify would hardly improve matters. The turmoil about the federal Sentencing Guidelines[216] provides a

213 *See* Wayne D. Brazil, *What Lawyers Want from Judges in the Settlement Arena*, 106 F.R.D. 85, 85 (1985) (describing survey of lawyers showing that "in overwhelming numbers, litigators say judges should get *actively* involved in settlement negotiations in most cases in federal court"). Perhaps this is because "[i]n their roles as case managers or settlement brokers, judges are in a unique position to re-frame settlement decisions for the parties because they have no stake in the outcome." Guthrie et al., *supra* note 198, at 822.

214 *See supra* text accompanying notes 96–99, 122.

215 *See* Peterson, *supra* note 14, at 91–111 (recognizing the difficulty of the problem, and suggesting delegation of case management authority to magistrate judges (i.e., substituting the procedural discretion of one set of judges for that of another) and enhancing judicial performance evaluations).

216 *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (examining the debate about the Sentencing Guidelines). Professor Stith and Judge Cabranes noted: "[i]f the new regime [of the Sentencing Guidelines] really did—if it *could*—eliminate unwarranted disparity in criminal sentencing, perhaps the considerable effort of the various participants to

warning about calibrating too precisely. Perhaps one could forbid any case management by judges, although it is not clear how that would be done unless the individual calendar system were abandoned or trial dates were set by court clerks. But the general calendar system means that each time a matter arises in a case the lawyers and the judiciary must absorb the high costs of acquainting a new judge with the issues in the case. Moreover, the absence of a single judicial officer presiding over the case start to finish creates incentives for "trying again" with arguments rejected during an earlier trip to court; unless all the judges react exactly the same way, this behavior is hard to condemn as well as being hard to control. And on the sorts of timing questions that form the heartland of case management, differences certainly can be anticipated. Indeed, in many master calendar systems the solution to that is to assign all such tasks to a presiding judge—thereby reposing the entire discretionary authority for a multijudge court in a single judicial officer. At least in terms of limiting the risks of procedural discretion, that alternative seems dubious.

In relation to other issues, modest solutions exist and have been used. Settlement conferences can be assigned to a different judge, who is not "polluted" with knowing about the parties' settlement positions if the case does not settle. The task of determining the appropriate attorneys' fee award can be shifted to another judicial officer,[217] although that might not be efficient if the decision requires much familiarity with the actual proceedings of the litigated case.

So abstract uneasiness about enhanced discretion must co-exist with appreciation of the difficulties presented by concrete alternatives. At least in that light, the current regime looks tolerable.

6. Procedural localism in the federal system may be on the decline. Procedural localism is an aspect of primary procedural discretion that may have important values on certain topics. In an age of enthusiasm for federal prosecution of certain types of crimes, for example, control over timing of certain events in civil cases must take account of the great variation in criminal cases' burdens among federal district courts. But as a value, federal procedural uniformity has considerable

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decipher and apply the Guidelines could be regarded as well spent." *Id.* at 5. But that goal has not been achieved, and the authors therefore embrace the "hope that the time will come when we can look back on the years of these Sentencing Guidelines as a period of transition between the old, fully discretionary sentencing system and a new, lasting regime of guided judicial discretion in criminal sentencing." *Id.* at 6.

217 *See* FED. R. CIV. P. 54(d)(2)((D) (authorizing reference to a special master without satisfying the "extraordinary circumstances" requirements of Federal Rule of Civil Procedure 53).

weight that could be undermined by enhanced local procedural discretion.

At least in terms of coordinated effort to contain discretionary procedural localism, recent reports are promising. Congress has acted to direct the judicial branch to cut back on divergent local rules.[218] At least some Circuit Judicial Councils are, as Congress directed, scrutinizing local rules and weeding out those that are not allowed under Rule 83.[219] The rulemakers have pushed further. The Judicial Conference's Local Rules Project pin-pointed many local rules that seemed to violate the requirements of Rule 83, and that rule has itself been twice amended to strengthen its limitations.[220] And the "opt-out" provisions introduced into many of the discovery rules in 1993 were mostly removed in 2000. So in this important area, the American trend is toward less procedural discretion.

7. Despite the local variations, the basic Federal Rules framework has endured. Some who condemn current practices suggest that they have supplanted what the framers of the Federal Rules introduced, and thus undermined that system. Of course, one answer to that criticism is that the framers introduced a system with considerable discretion, particularly in Rule 16. As a prominent federal judge put it, under the Federal Rules "one stretch sock fits all."[221] So the current trends toward procedural discretion largely conform to trends that have been there for sixty years.

But it is also important to appreciate that the Federal Rules effected very significant changes from what went before. Discovery is the most striking illustration of that change; as Professor Subrin has recently shown, the Federal Rules accomplished a genuine revolution.[222] It is true that the liberality of the rules reached a high-water mark in 1970, and that changes since then have largely been retreats from the broadest version of discovery,[223] but they do not signal an abandonment of the central commitment to broad discovery that was

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218 *See supra* note 85 and accompanying text.

219 *See* Carl Tobias, *A Sixth Circuit Story*, 23 FLA. ST. U. L. REV. 983, 987–88 (1996) (reporting that "several judicial councils have instituted rigorous review" of local rules).

220 *See* 12 WRIGHT ET AL., *supra* note 77, § 3152, at 498–505 (describing 1985 and 1995 amendments to Rule 83).

221 Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1902 (1989).

222 *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

223 *See* Marcus, *supra* note 67 (describing efforts to constrain overbroad discovery).

made in 1938.[224] The second fundamental change was in pleading; as the Supreme Court reaffirmed in 1993[225] and 2002,[226] the relaxed scrutiny of complaints that was introduced in 1938 should persist. Refinement of those relaxed requirements is likely to continue,[227] but the break from the much more demanding past continues to be striking and continues to be true. A simple comparison of the Federal Rules' pleading requirements to the draft of the American Law Institute's Transnational Rules[228] shows how different (and restricted) pleading rules might have to be to satisfy the rest of the world.

This sort of international contrast is critical to appreciate that the Federal Rules' approach continues to be followed in its fundamentals. That appreciation is important to provide perspective for the overblown criticisms of current changes in the American practices. The recent proposed changes to the discovery rules, for example, were denounced by some as "revolutionary," and representing a repudiation

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224 *See* Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 197–99 (1999) (arguing that, even though recent discovery amendments curtail discovery somewhat, the broad discovery introduced in 1938—unique in the world—is still qualitatively broader than discovery allowed in other countries).

225 *See* Leatherman v. Tarrant County Narcotics Intel. and Coordination Unit, 507 U.S. 163 (1993).

226 *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

227 *See generally* Marcus, *Puzzling Persistence*, *supra* note 65 (describing ongoing judicial effort to develop appropriate scrutiny of pleadings).

228 *See* Am. Law Inst. & UNIDROIT, *Principles and Rules of Transnational Civil Procedure Discussion Draft No. 3*, Rule 12.1 (Apr. 8, 2002) ("The plaintiff must state the facts on which the claim is based, describe the evidence to support those statements, refer to the legal grounds that support the claim, including foreign law, and the basis on which these Rules apply."). Lest the rule itself be insufficient to make it clear that lax American pleading is not sufficient, Comment R-12A elaborates,

> Rule 12.1 requires the plaintiff to state the facts upon which the claim is based. This Rule calls for particularity of statement, such as that required in most civil-law and most common-law jurisdictions and traditionally required in American "code pleading." In contrast, some American systems, notably those employing the "notice pleading" under Federal Rules of Civil Procedure, permit very general allegations. In these Rules, the facts pleaded in the statements of claim and defense establish the standard of relevance for exchange of evidence, which is limited to matters relevant to the facts of the case as stated in the pleadings.

Id. It should perhaps be noted that this draft has not been voted upon by the American Law Institute, and may change substantially before a vote occurs. But it is useful to consider as an idea of what "harmonization" of procedure from many countries might produce.

of the Federal Rules' liberality.[229] That is simply not so. Taken in big picture terms, then, the Federal Rules construct has survived, and the current gravitation toward increased discretion does not threaten to dislodge it in a serious way.

8. The pendulum can and does swing toward confining discretion as well as toward expanding it. Although this point is implicit in several earlier ones, it deserves separate statement. At least with regard to several of the procedural "hot spots" highlighted here, there have been efforts to curtail or channel discretion as well as movement toward expanding discretion. Local procedural latitude has been the target of both legislative[230] and rulemaking efforts.[231] The 1983 fortification of Rule 11 originated, in a sense, as part of an effort to override the tendency of judges not to use their discretion regarding imposition of sanctions, and the restoration of discretion whether to sanction in 1993 was designed in part to deal with the "success" of the 1983 initiative. Both appellate constraint[232] and some legislative efforts[233] have been directed toward attorney fee awards, as have rule amendments.[234] And increased appellate review of class actions has been facilitated,[235] along with proposed refinement of the rule on settlement approval.[236]

Undoubtedly many would say that these efforts are not enough, but they are fairly numerous and not entirely inconsequential. And this impulse seems most prominent in regard to what might be called substantive discretion, such as mass tort class actions and attorney fee awards. It is true that similar constraints have not been evident with regard to case management and settlement promotion, but the prospect of useful constraints there explains their absence.

CONCLUSION

Academia is well known for producing Cassandras who denounce all they see in society. To some extent the academic critics of the American increase in judicial discretion sound like Cassandras.

229 *See* Marcus, *supra* note 224, at 183 (quoting a member of the Standing Committee on Rules of Practice and Procedure discussing the change in the definition of scope of discovery in FED. R. CIV. P. 26(b)(1)).

230 *See supra* text accompanying note 85.

231 *See supra* text accompanying notes 84–89, 104–05.

232 *See supra* text accompanying notes 151–55.

233 *See supra* text accompanying note 166.

234 *See supra* text accompanying notes 156–58.

235 *See supra* text accompanying note 186.

236 *See supra* text accompanying note 187.

Academia can also produce Pollyannas, however, and this Article may be an example of that.[237] But one need not go so far as Professor Miller[238] to view the recent slouch toward discretion in American procedure with equanimity. As this Article details, there are significant trends toward increased procedural discretion in the United States, and equally surely there are reasons to be uneasy about them. But the portents do not presently seem apocalyptic to this observer,[239] and some trend lines are actually toward less discretion. Moreover, taken in the context of the variety of sorts of judicial discretion identified in Part I, the trends toward increased or continued discretion look less disturbing than they might if viewed in isolation. The future is not entirely bright, but the sky is not falling either.

237 *Cf.* Stephen Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 720 (2002) (suggesting that my view of the rules process betrays nostalgia for simpler days).

238 *See supra* text accompanying note 187.

239 *Cf.* Marcus, *supra* note 125 (evaluating the significance of the Agent Orange litigation as a possible sign that American litigation had reached an apocalypse).