ENGLAND'S REFORM TO ALLEVIATE THE PROBLEMS OF CIVIL PROCESS: A COMPARISON OF JUDICIAL CASE MANAGEMENT IN ENGLAND AND THE UNITED STATES

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I. INTRODUCTION

Lord Harry Woolf predicted that on "April 26, the civil justice system will be transformed. From then on . . . [i]nstead of the parties, judges will have the ultimate responsibility for the progress of cases . . . [and] a heavy burden . . . to ensure that the new system runs smoothly."[1] The date, April 26, 1999, marks the day on which England's new civil procedural code, the Civil Procedure Rules 1998 (CPR), took effect—revolutionizing civil litigation and, more specifically, the role of the judge in England's adversarial system. The English Parliament promulgated the CPR only after the Lord Chancellor's Department commissioned Lord Woolf to engage in a comprehensive examination of the health of the English civil procedural system. The findings of the "Woolf Inquiry," as the study has become to be known, are not unfamiliar to common law legal systems.[2] The problems that persist in England parallel the problems that generally afflict all legal systems that derive themselves from the common law tradition. Lord Woolf asserted that the fundamental problem throughout common law legal regimes did not concern the substance of court decisions, but concerned the *processes* leading to judicial outcomes.[3] Common law process, Lord Woolf found, remains "too expensive, too slow, and too complex" and advantages certain litigants over others.[4] And as a result, process within the common law tradition affords inadequate access to justice and produces an inefficient and ineffective legal system.[5]

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1. Lord Harry Woolf, *Why Skeletons Should Not Be Left in the Past*, TIMES (London), Feb. 2, 1999, at 37.

2. *See, e.g.*, Andrew Burr & Richard Honey, *The Post-Woolf TCC: Any Changes*, 17(5) CONSTR. L.J. 378 (2001).

3. *See* LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 4 (1995), *available at* http://www.dca.gov.uk/civil/interfr.htm [hereinafter LORD WOOLF, INTERIM REPORT].

4. *Id.*

5. *Id.*

Lord Woolf's solutions for alleviating the problems of process, however, proved to be even more important than his findings. Discontent with the consequences of an unfettered adversarial system in which the parties maintain decisive control over the progress and costs of litigation, Lord Woolf called for a "fundamental shift" in the responsibility for the management of civil litigation in England from the litigants to the courts.[6] Under this transformation, the methods in which cases proceed to trial not only change, but, more markedly, the heightened responsibility of judges to engage in active case management drastically alters the former adversarial culture. Judges, rather than the parties, maintain the ultimate task of identifying and narrowing the issues and setting stringent timetables—in an effort to reduce cost and delay and to encourage settlement.[7] At a broader structural level, Lord Woolf believed that judicial case management is the primary means by which the problems of common law process—cost, delay, and complexity—could be resolved.[8] Lord Woolf's enlightenment and emphasis on judicial case management now constitute the foundational philosophy of the Civil Procedure Rules 1998 and the English civil litigation system as a whole.

Yet the insight of Lord Woolf and his recommendations stand in direct contrast to the traditional role of the judge in the adversary system. The view of the judge as a manager has had little, if any, historical significance in the common law tradition over time, and it has not been until relatively recently that England and the United States have embraced an active role for the courts in their respective adversarial systems.[9] Traditionally under the classical view, judges were not to be involved in the preparation of cases for trial.[10] Judicial independence forced judges to be disengaged from and dispassionate about the dispute in order to ultimately ensure the fairness and impartiality of outcomes.[11] Unless one of the parties requested the courts to do something, the judge for the most part did not intervene in pretrial preparation.[12] The traditional course of litigation in our adversary system, therefore, rested in the hands of the litigants.[13] To compliment the detached and disinterested judge, this adversarial approach emphasized the autonomy of the litigants, who were principally responsible for using their own devices to define and shape the dispute throughout pretrial.[14]

This traditional conception of the judiciary persisted in both England and the United States until the need for a managerial function emerged. The confluence of increased pretrial discovery rights, escalation in the volume of work, and growth in public perception that courts have become overly inefficient and justice too costly established the

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6. *Id.* at 18.

7. *See id.* Lord Woolf broadly defined case management to include: identifying the issues in the case; summarily disposing of some issues and deciding in which order issues are to be resolved; fixing timetables for the parties to rake particular steps in the case; and limiting disclosure and expert evidence. *See* LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 14 (1996), *available at* http://www.dca.gov.uk/civil/final/contents.htm [hereinafter LORD WOOLF, FINAL REPORT].

8. *See* LORD WOOLF, INTERIM REPORT, *supra* note 3, at 21.

9. *See* CATHERINE ELLIOT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 103–04 (3rd ed. 2000); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982).

10. *See* Resnik, *supra* note 9, at 382.

11. *See id.* at 376.

12. *See id.* at 384.

13. *See* Jonathon T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 34–37 (2003) (arguing that judges should return to their traditional role of adjudication in which adversaries framed their own disputes and judges resolved disputes by referencing identifiable bodies of law).

14. *See* Resnik, *supra* note 9, at 376.

need for pretrial judicial case management.[15] The creation of expansive discovery rights allowed parties to resolve conflicts over witnesses and documents through the command of the courts.[16] Similarly, the increase in the volume of litigation over time necessitated judges to intervene and efficiently manage their dockets to minimize backlogs and the obstruction of justice.[17] In addition to voluminous litigation, the rise of complex and mass tort litigation further compelled judges to assume an active managerial role throughout the pretrial and remedial phases of litigation.[18]

Although both legal systems experience similar problems giving rise to judicial case management, managerial judges function in distinct contexts and within differing sets of procedural values in England and the United States. For example, judicial management of civil litigation has only recently taken meaningful roots in the England's civil process within the past fifteen years, while case management in the United States was contemplated in the original drafting of the Federal Rules of Civil Procedure in 1938.[19] The judicial role in case management, moreover, is more active and intensive in England with the implementation of the Woolf Reforms compared to the more flexible and discretionary approach adhered to in the United States.

The purpose of this Note is to compare the role of judges as managers in England and at the federal level in the United States. This Note does not comparatively assess what some authors call "case management tools" or management techniques (e.g. dismissal at the pleading stage and summary judgment) and only comparatively evaluates pretrial, and not post-trial, judicial management. It is also not a goal of mine to argue that one sovereign should implant or adopt the judicial management system of the other. Instead, the central focus of this Note principally concerns the shifts in power from the parties to judges throughout pretrial civil process and the core values that each procedural system strives toward in the pursuit of their ultimate goal of achieving justice.

To further demonstrate this comparison, the development of judicial case management and its current status in both legal systems is discussed. Part I begins with a description of the history of case management at common law in England. A detailed discussion of Lord Woolf's investigation follows that examines his findings on the problems of process and his recommendations for procedural reform. This Note then examines the recent adoption of England's procedural code, concentrating on the increasing role of the judge as a manager within the adversarial system. In Part II, this Note examines managerial judges in the United States. First, the development of the Federal Rules of Civil Procedure is discussed including the circumstances which gave rise to judicial management. Next, the primary authority on managerial judges, Rule 16 of the Federal

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15. *See generally id.* at 391–400.

16. *See id.* at 391–92.

17. *See id.* at 395–97.

18. *See, e.g.*, Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2149 (2000) ("Beginning in the 1950s with antitrust cases, judges taught each other to take control over what they then termed 'protracted' (and what we now call "large-scale" or "complex") litigation, and . . . began to transform themselves into managerial judges, attempting to manage both cases and lawyers."); Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (discussing the active role of judges at the remedial stage of multiparty, multi-issue disputes); REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES OF PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES, *reprinted in* 13 F.R.D. 41, 62–66 (1953) (recognizing the need for a strong judge to organize and manage disputes during pretrial in the context of complex antitrust litigation).

19. *See* LORD WOOLF, INTERIM REPORT, *supra* note 3, at 28; Resnik, *supra* note 9, at 378.

Rules of Civil Procedure, is analyzed, as well as some academic commentary on the aspirations of case management.

Lastly, in Part III, this Note attempts to meaningfully compare judicial management in England and the United States. This final part provides a comparison on two levels. The first subsection evaluates the similarities and differences of managerial judges at a functional level, which compares the positive law in both procedural contexts and how power is transferred from the parties to the judge. The second level of comparison goes beyond that of the first. Because law is educative and can only be compared in its social, political, and cultural contexts,[20] this last section looks behind the positive authority and legal rules to evaluate their normative meaning. In doing so, I examine what stories are told by the law of England and the United States through the values judicial management expresses in both procedural systems. This Note concludes by arguing that through an understanding of the legal and normative framework of English discourse, the United States learns that we can improve the access to civil process in our courts without having to sacrifice the values historically and culturally embedded in our federal procedural system.

II. CASE MANAGEMENT IN ENGLAND

A. *Common Law History of Case Management*

The traditional view of the judge and the supremacy of the adversaries to frame their own controversies[21] characterized civil procedure in England since the Norman Conquest.[22] Pretrial procedure in the English common law system consisted of only pleading,[23] and there were no other preliminary mechanisms to test the truth of pleadings and to ascertain beforehand the germane issues to be litigated at trial.[24] Judges at common law did not participate in the narrowing of issues throughout pretrial. They merely accepted at face value what the adversaries asserted in the pleadings, and left it for the trial to dispose of cases or claims that lacked merit.[25]

The historical roots of the pretrial conference and modest judicial involvement in pretrial process began in 1868 when the English Parliament introduced a requirement that the parties convene at a hearing with the judge after the pleadings were filed to discuss the availability of proof and contested issues.[26] This obligation was later expanded to require the plaintiff to summon the defendant to appear before the judge, and the judge was authorized to make orders regarding admissions, witnesses, and the inspec-

20. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 11 (1994).

21. *See supra* text accompanying notes 10–18.

22. *See* Edison R. Sunderland, *The Theory and Practice of Pretrial Procedure*, 36 MICH. L. REV. 215, 215 (1937).

23. *See id.* at 216.

24. *See id.* at 217.

25. *See id.* at 215-17. Professor Sunderland explained:

> The parties themselves framed their own controversies, and laid them before the court for decision. The judges were in no way concerned with what the parties brought forward. . . . Whatever the parties asserted or denied was taken at its face value as a basis for trial. The judges never sought to protect themselves or the parties from the useless trial of issues based upon the allegations or denials which had no colorable existence in fact. It was their business to try the cases as the parties presented them, and if a case lacked substance the trial would disclose it.

Id. at 215.

26. *See id.* at 220.

tion of documents.[27] A modern semblance of case management can be found in the former Supreme Court Rules of England that is not distinct from the pretrial hearing at common law. England's Supreme Court Rules require parties appearing before the Supreme Court to meet with the judge for certain actions to provide a pretrial forum for the parties to exchange evidence and facilitate discovery.[28] Taken as a whole, however, England's use of an active judge remained scarce over time due to its system's regard for the autonomy of parties to shape the dispute and adherence to traditional notions of adversarial process.[29] It is not until the influence of the Woolf Inquiry and its embodiment in the CPR of 1998 that creates a consolidated procedural code that revolutionized the responsibility of the judge as a manager.

B. Lord Woolf and the Road to Procedural Reform

In March of 1994, the Lord Chancellor Mackay commissioned Lord Harry Woolf to evaluate the current status of civil litigation in England.[30] This effort to assess the structure and functioning of the civil procedural system stemmed from growing public sentiment that the system did not afford equal access to justice and lacked both efficiency and effectiveness due to spiraling costs, increasing duration and breadth, and the system's inherent complexity.[31] Addressing these perceived shortcomings, the objectives of Lord Woolf's review sought to improve access to justice and reduce cost of litigation, reduce the complexity of the civil procedure rules and modernize their terminology, and eliminate unnecessary distinctions between practice and procedure.[32] To those ends, Lord Woolf's examination was not concerned with judicial interpretation and decision making; his inquiry centered on the problems of *process* throughout dispute resolution in civil courts and the procedure leading to judicial decisions.[33]

1. Problems of Process

In a series of two reports to the Lord Chancellor, Lord Woolf identified the major problems of the then-existing civil regime and recommended fundamental changes to the civil litigation system.[34] After much time and research, he concluded that the primary problems of civil process in England were:

> the excesses of and the lack of control over the system of civil litigation; the inadequate attention [that] the system gives to the control of costs and delay and to the need to ensure equality between the parties; the complexity of the present system; and the

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27. *See id.* at 220–21.
28. *See* RULES OF THE SUPREME COURT, Order 25 (1998).
29. *See, e.g.*, JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM 67–68 (1998).
30. STEPHEN M. GERLIS & PAULA LOUGHLIN, CIVIL PROCEDURE 1 (2001). The Lord Chancellor appointed Lord Woolf to evaluate the rules and procedure of civil courts in England and Wales. The result of Lord Woolf's examination produced two reports issued by the Lord Chancellor's Department: an Interim Report in 1995; and a Final Report in 1996. The findings and recommendations detailed in both of these reports provided the foundation for subsequent legislative reform to England's civil procedural system.
31. *Id.*
32. LORD WOOLF, INTERIM REPORT, *supra* note 2, at Intro.
33. *See id.* at 4 (emphasis added); LORD WOOLF, FINAL REPORT, *supra* note 7, at 9.
34. *See supra* text accompanying note 30.

> absence of any satisfactory judicial responsibility for the effective use of resources within the civil system.[35]

The "cumulative effect" of these problems of civil process constituted the impediment to the equal access to justice.[36]

Lord Woolf's principal finding was that England's unfettered adversarial system pinned an exceeding amount of responsibility for initiating and conducting proceedings on the adversaries and minimized the role of the judge throughout adjudication.[37] The nature of England's adversary system fostered an unrestrained climate of advocacy in which, he argued, "the litigation process is too often seen as a battlefield where no rules apply. In this [adversarial] environment, questions of expense, delay, compromise, and fairness may have only a low priority. The consequence is that expense is often excessive, disproportionate, and unpredictable; and delay is frequently unreasonable."[38] The adversary system's esteem for litigant autonomy and the authority of parties to control and shape their proceedings without restraint remained at the core of the problems of civil process.

Expanding on his central insight into the "combative" adversarial environment, Lord Woolf found that the exorbitant cost of litigation rendered litigation unaffordable and deterred individual litigants from seeking relief—resulting in a denial of access to justice.[39] Not only were costs excessive and unaffordable, but costs were also disproportionate. The expense of civil litigation is proportionate, he declared, when "the achievement of the right result [is] . . . balanced against the expenditure of the time and money needed to achieve that result."[40] This was not the case in England because the cost of litigation, most typically in smaller cases, frequently exceeded the value of the issues in dispute.[41] Lord Woolf believed that the confluence of excessive cost and disproportionality resulted in "total uncertainty" for the parties as to the amount of expenditure litigation will demand and the degree of involvement.[42] Cost uncertainty forced individuals to commit to legal consultation on an unlimited hourly work scale. As a result, this created incentives for lawyers to work more than necessary on litigation to increase compensation, which further spiraled costs out of control.[43] Synthesizing the interrelated problems of costs and workload, Lord Woolf asserted that "there can be no effective control of costs because there is no effective control of the work."[44]

Further, Lord Woolf found that increased cost resulted in part from widespread delay throughout the civil procedural system. Unnecessary delay permeated various aspects of civil litigation, including the progression of the case to trial, time to reach set-

35. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 18.
36. *Id.*
37. *See id.* at 7.
38. *Id.* at 8–9.
39. *Id.*
40. *Id.* at 19.
41. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 9.
42. *Id.* at 10.
43. *See id.* at 10–11. To the credit of lawyers, Lord Woolf did acknowledge that the incentives created to do more work on an hourly basis also derived from England's system of professional negligence. Lawyers' fear of professional liability increased costs because lawyers believed they need to investigate every aspect of the case to shield themselves from potential liability. *See id.* at 11.
44. *See id.* at 11.

tlement, and the delay in obtaining a hearing date.[45] Delay notably arose from, Lord Woolf argued, the failure for cases to progress "efficiently," needless time expended on "peripheral issues," and procedural gamesmanship used to wear down opponents.[46] Parties mostly tended not to settle, moreover, until the latest stages of the proceedings—failing to utilize settlement as a cost-effective alternative to litigation. Inherent in the system's delays was the absence of a "plan or program requiring a hearing among the parties" or "any attempt to concentrate on the key issues and key evidence."[47]

And lastly, Lord Woolf determined that then-existing civil procedure was needlessly complex in nature due to its multiplicity of practice directions for particular jurisdictions, unnecessary procedural distinctions between courts, and uncertain applications of substantive law.[48] Although it operates at its worst when lay individuals try to participate in the adversarial system, the complexity of civil litigation "impedes access to the courts and imposes an unnecessary burden on the parties," irrespective of who the parties may be.[49]

2. Proposed Reform and the Call for Judicial Case Management

After concluding that the unrestrained culture of England's adversary system was to "a large extent responsible for" the problems of cost, delay, uncertainty, and complexity,[50] Lord Woolf argued that no alternative solution remained except for the "fundamental shift in the responsibility for the management of civil litigation from the litigants and their legal advisors to the courts."[51] In his new approach to justice, Lord Woolf recommended heightened proportionality among the cost and issues at stake, a single procedural code of rules to diminish complexity, and a change in culture toward cooperation between the parties and settlement.[52] Judicial case management and the responsibility of courts, however, were "crucial" to Lord Woolf's reforms.[53] In terms of end-means analysis, judicial case management is the primary mechanism by which to achieve a reinvigorated set of objectives[54] toward which, Lord Woolf believed, the new English procedural system should strive.[55]

Under Lord Woolf's proposed reforms, the role of the judge in the management of the case is a substantial one. The fundamental shift in responsibility to the courts at-

45. *See id.* at 13.

46. *Id.*

47. GERLIS & LOUGHLIN, *supra* note 30, at 4.

48. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 15–16.

49. *Id.* at 15.

50. *Id.* at 18.

51. *Id.*

52. GERLIS & LOUGHLIN, *supra* note 30, at 5–8. This is not to say that the proposed reforms are mutually exclusive. Judicial case management can be seen as a larger reform from which other solutions can be achieved and/or implemented. For example, under the "Woolf Reforms," judges are to determine the value and cost of litigation as a means of achieving proportionality. Similarly, judges will facilitate the changes in adversarial culture among the parties because judges are to create timetables and require party conferencing. *Id.*

53. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 21.

54. Some of Lord Woolf's "working objectives" for England's civil procedural reform include the following: seeking settlement before resorting to the courts; utilizing less-costly alternative dispute resolution; fully informing parties of costs and consequences of litigation; utilizing pre-determined timetables; considering court resources and caseload; discouraging excessive discovery; and simplifying and clarifying rules of procedure. *See id.* at 19–21.

55. *See id.* at 21.

tempts to temper party autonomy and ensure that litigants themselves do not enjoy sole and unfettered control of the proceedings of the case.[56] Judicial case management involves a transformation of judicial responsibility and creates a "new ethos" that demands new training in the development of case management skills.[57] Lord Woolf made explicit, however, that his recommendations were not an attempt to abandon England's adversarial tradition for inquisitorial one; instead, his aim was "to preserve the best features of the present adversarial system while giving a more *interventionist management role* to the courts."[58]

Given his distrust for an unrestrained adversarial system that unduly heightened the cost of litigation and restrained access to justice, it is not surprising that one of Lord Woolf's primary recommendations was to amplify judicial case management. Although proportionality was needed to curb expense and a single set of procedural rules to reduce complexity, Lord Woolf believed reform could not be sustained unless the surrounding adversary culture of civil litigation became dedicated to openness and cooperation among the parties, and committed to dispute settlement in which litigation was a means of strictly last resort.[59] A heightened role for the judge in the management of cases empowers the court to encourage this shift in focus toward settlement by extending the judge's responsibility beyond the mere oversight of the proceedings to encompass the authority to determine the amount of time and resource to be expended on the resolution of claims. In doing so, Lord Woolf argued that judges are in the position best equipped to "facilitate and encourage earlier settlement through earlier identification and determination of the issues and tighter timetables."[60]

To realize these goals, Lord Woolf proposed a three-tiered system of case management designed to channel cases based on their estimated cost, financial weight, and complexity of issues.[61] The three levels or "tracks" of the new procedural system are small claims, the fast track, and the multi-track.[62] Under Lord Woolf's layered management approach, judges maintain a channeling function in which they are to allocate cases to the appropriate management track in the interest of justice, cost to the parties, duration, resources of the court, and the needs and desires of the parties.[63] Although parties are allowed to offer their suggestions as to the level of management, judges enjoy the ultimate authority to determine which track is best-suited for the resolution of the dispute.[64]

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56. *See id.* at 18.
57. *Id.* at 23.
58. *Id.* at 29 (emphasis added). Lord Woolf's specific objectives of judicial case management were:

> achieving an early settlement of the case or issues in the case where this is practical; the diversion of cases to alternative methods for the resolution of the dispute where this is likely to be beneficial; the encouragement of a spirit of cooperation between the parties and the avoidance of unnecessary combativeness which is productive of unnecessary additional expense and delay; the identification and reduction of issues as a basis for appropriate case preparation; and when settlement cannot be achieved by negotiation, progressing cases to trial as speedily and at as little cost is appropriate.

Id. at 30.

59. *See* GERLIS & LOUGHLIN, *supra* note 30, at 6–8.
60. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 22.
61. *See id.* at 6.
62. *See id.*
63. *See id.* at 38–39.
64. *See id.* at 39.

The small claims track is the simplest and demands the least amount of judicial case management.[65] Primarily designed for individual disputes and consumer matters, the small claims track operates to bring the cases swiftly to a hearing and to deter any procedural delaying techniques of the parties.[66] Adversaries are given a fair opportunity at the hearing to be heard and are allowed to present evidence. The judge is then to reach a decision based on her findings, and that decision is effectively final because cases allocated to the small claims track only maintain a limited right of appeal.[67]

Claims above the small claims financial threshold and of a modest nature are heard in the fast track. These cases adhere to a "limited procedure designed to take cases to trial within a short but reasonable timescale at a fixed cost that litigants can afford."[68] Upon the receipt of defense, the judge is to be proactive and frequently communicate with the parties in reaching and abiding to an accelerated timeline for discovery, use of experts, and a target trial date (20-30 weeks from initiation), if the cases fails to reach a reasonable settlement.[69] Limited procedures and fixed costs allow litigants to assess the risks and costs in pursuing litigation and afford greater certainty in resolving the dispute.[70] The central purpose of the fast track is to provide greater access to justice for individuals who would otherwise be unable to afford to litigate,[71] and "to ensure equality of treatment between litigants even if they are of unequal means."[72]

All other litigation that the small-claims and fast track do not cover is channeled into the multi-track. The multi-track has the broadest scope of the three tracks, as it includes case presenting relatively straightforward issues in addition to claims that are complex, of financial weight, and/or of significant public interest.[73] Judicial case management, moreover, operates at varying degrees with litigation in the multi-track and has the potential to function at its highest intensity. At the discretion of the judge, cases can be assigned standard directions and timelines with which litigants must comply.[74] Conversely, for the more complex and costly disputes, judges will exercise "full hands-on management . . . from a very early stage."[75] Irrespective of the complexity or financial stake of the litigation, all disputes in the multi-track are to have at least two interlocutory management meetings with the judge: an initial case management conference is to take place right after the pleading stage and another meeting for pretrial review shortly before the commencement of trial.[76] These conferences afford the opportunity to keep the judge abreast of parties' proceedings and allow for the exchange of discovery documentation, witness lists, and experts. The judge is authorized to set deadlines for document requests and discovery and is to dispose of any issues or encourage settlement of issues not in contest.[77]

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65. *See id.* at 14.
66. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 107.
67. *See id.* at 108.
68. *Id.* at 41.
69. *See id.* at 42–43 .
70. *See id.* at 41.
71. *See id.*
72. LORD WOOLF, INTERIM REPORT, *supra* note 3, at 41.
73. *See id.* at 48.
74. *See id.*
75. *Id.*
76. *See id.*
77. *See id.* at 49.

To initiate the three-tiered approach to case management, Lord Woolf recommended that a procedural judge assess and distribute cases to the appropriate judicial case management track.[78] Because cases in the small claims and fast track follow more standard procedures and timetables, the bulk of the procedural judge's work is to determine the degree of case management required by litigation falling into the relatively larger and intensive multi-track. Predominately for litigation in the multi-track, the procedural judge needs to make an initial determination as to whether a case requires hands-on judicial control, more limited case management, or can proceed with more standard directions and timetables.

It is evident from these recommendations that judicial case management is the primary instrumentality through which Lord Woolf believed England could realize its primary objectives of curtailing excessive costs and reducing complexity and unnecessary delay. With the enactment of the CPR in 1998, the managerial judge acquires an interventionist role of controlling the progress and conduct of the adversaries throughout pretrial—not surprisingly, because it was the functioning of an unshackled adversary system Lord Woolf believed to be the principal barrier to equal access to justice.

C. Case Management in the Current Regime

As a result of Lord Woolf's two-year exhaustive inquiry into the functioning and fitness of the civil procedural system, the English Parliament adopted his proposed systematic reform with the enactment of the Civil Procedure Rules (CPR) 1998.[79] The "overriding objective" of the CPR is to enable "the court to deal with cases justly."[80] The CPR does not assert that the overriding objective is to generally effectuate "justice;" the central purpose of the new Rules is to empower the *courts* as the means by which to achieve justice. In harmony with Lord Woolf's objectives for procedural reform,[81] the courts' duty to justly deal with cases consists of: ensuring that the parties are on equal footing; saving expense; dealing with cases in ways that are proportionate (based on cost, complexity, and the financial position of the parties); ensuring that the case is dealt with expeditiously and fairly; and allotting the appropriate share of the court's resources with respect to other concurrent litigation.[82] Courts are obliged to further the overriding objective whenever acting under the *procedural* authority prescribed by the CPR.[83]

The courts' obligation to effectuate the overriding objective extends to the exercise of their case management powers.[84] Under the CPR, courts are given broad authority to

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78. *Id.* at 38. The procedural judge can be an appointed district court judge or can be the Master of the court. *See id.* at 39.

79. Civil Procedure Rules, SI 1998/3132, *as amended by* SI 1999/1008, SI 2000/221, SI 2000/940, SI 2000/1317, SI 2000/2092, SI 2001/256, SI 2001/ 1149, SI 2001/1388, SI 2001/1769, SI 2001/2792, SI 2001/4015, SI 2001/4016, and SI 2002/2058, *available at* http://www.dca.gov.uk/civil/procrules_fin/menus/rules.htm [hereinafter CPR]. All of Lord Woolf's recommendations that are explicated in his *Interim Report* and *Final Report*, including those specific to judicial case management, were implemented into the Civil Procedure Rules 1998 with only a few minor exceptions. *See* GERLIS & LOUGHLIN, *supra* note 30, at 2.

80. CPR 1.1(1).

81. *See supra* text accompanying notes 54 and 58.

82. CPR 1.1(2).

83. *Id.* 1.2 (emphasis added). The courts' obligation to the overriding objective does not encompass their adjudicative role at trial. In this context, the overriding objective is concerned with process and how courts handle cases as they proceed to trial. In addition to the courts, the parties also maintain the duty to further the overriding objective. *Id.* 1.3.

84. *Id.* 1.4(1).

engage in "active case management,"[85] and enjoy a plenary power to manage civil litigation, which includes: encouraging party cooperation, using alternative dispute resolution and settlement; identifying the issues at an early stage and determining which issues can be disposed of and which require full investigation; considering and assessing the costs to be spent on issues in relation to their financial and substantive weight; fixing timetables and controlling the progression of litigation; and directing the parties to ensure that trial proceeds quickly and efficiently.[86]

In addition to the general duties courts maintain throughout case management to further the overriding objective, the CPR prescribes more specific powers to courts to directly manage the issues of a case. Courts are given broad authority over the development of issues, and are authorized to actively manage issues to ensure that cases are effectively distilled and prepared if trial becomes necessary. For example, the CPR allows judges to separate or consolidate issues in the interest of common evidence and efficiency;[87] judges are empowered to determine the substantive merit of claims from the outset and can exclude issues from consideration;[88] and judges can even "dismiss or give judgment on a claim after deciding on a preliminary issue."[89] The CPR's issue management prescriptions enable judges to control the direction of the parties and the litigation at an early stage, and to reduce costs and complexity by disposing of non-meritorious claims and focusing on the essential issues that remain in contention. This expansive role is consistent with the underlying purposes of civil procedural reform in which courts are to perform a hands-on interventionist role over the adversaries to ensure more effective use of resource and proportionality within dispute resolution.

At the preliminary stage, judicial management involves allocating cases to the appropriate case management track. Once the opposing party has filed a defense with the court, the judge must initially evaluate the complexity of the issues, remedy sought, breadth of evidence, and also anticipate the potential cost of litigation.[90] To aid the judge with his initial track determination, the parties are required to complete an allocation questionnaire to provide the court with more information, in addition to the pleadings, from which to make the allocation.[91] The questionnaire reveals the parties' willingness to settle or use alternative dispute resolution, the number of witnesses, their future use availability for trial, and the need to utilize expert testimony and in what capacity.[92] This type of information assists the judge in examining the merits of the claim and the potential need for trial. But more importantly, the parties are allowed to offer which track they see suitable for the dispute and are to support their decision with estimates of the value of the claim, the length and duration if the case reaches trial, and parties are also required to estimate the costs that they expect to incur from resolving the dispute. Although the judge has the ultimate responsibility of determining which of the three case management tracks to assign the case to, the allocation questionnaire supplies the judge with valuable information that is not provided in the pleadings. Information

85. *Id.* 1.4(2).
86. *Id.*
87. *Id.* 3.1(e), (g).
88. *Id.* 3.1(k).
89. *Id.* 3.1(l).
90. *Id.* 26.1(1)(b). *See* GERLIS & LOUGHLIN, *supra* note 30, at 154.
91. CPR 26.3(1).
92. *See* GERLIS & LOUGHLIN, *supra* note 30, at 156.

from the parties about their expectations, costs, and time ensures that the judge's allocation decision is well-informed and best-tailored to the nature of the dispute.

After the court files the pleadings and receives the allocation questionnaire, the case needs to be allocated. Generally speaking, the scope of each of the three management tracks is based on the financial value of the claim; the complexity of issues is only an ancillary factor that courts use to distinguish allocations from others.[93] Because the financial stake of the claim is almost always contested and defendants admit (of course) to no liability, courts typically have to consider other factors, besides financial weight, to distribute claims to the appropriate track.[94]

1. Small Claims Track

Claims that have a value less than 5,000 pounds are most often allocated to the small claims track.[95] Small claims is designed for straightforward disputes that do not require a great deal of discovery and preparation and can be resolved at a one-time hearing. After the defenses are filed and the case allocated, the judge sets a final hearing date. The nature of the hearing is informal: strict rules of evidence do not apply, the judge can limit cross-examination, and the judge must provide reasons for her decision at the end.[96] The judge enjoys some flexibility in the small claims track compared to the others as she is able to tailor the hearing depending on the nature of claim and whether the parties are represented by counsel.

2. Fast Track

The fast track is intended for claims with a value of less than 15,000 pounds, but claims must also meet other requirements in addition to value.[97] The length for trial is limited to not more than one day, and the number of oral and expert witnesses is restricted.[98] Although claims allocated to the fast track receive a formal trial, pretrial procedure is limited. Judges set an initial timetable that controls the disclosure of evidence, amount of discovery, witness statements, and the evidence to be presented at trial.[99] The distinguishing characteristic of the fast track is the one-day trial that is to commence within 30 weeks with limited pretrial procedure.[100] But the judge retains the authority to allow longer claims instead of allocating the claim to the relatively more onerous multi-track.

93. *See id.* at 163.

94. *See id.* at 164, 168. Rule 26.8(1) lists a number of factors courts can consider for track allocation, including nature of the remedy sought, complexity of facts, law, or evidence, number of parties, value of counterclaims, amount of oral evidence, importance of the claim to third parties, and the intent of the parties. *See* CPR 26.8(1).

95. CPR 26.6(1).

96. *Id.* 27.8(2)–(6).

97. *Id.* 26.6(4).

98. *Id.* 26.6(5).

99. *See* GERLIS & LOUGHLIN, *supra* note 30, at 167.

100. *See id.* at 189.

3. Multi-track

Cases allocated to the multi-track typically have a financial value exceeding 15,000 pounds.[101] The multi-track is designed for complex claims or claims high in value that require heightened case management and participation from the judge. The managerial judge handling a case in multi-track must adapt and customize her management techniques to the needs of parties and the nature of the claim. Once the case is allocated, the judge may provide the parties with directions, a timetable for standard discovery disclosures and the need for experts and other evidence, set a case management conference, and fix a trial date.[102] The court will most often set a case management conference when it believes the parties are not adhering to or remain in disagreement with the directions and timetables.[103] The conference allows the judge to evaluate in what direction the cases is heading, the likely time scale of the case, the extent of issue development, and to explore the viability of possible settlement.[104] At her discretion, the judge may also set a pretrial review to be held eight to ten weeks before trial to examine progress, further compliance with directions, and to determine parameters for trial.[105] Cases in the multi-track are only expected to last one week at trial, but can last longer depending on the circumstances. Unlike the small claims and fast tracks, the multi-track does not fix costs throughout litigation, but managerial judges are authorized to scrutinize the claims in the interest of the overriding objective and proportionality.[106]

As evinced above, the track in which the judge allocates the dispute will influence how the litigation proceeds. While fulfilling their allocation function, English judges are making important decisions such as how much discovery is needed, the amount of proof required, and the length and scope of trial. In this crucial respect, the enhanced case management powers—calling for efficient track allocation—authorize judges to make outcome-determinative decisions about each case. As a result, two similar claims that are allocated to different tracks will receive different pretrial procedural treatment and potentially will produce differing substantive results. Yet, the judge's authority to make critical decisions regarding how a case is tracked and thus treated throughout pretrial and trial remains harmonious with Lord Woolf's greater conception of an interventionist judge to manage the adversaries in an effort to reduce the costs, complexity, and delay embedded in civil process.

4. Efficacy of Lord Woolf's Reforms

After only four years since England adopted its Civil Procedure Rules in 1998, limited empirical evidence of the effectiveness of the Woolf Reforms suggests that the new procedural system, for the most part, is working well in addressing the problems of civil process. The Lord Chancellor's Department has commissioned a number of empirical studies and reports (both quantitative and qualitative) surrounding the performance of

101. CPR 26.6(6).
102. *See* GERLIS & LOUGHLIN, *supra* note 30, at 198–99.
103. *See id.* at 199.
104. *See id.*
105. *See* GERLIS & LOUGHLIN, *supra* note 30, at 202.
106. *Id.* at 204.

specific aspects of England's new civil procedural regime.[107] The most recent comprehensive study from the Lord Chancellor's Department indicates that Lord Woolf's recommendations and the Civil Procedure Rules have been fairly successful at remedying the problems of cost, delay, and complexity that formerly inhered in the unfettered adversarial climate of civil litigation.[108] In particular, the empirical evidence reveals that there has been an overall reduction in the number of claims filed,[109] more cases have reached settlement and are settling earlier in the course of litigation,[110] and the time to resolve disputes has significantly declined.[111] The report also found that many practioners generally felt that the recent changes have reduced complexity across jurisdictions by simplifying procedures and establishing clearer ground rules throughout litigation.[112] In terms of climate, the Lord Chancellor's Department indicated that the new procedural regime has fostered a more cooperative environment for the adversaries, including increased communication and exchange of information.[113] The impact of the reformed adversarial culture is exhibited in the increase in settlement and earlier resolution of disputes.[114]

Although improvement has been made in the areas of delay, settlement, and complexity, the impact the Woolf Reforms have had on reducing costs remains inconclusive. The absence of reliable findings on cost is primarily attributable to a lack of reliable data. In its most recent comprehensive empirical study, the Lord Chancellor's Department could not reach a definitive position on cost reduction because of the incipiency of the new Civil Procedure Rules and the need for additional time for any cost effect to be realized.[115] The study found, however, that there was a front-loading of costs because more work is now demanded from the adversaries earlier on in the litigation.[116] Another empirical study jointly conducted by the Law Society and the Civil Justice Council concurred, finding that litigation was more expensive earlier during the pretrial stage.[117] This report contended that costs were now frontloaded because "each potential saving [of the reforms] is offset by other changes that require more work, or bring work to an

107. In June of 2003, Prime Minister Tony Blair dissolved the Lord Chancellor's Department and replaced it with the Department of Constitutional Affairs. *See, e.g.*, *Britain Abolishes Ancient Post*, WASH. POST, June 14, 2003, at A20. The various empirical reports and studies of the impact of procedural reform published by the Department can be found at: http://www.dca.gov.uk/publications.htm.

108. *See* LORD CHANCELLOR'S DEPARTMENT, FURTHER FINDINGS: A CONTINUING EVALUATION OF THE CIVIL JUSTICE REFORMS § 1 (August 2002), *available at* http://www.dca.gov.uk/civil/reform/ffreform.htm [hereinafter FURTHER FINDINGS].

109. *See id.* §§ 3.1–3.12.

110. *See id.* §§ 4.1–4.4; *see also id.* §§ 3.13–3.26 (discussing how the cooperative climate has resulted in more settlement).

111. *See id.* §§ 6.1–6.12. The average time to resolve cases allocated to the small claims track, however, have increased. *See id.* § 6.9.

112. *See* FURTHER FINDINGS, *supra* note 108, §§ 5.1–5.6.

113. *See id.* §§ 3.13–3.26, 4.1–4.4. *See also* TAMARA GORIELY ET AL., MORE CIVIL JUSTICE? THE IMPACT OF THE WOOLF REFORMS ON PRE-ACTION BEHAVIOR xxix–xxxi (The Law Society & Civil Justice Council 2002) (examining the effect of the Woolf Reforms on how adversaries acted prior to litigation and its effect on the settlement of claims in the areas of personal injury, clinical negligence, and housing claims). The report generally found that "[m]ost practioners regarded the Woolf reforms a success. The reforms were liked for providing a clearer structure, greater openness [among adversaries], and making settlements easier to achieve." *Id.* at v.

114. *See* FURTHER FINDINGS, *supra* note 108, §§ 3.13–3.26, 4.1–4.4.

115. *See id.* §§ 7.1, 7.4.

116. *See id.* §§ 7.1–7.3, 7.8–7.9.

117. *See* GORIELY ET AL., *supra* note 113, at xxx (discussing the front-loading of costs in the context of personal injury disputes).

earlier stage, so that it is required in a greater proportion of cases."[118] While agreeing that the evidence as to the effect on cost is inconclusive, this report was more critical of the Woolf Reform's ability to reduce litigation costs than was the Lord Chancellor's Department, and it suggested that there has been no overall decrease in cost to date.[119]

Based on the sparse amount of empirical data available, it appears overall that the Civil Procedure Rules are reasonably effective at alleviating the problems of process that formerly plagued civil litigation. Although some evidence suggests that the procedural reforms in England might not be as effective at specifically curbing costs, with the passage of more time, cost findings will become more definitive. But, nonetheless, four years after the enactment of the Woolf Reforms, civil process in England has already experienced a lessening of complexity, a decrease in delay, and an escalation of settlement. Building upon these vast improvements, the near future will ultimately dictate the vigor of Lord Woolf's legacy as a reformer of English procedure.

III. CASE MANAGEMENT IN THE UNITED STATES

A. Federal Rules of Civil Procedure

Compared to English law, the roots of judicial case management developed earlier in the United States, yet do not remain as profound in principle after the enactments of the Woolf Reforms. As early as the turn of the twentieth century, judges became alarmed about growing public sentiment that courts were too slow and justice too costly, and began efforts to improve their efficiency through managerial techniques.[120] For example, Roscoe Pound openly criticized the judiciary for persistent delay and technical procedural rules, and urged both the bench and bar "to take responsibility for the weaknesses in the administration of justice."[121] Constant criticism and unhealthy perceptions of court administration eventually lead to the recognition that a uniform set of procedural rules were required for federal courts.

The United States Supreme Court promulgated the Federal Rules of Civil Procedure ("Rules") in 1938 pursuant to the Rules Enabling Act of 1934.[122] The major goals of the Rules were generally three-fold. First, the Rules were a means of restructuring the federal civil procedural system and shaping the functioning of civil litigation at the federal level.[123] The second purpose of the Rules was to increase uniformity across federal practice.[124] And third, the drafters wanted to eliminate the rigidity and technicalities of procedure that originally descended from England and was in practice in the states.[125]

118. *See id.* at xxix.

119. *See id.* at vi, xxix–xxxi.

120. *See* Resnik, *supra* note 9, at 395. Many credit Roscoe Pound and his criticism of the administration of justice as the impetus for twentieth century procedural reform. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); John H. Wigmore, *Roscoe Pound's St. Paul Address of 1906*, 20 J. AM. JUDICATURE SOC'Y 176 (1936).

121. *See* Resnik, *supra* note 9, at 395.

122. *See, e.g.*, STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 124 (2001). Congress authorized the Supreme Court to draft the federal rules and "to prescribe rules for the conduct of their business." Rules Enabling Act, Pub. L. 73-415, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (1994)).

123. *See* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972 (1989).

124. *See id.* at 1973.

125. *See id.* at 1975.

By increasing flexibility in the administration of procedure, the Rules provided judges with discretion to fairly and effectively adjudicate.[126] But, as evinced by the three overreaching purposes, a strong tension persists in the Rules: the goal of uniformity is difficult to reconcile with the goals to promote flexibility and discretion.[127] The principal objective of the Rules can be found in Rule 1: the rules are to be construed and administered to achieve the "just, speedy, and inexpensive determination of every action."[128]

Case management at the federal level primarily descends from and is codified in Rule 16. Rule 16 today authorizes courts to hold pretrial conferences and issue scheduling orders.[129] But Rule 16 has enjoyed an interesting history. After its enactment in 1938, Rule 16 was left untouched for 45 years before it was amended in 1983 to its present form.[130] The primary objective of Rule 16 was to encourage, but not require, judges to be involved in the factual and issue development to be litigated at trial.[131] The discretionary nature was consistent with the drafter's intent to eliminate formal pleading derived from England's writ system and to provide a more relaxed manner in which to narrow issues and expedite proof. But the drafters of the Rules did not want to go as far as requiring judicial conferences because too much judicial control would undermine litigant autonomy and the adversarial character of the system; also, the drafters were cautious that parties could be coerced by mandatory conferences with the court.[132] Although the original Rule 16 sought to utilize the pretrial conference to effectuate the Rule's objectives, in actuality Rule 16 did not fulfill these aspirations because pretrial procedure remained at the discretion of the individual federal courts.[133]

But as court dockets grew crowded, discovery became more liberalized and costly, and procedural delay ensued, the traditional umpireal view of the judge eroded and the need for judges as managers and facilitators, in addition to adjudicators, emerged.[134] Consequently, "Rule 16 was extensively rewritten in the [1983 amendments to the Rules] so as to make scheduling and case management an express goal of pretrial procedure."[135] The Advisory Committee Notes to the 1983 amendments provided that the amended Rule 16 reflects a shift in "emphasis away from a conference solely on the trial and toward a process of judicial management that embraces the entire pretrial phase."[136] After 1983, Rule 16 mandates pretrial management in virtually all cases.[137]

The first subsection of the amended Rule 16 describes the objectives of the pretrial conference. Under Rule 16, judges maintain the "discretion" to direct the parties to appear for a conference before trial.[138] The Rule is explicit that there is no requirement of the judge to hold a pretrial conference. Yet, the judge may hold a pretrial conference with the parties for any of the following purposes: to expedite the disposition of the

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126. *See id.*
127. This inherent conflict within the federal procedural system is discussed more thoroughly *infra* Part IV.
128. FED. R. CIV. P. 1 (1993).
129. FED. R. CIV. P. 16 (1993).
130. *See* Shapiro, *supra* note 123, at 1981.
131. *See id.* at 1978.
132. *See id.* at 1981.
133. *See id.*
134. *See supra* text accompanying notes 10–18.
135. 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1521 (1990).
136. FED. R. CIV. P. 16. (1983) (amended 1993) advisory committee's note.
137. FED. R. CIV. P. 16(b) (1993).
138. FED. R. CIV. P. 16(a).

action; to establish control over the case's progression; to discourage wasteful pretrial conduct; to improve the quality of trial through more preparation; and to facilitate the settlement of the case.[139] The last purpose—facilitating settlement, which was added in the 1983 amendments—serves as an explicit recognition of the transformation from the role of the judge as a neutral adjudicator to an active manager of litigation. If the judge elects to meet with the parties, the Rule also provides "subjects for consideration" at the pretrial conference.[140] There are over sixteen non-exhaustive subjects that could be discussed, but the most relevant to this Note's purpose are the following: the simplification of the issues and eliminating frivolous claims; avoidance of unnecessary proof and cumulative evidence; control, exchange, and scheduling of discovery; settlement and alternative dispute resolution; and imposing reasonable limitations on time.[141] Rule 16, moreover, does not restrict the number of pretrial conferences that a judge may order. Given the expansiveness of these subjects to be considered in relation to the original drafting, Rule 16 acknowledges the heightened role of the judge, albeit discretionary, to participate in the sharpening and simplification of issues of law and fact to be litigated at trial.

The second major authority for judicial management in Rule 16, the scheduling order, works in conjunction with the pretrial conference. Although the discretionary pretrial conference existed in modest form in the original drafting of the Rules, the scheduling order was the primary reform of the 1983 amendments to Rule 16, and one that expressly embraces the rising need for judicial case management of civil litigation. After the parties and judge engage at the pretrial conference, Rule 16 *mandates* that the judge enter a scheduling order reciting the actions to be taken.[142] Requiring a pretrial scheduling order promotes careful pretrial management by establishing timetables by which the case should proceed.[143] The pretrial scheduling order is designed to control the subsequent courses of action remaining before trial.[144] Rule 16(b) requires that the order set time limits for parties to join other parties and to file motions, and suggests, but does not require, that the scheduling order also contain timetables for the amount and disclosure of discovery, the dates for additional conferences, and "any other matters appropriate in the circumstances of the case."[145] The Rule adds bite to the judge's scheduling order because it is binding and subject to sanction, and can only be amended for a showing of good cause.[146] The obligatory scheduling order signifies a movement beyond the discretionary pretrial conference. Although it is in the best interests of the parties and the courts to convene at least once to discuss the outlook of litigation, the broad scope of the mandatory scheduling order forces the judge to actively participate in the preparation of the dispute and empowers the courts, rather than the adversaries, to construct the parameters of pretrial procedure.

But Rule 16 and its authorization of judges to hold conferences and enter binding scheduling orders do not operate in a vacuum. The judge's role as a manager under

139. FED. R. CIV. P. 16(a).
140. FED. R. CIV. P. 16(c).
141. FED. R. CIV. P. 16(c).
142. FED. R. CIV. P. 16(b), (e) (emphasis added). If a pretrial conference is not held, the judge still must enter an order after receiving the repost from the parties' conference under Rule 26(f).
143. *See* 6A WRIGHT, MILLER & KAY, *supra* note 135, § 1522.1.
144. FED. R. CIV. P. 16(e); *see also* 6A WRIGHT, MILLER & Kay, *supra* note 135, § 1526.
145. FED. R. CIV. P. 16(b).
146. FED. R. CIV. P. 16(b).

Rule 16 is interrelated to and interconnected with the federal discovery rules. For example, Rule 26 requires the parties to disclose certain evidence, witnesses, and documentation to the other party.[147] Even if the court elects not to hold a conference under Rule 16, the Rule still requires the judge to issue a scheduling order for the management of the case after the mandatory disclosures have been exchanged.[148] Similarly, Rule 16 conferences with the judge are an alternative means to obtain information otherwise sought through Rule 33's interrogatories.[149] Parties can reveal witness lists, experts, and evidence for trial without having to take a great deal of time to request information and wait for the reply. But it is important to note that the pretrial conference is not a substitute for discovery. Although judges have the power as a manager to facilitate discovery, the parties remain the driving force behind the factual and issue development of the case. Rule 16 and its creation of a discretionary, managerial role for the judge only serve to supplement and augment the adversaries in the interest of achieving the "just, speedy, and inexpensive determination of every action."[150]

B. Other Sources

Although Rule 16 and its command for pretrial judicial management provides the primary source of authority for the managerial role of judges in the federal system, the *Manual for Complex Litigation, Third* signifies the substantial commitment of federal judges and academics to encourage judges to become active pretrial managers.[151] The Federal Judicial Center, the distributor of the *Manual*, offers practice recommendations for the federal judiciary regarding problems associated with complex litigation. The suggested techniques are not binding on federal judges like the Federal Rule of Civil Procedure are, but nonetheless the academic and judicial commentary serve as a persuasive starting point for judges presented with complex litigation planning in federal courts. Not surprisingly, the Federal Judicial Center's compilation devotes a significant amount of discussion to judicial supervision and the management of large-scale litigation.[152]

The Federal Judicial Center recommends that federal judges should actively engage in "effective judicial management."[153] Effective management embodies the following characteristics: First, management is active and judges need to anticipate problems before they arise; second, management is not just procedural but involves judges integrating themselves with the substantive merits of the dispute; third, judges must minimize delay and decide disputes promptly; fourth, judges need to continuously participate in the progress of the litigation; fifth, timetables must be set in the interests of the parties, but adhered to once agreed upon; and last, judges need to be prepared and informed about all aspects of the litigation.[154] The central insight of the Federal Judicial Center's

147. *See generally* FED. R. CIV. P. 26.
148. FED. R. CIV. P. 16(b).
149. *Compare* FED. R. CIV. P. 33 *with* FED. R. CIV. P. 16.
150. FED. R. CIV. P. 1.
151. MANUAL FOR COMPLEX LITIGATION (THIRD) (1995).
152. "Case management is not an end in itself; rather it is intended to bring about a just resolution as speedily and inexpensively as possible. It should be tailored to the needs of the particular litigation and to the resources available." *Id.* § 20.1.
153. *Id.* § 20.13.
154. *Id.*

management recommendations is the need for judges to be prepared and to be effective planners because judicial management is most needed at the early stages of litigation.[155] Once judges have established this course, they can set the appropriate schedule and maintain control over the proceedings of pretrial litigation. Even though the Judicial Center maintains an idealistic approach to judicial management, it is useful as an aspirational benchmark for federal judges and their role as managers in an American adversarial system that presents courts with complex civil litigation.

IV. COMPARATIVE ANALYSIS

A. Functional Comparison

In addition to their primary function as adjudicators in an adversary system, both England and the United States have within the past twenty years shifted greater responsibility to the judges and courts to perform a heightened function in the management of civil litigation. Although both legal systems suffer from the similar problems—cost, delay, and complexity—of common law process,[156] each legal regime has adopted differing conceptions of and legal rules with regard to the judge's role as a manager of pretrial litigation.

The procedural rules initially differ in the characterization of their purposes. The "overriding objective" of England's CPR is to enable "the *court* to deal with cases justly."[157] After the Woolf Reforms judges have a greater responsibility as an instrumentality of justice. Moving away from the traditional notion that the adversaries alone with only minimal intervention from the courts can effectuate justice, the CPR provides for judges, and not the adversaries, to actively ensure that just results are realized, and does so by authorizing judges comprehensive power to engage in pretrial management. In doing so, the CPR requires the court to "further the overriding objective by actively managing cases."[158]

The objectives of Federal Rules of Civil Procedure in the United States, by contrast, do not go as far. Rule 1 generally states that the Rules seek to "to secure the just, speedy, and inexpensive determination of every action."[159] Unlike the CPR, there is no mention of courts in this objective or empowering courts to further justice. Although the Rules explicitly recognize the need for judicial management, the Rules do not acknowledge courts and judges as a principal means to realize their purpose and are more deferential to litigant autonomy. Conversely, the CPR shares similar objectives as the

155. *Id.* §§ 20.1, 20.11. "[A]n investment of time in case management in the early stages of litigation will lead to earlier dispositions, less wasteful activity, shorter trials, and, in the long run, to economies of judicial time and a lessening of judicial burdens." *Id.* § 20.1.

156. *See* LORD WOOLF, INTERIM REPORT, *supra* note 3, at 4 (England); Resnik, *supra* note 9, at 395–97 (United States). *See also* Thomas D. Rowe Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation: Background Paper*, 1989 DUKE L.J. 824, 830 (1989) ("The litany of complaints about the [American] civil justice system is largely a familiar one. Perhaps most frequently mentioned among the perceived problems are cost, high volume, and delay. Common dissatisfactions also include excessive complexity and formality; stress and aggravation of tensions between parties; lack of access to justice for many, especially the poor and those with relatively little experience in the legal system; and high incidence of frivolous claims.").

157. CPR 1.1 (emphasis added).

158. *Id.* 1.4(1).

159. FED. R. CIV. P. 1.

Rules, but go as far as to explicitly recognize from the outset courts and their role in assuring the realization of justice.

The differences in the preliminary perceptions of judges in their respective civil justice systems grow increasingly evident within the context of the legal rules prescribing judicial management. As a general matter, solely in terms of the breadth of positive authority concerning pretrial management, England prescribes far more encompassing and detailed procedures, expectations, and responsibilities for managerial judges compared to the Unites States. England devotes an entire section (a set of rules) of the CPR to the courts' case management powers. The CPR establishes a litany of general powers of management and other procedure tools the judge can employ in performing her management function.[160] This includes, for example, authority to hold hearings, consolidate issues, dismiss claims, and other measures designed to further the overriding objective.[161] England's positive law delineating the expansive management powers of the judge lends additional support to its recognition of the judge as a manager of civil litigation. In comparison, the extent of positive law dedicated to judicial management in the United States is far less extensive. The critical mass of case management is found in the text of Rule 16. The Rule is somewhat similar to the CPR in that it provides a list of topics that the judge and parties can discuss at a pretrial conference. But Rule 16 does not prescribe broad management powers to judges; it only allows for a hearing and mandates a scheduling order. Although by no means insignificant, Rule 16 serves as the primary source of case management authority in the United States, yet remains narrower in scope and less far-reaching in contrast to England.

Descending from the disparity in the scope of positive law, the extent and content of substantive authority differs across both legal systems. Beyond the acknowledgement that case management is needed to control the adversary system, the substance of judicial responsibility to engage in case management begins to diverge in two notable areas. First, the United States lacks the intensity of the three-tiered approach to case management as in England. By creating distinct case management tracks, England seeks to improve access to justice in civil litigation by channeling cases based on complexity, cost, and financial value. The responsibility for evaluating claims and allocating them to the appropriate tracks falls solely on the judge. And once the judge makes the determination, she also retains extensive authority in tailoring the case management to the dispute—including eliminating issues, resolving factual discrepancies, and even dismissing claims. In this capacity, the judge's allocation function operates as one of the most crucial managerial functions because of the degree to which it affects the remainder of pretrial procedure and the shaping of the dispute.

Second, as mentioned with respect to quantity above, England's substantive grant of authority to judges as managers exceeds in scope and comprehensiveness to that of the United States. Rule 16 gives judges the discretion to conduct a preliminary hearing with the parties to begin developing and narrowing issues. This goal is further realized with the 1983 amendments to Rule 16 that mandate that judges enter a scheduling order explaining the deadlines for action and events prior to trial. Rule 16 is significant because it serves as procedural milestone that judicial management of pretrial is to occur in all

160. *See generally* CPR 3.1–3.10.
161. *Id.* 3.1.

civil litigation. But the United States does not explicitly acknowledge a concrete level of judicial management and instead defers to the individual discretion of federal judges.

The extent of case management power in England, however, surpasses the prescriptions contained in Rule 16. Foremost, the CPR authorizes judges to engage in "active case management."[162] It is the "active" nature of management that differentiates the CPR from the Federal Rules of Civil Procedure. The responsibilities given to judges under Rule 16 can be found in more detailed form in the CPR. But the prescriptions of the CPR extend further. Under the court's general powers of management, not only can the judge direct hearings and fix schedules, the judge is authorized, for example, to exclude issues from consideration and give preliminary judgment on claims.[163] Case management powers such as these are more intensive and go beyond the managerial authority of Rule 16. The CPR's expansive grant of authority to managerial judges reflects a fervent commitment to the interventionist role of the judge in the adversary system in relation to its common law counterpart in the United States.

But this functional comparison would be incomplete without recognizing that judicial management in England and the United States maintain, at the broadest level, substantial similarity. Because both legal systems share what Lord Woolf asserted to be the central problem of all common law systems—cost, delay, and complexity of *process*—the remedies each has employed are similar. Both England and the United States recently came to the realization that an unrestricted adversarial system results in the problems of process and have therefore responded by shifting the responsibility for pretrial management to the courts. More specifically, England and the United States authorize the judge to have hearings with the parties, to establish timetables for discovery and pretrial motions, and to encourage the settlement of disputes short of litigation. The presence of this judicial authority illustrates the insight each legal system shares in which the costs and delay of common law process can be diminished with the empowerment of judges to intervene and participate in pretrial procedure with the adversaries.

B. Comparison of Values

Professor Mary Ann Glendon speaks of law as something beyond the commands of positive legal rules. For Glendon, law serves an educative purpose and is a means through which to interpret and understand culture. Thus, any comparison of legal rules requires knowledge of how they function "in their legal, economic, and cultural context."[164] Law in its pedagogical form "tells stories about the culture that helped to shape it and which it in turn helped to shape: stories about who we are, where we come from, and where we are going."[165] The stories that law tells as an expression of reality may have more of an affect on our lives then on the content of legal rules and commands themselves.[166] Professor Glendon's insight is useful for the purposes of this discussion. Applying her comparative principles to this analysis, we can ask, "What does the law of judicial case management tell us about the values of England and the United States?"

162. *Id.* 1.4(2).

163. For a more detailed description of the judge's general powers of management, see *id.* 3.1. *See also supra* text accompanying notes 83–88.

164. GLENDON ET AL., *supra* note 20, at 11.

165. *Id.* at 16.

166. *See id.*

How are the stories told? And what values emanate from and are accentuated by each system's laws prescribing judicial management?

Beyond their functional differences, I have chosen to evaluate England and the United States' case management systems in light of four sets of principal values a procedural system may seek to achieve: efficiency; predictability, certainty, and uniformity; flexibility and discretion; and adversarialism.[167] In no respect is this list of values meant to be exhaustive; there remain various other objectives a procedural system may strive toward. The values investigated, moreover, do not reflect normative principles that every just procedural system should maintain. The primary goal here is to evaluate the stories of England and the United States told by the law of case management and to discern the values each pursue in the their ultimate purpose of achieving civil justice.

1. Efficiency

Almost by way of definition, judicial case management is characterized as an efficiency-maximizing means. Advocates of judicial case management assert that management enhances efficiency in three respects: decreasing delay; producing more dispositions; and reducing litigation costs.[168] Both English and American courts reformed pretrial management out of growing public concern that litigation was too slow and costly. And in response, both legal systems felt that case management was the solution to improve efficiency.[169] But given the similar movements to be more efficient, England's intensive approach to judicial management reflects a more profound commitment to achieving efficiency compared to the United States. What predominately distinguishes England's commitment from the United States is the three-tier track management system and the notion of proportionality instituted as a result of the Woolf Reforms. The tracking system allows cases to proceed under a set of tailored conditions that reflect financial weight and complexity of issues. England is chiefly concerned with empowering the judge to assess and allocate cases in the interest of quick and least-expensive resolution of disputes. In addition, judges are authorized in England to determine the value and costs of litigation as a means of realizing proportionality. England's pretrial management system seeks proportionate litigation by ensuring that the costs of achieving the right result equates with the expenditure and time needed to reach that result.

The United States, by contrast, does not have a comparable track approach and each dispute receives the same treatment: whatever the federal judge determines is appropriate in her discretion. The United States' deference to the courts to shape the management of the case reveals the need to be flexible in its approach, and thus does not cherish efficiency to the extent England does in its Civil Procedure Rules. Although American judges are authorized to execute pretrial schedules and participate in narrowing of issues for trial, Rule 16 has no structural requirement that cases be completed in specified time frames or that trials be limited in scope, as in the English tracking system. This is not to say that more management is necessarily more efficient, because there can be diminish-

167. By adversarialism, this Note is referring to a procedural system's regard for an adversarial approach to adjudication and a corresponding traditional role of the judge. *See, e.g., supra* text accompanying notes 10–18.

168. *See* Resnik, *supra* note 9, at 417.

169. In the stated purposes of both procedural rules, England and the United States recognize the need for efficiency. *See supra* text accompanying notes 82 and 128.

ing returns to scale from management at a certain point. In other words, too much management is in fact inefficient. But England's case management approach does not extend to that point.[170] Instead, England authorizes judges to proportionally minimize party-to-party and litigation costs by channeling like claims together to realize earlier dispositions and promote efficient outcomes.

2. Predictability, Certainty, and Uniformity

The efficiency-driven tracking system in England and the elasticity of the United States' Rule 16 offers interesting insight into how both legal orders emphasize predictability, certainty, and uniformity. England's approach from the outset introduces heightened predictability because the parameters of judicial management are specified within England's procedural code. Once the judges initially allocates the dispute, parties are aware, for example, of the amount of evidence that can be used, the number of weeks for discovery, the procedural tactics allowed, and most firmly, the trial date. The tracking system places the litigants on notice as to the level of management required and the scope of judicial involvement prior to trial—allowing parties to better estimate the cost and breadth of litigation. In doing so, England's judicial management system creates more predictable and uniform outcomes because the parties enter litigation with clearer expectations of how the dispute will proceed.

Unlike England, case management in the United States does not achieve certainty and uniformity in results, to the extent that the English system strives to, because of the flexibility inherent in the Federal Rules of Civil Procedure. The Rules present a contradiction of values because it is difficult, if not impossible, to reconcile the need for a uniform procedural system and the desire for flexibility. If judges are given broad discretion to manage and shape the litigation, litigants cannot expect much of a degree of uniformity in management from judge to judge. It seems at this level uniformity counterbalances flexibility and discretion: any significant pursuit of one value can only be realized in exchange for the sacrifice of the other. Yes, the flexible approach is *practiced* uniformly across federal courts, but more significantly, uniformity *in result* as an end in and of itself cannot meaningfully coexist within America's procedural system that covets the flexibility and discretion of its civil process.

3. Flexibility and Discretion

Not all individual cases fit precisely into rigid sets of rules. In fact, the mechanical application of rules to individual cases can itself create injustices. Thus, it is often said that where rules end, discretion begins.[171] Discretion must supplement rules because "[r]ules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases."[172] As a result of these limitations

170. *See supra* Part II.C.4 (examining empirical evidence that indicates the Woolf Reforms have decreased complexity and minimized delay throughout civil litigation). Empirical evidence to date on the costs of litigation in the post-Woolf era is, at best, inconclusive. *See id.*

171. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969). "I think that in our system of government, where law ends tyranny need not begin. Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." *Id.*

172. *Id.* at 17.

on the formulation and application of positive law, discretion is necessary to achieve individualized justice.[173] A procedural system might value discretion and flexibility for this very reason. As applied to the focus of this Note, giving judges discretion to act, rather than strict prescriptions to abide by, better equips judges to ensure individualized justice prevails when a particular case does not fit within the law's rigid rules. Judicial discretion, therefore, enables judges to tailor pretrial procedures to each case as to best effectuate individualized justice.

Judicial case management is a representative example of the flexibility and discretion that permeates the federal procedural system in the United States. Rule 16 provides that courts "*may* in [their] discretion" engage in a pretrial management conference to discuss matters such as settlement, pretrial activities, and management and control over the case.[174] Because the Rules delegate discretion to judges as managers, the system acknowledges that the nature and scope of disputes are difficult to anticipate. Discretionary management also recognizes that the judges vary in their willingness to utilize case management tools and that different "local legal cultures" vary in their receptiveness to particular innovative management practices now available under the Rules.[175] For instance, Rule 16 authorizes courts to adopt and enforce any special procedures it deems appropriate for managing complex litigation.[176] The diverse complexion of federal courts and the variation of case management practices virtually necessitate flexibility in the administration of justice. The American procedural system expressly reflects this need throughout the laws authorizing judicial case management, and values the elasticity of management over bright-line rules. From this value judgment, it is evident that the United States maintains flexibility and judicial discretion not because they are impediments to certainty and uniformity, but rather out of a confidence in judges acting within their sound discretion to tailor case management as the dispute evolves.

Because the reformed procedural system in England stresses the desire for efficient and proportionate results as well predictable outcomes, it is difficult to see how the system also seeks to maintain flexibility and discretion. This difficulty in harmony between values is the exact converse of the uniformity-flexibility contradiction inherent in America's federal rules. Under the CPR, judges are to allocate cases to tracks with predetermined conditions for pretrial activity and management. There would appear to be little room for discretion in such a formal and rigid process, but in fact there is. Upon the allocation of the case, the CPR authorizes broad powers for judges to manage pretrial litigation, including sharpening issues, compelling discovery, and dismissing claims. The tracks alone do not operate on auto-pilot; the judge still needs to direct the litigation with the help of the adversaries. Because England integrated a discretionary component into what appears to be a relatively rigid management process, England does not suffer from the flexibility-uniformity dichotomy of values at the level of severity that America does. In contrast to the United States, England can still achieve its more-prominent values of efficiency and predictability while also enjoying the flexibility of judges to customize post-allocation management.

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173. *Id.* "Only through discretion can the goal of individualized justice be attained." *Id.* at 19.
174. FED. R. CIV. P. 16(a) (emphasis added).
175. *See* Shapiro, *supra* note 123, at 1995.
176. FED. R. CIV. P. 16(c)(12).

4. Adversarialism

The adversary system is a distinctive attribute of English and American civil procedure. Under a traditional adversarial approach to civil adjudication, the parties control the pace and shape of litigation, rather than judges or officers of the state.[177] This private mechanism for adjudicating disputes arises out of a fear that if the judge were to become too deeply involved in the framing of the dispute, the judge may arrive at predispositions about the case and impair her impartiality.[178] There is a risk that too much exposure to the factual and legal details of the case will interfere with the judge's traditional role as a detached and disinterested decision maker. An adversarial adjudicatory model, however, alleviates these concerns of neutrality and fairness by requiring the individual litigants to present proof and make reasoned arguments to a neutral arbiter.[179] In doing so, the adversarial model allows the affected parties to actively participate in the adjudication of their disputes.[180] A procedural system might adhere to the adversarial model of adjudication because it empowers the private individual stakeholders (i.e. the parties) of the dispute to participate, control, and shape the litigation, and also ensures that the resolution of disputes is reached by an impartial an uncommitted public official (i.e. a judge).

The transformation toward heightened judicial management of litigation generally frustrates the underlying purposes of allowing the parties to control the framing of the dispute. It appears with the enactment of the Woolf Reforms that England is more willing to diverge from its adversarial roots than the United States as they both carry forward with their respective judicial management systems. The CPR in England grants judges far-reaching managerial authority over pretrial litigation. Broad judicial management authority usurps power from the adversaries to control and define the dispute. In alleviating the problems of process, England is not abandoning its adversary system, but by vastly empowering judges, England is wary of the problems an uncontrolled adversary system creates, and consequently has decided to limit its scope. From this transition, we can see a shift in value from a traditional adversarial approach to adjudication to an adversarial approach that is substantially checked and curtailed by an active and interventionist judge.

The United States also enjoys the heightened awareness of an unrestrained adversary system, but is less inclined than England to significantly surrender pretrial management over to the courts. By retaining a discretionary approach to judicial management, the United States has attempted to preserve the value it extracts from the adversarial process—by doing as little as necessary to reform management without interfering with its operation. Although Rule 16 mandates that the judge enter a scheduling order for pleading and discovery, the Rules do not require any additional management of the case, and the judge remains at will to not engage in any further case management. That is not to say that some judges will not execute their discretionary powers. But because the United States has not prescribed a more drastic approach (e.g. a track allocation system with expansive judicial power) and adheres to a flexible management approach,

177. *See, e.g.*, Resnik, *supra* note 9, at 380–81; TIDMARSH & TRANGSRUD, *supra* note 29, at 67.

178. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382–83 (1978).

179. *See id.* at 364.

180. *See id.*

the United States sustains a greater commitment to its adversarial approach to adjudication.

V. CONCLUSION

The comparison presented here reveals that English and American legal discourse seek to achieve different sets of values in their civil procedural systems. The law of judicial case management in England expresses a desire for process that is efficient and predictable for the litigants. In doing so, England has transitioned from its former notions of an adversary system controlled by the parties to a regime that regards the intense management of process by courts. Judicial management, however, tells a different story in the United States. The rhetoric of the American legal discourse communicates the aspiration to maintain flexibility throughout its civil process, and a reluctance to frustrate the value its culture places on preserving the power of the litigants in an adversarial system. As in England, the United States believes that managerial judges are a particular means through which the problems of civil process can be alleviated. But, unlike its common law counterpart, the United States retains a discretionary approach to case management that allows judges to individually tailor disputes as they evolve in the pretrial process. The elasticity of American judicial management reflects a willingness to sacrifice a degree of efficiency and uniformity in exchange for the flexibility to sustain our historical common law ideals of adversarial process.

By engaging in this contextual comparison of values, I am *not* advocating that the United States import or adopt England's model of judicial case management. Such a task is untenable because "abstracting the practices, rules, and institutions of the law from their organic context would sacrifice their meaning and coherence."[181] But by comparing each discourse's expression of values, we are compelled to describe and articulate a legal and normative framework that is foreign to our own.[182] This then allows us to utilize an alternative understanding as a point of insight as we reflect upon and reevaluate the values of our own discourse. In this capacity, "comparative analysis creates a possibility for critical, practical reasoning about ourselves."[183]

So the question remains—what can we learn from England? I believe that we can learn much from England beyond their positive rules of case management. First, Lord Woolf's expansive inquiry and subsequent recommendations for civil procedural reform in England force us to also ask critical questions about the health of civil process in our adversarial system. England's experience demonstrates that there is much to gain through a comprehensive assessment of the performance of civil procedure. In that same light, what might we gain by engaging in a Woolf-like examination of civil process in our system? What form might such a study take? After taking the effort to examine the current state of civil litigation, England also reveals that reforms specifically geared toward alleviating the problems of civil process can also be effective. As applied to the United States, this compels us to ask ourselves what might the equivalent of the Woolf Reforms look like in our American procedural system? Which aspects of the

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181. Paolo Wright-Carozza, *Organic Goods: Legal Understandings of Work, Parenthood, and Gender Equality in Comparative Perspective*, 81 CAL. L. REV. 531, 535 (1993).
182. *See id.*
183. *Id.*

Federal Rules of Civil Procedure work well and which do not? To what extent, if any, are we willing to diverge from our adversarial traditions to effectuate such reforms? Questions like these, as well as many others, are no longer afterthoughts as a result of the recent transformations in England. England teaches us that by asking critical questions about our American procedural system, we are able to recognize the strengths and limits of civil process. In doing so, we are then equipped to improve upon our current approach in order to ultimately overcome the problems of civil process, which England taught us can be done.

Second, beyond forcing us to ask difficult questions about the performance of our civil process, the normative content that lies behind England's law of case management reveals that we could improve access to justice in our federal courts through a reexamination of our values of process. The flexibility, discretion, and adversarial approach we highly value are inherently integrated into our legal, economic, and cultural context. For those reasons, these objectives, therefore, should not be forgotten or realigned, but underscored. But England introduces another vital purpose of a procedural system that I believe can meaningfully coexist within our core values. As it functions today, case management in England strives toward efficient and proportionate results, while also affording judges the flexibility to manage the dispute. England serves as evidence that these values can in fact be reconciled. Although the United States' adversarial model differs due to its strong presumption of flexibility and discretion within its civil process, England exemplifies how an objective of efficiency can be harmonized with the aims of flexibility and discretion. The United States can learn from England's recognition as we attempt to improve the processes leading to judicial outcomes in our courts. That is not to say the United States should import the positive rules and institutions of the English procedural system; such an argument would vastly undermine the purpose of this comparative analysis. Instead, after evaluating the legal and normative discourse of the English procedural system, I believe that the values embedded in the framework of the American procedural system can coalesce with notions of efficiency and proportionality as English law expresses. The confluence of these values would allow us to further reduce the cost and delay that ultimately restricts access to civil justice. It is here where we can learn from the story English law describes. As we continue to reform our civil process, the story in England educates us that we can strive to achieve efficient and proportionate results without necessarily having to counterbalance or yield our deep-rooted procedural values of flexibility, discretion, and adversarialism.