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MANAGEMENT'S SUBSTANTIVE EDGES

Alexander A. Reinert[†]

Although judicial management has evolved over the last forty years, Judith Resnik's seminal paper, *Managerial Judges*,¹ still resonates today. My goal in this Essay is to discuss some of the elements of management that have been transformed, while paying heed to the complex aspects of management that remain.² As I will discuss in greater detail below, some aspects of management have become more transparent, while others have become harder to discern. And along the way, the overlap of management with substantive decision-making has often become harder to police.

I begin with some reflections on what has changed about the practice of judicial management over the past forty years. Perhaps the most prominent change is the increased role of magistrate judges in conducting many management functions, relieving to a degree some of the due process and fairness concerns identified in *Managerial Judges*. At the same time, the fundamental challenges posed by judicial management remain. Like Professor Resnik did in her original article, I ground these reflections in my own experience as a civil rights litigator over the past twenty years.³

I then turn to look at management today through two prisms. One is management that is explicitly substantive in nature—that is, Congress's institution of rules governing specific categories of cases in which management serves substantive ends. I use the Prison Litigation Reform Act as one salient example, but there surely are others.⁴

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

2. Here, let me offer the caveat of so many proceduralists—I will be addressing federal courts in this essay. State courts are more important and complex in many ways, and certainly have managerial characteristics that resemble federal courts. But, like Professor Resnik in her seminal article, *see id.* at 376 n.4, I focus here on federal courts.

3. This is always risky. Most, but not all, of my practice has been in federal courts throughout New York State, and most of it has involved litigation on behalf of incarcerated people.

4. The Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (2018), for instance, or the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2018), could all serve as examples.

These management devices achieve their substantive ends without apology, inviting judges to manage prison conditions cases into the dismissal dustbin, while also narrowly limiting the instances in which courts can use management tools to prompt structural reform of the carceral experience.

The second prism is more granular, as it looks to the individual rules of practice (or “standing orders”) adopted by district court judges throughout the United States. These standing orders are an essential part of judicial management in the federal courts (the first document I look at after filing a case is the standing orders of the judge to which the case has been assigned). Indeed, courts have the power to issue significant sanctions for violations of an individual judge’s standing orders.⁵ But their importance is underappreciated in the procedural literature. Along with local rules, standing orders garnered some criticism as part of the Local Rules Project commissioned by the Judicial Conference in 1986.⁶ But little has been done to monitor the adoption or enforcement of standing orders,⁷ only a few scholars have focused attention on them,⁸ and I am aware of no attempt since the Local Rules

5. See Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 443–44 (2010) (discussing varying treatment of standing orders and sanctions).

6. The 1989 report summarizing the project noted that standing orders and local rules were sometimes in direct conflict with the Federal Rules, but did not explore standing orders in any great detail. See generally COMM. ON RULES OF PRAC. AND PROC., JUD. CONF. OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES OF CIVIL PRACTICE (1989) (proposing changes to local court rules).

7. Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 565 (2002).

8. See 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, 10–12 (1994) (focusing on individual judges’ standing orders requiring a pre-motion conference); Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 65 (2015) (discussing standing orders related to patent litigation); Carrie E. Johnson, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 235 (1997) (discussing standing orders in Eastern District of Virginia and facilitation of rocket docket). Standing orders are given some discussion in Jordan, *supra* note 6, but the specific content of standing orders is discussed in only one footnote, *id.* at 441 n.115. More attention has been given to Local Rules promulgated at the district level. Andrew Hammond has looked closely at how each District’s local rules impact pro se litigants, see Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689 (2022), but these local rules are not as granular as a judge’s individual rules of practice. See also Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 121 (2015) (discussing process for adopting or amending local rules and the impact on litigants). In an article about the fragmentation in procedure, Erwin

Project to conduct the broad empirical canvas I report on in this paper.⁹ Based on a close review of every individual rule adopted by active district judges (382 rules in total), I focus on three kinds of individual rules: (1) rules that, by design or impact, influence litigation decisions without any direct judicial management and their influence on litigators; (2) rules that differ depending on the substantive claim brought by the plaintiff; and (3) rules that appear tailored to achieve substantive social goals that are orthogonal to the litigation itself.

I conclude by exploring whether these two sources of management—one explicitly linked to specific kinds of substantive claims and the other the product of individual judicial discretion—are an improvement on the somewhat ad hoc management Professor Resnik described 40 years ago. I suggest that some of the same problems persist, but that empirical questions remain, particularly regarding the impact of judges' individual rules.

I. THE MORE THINGS CHANGE, . . .

It is worth, at the outset, reflecting on how much has changed about federal civil practice since Professor Resnik wrote her article, but how many of the problems she identified with judicial management have remained. We might start with the relationship between management and trial because one of Professor Resnik's worries about judicial management was that the same judicial officer who would be managing the case, and obtaining ample information from the parties relating to the merits of the case, would ultimately make a merits decision after hearing or trial.¹⁰ Is this concern mitigated by the fact that over the last forty years the prevalence of trials in federal court has

Chemerinsky and Barry Friedman mention standing orders in a footnote, but otherwise focus on local rules. See Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 *MERCER L. REV.* 757, 760 n.11 (1995) (noting the contribution of standing orders to lack of uniformity of federal rules); see also Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 *DUKE L.J.* 929, 942 (1996) (mentioning standing orders as one among many causes of a "degeneration" of federal civil practice).

9. One study attempted to examine the impact of individual rules encouraging the participation of "inexperienced" or "newer" attorneys. Kimberly A. Jolson, *The Power of Suggestion: Can a Judicial Standing Order Disrupt a Norm?*, 89 *U. CIN. L. REV.* 455, 456–457 (2021) (focusing on the District of Massachusetts). Another study tested whether permitting note-taking by jurors (a subject of some individual rules of practice) can affect trial outcomes. Justin Sevier, *The Unintended Consequences of Local Rules*, 21 *CORNELL J. L. & PUB. POL'Y* 291, 294 (2011).

10. *Managerial Judges*, *supra* note 2, at 433–35.

continued to decrease?¹¹ Or that some categories of disputes have been shunted into private adjudication such as arbitration?¹² Perhaps not, given that the law has shifted to invite judges to make substantive decisions earlier in the case, via summary judgment and motions to dismiss.¹³ And the mandatory management conference, in its infancy when Professor Resnik's article was first published,¹⁴ combined with each district's local rules,¹⁵ combine to inject the district court into disputes early in the litigation. Although it may be less likely for district court judges to know "too much" about the case when conducting trial, they still may have access to significant extraneous information when they are deciding motions to dismiss or for summary judgment, potentially affecting "our standards of what constitutes rational, fair, and impartial adjudication."¹⁶

There also have been changes in *who* is responsible for management, a shift everyone at this gathering appreciates. Amendments to the Federal Magistrate Act in 1979 added to the responsibilities of

11. Data suggest that trials in federal courts have significantly declined over the past seventy-five years. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 fig.1 (2004) (showing that the number of civil trials across all U.S. district courts dropped from more than 12,000 in the 1980s to less than 5000 in 2002); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 713 tbl.1 (2004) (presenting trial statistics from 1970 through 2000). But see Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 520–21 n.115 (1986) (arguing that data regarding trial prevalence seventy-five years ago may be unreliable).

12. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* U. ILL. L. REV. 1, 9–11 (2010) (reviewing the expansion of arbitration in the twentieth century).

13. See Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 863 (2018) (discussing several procedural mechanisms that allow judges to make substantive decisions earlier in a case).

14. As Resnik noted, Rule 16 was in the process of being amended. *Managerial Judges*, *supra* note 2, at 399–400. The first significant amendments were introduced in 1983, mandating an initial conference in most cases, and it has been amended multiple times since then, generally with the goal of increasing the opportunities for judicial involvement early in the litigation. See FED. R. CIV. P. 16 advisory committee's notes (discussing 1983, 1993, 2006, and 2015 Amendments).

15. When Resnik's article was published, only 10 district courts had local rules requiring a pretrial conference. *Managerial Judges*, *supra* note 2, at 399 n.105. Now every district has local rules that address management tools and, as discussed in detail below, most individual judges have practice orders that address management in detail.

16. *Managerial Judges*, *supra* note 2, at 380.

federal magistrates and ushered in an era in which, in some districts, magistrates conduct many of the management and disposition responsibilities once reserved exclusively for district court judges.¹⁷ So, while some of Professor Resnik's concerns about judicial management may resonate less for district court judges, the concerns are presumably still present given the greater responsibility of magistrate judges.

There are also ways in which the paradigm cases Professor Resnik uses to illustrate her concerns with judicial management no longer look the same today. Take the hypothetical case *Paulson v. Danforth, Ltd.*, an "unexceptional" tort case in which, on Professor Resnik's telling, the district judge actively engages in pressuring settlement throughout the course of discovery disputes.¹⁸ Today, it would be unusual for a district judge to actively engage in settlement discussions with the parties—instead, those responsibilities would be handled by a magistrate judge or court-adjacent mediator.¹⁹ Indeed, it is a credit to Professor Resnik that many judges now understand the due process/fairness concerns implicated when they try to combine the role of settlement facilitator/ultimate decider.²⁰

There also have been many changes in the area of structural-reform litigation, the other paradigm case *Managerial Judges* offers up as an example of judicial management.²¹ Such cases have become far more challenging, because of changes to both statutory and constitutional law.²² But as I discuss below, even if obtaining a judgment

17. The number of magistrate judgeships also has increased significantly over time. In 1970, after passage of the 1968 Federal Magistrates Act, the Judicial Conference allocated 82 full-time magistrate judge positions and 449 part-time positions; by 2021, there were 561 authorized full-time positions and 25 part-time positions. PETER G. MCCABE, FED. BAR ASS'N, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 14 (2014); *Table 1.1—U.S. Federal Courts Judicial Facts and Figures*, U.S. CTS. (Sept. 30, 2021), <https://www.uscourts.gov/statistics/table/11/judicial-facts-and-figures/2021/09/30>.

18. *Managerial Judges*, *supra* note 2, at 388, 390–91.

19. These arrangements will depend on the district and the specific judge.

20. *See Managerial Judges*, *supra* note 2, at 425 (explaining the due process/fairness concerns).

21. *Id.* at 377.

22. For example, establishing standing in injunctive cases has become ever more difficult as a result of the Supreme Court's Article III jurisprudence. *See generally* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984) (arguing that the Supreme Court's standing doctrine inappropriately imposed new barriers to public law litigation in federal courts); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301 (2002) (arguing that standing jurisprudence disfavors the powerless). The Court has also interpreted Rule 23 in such a

similar to the hypothetical *Petite v. Governor* is less likely today, judicial management is still front and center in those cases, in part precisely because of Congress's desire to alter the substantive outcomes of those cases.

Moreover, some of the same sources and motivations for judicial management persist today. Management is still motivated by externally imposed sources like discovery conflict and the need for posttrial oversight, and internally imposed goals like a quest for efficiency.²³ As Resnik observed many years ago, and as is still true now, much of judicial management centers around discovery disputes.²⁴ The presence of significant discretion was as true when Professor Resnik wrote as it is today—in many aspects of management, that discretion is effectively unreviewable.²⁵ Pretrial management is likely more visible now because every letter requesting any kind of interim relief, and the court's response, is entered on the public docket.²⁶ But still, perhaps more so than when *Managerial Judges* was published, federal judges “negotiate with parties about the course, timing, and scope of both pretrial and posttrial litigation.”²⁷

The question is whether judges are at the “center” of structural-reform litigation, or that in “unexceptional” tort cases judges have “descended into the trenches to manage the case.”²⁸ As I reflect on this question in connection with my own experience, I was struck by two seeming contradictions. On one hand, Professor Resnik's paper so accurately captures both current practice and some of its problems that it might strike a casual reader as obvious, even though at the time it was anything but. On the other hand, having litigated for more than twenty years now, in cases ranging from individual damages actions to litigation directed towards significant structural reform, I can report that it is the rare case in which I have been involved in which Article III judges take a truly managerial role.

way to make class actions seeking structural reform less viable. See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 781 (2016) (explaining how the Court interpreted Rule 23 in a way that increases barriers to bringing structural reform class actions).

23. See *Managerial Judges*, *supra* note 2, at 391–95.

24. *Id.* at 378–79.

25. *Id.* at 411.

26. Indeed, although Professor Resnik characterizes management as informal, off the record, and often held outside of the public eye, *id.* at 407, my own experience is that other than during settlement conferences, most judicial management takes place in open courtrooms, on the record, and visible to the public.

27. *Id.* at 378.

28. *Id.* at 391.

How to resolve this conflict? One should be cautious about relying on “anecdota,” of course. But as I reflected further, it became obvious to me that the conflict may be illusory. Judicial management comes in many forms. And, most importantly for the purposes of this essay, different forms of management can have substantive edges.

My experience in *Peoples v. Annucci*, an injunctive class action challenging the use of solitary confinement in New York State, is illustrative.²⁹ That case began with two different plaintiffs filing pro se and surviving the defendants’ initial motion to dismiss. After other attorneys and I entered appearances for the plaintiffs and filed an amended complaint making class action allegations, the district judge entered a routine order for a status conference. At that conference, the parties discussed the defendants’ intention to file a renewed motion to dismiss (the court’s individual rules required a premotion conference for motions to dismiss). We argued that, given the court’s resolution of the motion to dismiss when the plaintiffs were proceeding pro se, there was no reason to go through additional motion practice. The district judge was unmoved and, though her remarks indicated that she would be unlikely to grant the motion, her comments also suggested that she was anchored to a view that solitary confinement was problematic in a more limited set of circumstances than we maintained in the amended complaint.

We would not appear before the judge again until more than two years later, for a fairness hearing to approve the comprehensive class action settlement addressing the use of solitary confinement in New York State prisons. But the court’s remarks at the status conference—on one hand expressing openness to plaintiffs’ theory of the case but on the other hand indicating that there were limits to that acceptance—could not have helped but impact the parties as they negotiated a settlement. This kind of management, as Resnik observed so long ago, is essentially unchecked. It can’t be found in an opinion that would be appealed. And it has a substantive impact as the parties proceed through the litigation without any judicial intervention. But it has a different cadence than the hands-on management described in *Managerial Judges*.

Fast forward in *Peoples* to spring of 2021. After almost four years of monitoring, the agreement would expire in the fall. But because of the COVID pandemic, a critical piece of the settlement—prison visits to troubleshoot implementation issues—had been

29. See *Peoples v. Annucci*, 180 F. Supp. 3d 294, 296 (S.D.N.Y. 2016) (granting motion for approval of class action settlement).

suspended. Plaintiffs proposed to the defendants that the parties jointly agree to extend the agreement by a year to account for the gap in oversight, but defendants declined. The plaintiffs had a dilemma—try to work out an agreement with the defendants or go to the court. On one hand, plaintiffs’ counsel knew that they had an obligation (under the settlement agreement and the court’s Individual Rules) to attempt in good faith to work out any disagreement with the defendants before seeking the court’s intervention. The settlement agreement also provided very limited circumstances under which it could be extended beyond the parties’ initial agreed term. On the other hand, with the expiration of the settlement agreement looming, any time taken to try to work out an agreement with the defendants was risky. Plaintiffs nonetheless chose the latter course and, when the parties could not reach any agreement, sought relief before the court. It took the district judge nearly a year to decide the plaintiffs’ motion for an extension, ultimately granting the request, but not without the cost of class counsel being unable to enforce the agreement while their motion for an extension was pending.

This is not to suggest that judicial management was not relevant in *Peoples*. In a sense, it was the prospect of management that informed the parties’ interactions with each other. Before agreement was reached, it informed the parties’ assessment of the settlement posture. The settlement agreement built in layers of negotiation and discussion before management could be invoked. And the parties took those provisions, and the implication that management should be sparse, into account as they worked over the course of the agreement to implement its terms. I have seen similar patterns reflected in other structural reform litigation.³⁰

30. Take two cases (with which I was not involved) seeking to compel prison administrators to introduce safeguards against COVID infection within prisons and jails. In *Whorley v. Northam*, No. 3:20-cv-00255, 2020 WL 2485923 (E.D. Va. May 12, 2020), the court played almost no role before the parties came to a settlement agreement. *Id.* at *1. And when the defendant moved to terminate court supervision, the court declined to rule, inviting the parties to meet and confer before issuing a status report notifying the court that the parties had agreed to a private settlement agreement that would not be enforceable in federal court. And in *Catchings v. Wilson*, No. 1:21-cv-00428 (D. Md. Apr. 28, 2021), the parties entered into a settlement agreement after the court ordered them to submit a joint statement reflecting their points of agreement and disagreement. Order, *Catchings*, No. 1:21-cv-00428 (D. Md. Mar. 15, 2021), <https://clearinghouse.net/doc/111418/>, at 1–2; Settlement Agreement and Release, *Catchings*, No. 1:21-cv-00428 (D. Md. Apr. 15, 2021), <https://clearinghouse.net/doc/111650/>.

By contrast, management conducted by magistrate judges will often be less sporadic. In a different class action in which I was involved, a damages case on behalf of a class of people held at Rikers Island, the parties met with the magistrate judge more than a dozen times to hammer out an agreement. By the end of the negotiation, the magistrate judge was privy to the parties' privately held assessments of the strength and weaknesses of their respective positions, the relevant discovery, and any number of other pieces of information. This is the kind of information that Professor Resnik worried could raise due process or fairness concerns when the manager was also the ultimate decider, but here the manager was the magistrate judge, to whom the district judge had referred the parties to manage discovery and discuss settlement. And in the ordinary course, the district judge would conduct a fairness hearing to ensure that the settlement agreement was fair to absent class members. But the parties in *Parker*—after coming to a preliminary agreement—consented to proceeding before the magistrate judge for the entirety of the proceedings. In this sense, it was not judicial management that raised the due process concerns identified by Professor Resnik, but the parties themselves.

One could imagine why the parties might have made this decision. After all, the magistrate judge had expended significant time and capital getting the parties to an agreement. Presumably, she would be highly unlikely to reject the settlement given that she had supervised its finalization. The parties might also have thought that, should problems with administering the settlement arise, the magistrate judge would better understand the parties' goals and understanding when they reached agreement.

These observations illustrate a mixed kind of management. In *Managerial Judges*, Resnik contrasts the judge who "passively awaits[s] parties' pretrial requests" with the judge who "supervise[s] case development before trial and . . . manage[s] decree implementation after trial."³¹ Today, some management is top-down, but not always driven by judges. As I discuss in the next section, management also can be dictated by statutes for specific kinds of cases. And while judges sign off on the basic framework for how parties will develop the litigation, they also have created screening structures that give parties ample leeway to work their cases, with the court giving signals of varying intensity regarding how much judicial supervision the parties should expect. The prospect of active management casts a shadow even when the judge is not present—there is always a threat of scrutiny

31. *Managerial Judges*, *supra* note 2, at 386.

by the court to ensure that the parties are pursuing the case in a timely and efficient fashion. In this system, parties can no longer “let the case lie dormant for years,” but they still retain significant control over discovery and negotiated resolution.³² And as I discuss below, to some degree that is a feature of local rules or judicial standing orders—they often include devices that force parties to manage themselves or to recruit adjuncts to the court to engage in management.

II. MANAGEMENT THROUGH TWO PRISMS: TOP-DOWN AND BOTTOM-UP

Judicial management has been fostered by changes to the Federal Rules, changes that were on the horizon when Professor Resnik’s paper was published. And to the extent that one of Professor Resnik’s critiques was that management was opaque and subject to an individual judge’s predilections, one might imagine that more uniform management rules might ameliorate some of the concerns she identified—indeed, although Professor Resnik did not endorse it as an approach, she identified management by rule as one possible response to her concerns. But she noted that it would be difficult to craft top-down management rules that would fit all cases. In this section, I want to show how some of what we are living in today reflects two visions of judicial management. One, top-down in effect, is substantive on its face—management of particular kinds of litigation through legislation like the Prison Litigation Reform Act (PLRA). The other, developed bottom-up by individual judges, is management through the individual rules of practices adopted by the majority of federal district court judges.

The PLRA, for example, bars federal courts from entering consent decrees (a common form of settlement in prison conditions cases before passage of the PLRA in 1996) unless the federal court makes specific findings regarding the need for the decree and the specific constitutional violations engaged in by the defendant.³³ In most circumstances, even defendants who wish to settle an injunctive action would resist agreeing as a condition of settlement that they violated the constitution. The PLRA gives the parties another option to a consent decree—the private settlement agreement.³⁴ But the PLRA bars enforcement of a private settlement agreement in federal court.³⁵ In

32. *Id.* at 384.

33. Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1)(A) (1997).

34. *Id.* § 3626(c)(2).

35. *Id.* § 3626(g)(6).

other words, the PLRA forces litigants to settle cases in such a way that federal courts will have no role in monitoring enforcement, essentially cutting courts out of this aspect of judicial management.

At the micro level of individual rules, consider a familiar scene to many lawyers in courts across the country: attorneys for the parties are in front of a judge arguing about the merits of a motion to dismiss or a motion for summary judgment. The court is asking questions, pressing each side on the strength of its position. A casual observer might think that the judge is in the midst of making a critical decision about the course of the case—whether to permit the plaintiff's claims to go forward to discovery or to trial. But the parties are only being heard on the defendant's pre-motion request to file a motion. Typically, the parties have filed brief letters setting out their positions on the contemplated motion. And pursuant to the court's individual rules, those letters must be filed prior to a dispositive motion.

Like the PRLA, this is judicial management, with a substantive edge. Depending on a judge's management style, she might use the hearing as an opportunity to discourage filing such a motion. She might send strong signals that the motion will be denied, or that she sees merit to some of the arguments contemplated. The parties will internalize those signals, perhaps moving them closer to settlement or emboldening them to stand firm in their legal position. The more direct the court is in expressing its views, the stronger the signal. And the more uncertain a judge is, the more the signal is muddled. Without ever writing a word in an opinion, a judge may be able to effectively decide the case.

Many other instances of judicial management have similar substantive salience. Internal practices regarding discovery disputes or settlement mediation can be deployed not just as means to most efficiently manage the expenditure of judicial resources, but also to manage particular kinds of cases in particular ways. Some of these tools are more open to public view than others—MDL procedures or the management aspects of the PLRA. But far more are submerged, visible in district-wide "Pilot Projects," practice orders before individual judges, or simply in the ether of a particular judge's approach. And as one moves from institutionalized management devices like the MDL or the PLRA to less formal ones, Professor Resnik's original

observation that judicial management is relatively unrestrained becomes even more prescient.³⁶

My goal in this section is to explore both the top-down and the bottom-up forms of management. I use the PLRA as an example of top-down explicitly substantive management. And I rely on a comprehensive canvas of every active federal district judge's individual practice order to identify specific kinds of management tools found therein.

A. Top-Down Management: The PLRA

The PLRA is one example of how Congress has attempted to manage specific kinds of cases to achieve substantive ends. The PLRA has had a significant impact on the course of prison litigation, as Congress intended. Congress's self-stated goal was to make it more difficult for incarcerated people to bring litigation of all kinds, although this goal was dressed up with language about eliminating frivolous cases so that courts could focus on meritorious ones.³⁷ Much of the PLRA's impact has been via its substantive provisions—the requirement, say, that a court only enters prospective relief that is narrowly tailored to a specific constitutional violation³⁸—or the prohibition on damages for emotional distress in the absence of a showing of physical injury.³⁹ These provisions and others have been the subject of past scholarship.⁴⁰

But the PLRA also does substantive work through its management provisions. Take, for example, the provision of the PLRA that

36. *Managerial Judges*, *supra* note 2, at 378 (“Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.”).

37. See generally Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) (examining impact of PLRA on litigation by incarcerated people); *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (“Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits . . .”).

38. 18 U.S.C. § 3626(a)(1)(B) (1997).

39. 42 U.S.C. § 1997e(e) (2013).

40. See generally Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 917 n.145 (2009) (questioning invocation of “frivolous” lawsuits as justification for PLRA); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 552 (2021) (questioning assumptions regarding PLRA's exhaustion provisions); Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385 (2022) (pointing to several limitations imposed by the PLRA); Margo Schlanger, *Trends in Prisoner Litigation, As the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 153 (2015) (noting specific provisions of the PLRA that “undermined prisoners' ability to bring, settle, and win lawsuits.”).

empowers judges to dismiss actions based on affirmative defenses early in the litigation, before the defendant has responded in any way, by motion or answer, to the complaint.⁴¹ As a form of docket management, courts are invited to construct arguments to dismiss based on exhaustion or qualified immunity, even though those defenses are forfeited if not raised by the defendant.⁴² To make matters worse, almost every court that has provided exemplars of complaints to be used by incarcerated persons proceeding pro se includes a section asking the incarcerated person whether they have exhausted their remedies, even though the Supreme Court has made clear that exhaustion is a matter to be pleaded and proved by the defendant.⁴³

The PLRA contains other provisions in which management bleeds into substance. Defendants can waive replying to an incarcerated person's pleading without fear of losing any rights—courts may not order relief unless some reply has been filed, and courts can order that a reply be filed if they find that the plaintiff has a “reasonable opportunity” to prevail on the merits.⁴⁴ The PLRA also imposes restrictions on the ability of incarcerated people to participate in hearings in person by requiring that courts use telephonic or other means to afford access to hearings, without removing incarcerated people from their place of confinement.⁴⁵ This management tool has a significant impact on the ability of an incarcerated person to fully participate in litigation affecting their rights.⁴⁶ The PLRA also limits a

41. 42 U.S.C. § 1997e(c) (2013).

42. See, e.g., *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 750–51 (6th Cir. 2015) (affirming a finding that a qualified-immunity defense was waived when defendants failed to plead it in their answer).

43. See Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 904 (2017) (finding that 77 percent of form pro se complaints request information about exhaustion in prison); *Jones v. Bock*, 549 U.S. 199, 216 (2007) (holding that exhaustion is an affirmative defense).

44. 42 U.S.C. § 1997e(g)(2) (2013).

45. *Id.* § 1997e(f).

46. In the immigration and criminal context, there is evidence that individual litigants fare worse when appearing remotely rather than in person. See Shari S. Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 898 (2010) (noting that “the results from the Cook County Bail Study show that the defendants were significantly disadvantaged by the videoconferenced bail proceedings held between 1999 and 2009”); Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. UNIV. L. REV. 933, 933 (2015) (based on empirical study of the use of televideo technology in immigration adjudication, reporting that “detained televideo litigants were more likely than detained in-person litigants to be deported” and “these inferior results were associated with the fact that detained litigants assigned to televideo courtrooms

court's order to enter certain prospective relief without first permitting the defendant a chance to comply with prior court orders that involved less intrusive relief.⁴⁷ The statute similarly cabins the power of courts to appoint special masters⁴⁸ and contains numerous provisions limiting the duration of any preliminary injunctive relief.⁴⁹

The PLRA, then, makes the hypothetical structural-reform case in Professor Resnik's article, *Petite v. Governor*,⁵⁰ far more fanciful. Aside from the changes in substantive law between now and then, the PLRA would not tolerate a federal judge simply finding prison conditions "unconstitutional" and ordering defendants to cure that constitutionality "forthwith."⁵¹ First, the plaintiffs would have had to prove specific constitutional violations, and the court would have had to find the existence of specific violations and that specific remedies were necessary and the least intrusive means of remedying those violations. Further, before the Court could have ordered any of that relief, it would have to have given the defendants a chance to remedy the deficiencies themselves. And even if the Court found violations, it would have been limited to a two-year term of enforcement. Finally, if the parties choose to settle, which has become increasingly likely, the PLRA would make it all but certain that the Court would lose any authority to manage the case going forward by incentivizing a private settlement agreement rather than the consent decrees that were so common pre-PLRA.⁵²

B. Management at the Micro Level

The PLRA is an example of a management tool gifted by Congress. It goes hand in hand with the management tools provided under

exhibited depressed engagement with the adversarial process"). See generally Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? – The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L. J. 259 (2008) (based on more than 500,000 cases, reporting that using video teleconferencing in asylum removal hearings "roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum").

47. 18 U.S.C. § 3626(a)(3) (1997).

48. *Id.* § 3626(f).

49. *Id.* § 3626(b)(1)(A).

50. *Managerial Judges*, *supra* note 2, at 387.

51. *Id.*

52. See Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIAMI L. REV. 519, 534–35 (2015) (noting that private settlement agreements have "grown common in prisoners' injunctive cases").

the Federal Rules and, to some degree, the Local Rules of district courts. Because of the visibility of management tools, it is easier to engage with whether the tools achieve the important goal of judicial management without undermining important rights. However, judges are constantly using management tools that fly far beneath the surface.

Some of these tools are, like the Local Rules, more visible because they are imposed through some kind of process that invites public participation.⁵³ Take, for example, the Southern District of New York's Pilot Plan regarding certain police misconduct cases brought under Section 1983.⁵⁴ Developed after consultation among judges, defense counsel, and the civil rights bar, the Section 1983 Pilot Plan makes significant changes to the management of most police brutality cases by:

- Extending the time for defendants to file an answer from 21 days to 80 days;
- Providing for limited basic discovery at the outset of the case, then a stay of discovery while the parties are forced to mediate for up to six months;
- Requiring plaintiffs to provide criminal history and medical releases with the filing of the complaint, with some damages forfeited if a release is not provided.⁵⁵

From the court's perspective, the results of the Pilot Plan were a tremendous success, with 70 percent of cases settling before *any* judicial intervention.⁵⁶ Some plaintiffs' counsel were less impressed, arguing that the minimal discovery, combined with a stay of discovery during mediation, forced plaintiffs to settle their claims at a discount because they lacked critical information.⁵⁷ Other lawyers noted that the delays in obtaining full discovery could prejudice clients who

53. See FED. R. CIV. P. 83(a)(1) (permitting adoption of local rules after period for public notice and comment).

54. *Plan for Certain § 1983 Cases Against the City of New York*, S.D.N.Y. 1 (Nov. 15, 2013), <https://www.nysd.uscourts.gov/sites/default/files/pdf/1983%20Revised%20Plan%20and%20Exhibits.6.10.14.pdf>.

55. *Id.*

56. S.D.N.Y., S.D.N.Y. PILOT § 1983 PLAN: OVERVIEW AND CALL FOR PUBLIC COMMENTS 2 (November 15, 2013), <https://www.nysd.uscourts.gov/sites/default/files/pdf/Section%201983%20Plan%20White%20Paper.pdf>.

57. See Colin Moynihan, *Court Plan to Handle Police Lawsuits Is Criticized*, N.Y. TIMES, July 14, 2013, <https://www.nytimes.com/2013/07/15/nyregion/court-plan-to-handle-police-lawsuits-is-criticized.html> (summarizing criticism of Pilot Plan by plaintiffs' civil rights bar).

needed additional information to add defendants prior to the running of the statute of limitations.⁵⁸

Many courts have instituted similar pilot management projects for other kinds of substantive claims, be they patents, employment discrimination, and the like.⁵⁹ Note that the goal of these pilot projects is, in general, to take courts out of day-to-day management of specific kinds of cases by imposing a structure that essentially outsources management to the parties and court-adjacent actors like mediators. And success is measured, to some degree, by the extent to which judges do not have to involve themselves in the case prior to their resolution.

But at an even more granular level than district-wide pilot projects are judge-specific management devices usually memorialized in individual rules of practice or judicial preferences. Unlike legislation or rulemaking, these devices are not generated through a participatory process. But they are public, usually available on court websites, and used by judges to direct the parties in numerous areas, from formatting and length of briefs, to means of contacting the court, to rules of decorum.

Notwithstanding the impact individual rules of practice have on the course of litigation in federal court, they have been subjected to very little scrutiny.⁶⁰ And since the 1989 study occasioned by the Local Rules Project, to my knowledge, no one has attempted to study the whole of individual rules throughout the federal system.

With that goal in mind, I attempted to determine which active federal district court judge (excluding judges who have taken senior status) has promulgated individual rules and, if so, what those individual rules contained beyond basic requirements like how to communicate with the Court, default briefing schedules, and the like. The results are reported here. Of the 600 district court judges in the dataset,⁶¹ 382 (or about 64 percent) have promulgated some form of individual rules. There appears to be some conformity among the districts. There

58. *Id.*

59. Initial Discovery Protocols for Employment Cases Alleging Adverse Action, N.D. Cal. General Order No. 71, at 1 (Feb. 1, 2018), https://www.cand.uscourts.gov/filelibrary/3308/GO_71_1-16-2018.pdf (establishing the pilot discovery plan for employment discrimination cases). See generally MARGARET S. WILLIAMS ET AL., FED. JUD. CTR., PATENT PILOT PROGRAM: FIVE-YEAR REPORT (2016), <https://www.law.upenn.edu/live/files/7818-patent-pilot-program-five-year-report> (describing the pilot program and five-year impact).

60. See *supra* notes 6–10 and accompanying text.

61. There are 677 authorized District Court judgeships, and 74 current vacancies.

are twenty-six districts in which none of the judges appear to have promulgated individual rules.⁶² In the rest of the districts, all or nearly all of the judges promulgated individual practice rules.

For the purposes of this Essay, I am less interested in the direct management devices found within the rules—many of the rules set forth page limitations for briefs, tell parties what they should include in their briefs, or inform parties how to communicate with the court, for example. Instead, I focus more on three categories of rules found in some of the individual practice orders: (1) rules that, by design or impact, influence litigation decisions without any direct judicial management; (2) rules that differ depending on the substantive claim brought by the plaintiff; and (3) rules that appear tailored to achieve substantive social goals that are orthogonal to the litigation itself.

1. Managing Through Indirect Influence

Litigation is meant to resolve a central dispute between the parties, but the process itself presents constant opportunities for new disputes, usually between the parties' representatives. From the moment a complaint is served, the opportunities arise. Will the defendant move to dismiss or file an answer within the time frame required under the Federal Rules? Probably not. Will the parties agree on the scope and timing of discovery? Almost certainly not. Will they find that they have provided sufficient responses to the discovery demands served upon them? And so on.

Most courts, even those committed to managerial judging, presumably do not want to manage these disputes. But the Federal Rules are soundly committed to providing that management. Courts probably could not function if the parties brought every one of these disputes to a judge's attention. Indeed, the parties, or at least their representatives, are conscious of this—how many lawyers have had the internal conversation along the lines of “I would rather not consent to a second extension of time to file the Answer, but does the judge really want to

62. No judges in the following districts appear to have promulgated individual rules: District of Alaska, the Middle and Southern Districts of Alabama, Eastern and Western Districts of Arkansas, Northern District of Florida, Middle District of Georgia, Northern and Southern Districts of Iowa, Central District of Illinois, Eastern and Western Districts of Kentucky, Western District of Louisiana, District of Maryland, District of Maine, Southern District of Mississippi, District of Montana, North Dakota, New Hampshire, Nebraska, Eastern and Western Districts of Virginia, District of Vermont, Eastern District of Washington, and Northern and Western Districts of West Virginia.

be bothered with this?” There is a balance for litigants who want to preserve precious capital with the court, conserving that for disputes that truly matter to them.

And some courts encourage this framing through rules that indirectly influence decisions about when to invoke judicial intervention, and about what matters. Some rules are “funneling”—they encourage parties not to seek judicial management. Fed. R. Civ. P. 37(a)(1) imposes a duty on parties to confer in good faith to resolve discovery disputes prior to moving the court. Some judges provide even greater specificity about what it means to meet and confer. Take the following example from some judge-specific individual rules of practice:

The moving party should note that “good-faith conference” does not mean that it has merely sent its adversary a letter or email, to which the adversary has not yet responded. The Court expects that, at a minimum, the moving party will have called its adversary and made efforts to engage in a meaningful dialogue, in an attempt to resolve any discovery issues.⁶³

Individual Rules of Practice like Judge Rochon’s are ubiquitous in the set of practices I reviewed. Out of the 382 judges with individual rules of practice, almost half (189) specified that the parties meet and confer obligations. And although many were directed towards the requirement to meet and confer prior to bringing discovery disputes to the court, many went beyond the obligations imposed by the Federal Rules or the relevant courts’ local rules, to include meet and confer obligations before dispositive motions, *Daubert* motions, or sometimes before *any* motion was filed.⁶⁴

63. Hon. Jennifer L. Rochon, *Individual Rules of Practice in Civil Cases*, S.D.N.Y. 4 (Sep. 9, 2022), <https://www.nysd.uscourts.gov/sites/default/files/practice-documents/JLR%20Rochon%20Individual%20Rules%20of%20Practice%20in%20Civil%20Cases.pdf>.

64. See, e.g., Hon. Madeline G. Haikala, *Initial Order*, N.D. Ala. 3–4, [https://www.alnd.uscourts.gov/sites/alnd/files/MHH Initial Order 2020.pdf](https://www.alnd.uscourts.gov/sites/alnd/files/MHH%20Initial%20Order%202020.pdf) (requiring meet and confer for motions to dismiss); Hon. Stephen P. Logan, *Rule 16 Case Management Order*, D. Ariz. 4–5, <https://www.azd.uscourts.gov/sites/default/files/judge-orders/SPL%20Case%20Mgmt%20Order%20%28prior%20to%20May%201%202017%29.pdf> (requiring meet and confer for Rule 12 and Rule 56 motions); Hon. Ana de Alba, *Standing Order*, E.D. Cal. 2,

The message of these rules was usually clear—from the judge’s perspective, although they understood that parties would disagree about matters arising over the course of litigation, they did not expect parties to bring those disagreements to the court until they were sure. Indeed, of the 380-odd individual rules of practice I reviewed, only one affirmatively said something encouraging parties to bring their disputes to the court:

It isn’t true that judges hate discovery disputes. . . . Some discovery disputes involve legal issues that need fleshing out and require briefing. Don’t hesitate to file motions in those instances, after you’ve tried in good faith to work the issues out with your opposing counsel.⁶⁵

This method of management, fully consistent with the Federal Rules, counts on the parties to exercise judgment about what kinds of disputes to bring to the judge’s attention. And when one considers that many judges routinely refer management of discovery and other nondispositive matters to magistrate judges,⁶⁶ it means that district courts manage very little of the discovery and other routine disputes that arise between the parties.

One can imagine how meet and confer obligations incentivize differently-situated parties to behave strategically to take advantage of the Court’s expression of preference away from management. In certain kinds of cases—civil rights, employment discrimination, consumer rights, and some kinds of torts—defendants will systematically tend to have access to more information than plaintiffs. Given mutual discovery obligations, one might expect parties with greater access to information relevant to the dispute to have greater reason to resist

https://www.caed.uscourts.gov/caednew/assets/File/ADA/ADA_Standing_Order_12162022.pdf (requiring meet and confer for all motions in counseled cases); Hon. Thomas M. Durkin, *Case Procedures, Motion Practice Generally*, N.D. Ill., <https://www.ilnd.uscourts.gov/judge-info.aspx?HztO2ip/uh7HVAKHYPZ4iA==> (requiring meet and confer for all motions including *Daubert* disputes).

65. Hon. Pamela Pepper, C.J., *Tips for Parties Practicing Before Judge Pepper*, E.D. Wis. 5 (Nov. 8, 2022), <https://www.wied.uscourts.gov/sites/wied/files/documents/Tips%20for%20Parties%20Practicing%20Before%20Judge%20Pepper%20%28revised%20November%208%2C%202022%29.pdf>.

66. About ten percent of the judges with individual rules automatically refer discovery management to magistrate judges. Many more judges note in their rules that they do so routinely, and some local rules provide for such referrals as well.

discovery. Knowing that a court would prefer that parties work disagreements out between themselves, and that a court has a limited capacity and attention for entertaining such disputes, parties with greater access to information might be even more incentivized to resist discovery on the theory that, even if the plaintiff will take some disputes to the Court, ultimately the funneling feature of local rules and standing orders will mean that less discovery will be disclosed to the party who systematically lacks access to information (usually the plaintiff).

Another form of management that has an indirect effect on the conduct of litigants, and arguably more substantive bite than the meet and confer obligations found in standing orders, is the requirement by some judges that parties request a premotion conference before filing different kinds of motions. Almost a third of the judges with individual rules (119, or 31 percent) required that a party who intends to seek affirmative relief from the court participate in a premotion conference. Sometimes the requirement of a premotion conference is limited to particular kinds of motions (discovery, dispositive motions, etc.), and other judges require premotion conferences for any disputed motion.⁶⁷ The conference presents an opportunity for the judge to probe the parties' arguments, suggest further narrowing of the dispute, or perhaps convince a party either to withdraw the motion or its opposition to the motion.

The premotion conference, then, is an opportunity for the court to "rule" on a disputed matter without actually entering a ruling that could be appealed. And because a party might rationally conclude that the strength of the court's opinion as to the merits of the party's position should inform a decision about whether to proceed with a motion, premotion conferences might ironically lead to the court being confronted with and having to rule on the most intractable legal issues that arise in a case.

Not only do some courts require premotion conferences, but a few express their views about particular kinds of motions directly. Some, for example, express disfavor of Rule 12(b) or Rule 56

67. See, e.g., Hon. Gregory Woods, *Individual Rules of Practice in Civil Cases*, S.D.N.Y. (rev. Feb. 3, 2020), https://nysd.uscourts.gov/sites/default/files/practice_documents/GHW%20Civil%20Practice%20Rules%20February%202020%20DR_AFT_0.pdf (requiring premotion conference for motions to dismiss, motions for summary judgment, motions for judgment on the pleadings, motions to compel arbitration, motions to certify collective or class actions, motions for sanctions, motions concerning discovery, and motions to remand to state court).

motions.⁶⁸ One judge puts it bluntly: “In my view the overuse of motions filed pursuant to Fed. R. Civ. P. 56 in this District unreasonably delays the progress of civil litigation. Counsel are well-advised to avoid reflexively filing a motion for summary judgment.”⁶⁹

Moreover, the limitations imposed on the filings made for a pre-motion conference, particularly in the context of discovery, can implicitly force parties to abandon claims for particular material. Some judges, for example, require the parties to reduce their discovery dispute to a joint, three-to-five page letter.⁷⁰ Brevity has its place, but there will inevitably be situations where a party may forego making certain arguments, or seeking certain material, because of the need to conform to the court’s pre-motion filing requirements.⁷¹

These rules are indirect management tools that affect litigation decisions throughout the case. Funneling disputes via meet and confer obligations ensures that parties make strategic decisions about when and what to bring to the court’s attention. Requiring that parties appear before the court to seek permission to file a motion (even if it is doubtful that a court could prohibit the filing of a motion) allow courts to influence strategic decisions without ever entering an appealable ruling. This presents many of the dangers that *Managerial Judges* identified in other management devices.⁷²

68. Many courts express a distaste for Rule 12(b) motions that are based on a problem that can be cured with an amended pleading. See, e.g., United States District Court for the District of Colorado, *Uniform Civil Practice Standards*, Civ. Practice Standard 7.1B(b) (Dec. 1, 2022), [http://www.cod.uscourts.gov/Portals/0/Documents/Judges/Uniform Civil Practice Standards CMA RMR CNS NYW 2212.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Judges/Uniform%20Civil%20Practice%20Standards%20CMA%20RMR%20CNS%20NYW%202212.pdf).

69. Hon. William J. Martinez, *Practice Standards*, D. Colo. 6 (rev. Dec. 1, 2022), [http://www.cod.uscourts.gov/Portals/0/Documents/Judges/WJM/WJM Practice Standards.pdf?ver=2021-12-01-083546-143](http://www.cod.uscourts.gov/Portals/0/Documents/Judges/WJM/WJM%20Practice%20Standards.pdf?ver=2021-12-01-083546-143). Judge Martinez makes the same statement regarding Rule 12(b) motions that can be easily cured by amendment of the pleadings. *Id.* at 5.

70. See, e.g., Hon. Gregory Woods, *Individual Rules of Practice in Civil Cases*, Rule 2.C.ii, S.D.N.Y. (rev. Feb. 3, 2020), [https://nysd.uscourts.gov/sites/default/files/practice_documents/GHW%20Civil%20Practice%20Rules%20February%202020%20DR AFT 0.pdf](https://nysd.uscourts.gov/sites/default/files/practice_documents/GHW%20Civil%20Practice%20Rules%20February%202020%20DR%20AFT%200.pdf)) (limiting parties to joint five page letter).

71. I speak from personal experience. There are occasions where one must prioritize certain discovery requests over others, if the Court has indicated that it wishes the parties to narrow their disputes prior to seeking judicial intervention.

72. See *Managerial Judges*, *supra* note 2, at 425–26.

2. Explicitly Substantive Management

Judges use their individual rules of practice not only to apply across the board rules that have the potential for substantive impact, but also to set forward rules that apply only to certain kinds of substantive claims. In other words, these are management protocols like those found in statutes such as the PLRA, or District-wide plans like the Southern District's Section 1983 plan, in that they apply to specific kinds of substantive claims, but they apply on a judge-specific level. About 22 percent of the individual practice orders I reviewed had these kinds of provisions. Most were discovery protocols for specific kinds of claims, such as ERISA, FLSA, employment claims, or patent infringement actions.⁷³

Some, however, were more tailored and had substantive bite. Three judges in the Middle District of Florida, for example, have enacted, via a standing order, a requirement that the Clerk of Court inform prison officials when they receive a pleading or correspondence indicating that an incarcerated person is at risk of suicide or serious harm because of the high volume of cases the judges had received making such allegations.⁷⁴ Another judge encourages parties to enter into a stipulation in class action cases to avoid problems presented by

73. See, e.g., Hon. Dominic W. Lanza, *Case Management Order - ERISA Case*, D. Ariz., <https://www.azd.uscourts.gov/sites/default/files/judge-orders/DWL%20Case%20Management%20Order%20ERISA.pdf> (adopting specific discovery rules in ERISA cases); Hon. Josephine L. Staton, *Proposed Schedule of Pretrial and Trial Dates in Utility Patent Cases*, C.D. Cal. (rev. Aug. 31, 2022), <https://www.cacd.uscourts.gov/sites/default/files/documents/JLS/AD/Patent%20Cases%20Exhibit%20B%20-%20REVISED%202008%2031%202022.pdf> (setting forth patent-specific scheduling rules); Hon. Charlotte N. Sweeney, *Practice Standards (Civil Cases)*, D. Colo. 3–4, [http://www.cod.uscourts.gov/Portals/0/Documents/Judges/CNS/CNS Civil Practice Standards.pdf](http://www.cod.uscourts.gov/Portals/0/Documents/Judges/CNS/CNS%20Civil%20Practice%20Standards.pdf) (Aug. 2022) (including specific discovery rules for employment cases); Judge John G. Koeltl, *Individual Practices of Judge John G. Koeltl*, S.D.N.Y. 4–5 (May 28, 2020), https://nysd.uscourts.gov/sites/default/files/practice_documents/JGK%20Koeltl%20Individual%20Rules%20May%2028%2C%202020.pdf (listing specific discovery rules for FLSA and employment cases).

74. See Amended Standing Order of Judges Corrigan, Davis, and Howard Notifying Institution Regarding Inmate Claim of Suicidal Intent or Other Imminent Physical Harm, *In re Notification to Appropriate Officials in Prisoner Cases Alleging Possible Danger of Injury or Death*, at 1–2 (M.D. Fla. Jan. 11, 2018), <https://www.flmd.uscourts.gov/standing-order-judges-corrigan-davis-and-howard-notifying-institution-regarding-inmate-claim>.

Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016).⁷⁵ Perhaps most substantively freighted, another judge requires a specific “case statement” only in *Monell* cases providing significant factual detail at the pleading stage, including:

1. The alleged misconduct and basis of liability of each Defendant.
2. Alleged wrongdoers, other than Defendants, their alleged misconduct.
3. For any claim based on an alleged policy or custom, identify with specificity each policy or custom on which the claim is based, including whether the policy was formally or informally adopted.
4. For each officially adopted policy:
 - a. Describe in detail the nature of the policy;
 - b. Identify any alleged individuals or entities connected to the formation and implementation of the policy; and
 - c. Identify the source of the policy’s official adoption.
 - d. Describe in detail the circumstances that constitute the alleged “deliberate indifference” pertaining to the policy.
5. For each informally adopted custom:
 - a. Describe in detail the nature of the custom;

75. See United States District Court for the Northern District of Illinois, Hon. Thomas M. Durkin, Case Procedures, Class Certification Motions, <https://www.ilnd.uscourts.gov/judge-info.aspx?HztO2ip/uh7HVAKHYpZ4iA==> (last visited Mar. 8, 2023) (noting that plaintiffs “often file motions for class certification contemporaneously with their complaints” to avoid concerns raised by *Campbell-Ewald* and encouraging that parties “consider entering into a stipulation that would obviate the need for the Court to address the premature motion for class certification, while also addressing the concerns raised in *Campbell-Ewald* A sample stipulation may be found here.”).

- b. Identify any alleged individuals or entities connected to the formation and implementation of the custom; and
 - c. Describe in detail the circumstances that have caused the informal adoption or formation of the custom.
 - d. Describe in detail the circumstances that constitute the alleged “deliberate indifference” pertaining to the custom.
6. For any claim based on an alleged failure to train or supervise employees, describe in detail the conditions that pertain to the alleged failure to train or supervise.
7. For any such claim, describe the basis for the allegation that the alleged failure to train or supervise exhibited deliberate indifference, including that:
 - a. Municipal policymakers know that employees will confront the type of situation at issue here;
 - b. The situation at issue here involves a difficult choice or a history of employees mishandling; and
 - c. The wrong choice by an employee will frequently cause deprivation of constitutional rights.
8. For each theory of municipal liability described above, describe the direct causal relationship between the alleged violation and the alleged injury.⁷⁶

It is unsurprising that individual judges would seek to manage cases differently based on the kinds of claims presented. Doing so via standing orders, however, risks creating conflict with the trans-substantive commitment of the Federal Rules. Where standing orders are

76. Hon. Joshua D. Wolson, *Plaintiff's Monell Case Statement*, E.D. Pa. 1–2, <https://www.paed.uscourts.gov/judges-info/district-court-judges/joshua-d-wolson>.

in direct conflict with those commitments—as in, say, having a special pleading rule for *Monell* claims⁷⁷—parties may feel compelled to follow the judge’s standing order even if they believe they could prevail on appeal if their case were dismissed for failure to comply with the judge’s individual rules. And while there may be sensible reasons to have special discovery protocols for employment discrimination or FLSA cases, doing so through the adoption of individual standing orders creates potentially unfair disuniformity in federal procedure.

3. Outward-Looking Standing Orders

Finally, there were four areas covered by judges’ individual rules that speak to broader concerns than simply managing the case in front of them. Two relate to confidentiality. A small number of judges (only twenty-one) contain specific provisions in their individual rules advising parties that they would not agree to retain jurisdiction to enforce a settlement unless the settlement is stated on the record (i.e., not confidential). Two-thirds of the judges who have this provision in their individual rules are in the Southern District of New York, and the remainder are scattered in other districts. From what I can tell, these provisions are of relatively recent vintage, and may be a reaction to the #MeToo movement’s criticism of confidential settlements.⁷⁸

Slightly more common, but also related to confidentiality, are those provisions of individual rules which indicate a judge’s skepticism of blanket protective orders or filing documents under seal. Almost one-quarter (88) of the judges with individual rules had provisions reminding parties of the presumption in favor of public access to documents filed with the court and many of these judges also cautioned parties against submitting blanket protective orders or orders that gave parties too much leeway in designating documents confidential.⁷⁹ To be clear, many of these simply restated the relevant law

77. See *Leatherman v. Tarrant Cnty. Narcotics Intel. and Coordination Unit*, 507 U.S. 163 (1993) (holding that a federal court may not apply a heightened pleading standard in civil rights cases alleging municipal liability under § 1983); see *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (“no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim.”).

78. Criticism of confidential settlement agreements predates #MeToo. See Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1778–80 (summarizing literature on private settlement agreements).

79. See, e.g., Hon. Stephen P. Logan, *Rule 16 Case Management Order*, D. Ariz 3–4, available at <https://www.azd.uscourts.gov/sites/default/files/judge-orders/SPL%20Case%20Mgmt%20Order%20%28prior%20to%20May%201%2020>

regarding confidentiality, but even taking that step may signal to parties the court's reluctance to make documents confidential or seal judicial records. That signaling may be important given that blanket confidentiality orders and sealed dockets interfere with the public's access to important information.⁸⁰

Finally, there are provisions in some of the judges' individual rules of practice that are outward-looking in a different way. First, consider the provisions encouraging certain categories of attorneys—some courts refer to “young” or “inexperienced” attorneys, while others sometimes express concern about attorneys from underrepresented groups.⁸¹ This is a recent phenomenon, sparked by vocal expressions by courts that new lawyers were not being provided with adequate opportunities to practice before them.⁸² More than 100 judges include provisions of various kinds encouraging senior lawyers to provide these opportunities.⁸³ Many judges made clear that their concern was

[17%29.pdf](#) (detailing a presumption against blanket confidentiality orders); Hon. David O. Carter, *Initial Standing Order*, C.D. Cal. 4–5, available at <https://www.cacd.uscourts.gov/sites/default/files/documents/DOC/AD/STANDING%20ORDER.pdf> (Jan. 20, 2015) (adopting a presumption against filing documents under seal); Hon. Sarah E. Geraghty, *Standing Order Regarding Civil Litigation*, N.D. Ga. 23–25, https://www.gand.uscourts.gov/sites/gand/files/SEG_Standing_Order.pdf (adopting a presumption against sealing and blanket protective orders); Hon. John M. Gallagher, *Policies and Procedures*, E.D. Pa. 14–16, <https://www.paed.uscourts.gov/documents/procedures/galpol.pdf> (adopting a presumption against sealing and blanket confidentiality orders).

80. See Reinert, *supra* note 79, at 1780–83.

81. See, e.g., Hon. Kari A. Dooley, *Pretrial Preferences*, D. Conn., <https://www.ctd.uscourts.gov/content/kari-dooley-usdj>; Hon. Nancy J. Rosenstengel, *Case Management Procedures*, S.D. Ill. 5, <https://www.ilsd.uscourts.gov/documents/Rosenstengel.pdf> (making specific reference to race and gender); Hon. Hector Gonzalez, *Individual Practices*, E.D.N.Y. 3, <https://www.nyed.uscourts.gov/pub/rules/HG-MLR.pdf> (referring to diversity of profession).

82. See Shira A. Scheindlin, *Female Lawyers Can Talk, Too*, N.Y. TIMES, Aug. 8, 2017 (noting the gender disparities).

83. See, e.g., Hon. Analisa Torres, *Individual Practices in Civil Cases*, S.D.N.Y. 6 (rev. July 9, 2021), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AT%20Torres%20Individual%20Practices%20in%20Civil%20Cases%20-%207.9.2021.pdf (encouraging participation of less experienced attorneys); Hon. Tana Lin, *Standing Order for All Civil Cases*, W.D. Wash. 6–7 (rev. April 26, 2022), https://www.wawd.uscourts.gov/sites/wawd/files/LinStandingOrderreCivil-Cases_0.pdf (encouraging participation of less experienced attorneys); Hon. Staci M. Yandle, *Standing Order In Re: Increasing Opportunities for Courtroom Advocacy*, S.D. Ill. 1–2 (Jan. 7, 2020),

not just based on ensuring that newer members of the profession obtained experience that would make them better lawyers, but also that there were equity concerns—along lines of both race and gender—that overlapped with making space for newer lawyers to participate in court proceedings.⁸⁴

The final aspect of judges' individual rules that seem aimed beyond management of litigation are those practice orders which specifically invite litigants and lawyers to inform the court of their preferred honorifics and pronouns. Only eleven judges have included this provision in their individual practice rules. Six judges from the Northern District of California, one judge from the Central District of California, two judges from the Eastern District of New York, one judge from the Southern District of New York, and one judge from the Western District of Pennsylvania. This suggests a geographic/cultural factor in including rules geared towards inclusion in judicial standing orders.

In sum, these standing orders reflect a variety of commitments to management by federal judges. Some standing orders seem geared to avoid management by discouraging parties from seeking intervention or requesting affirmative relief. Others seek to manage specific kinds of cases differently than the “standard” case. And still others look to manage matters that are peripheral to the litigation itself, while important in other ways.

Whether these management devices have an impact on the litigants is another question. Can one assess whether more stringent meet and confer obligations result in less direct management by federal courts? Or whether judges who signal resistance to confidentiality orders or sealing orders are less likely to approve of such measures? Or that inexperienced attorneys receive more argument time in front

<http://www.ilsd.uscourts.gov/documents/SMYStandingOrder.pdf> (encouraging argument by “newer, female, or minority” attorneys, including by considering granting longer argument time); Hon. John R. Tunheim, *Standing Order on Diversity in the Courtroom*, D. Minn. 4, <https://www.mnd.uscourts.gov/sites/mnd/files/JRT.pdf> (encouraging newer lawyers to argue motions).

84. Interestingly, the judges who have provisions related to “inexperienced” or “newer” lawyers tended to have been judges for fewer years than judges who did not have such provisions (average years of service of 7.4 years versus 9.7 years), and also were more likely to be women—of the judges who had such provisions, 47 percent were women; of the judges who did not have such provisions, 34 percent were women.

of judges who specifically invite their participation?⁸⁵ These are empirical questions that have barely been studied, let alone answered.

CONCLUSION

Towards the conclusion of *Managerial Judges*, Professor Resnik raises and rejects the prospect of management by rules—a sort of one-size-fits-all approach to case management akin to the Speedy Trial Act.⁸⁶ She puts forward good reasons why it would be challenging to come up with such a management style—from the variety and complexity of civil cases to taking away judicial flexibility for individual cases.⁸⁷ One aspect of the management devices I have described in this essay—top-down management devices like the PLRA—might avoid, to some degree, these problems by specifying how specific kinds of cases are managed. But they introduce another kind of problem—Congress mandating a skewed management of particular litigation precisely because it is disfavored.

Judges' individual rules provide flexibility, by contrast, and they are generally transparent.⁸⁸ But as Carl Tobias has noted, the process by which standing orders are adopted, in contrast to the Federal Rules or even local rules of a District, leaves little place for public input or review.⁸⁹ Even if parties and lawyers believe that the standing orders are improper because they are in conflict with Federal or Local Rules, they will likely comply “because they wish to preserve harmonious, ongoing relations with the judge.”⁹⁰

Moreover, standing orders that operate by suggestion (via meet and confer obligations or pre-motion conference, for example) still do not result in “written, reasoned opinions” and are still “out of reach of appellate review.”⁹¹ Standing orders that make distinctions based on the content of substantive claims create disuniformity⁹² and, in some

85. There is at least one study that suggests the effect of such provisions is modest, but real. Jolson, *supra* note 10, at 479–80.

86. *Managerial Judges*, *supra* note 2, at 440–41.

87. *Id.*

88. *Id.* at 426 (raising concern that “awareness of the problems [with managing a case] does not necessarily qualify judges to design the solutions . . .”).

89. Carl Tobias, *Some Realism about Federal Procedural Reform*, 49 FLA. L. REV. 49, 58–59 (1997).

90. *Id.* at 59.

91. *Managerial Judges*, *supra* note 2, at 378.

92. See Tobias, *supra* note 90, at 58–59 (noting that standing orders “have greater potential for abuse” than Local Rules)

cases, conflict with trans-substantive norms.⁹³ This is a form of “legal clutter” that Paul Carrington warned about many decades ago.⁹⁴ And standing orders that appear designed to achieve substantive goals separate and apart from the litigation itself may have value, but their empirical impact is unknown.

My goal here is not to argue for the end of judicial standing orders. Nor is it to quarrel with Congress’s power to make substantive decisions about how cases should be managed. At base, I hope to show that, even though management has changed since *Managerial Judges* was published (in some ways precisely because Professor Resnik’s critique was so accurate), new management tools have arisen that have some of the same, and some new, failings.

93. Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2175 (1989).

94. Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L. J. 929, 947–48 (1996) (“Legal clutter is the enemy of simplicity; the more such material is placed in the hands of parties and lawyers, the more billable hours will be expended, but the less well read and well understood the real rules will be, and the more likely that litigation will digress from the merits to satellite controversies.”).