THE SHOT CLOCK COMES TO TRIAL: TIME LIMITS FOR FEDERAL CIVIL TRIALS

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I. INTRODUCTION

On May 25, 1992, Danny Biasone died in Syracuse in relative obscurity.[1] That same week, millions of people watched Michael Jordan lead the Chicago Bulls to a repeat National Basketball Association championship. What the fans and Michael Jordan did not know was that they owed the very existence of the NBA to Danny Biasone. In 1954, the NBA consisted of eight teams facing a bleak future. Fans had little interest in the game, in large part because many of the games had become boring demonstrations of the "stall," an offensive strategy in which the object was to keep possession of the ball for as long as possible without attempting any but the easiest of shots. In one game, neither *team* reached twenty points. Danny Biasone saved the NBA by inventing the shot clock, which obligated the teams to attempt shots within twenty-four seconds of taking possession of the ball. The game became fun to watch again because the rules limited how long the players could hold the ball.

The Federal Rules of Civil Procedure soon may have their own shot clock. The Supreme Court of the United States has transmitted to Congress a proposal to amend Rule 16 to permit trial judges to enter "an order establishing a reasonable limit on the length of time allowed for the presentation of

1. The facts concerning Danny Biasone's life and his contributions to basketball come from his obituary in Robert Thomas, Jr., *Danny Biasone, Ex-Team Owner and NBA Innovator, Dies at 83*, N.Y. TIMES, May 27, 1992, at D19, col. 4. For a few more details about this colorful character, *see* ROBERT PETERSON, CAGES TO JUMP SHOTS 178–83 (1990).

evidence."[2] This proposal comes against a backdrop of other efforts to shorten civil trials in the federal courts. Six district courts have explicitly authorized trial judges to impose time limits as part of their Civil Justice Expense and Delay Reduction Plans adopted pursuant to the Civil Justice Reform Act of 1990.[3] Other districts have included this authority in their local rules.[4] Even without explicit authority, the imposition of time limits of some kind is not unusual, although the number of reported cases involving them is small.[5] The

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2. 61 U.S.L.W. 4372 (U.S. Apr. 27, 1993); *see also Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, Judicial Conference of the United States, Aug. 1991,* at 13 [hereinafter *Proposed Amendments*].

3. 28 U.S.C. §§ 471-482 (1991). The Districts are the District of Delaware, the Southern District of Illinois, the District of Massachusetts, the Eastern and Southern Districts of Texas, and the Eastern District of Wisconsin. ADMIN. OFF. U.S. CTS., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS, PILOT COURTS AND EARLY IMPLEMENTATION DISTRICTS, (hereinafter CIVIL JUSTICE PLANS) app. II (June 1, 1992). The most detailed of these proposals is from the District of Massachusetts:

> Rule 5.03. Trial
> (a) Time limits for evidentiary hearing.
> (1) Absent agreement of the parties as to the time limits for the trial acceptable to the court, the court may order a presumptive limit of a specified number of hours. This time shall be allocated equally between opposing parties, or groups of aligned parties, unless otherwise ordered for good cause.
> (2) A request for added time will be allowed only for good cause. In determining whether to grant a motion for an increased allotment of time, the court will take into account:
> (A) whether or not the moving party has
> (i) used the time since the commencement oftrial in a reasonable and proper way, and
> (ii) has complied with all orders regulating the trial;
> (B) the moving party's explanation as to the way in which the requested added time would be used and why it is essential to assure a fair trial; and
> (C) any other relevant and material facts the moving party may wish to present in support of the motion.
> The court will be receptive to motions for reducing or increasing the allotted time to assure that the distribution is fair among the parties and adequate for developing the evidence.

Id. at 64.

4. Local Rule 13(d)(3)(xi) of the Southern District of Illinois provides for limits on the length of trial. Local Rule 503 of the Middle District of Pennsylvania permits the court to enter a "Special Trial Order" to limit the number of witnesses, attorneys, and the number and length of addresses to the jury and the court. Local Rule 8.04 of the Eastern District of Wisconsin permits the court to estimate a reasonable time limit for trial. Judge Charles Richey, at least at one time, had a standard order in which he limited each party to 45 hours of trial time for their direct cases. Charles R. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 GEO. L.J. 73, at 91 (1983) [hereinafter Richey, *Modern Management*].

5. In numerous conversations with the author, trial lawyers from many different states have stated that judges have placed time limits on them, at least informally. The paucity of reported cases thus is not a reliable guide to how widespread the practice is despite the lack of explicit authority under the rules. As the Fifth Circuit has written in another context, the few number of reported cases dealing with discovery conferences under Rule 26(f), "an accurate count is impossible. Thankfully, most of the mountainous volume of the District Courts' pre-trial activity never reaches the pages of a reporter or the files of a computer." Union City Barge Lines, Inc. v. Union Carbide Corp., 823 F.2d 129, 134 n.10 (5th Cir. 1987). Another indicator of how prevalent their use might be is that in one study of jury behavior in complex cases, two out of the three civil cases studied used time limits to shorten the trial. SPECIAL COMMITTEE ON JURY COMPREHENSION, ABA SEC. LITIG., JURY COMPREHENSION IN COMPLEX CASES 32 (1989)[hereinafter JURY COMPREHENSION REPORT]. The few reported civil cases that deal with

proposed change to Rule 16 thus follows some limited experimentation with time limits. This phenomenon, the formal revision of the rules to ratify and thus encourage actions the judges are already taking, is not new. For example, in the 1970's and 1980's, judges increasingly resorted to practices that have come to be known as "managerial judging."[6] The 1983 amendments to Rules 16 and 26 ratified and endorsed the practice,[7] which Professor E. Donald Elliott has aptly described as an *ad hoc* response to what the judges perceived to be a crisis of cost and delay in the federal courts.[8] Not only has the concept of time limits followed the same evolution as the more general concept of managerial judging, it is itself part of that evolution. Setting time limits for trials, just like setting limits on pleading or discovery, is a technique for streamlining cases for swifter disposition:

> The prototypical managerial decision is one that allocates limited resources. The notion that judges are to decide certain issues as "managers" implies that they must take into account the hard economic reality that procedural resources are limited and that decisions must be made on a sound "business-like" basis as to which opportunities to pursue and which to pass by.[9]

The managerial aspect of time limits becomes clear when one focuses on how they work: by forcing attorneys to choose among the items of admissible evidence available to them. Unlike present rules against the admission of irrelevant, confusing, or unreliable evidence,[10] a time limit imposed before trial obliges the trial lawyer to leave some good evidence on the cutting-room floor in the interest of a shorter presentation.[11] It rations civil trial time. The use of

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time limits include: McKnight v. General Motors Corp., 908 F.2d 104, 114–15 (7th Cir. 1990); Johnson v. Ashby, 808 F.2d 676 (8th Cir. 1987); Flaminio v. Honda Motor Co., 733 F.2d 463, 473 (7th Cir. 1984); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1171 (7th Cir. 1983); *In re* Galaxy Assoc., 118 B.R. 8, 10 (Bankr. D. Conn. 1990); United States v. Hardage, 750 F. Supp. 1460, 1526–1529 (W.D. Okla. 1990); Harris v. Marsh, 679 F. Supp. 1204, 1235 (E.D. N.C. 1987); MCI Communications Corp. v. American Tel. & Tel. Co., 85 F.R.D. 28 (N.D. Ill. 1979); Juneau Square Corp. v. First Wisconsin Nat'l Bank, 475 F. Supp. 451, 465 (E.D. Wis. 1979); SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 13–15 (D. Conn. 1977); United States v. United Shoe Mach. Corp., 93 F. Supp. 190, 191 (D. Mass. 1950).

6. *See, e.g.*, Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) [hereinafter Resnick, *Managerial Judges*]; Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Charles R. Richey, *A Federal Trial Judge's Reflections on the Preparation for and Trial of Civil Cases*, 52 IND. L.J. 111 (1976).

7. Rule 16 was substantially revised in 1983 to emphasize "a process of judicial management that embraces the entire pretrial phase, especially motions and discovery...Rule 16 thus will be a more accurate reflection of actual practice." FED. R. CIV. P. 16 advisory committee's note. The amended rule expanded the objectives and powers of the court in connection with pretrial conferences and authorized the already existing practice of sanctioning attorneys and parties who do not cooperate. *Id.* Rule 26 was amended at the same time to permit the court to combat the practice of excessive discovery, and the Advisory Committee noted that the "grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c)." FED. R. CIV. P. 26 1983 amendments advisory committee notes.

8. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309–311 (1986).

9. *Id.*

10. *See* FED. R. EVID. 402 (exclusion of irrelevant evidence), 403 (exclusion confusing or misleading evidence), and 802 (exclusion of hearsay).

11. In one respect, the tradeoff is not new. Federal Rule of Evidence 403 already permits the court to exclude relevant evidence if its probative value is substantially outweighed by

time limits for trials has encountered mixed success in the courts of appeals. The Seventh Circuit, for example, has praised their use to limit the trial of the *MCI Communications v. American Telephone & Telegraph* antitrust case to thirty-one days.[12] The same court, however, in opinions by Judge Richard Posner, has caustically criticized the use of time limits in two cases not as gargantuan as the *MCI* case.[13] Although Judge Posner accepted the premise that courts should, if possible, balance the cost of using more trial time against the benefits of doing so, he characterized the time limits imposed in those cases as arbitrary, inflexible, and cumbersome.[14] The Eighth Circuit has gone further and questioned whether trial courts have the power to exclude relevant, non-cumulative testimony just because it will cause delay.[15] The proposed amendment to Rule 16 would explicitly grant such authority despite the doubts that the courts have expressed about them.

The case for the use of time limits on trials rests on several assumptions: first, that there is a need to ration civil trial time because it is a resource in very short supply; second, that using trial time more efficiently is a desirable goal because trials have an important role to play even in an era obsessed with case disposition; third, that, but for time limits, trials will tend to last too long; and fourth, that trial judges can identify cases that are good candidates for time limits, are capable of deciding rationally how long a trial "should" take, and can enforce them at an acceptable cost and in a fair manner. Unless the assumptions are true, the imposition of time limits should neither be ratified nor encouraged by amendment of Rule 16.

The purpose of this article is to examine each of the assumptions in turn. The approach is explicitly economic. Using economics to evaluate legal procedures is nothing new,[16] but it is particularly appropriate where the procedure in

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consideration of undue delay or waste of time. The Advisory Committee Notes to the proposed amendment state that the use of time-limits imposed before trial may be a better way to handle the problem because the parties would have "a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial." *Proposed Amendments, supra* note 2, at 14. Why this likely would be true is discussed in Part IV (C) (1) of this article, *infra*.

12. *MCI*, 708 F.2d at 1171.

13. McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990); Flaminio v. Honda Motor Co., 733 F.2d 463, 473 (7th Cir. 1984).

14. In *McKnight*, Judge Posner wrote that "to impose arbitrary limitations, enforce them inflexibly, and by these means turn a federal trial into a relay race is to sacrifice too much of one good — accuracy of factual determination — to obtain another — minimization of the time and expense of litigation." *McKnight*, 908 F.2d at 115. Six years earlier, in *Flaminio*, Judge Posner ridiculed the logistics of time limits but went on to describe the time limit imposed by the district judge as "not an unreasonable period in relation to the complexity of the issues...." *Flaminio*, 733 F.2d at 473. In both opinions, therefore, Judge Posner recognized the legitimacy of the balance that the judge sought to strike but criticized the means.

15. Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987). In an older case involving the exclusion of witnesses rather than time limits, the Second Circuit expressed a similar sentiment, that "in no event at this pre-trial stage should witnesses be excluded because of mere numbers, without reference to the relevancy of their testimony." Padovani v. Bruchhausen, 293 F.2d 546, 550 (2d Cir. 1961).

16. *E.g.*, George L. Priest, *Measuring Legal Change*, 3 J.L. ECON. & ORG. 193 (1987); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93 (1986); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983); GORDON TULLOCK, TRIALS ON TRIAL (1980); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) [hereinafter Posner, *Legal Procedure*].

question is one designed overtly to ration procedural resources among cases. Part II of this article looks at the supply of federal civil trial time and notes both that it has been dwindling and that it is likely to continue to do so. Part III discusses the importance of preserving time for trials. Part IV explores the inherent tendency of trials to last too long and the consequent theoretical potential for time limits. Part V turns to the practicalities of how a trial judge is to determine and enforce the appropriate length for a trial.

This article's analysis supports the routine consideration of time limits for trials that are expected to last four days or more.[17] The article offers some suggestions on how the court can solve the practical problems of how to choose and enforce an appropriate time limit in such cases. Although judges need not mount a ticking shot clock in every court room, Danny Biasone was right in one respect: sometimes less *is* more. Perhaps if Mr. Biasone had devoted himself to the law rather than to basketball, he would have invented time limits for trials long ago.

II. THE SUPPLY OF FEDERAL CIVIL TRIAL TIME

Federal judges have a number of other duties besides presiding over civil trials. The criminal side of the docket requires attention and is entitled to statutory priority.[18] Judges who are conducting criminal trials and related proceedings obviously cannot simultaneously personally tend to their civil cases. The civil cases themselves impose on the judges many obligations in addition to trials, such as ruling on motions, establishing schedules for discovery and pleading, and presiding over pretrial conferences.[19]

The proposal to permit judges to impose time limits on federal civil trials is an attempt to use the judges' time more efficiently, to ration by direct decree the amount of the judge's civil trial time that the particular set of litigants can use. Viewed as a rationing device, time limits necessarily presuppose that the supply of civil trial time — the procedural resource being rationed — is in short supply. This section examines the statistical trends to illustrate to what extent and why the amount of time available for civil trials has decreased. It also discusses whether the trend away from allocating time to civil trials is likely to change in the foreseeable future.

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17. The idea for the possible routine imposition of time limits had been around since at least 1986. Roger W. Kirst, *Finding a Role for the Civil Jury in Modern Litigation*, 69 JUDICATURE 333, 337 (1986) ("All jury trials should have time limits substantially less than the time now required."). However, the participants in a recent symposium on the civil jury opposed time limits. BROOKINGS INSTITUTION, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM at 24-25 (1992).

18. The Speedy Trial Act requires that defendants be indicted within thirty days of their arrest and trial within seventy days, although certain time periods can be excluded from these calculations by the court. 18 U.S.C. § 3161 (1992). There is no comparable statute for federal civil cases.

19. Federal Rule of Civil Procedure 16(b) requires the court, acting either through the district judge or a magistrate judge, to enter a scheduling order for every case not exempted from the rule within 120 days of the filing of the complaint. Rule 16(c) lists eleven topics to be covered in pretrial conferences.

A. The Statistical Trends

Others have concluded that there is a shortage of adjudicative services.[20] Professor Resnick supported her conclusion with some of the statistics relating to civil trials.[21] Table 1 is an attempt to provide a more comprehensive look at what has been happening to civil trials in federal court. The Administrative Office of the U.S. Courts keeps voluminous statistics on the activities of the federal courts, and in particular it reports the number and length of trials.[22] The figures and averages derived from these statistics[23] appear in Table 1 and demonstrate that the perception of a shortage of civil trial time is correct.

By any measure, the amount of time being devoted to federal civil trials is dwindling. In 1973, federal district judges held 10,896 civil trials.[24] In 1992, that number was 10,527[25], despite a 230% increase in civil filings[26] and a 61% increase in the number of authorized district judgeships.[27] The trend in the number of civil trials is even more foreboding. The number of civil trials peaked in 1982 at 14,433, but it has declined in every year since then.[28] Even these dwindling numbers are deceptively high. The reported number of civil "trials" includes all evidentiary hearings and not just trials on the merits.[29] Courts hear evidence on contested motions[30] and applications for preliminary injunctions.[31] The federal civil trial system simply is not generating many trial results, and the trend is decidedly downward.[32]

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20. Judith Resnick, *Failing Faith: Adjudicatory Procedure In Decline*, 53 U. CHI. L. REV. 494, 497 (1986) [hereinafter Resnick, *Failing Faith*]; Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier System in Civil Cases*, 99 HARV. L. REV. 1808, 1811 (1986).

21. Resnick, *Failing Faith*, *supra* note 20, at 558–60.

22. Each year, the Administrative Office of the U.S. Courts publishes these statistics in the supplemental statistical tables of the *Annual Report of the Director of the Administrative Office of the United States Courts to the Judicial Conference* [hereinafter *Annual Report*]. The number and length of civil trials appear in Table C–8. Table C–9 lists the trials that last more than twenty days.

23. The averages use the number of authorized district court judgeships. That number is an imprecise measure of the number of working judges because at any given time a certain number of judgeships are vacant and because judges on senior status, some of whom carry significant dockets, are not counted. I use the number of authorized judgeships for convenience and consistency.

24. 1973 *Annual Report*, *supra* note 22 at 382, Table C–8.

25. Gwen Coleman and Elaine Young of the Administrative Office of the United States Courts graciously provided these (and many other) figures. These particular numbers come from Table C–8 for the twelve months ending June 30, 1992.

26. Compare 1973 *Annual Report*, *supra* note 22, at 382 (Table C–8) with Table C–8 for 1992.

27. The number of authorized judgeships listed in Table 1 comes from the 1980 *Annual Report*, *supra* note 22, at 126 (Table 3) (for 1973–80), the 1990 *Annual Report* at 7 (Table 5) (for 1981–1990), and from 28 U.S.C. § 133 (1992) (listing the number of authorized judgeships per district, and noting the provision of several temporary judgeships, following the Federal Judgeship Act of 1990).

28. *See Annual Reports*, *supra* note 22, for 1983–91 at Table C–9. The Administrative Office provided the author with the figures for 1992.

29. *See, e.g.*, 1990 *Annual Report*, *supra* note 22, at 164, note to Table C–8, ("Includes hearings on temporary restraining orders and preliminary injunctions, hearings on contested motions and other contested proceedings in which evidence is introduced.").

30. FED. R. CIV. P. 43.

31. FED. R. CIV. P. 65.

32. For a discussion of why it is important for the judicial system to generate a sufficient number of trial results, *see* part III, *infra*.

The average number of civil trials per authorized district court judgeship illustrates the trend even more dramatically. One response to the dramatic increase in the number of civil cases filed has been to expand the size of the judiciary three different times in the last twenty years.[33] From all reports, the judges are working harder than ever.[34] Yet this greater number of extraordinarily diligent men and women are finding themselves able to "try" fewer than seventeen civil matters per year, including evidentiary hearings.[35] That number fluctuated between 1973 and 1984 but has declined steadily ever since. In the eight reporting years since 1984, the average number of civil trials per authorized judgeship has declined by 42%. More judges are trying fewer civil cases.

Those numbers do not reflect merely an increase in the average length of trial. The number of civil trials lasting ten days or more has increased by 37% in the last twenty years, but, as Table 1 demonstrates, the estimated number of civil trial days per authorized judgeship has declined during the same period.[36]

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33. Pub. L. No. 95–408 (1978 additional judgeships); Pub. L. No. 93–353 (1984 additional judgeships); Pub. L. No. 101–650 (1990 additional judgeships).

34. Federal judges certainly think so. Judge Anne C. Conway of the Middle District of Florida recently described her reaction to taking the bench and finding a docket of 570 civil cases, 1070 pending motions, and a mounting criminal docket:

> I began my tenure as a district court judge by losing sleep. In the middle of the night, I would wake up and think of something I had done — or not done — on a case. I thought of motions pending for over two years. I worried about six-year-old cases that had not been set for trial. I thought of all the time spent in the courtroom, either in trial or at hearings, sentencings, status conferences, or rearraignments, while motions continue to flow in. ...
>
> After several of these middle of the night sessions, and a few practical suggestions given to me during daylight hours, I devised a strategy that permits me to make some headway. As often as possible, I come in at 7:00 A.M. to clear off my desk. If I am lucky, I am left alone to work on cases until 8:00 or 8:30. I am in trial from 9:00 A.M. to 4:30 P.M., with an extended break for lunch so I can go through the paperwork that has accumulated during the morning. At 4:30 P.M., I begin sentencings, rearraignments, and pretrial conferences. Members of my staff listen to the intercom to hear when I take a break, and they literally line up outside my office door to ask questions. I sometimes feel besieged, but we are making progress.

Anne C. Conway, *First Impressions*, 19 LITIG. 3 (Winter 1993). One federal circuit judge has written that "[m]ost of us [federal judges] are now working to maximum capacity." Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan., 1993, at 52. Judge Reinhardt's statement came in the context of an open letter to Senator Joseph Biden, the chairman of the Judiciary Committee, calling for a doubling of the size of the federal appellate judiciary to accommodate the increased demands of the docket. Judge Irving R. Kaufman has written that "I am second to none in my admiration of hard work, but that particular ointment has already been liberally applied," and that federal judges operate under "a crushing burden that translates into a need to dispose of more than a case a day or face an ever-growing backlog." Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 3 (1990).

35. This number may be artificially low because of the extraordinary number of vacant district court judgeships. Richard B. Schmitt, *Push for More Judges Gains Political Steam*, WALL ST. J., Feb. 24, 1993, at B12, col. 1. Even if one calculates the average using the number of authorized judgeships before the Federal Judgeship Act of 1990 (575), however, the average was only 18.3 trials per year.

36. The fourth column of Table 1 is an estimate of the number of civil trial days because an exact count is not possible, for two reasons. First, as noted, the statistics on civil "trials" include hearings on temporary restraining orders, preliminary injunctions, and any other contested motion at which evidence is introduced. The category for one-day "trials," therefore, overstates the number of actual trials on the merits. Second, trials that last between 4 and 20 days are reported in only two categories, those between 4 and 9 days, and those 10 and 19 days. Counting days cannot be done without making some assumption about the distribution of the

From a high of 83.7 days per year per authorized judgeship in 1983, the average has declined to 52.9 days per year in 1992. Presiding over civil trials simply is not as big a part of a federal district judge's job as it once was. There is a shortage of trial time for civil litigants.

TABLE 1

Year	Authorized Judgeships	Total Number of Civil Trials	Civil Trials Per Judgeship	Estimated Civil Trial Days Per Judgeship
1973	400	10,896	27.2	not available
1974	400	10,972	27.4	67.4
1975	400	11,603	29.0	72.2
1976	399	11,656	29.2	81.1
1977	398	11,604	29.2	74.9
1978	399	11,389	28.5	73.9
1979	516	11,655	22.6	60.33
1980	516	12,951	25.1	71.5
1981	516	14,398	27.9	81.3
1982	515	14,433	28.0	81.3
1983	515	14,391	27.9	83.7
1984	515	14,374	27.9	83.0
1985	585	14,254	24.8	76.0
1986	585	13,276	23.1	71.8
1987	585	13,162	22.9	76.3
1988	585	12,536	21.8	72.4
1989	585	12,085	21.0	69.0
1990	585	11,502	20.0	64.8
1991	645	11,024	17.1	55.1
1992	645	10,527	16.3	52.9

cases within those categories. The calculations in Table 2 make the simplest assumption, that on average cases in the 4–9 day category will last 6.5 days and that on average cases in the 10–19 day category will last 14.5 days. The inclusion of contested hearings, of course, results in an overstatement of the amount of time spent in civil trials. The use of the mid-point for the two categories of longer trials should have the same effect of overstatement, as one would expect more trials in each category to fall closer to the shorter time interval.

The significance of these figures for the use of trial time limits is that such limits address a real problem. The supply of civil trial time is declining, and time limits deal with the shortage by rationing consumption of it. Before concluding that time limits are needed, however, one must examine what is causing the federal courts to spend less time trying civil cases and to assess whether those pressures are likely to continue. Unless such pressures are a permanent fixture in the federal courts, perhaps using time limits to ration civil trial time would be an unnecessary step.

B. Possible Explanations for the Trend

What is squeezing out the civil trial? The decline in the amount of time being devoted to civil trials is attributable to two sources: increasing pressure from the criminal docket and increasing pre-trial management responsibilities for more, and more complex, civil cases.

1. The Criminal Docket

Because it is entitled to priority, the criminal docket is a likely culprit for the courts' lack of time to try civil cases. It is certainly the one most observers blame for congestion in the federal courts. The Chief Judge of the United States District Court for the Southern District of California has described her court as "a police court" that is sinking in a mire of criminal cases."[37] A survey of judges in the Northern District of Illinois yielded the unanimous conclusion that the "ever-increasing demands" of the criminal docket have made it more difficult to pay attention to their civil docket.[38] One court has commented that the effect of the expansion of the criminal docket is to leave civil cases "moldering."[39] As the following discussion demonstrates, these impressions are correct, for a number of reasons.

a. The Size of the Criminal Docket

Table 2 summarizes some of the major statistics relating to the criminal docket for the last thirteen years.[40]

The number of new criminal case filings per year has increased by 70% in the past thirteen years. The number of authorized judgeships has not kept pace, with the result that for each authorized judgeship today there are 73.6 new criminal cases filed rather than the 54.2 new cases filed in 1980. The primary source for this increase in the number of criminal cases is no secret: the war on drugs that began under President Reagan.[41] As Table 2 illustrates, drug filings now are coming in at roughly four times the rate of 1980. Many of these cases would have been in state court but for the increasing

37. Robert D. Raven, *Don't Wage War on Crime In Federal Courts*, TEXAS LAW., Aug. 31, 1992 at 12.

38. *Civil Justice Reform Act Advisory Group of the United States District Court for the Northern District of Illinois, Preliminary Report (1993)*, at 16 [hereinafter *N.D. Ill. Preliminary Report*].

39. United States v. Reaves, 636 F. Supp. 1575, 1577 (E.D. Ky. 1986).

40. These numbers appear, or are derived from, Tables C–8, D–1, and D–2 of the *Annual Reports*, *supra* note 22, for the relevant years.

41. Kaufman, *supra* note 34, at 5; *see also N.D. Ill. Preliminary Report*, *supra* note 38, at vi.

"federalization" of drug crimes.[42] Because the criminal docket has grown so dramatically, and because it is entitled by law to priority over civil cases, the federal courts have far less time and attention to devote to the civil docket.

TABLE 2

The Criminal Docket

Year	Authorized Judgeships	Number of New Criminal Cases	New Criminal Cases Per Judgeship	New Drug Cases Filed
1980	516	27,968	54.2	3,130
1981	516	30,355	58.8	3,697
1982	515	31,623	61.4	4,193
1983	515	34,927	67.8	5,094
1984	515	35,911	69.7	5,606
1985	575	38,546	67.0	6,690
1986	575	40,427	70.3	7,893
1987	575	42,156	73.3	8,869
1988	575	42,336	73.6	10,020
1989	575	43,632	75.8	11,541
1990	575	46,530	80.9	12,226
1991	645	45,053	69.8	11,660
1992	645	47,467	73.6	12,512

b. The Complexity of the Criminal Docket

More complex cases take more court time. The criminal docket has become more complex as it has also grown in absolute numbers. Table 3 provides one measure of complexity. The "weighted" criminal filings per authorized judgeship attempts to adjust the number of filings by "weighing" cases according to their complexity.[43] A "typical" case receives a weight of 1.0, while a more demanding case receives a weight greater than one and a less demanding one receives a weight less than one. The criminal filings, once they are weighted by their complexity, further show why federal judges are spending more time on their criminal dockets. Weighted criminal filings per judgeship grew 23% between 1980 and 1990, and have dipped in the last two years only because of the expansion in the number of authorized judgeships. Even with

42. Raven, *supra* note 37, at 12.

43. The 1980 *Annual Report*, *supra* note 22, at 290, contains a discussion of the history and the details of the weighting system.

that change, weighted criminal filings are significantly higher than twelve years ago.

TABLE 3
Criminal Filings

Year	Weighted Criminal Filings Per Judgeship
1980	47
1981	45
1982	47
1983	53
1984	53
1985	52
1986	53
1987	53
1988	54
1989	55
1990	58
1991	53
1992	54

The weights, which were developed in 1979 by the Federal Judicial Center, do not capture all the complexity of a criminal case. For example, they do not take into account some of the complexities of new types of cases such as those brought under the Racketeering Influenced and Corrupt Organization Act.[44] As a result, new weights are being developed.[45] Table 3, however, is a strong indication that more criminal cases, of greater complexity, are diverting the judges' attention from the civil docket.

c. Procedural Changes for Criminal Cases

New procedures applicable to the criminal docket are consuming time once available for civil cases. One example is the Bail Reform Act,[46] which increases substantially the ability of the United States to seek pretrial detention of criminal defendants. Although hearings under this Act occur before United States Magistrate Judges, the results are subject to de novo review in the district

44. 18 U.S.C. § 1961 (1988).
45. *N.D. Ill. Preliminary Report, supra* note 38, at 13, n.6.
46. 18 U.S.C. § 3141 (1992).

courts.[47] Time spent reviewing those results is time that courts cannot spend on civil cases.

By far the greatest procedural change, however, has been the promulgation of federal sentencing guidelines by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984.[48] Under these guidelines, federal judges now have less discretion with respect to the sentence to be imposed upon convicted criminal defendants. Although judges may depart from the guidelines, they may do so only if they find an aggravating or mitigating factor, and they must give the specific reason for imposing a sentence different from the guideline.[49] Furthermore, facts that may not matter to the conviction of the defendant, such as the amount of drugs involved or the extent to which the defendant accepted responsibility for the crime in a timely manner, may be crucial to determining the defendant's sentence under the guidelines.[50]

The Sentencing Guidelines have diverted resources from civil cases in at least two ways. First, there has been a dramatic increase in the number of contested sentencing hearings.[51] The judges of the Northern District of Illinois believe that sentencing now takes an extra forty hours of court time per year because they must state the reasons for the particular sentence imposed and because the classification system used by the Guidelines creates new factual issues to be resolved.[52] Another recent survey found that 90% of district judges believe that the Sentencing Guidelines have increased the time required for sentencing between 25% and 50%.[53] This is time that otherwise would be available for civil cases.

A second way in which the Sentencing Guidelines have affected the time available for civil cases is by making a guilty plea less attractive relative to a trial. By one account, the decreased flexibility of the U.S. Attorney's office with respect to the sentence it can offer during plea bargaining has resulted in a 5% drop in guilty pleas and a 33% increase in new federal criminal trials.[54] One measure of this tendency to take a chance on trial rather than the certainty of a plea is the ratio of criminal trials to guilty pleas. A defendant must choose between these two options, and if more defendants are choosing the much more time-consuming option of trial, then this ratio will rise. That is in fact what has happened since the Sentencing Guidelines went into effect.[55] Table 4 demon-

47. *N.D. Ill. Preliminary Report, supra* note 38, at 20.

48. In Mistretta v. United States, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the Sentencing Commission and discussed extensively its history, operation, and effect.

49. 18 U.S.C. §§ 3553 (a) and (b) (1988).

50. Raven, *supra* note 37, at 12. I am also indebted for this point to Roberta Kemp Flowers, formerly of the U.S. Attorney's Office in Miami and now an Assistant Professor of Law at Stetson University College of Law.

51. The 1990 *Annual Report, supra* note 22, at 15, shows a doubling in the number of such hearings over 1989.

52. *N.D. Ill. Preliminary Report, supra* note 38, at 20.

53. Kaufman, *supra* note 34, at 5, n.31; *see also* Alexander Wohl, *The Calculus of Rationality*, A.B.A. J., Jan. 1992, at 40.

54. Raven, *supra* note 37, at 12; *see also* Wohl, *supra* note 53 at 40.

55. The Sentencing Commission used a different ratio, the ratio of convictions to guilty pleas, to conclude that the Guidelines have had no effect on the choices being made by defendants. The Federal Sentencing Guidelines, December 1991 Report of the United States

strates that for the three years preceding the effective date of the Guidelines on November 1, 1987 (the reporting year ending June 30, 1988, is omitted because the Guidelines took effect during that period), the ratio of criminal trials to guilty pleas fluctuated between .197 and .177.[56] After the Guidelines went into effect, that proportion grew significantly and remains significantly higher than before.

TABLE 4

Year	Criminal Trials	Guilty Pleas	Ratio
1985	6475	33,823	.191
1986	6966	35,448	.197
1987	6823	38,440	.177
1989	8017	37,976	.211
1990	8931	39,734	.225
1991	8925	40,723	.219
1992	9465	42,339	.223

In light of these developments, it is no wonder that civil cases receive less attention in federal courts. Federal judges must deal with more criminal cases than they once did, the cases in general are more complex, and procedural reforms have added to the burdens coming from the criminal side of the docket.

d. The Future of the Criminal Docket

The demands of the criminal docket are not likely to lighten soon, primarily because Congress and the Executive Branch cannot seem to resist the temptation to add to them. A primary example is "Operation Triggerlock," under which the federal government uses federal firearms statutes to prosecute chronic violent offenders.[57] The purpose is to subject these defendants to harsh federal sentences.[58] As desirable as these results may be, the cases brought pursuant to Operation Triggerlock are taking a significant amount of federal judges' time.[59] This recent program to enforce more aggressively already existing laws is adding to the squeeze on civil trial time.

Congress did nothing about the criminal docket when it passed the Civil Justice Reform Act of 1990. Congress meanwhile continues to expand the scope of federal criminal law. In 1992, "car-jacking" became a federal crime.[60] A

Sentencing Commission, Executive Summary, at 77. That is the wrong ratio. Defendants do not choose between *conviction* and a guilty plea but rather between *trial* and guilty pleas.

56. These figures come from Tables C–8 (number of criminal trials) and D–6 (number of guilty pleas) in the *Annual Reports*, *supra* note 22, for the relevant years.

57. *For the Record*, WASH. POST, July 31, 1992, at A22.

58. Raven, *supra* note 37, at 12.

59. *N.D. Ill. Preliminary Report*, *supra* note 38, at 18.

60. Pub. L. No. 102–519, 106 Stat. 3384, 102d Cong., 2d Sess. (1992).

recent proposal by Senator Barbara Boxer would make it a federal crime to "stalk" another by crossing state lines or using the mails or the telephone to make threats.[61] Earlier, but quite recent, proposals would have federalized any state crime committed with a gun that had crossed state lines[62] and would have amended the federal criminal code to give the federal government more opportunity to try juvenile offenders as adults in federal court.[63] The new Congress, with a Democratic President, is likely to expand the criminal jurisdiction of the federal courts,[64] at least in part because being tough on crime is politically popular.[65] The civil litigant, who is lost in this process of turning the federal courts into primarily criminal courts, apparently does not have such political pull. The pressure on the availability of civil trial time coming from the criminal side of the docket thus does not appear likely to abate soon.

2. The Civil Docket

Not all of the squeeze on civil trial time is coming from the criminal docket. Developments over the last twenty years on the civil side as well have made it more and more difficult to secure a civil trial in federal court.

a. The Number and Complexity of Civil Cases

Litigants are filing more, and more complex, civil cases. In 1980, 168,789 civil cases were commenced in federal court.[66] In 1992, the number was 226,895[67] despite an increase in the interim of the minimum amount in controversy for a diversity case from $10,000 to $50,000.[68] The judges believe that the increase in the number of cases, and increases in their complexity, have led to increased cost and delay.[69] These changes do not by themselves, however, explain why the courts would be spending *less* time trying civil cases. At first glance, one would expect these trends to counterbalance the growth of the criminal docket and at least enable civil trials to hold their own.

b. Procedural Changes for Civil Cases

Table 1 reveals that the number of civil trials per judgeship and the average number of civil trial days for judgeship both peaked in 1984 and have declined remarkably since. What happened in 1984 on the civil side to divert federal judges from trying civil cases? The 1983 amendments to Rule 16 of the Federal Rules of Civil Procedure fundamentally changed the role of the federal judge in civil litigation "from a passive umpire to a managerial activist."[70]

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61. Constance Sommer, *Senator, Wife Know Awful Lot About Stalkers; They Describe Ordeal To Panel Considering Legislation to Make Harassment A Federal Offense*, L.A. TIMES, March 18, 1993, at A5 col. 1.

62. S. 1241, 102d Cong., 1st Sess. (1991).

63. Raven, *supra* note 37, at 12.

64. *Push For More Judges Gains Political Steam, supra* note 35, at B12, col. 1.

65. Raven, *supra* note 37, at 12.

66. 1980 *Annual Report*, *supra* note 22, Table C–1, at 370.

67. 1992 *Annual Report, supra* note 22, Table C (on file with author and the Administrative Office of the U.S. Courts).

68. 28 U.S.C. § 1332(a) (1992).

69. *N.D. Ill. Preliminary Report, supra* note 38, at 31–32.

70. Robert F. Peckham, *A Judicial Response To The Cost of Litigation: Case Management, Two-State Discovery Planning and Alternative Disputes Resolution*, 37 RUTGERS L. REV. 253, 254 (1985) [hereinafter Peckham, *Judicial Response*].

Judges have increasingly become managers of cases and have intervened in the pretrial process early and often to limit discovery, narrow issues, set deadlines, promote stipulations, and otherwise attempt to expedite civil cases, frequently through pretrial conferences with counsel.[71] For example, Judge Robert F. Peckham, a leading proponent of case management, routinely convenes conferences at which he presses the lawyers to identify the issues, reaches for ways to dispose of issues by motion, inquires into discovery needs, and introduces the possibility of settlement.[72] These activities are in keeping with the purpose behind the 1983 amendments, to foster "a process of judicial management that embraces the entire pretrial phase, especially motions and discovery."[73] Since these amendments, judges have become active and knowledgeable, rather than remaining passive and ignorant of the details of the cases during the pretrial stage.[74]

Those who supported more active pretrial involvement by the court anticipated that it would impose significant burdens on the judiciary. They were right. Judges who manage cases spend enormous amounts of time doing so because to make managerial decisions they must become intimately familiar with the case, a process which requires that they immerse themselves in the contentions of the parties as well as the actual and potential evidence.[75] Regardless of one's views on the propriety or effectiveness of case management,[76] there is no denying what an investment of judicial time and energy it has required. It is no wonder that the average number of days devoted to civil trials has declined. A judge cannot simultaneously hold a case management conference and preside over a trial. As Professor Resnick observed in the early years of the case management movement:

> Rather than concentrate all of their energy deciding motions, charging juries, and drafting opinions, managerial judges must meet with parties, develop litigation plans, and compel obedience to their new management rules.... And although litigants and judges can contain costs by relying on conference calls and written exchanges, they still spend substantial time and money.[77]

The size and complexity of the civil docket, and the way federal courts have handled it, have both contributed to the dwindling supply of federal civil trial time.

c. The Future of the Civil Docket

i. The Demands of Case Management

If case management is a cause of the decline in the amount of time being devoted to civil trials, then the future bodes ill. There is no reason to believe that federal judges will be spending less time managing cases and more time

71. Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189 (1992).
72. Peckham, *Judicial Response*, *supra* note 70, at 257–58 n.13.
73. FED. R. CIV. P. 16 advisory committee's notes.
74. William W. Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 717 (1989).
75. Resnick, *Managerial Judges*, *supra* note 6, at 424.
76. Compare *id.*, with Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525 (1991) [hereinafter Richey, *Rule 16 Revisited*].
77. Resnick, *Managerial Judges*, *supra* note 6, at 423–24.

trying them. To the contrary, one of the Congressional findings in connection with the Civil Justice Reform Act of 1990 was that an effective way to reduce cost and delay in federal litigation is to have "early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events."[78] Each district must create a cost and delay reduction plan, and it must consider and may include provisions related to case management.[79] Vice-President Quayle's now-moot Agenda for Civil Justice Reform and the response of the American Bar Association agreed on this if little else: judges should take a "hands-on" approach to case management.[80] Other proposed amendments to Rule 16 expand the pretrial case management powers of the trial judge.[81] The proponents of case management have carried the day and thereby may have insured that civil trials will continue to be a low priority.

One significant change, however, is designed to reduce the amount of time necessary to manage cases. The case management movement originated in response to widespread abuse of the discovery process.[82] The discovery rules are tools to be used and adapted to the needs of the individual case. They apparently worked well until the 1970's when, according to one federal judge, "the increasing competitiveness and aggressiveness of the bar and the loosening of professional restraints profoundly changed the litigation environment."[83] Discovery became not a means to an end but an economic weapon,[84] and the adversary spirit led lawyers to use the tools of the discovery process not to craft an amount and method of discovery appropriate to the individual case but rather to bash each other into submission without fear, as the size of the litigation bar grew, of retribution in future cases.[85] The lawyers could no longer be trusted to use the generic procedures of the federal rules to tailor the process for each individual case.[86] Case management resulted,[87] and the courts were given the power to do the tailoring.[88] It is largely that process of managing discovery that makes case management so time consuming.

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78. Pub. L. No. 101-650 § 5(B).

79. 28 U.S.C. § 473(A)(2) (1992). One of the key principles underlying the legislation is "promulgating a national, statutory policy in support of judicial case management." S. REP. NO. 416, 101ST Cong., 2d Sess. 13 (1990), *reprinted in* 1990 U.S.C.C.A. N. 68012. The plans adopted under this legislation emphasize case management. Howard Spierer, *Aggressive Case Management Highlights District Court Plans*, LITIG. NEWS, October 1992, at 7.

80. LITIG. NEWS, Dec. 1991.

81. Richey, *Rule 16 Revisited*, *supra* note 76, at 539.

82. *See, e.g.*, Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17 (1988); BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 6 (1989); Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 806-807 (1981); Dudley, *supra* note 71, at 191.

83. Schwarzer, *supra* note 74, at 705.

84. Kaufman, *supra* note 34, at 6.

85. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 240-241 [hereinafter Brazil, *Views from the Front Lines*] (discovery not as big of a problem where the lawyers regularly interact with each other as they would in a small town).

86. Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295 (1978) [hereinafter Brazil, *Adversary Character*].

87. Resnick, *Failing Faith*, *supra* note 20 at 527.

88. FED. R. CIV. P. 26(b) was amended in 1983 to permit the trial court to limit the frequency or amount of discovery according to the needs of the cases the amount in controversy, and the parties' resources, among other factors.

Rule 26 likely will be amended in December 1993 to change fundamentally the way discovery is conducted, at least in the early stages.[89] Under the proposed amendments, the parties are to meet early in the case to devise a discovery plan, and are to exchange the identities of potential witnesses and all documents that bear on disputed facts.[90] These proposals, in various forms, have been around since at least 1978,[91] and their goal is to make lawyers more cooperative and less adversarial in the way they conduct discovery. If these goals are realized, fewer discovery disputes may mean less of a need for case management.

That hope may be forlorn: as one commentator described it, the new rule is the triumph of hope over experience.[92] At least in the short term, one can expect increased rather than decreased litigation over discovery issues as the courts sort out how the disclosure rules will work in practice.[93] Just as today district judges and their staffs spend time deciding motions to compel and motions for protective orders, the disclosure rule is likely to produce "satellite litigation" over the adequacy of the disclosures.[94]

A longer term problem is that the disclosure rules will succeed only if the lawyers adopt a broader view of their professional obligations. The rules "depend upon an elevation of the professionalism of lawyers,"[95] because lawyers who are willing to abuse the present rules and risk sanctions[96] are going to be willing to risk sanctions under disclosure rules. If all new Rule 26 yields is an initial inadequate disclosure followed by the usual rounds of adversarial discovery, then all that has been done is to add another layer to the process, and even more disputes for judges to manage. Magistrate Judge Wayne Brazil foresaw the problem when he first proposed the disclosure rule: "[c]anons and disciplinary rules especially tailored to civil matters should be drafted. Moreover, ethical standards should be refined in order to distinguish between the different requirements of the investigative and discovery stages, on the one hand, and the trial and post-trial stages on the other."[97] Lawyers will have to be more professional and less adversarial or new Rule 26 will not free the judges to try more cases.

The necessity for lawyers to change their adversarial ways comes at a time of great efforts to improve the professionalism of lawyers, particularly in

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89. 61 U.S.L.W. 4372–76 (U.S. Apr. 27, 1993).
90. *Id.*
91. The idea originated in Brazil, *Adversary Character, supra* note 86.
92. Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).
93. According to the presenters of one recent seminar on the subject, "the rule is ripe with material for discovery motions." Colleen McMahon and Jordana G. Schwartz, *Analysis of Amendments to the Federal Rules of Civil Procedure as Approved by the Judicial Conference and Forwarded to the Supreme Court, reprinted in* ALI-ABA, *New Directions in Civil Procedure* at 16–17 (1993).
94. Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 158 (1991).
95. Mullenix, *supra* note 92, at 798 (quoting FED. R. CIV. P. 25.1 Reporter's Note (Proposed Draft Feb. 24, 1990)).
96. *See* FED. R. CIV. P. 26(g), 37(b)(2), and 37(d).
97. Brazil, *Adversary Character, supra* note 86 at 1349; *see also* Schwarzer, *supra* note 74, at 711. ("While the threat of sanctions may be a deterrent, it tends to address the symptoms rather than the causes of the problem, namely the lack of clearly defined and appropriate standards of conduct for lawyers in litigation.").

the context of litigation. Numerous courts and bar associations have promulgated codes of courtesy or professionalism to try to guide the bar through the thickets of adversarial litigation.[98] The development of such codes is admirable but its causes are not. One of the most recent of these codes is that of the Seventh Circuit.[99] The judges and lawyers surveyed in connection with that code told a familiar and quite recent story of persistent, gross discovery abuse.[100] The monster has been identified but not slain. New Rule 26 will do nothing to make trial time more available until it is slain, and the best one can say now is that the returns are not yet in on the professionalism movement.

ii. The Provision of Substitutes for Trial

Another reason to be pessimistic about the future supply of civil trial time is that instead of doing anything about the major source of pressure on civil cases, the criminal docket, Congress has been busy providing substitutes for civil trial. Those substitutes are settlement conferences, early neutral evaluation, arbitration, mediation, summary jury trial, and other methods of alternative dispute resolution (ADR). Settlement was added as an appropriate topic for discussion at pretrial conferences in 1983,[101] and new changes will make the district judge even more powerful to encourage settlement by authorizing the judge to compel attendance at the conferences of party representatives with authority to settle.[102] The 1990 Civil Justice Reform Act requires all district courts as part of their delay and expense reduction plans to consider implementing or widening their use of ADR.[103] These are but the latest manifestations of the growing influence of the ADR movement, which has been powerful and gaining strength for many years.[104]

The more cases that settle the fewer there are to manage and, therefore, at least theoretically the courts will have more time to try civil cases. Many observers, however, are pessimistic that any time saved will be spent trying civil cases. Instead, they view the provision of ADR techniques as ways "of devising or borrowing mechanisms to bypass adjudication."[105] The pressure of

98. The following courts and bar associations have issued such codes or reports on civility and professionalism (all are on file with the author): Florida Bar Committee on Professionalism, Hillsborough County (Fla.) Bar Association; State Bar of Arizona; Committee on the Profession of the Association of the Bar of the City of New York; Committee on Civility of the Seventh Federal Judicial Circuit; Commission on Professionalism of the American Bar Association; the Supreme Court of Nebraska; Chief Justice's Commission on Professionalism (Ga.); Mississippi State Bar's Professionalism Committee; Virginia State Bar; Allegheny County Bar Association (Pa.); The Missouri Bar; United States District Court for the Northern District of Illinois; Committee on Lawyer Professionalism of the Kentucky Bar Association; Indiana State Bar Association; Kansas City Metropolitan Bar Association; State Bar of Montana; Illinois State Bar Association; Pennsylvania Bar Association; Houston Bar Association; Dallas Bar Association; Supreme Court of Texas; Cleveland Bar Association; Memphis Bar Association; North Carolina Bar Association; Multnomah (Oregon) Bar Association; Commission on Professionalism of the State Bar of New Mexico.

99. *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit* (June 9, 1992).

100. *Id.* at 6.

101. FED. R. CIV. P. 16 advisory committee's note.

102. 61 U.S.L.W. 4372 (U.S. Apr. 27, 1993).

103. 28 U.S.C. §§ 473(a)(6), b(1)(4) (1992).

104. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

105. Resnick, *Failing Faith*, *supra* note 20, at 538.

the criminal docket is relentless, and the civil docket must either gather dust or be disposed of by settlement. The federal courts increasingly are in the business of settling civil cases as a substitute for trial.[106] The emphasis reflected in the rule changes and the Civil Justice Reform Act demonstrate that the system has given up on finding more time to try civil cases. In Professor Resnick's words, "[i]n legislation, in rule-making, and by proposed procedural innovations, policy makers are announcing preferences that are decidedly anti-trial."[107]

The supply of federal civil trial time thus is decreasing, and there is good reason to fear that the forces driving this trend will worsen before they improve. If trial time can be used more efficiently, it should be. The desirability of such more efficient use is the subject of the next section.

III. THE IMPORTANCE OF TRIALS

One response to the dwindling supply of civil trial time is not to care. Trial is not the only, or even the primary, way to resolve civil disputes. By most estimates, between 60% and 80% of federal civil cases settle.[108] A substantial percentage otherwise end short of trial by dismissal or summary judgment.[109] Even more significantly, most civil disputes never reach litigation. Scholars have estimated that only a very small percentage of potential lawsuits become actual cases.[110] Almost all disputes settle without becoming lawsuits. One may legitimately wonder whether measures to preserve a role for trials are necessary.

For some, the importance of trials is self-evident.[111] Particularly with respect to suits of wide significance to the public such as litigation against governmental institutions, some argue that settlement is not a reliable means of achieving justice because of the potentially narrow interests of those controlling the litigation and the difficulties of enforcing consent decrees.[112] Even those who defend settlement are concerned about such cases.[113] But trials are important in private disputes as well, if only to make settlement of other cases easier

106. Elliott, *supra* note 8, at 323.

107. Judith Resnick, *Finding the Factfinders, in* VERDICT 502 (Robert E. Litan ed. 1993).

108. Kaufman, *supra* note 34, at 16 n.105; Resnick, *Managerial Judges*, *supra* note 6, at 385 n.53 (as far back as 1935, 70% of civil cases filed in federal court never reached a judge or jury).

109. Dudley, *supra* note 71, at 202 (18% of civil cases terminated by granting of a dispositive motion) (citing Paul R. Connolly et al., Judicial Controls and the Civil Litigative Process: Discovery, Federal Judicial Center (1978)); *see also* Herbert M. Kritzger, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 164 (Table 3) (1986) (20% of federal civil cases decided on motions); Resnick, *Failing Faith*, *supra* note 20, at 511–512 (1986) ("35 percent of all federal cases are disposed of by ... motions ... [to] dismiss[] or for summary judgment").

110. David M. Trubeck et al., *supra* note 16, at 83 (9 out of 10 disputes do not result in suits being filed); Daniel Misteravich, *The Limits of Alternative Dispute Resolution: Preserving the Judicial Function*, 70 U. DET. MERCY L. REV. 37, 38 (1992) (11% of disputes evolve into lawsuits) (citing Edward O. Burnet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 6 (1987)); Priest and Klein, *supra* note 16, at 2 (very few potential claims ever reach courthouse).

111. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Alschuler, *supra* note 20, at 1808; Edwards, *supra* note 104, at 668.

112. Fiss, *supra* note 111, at 1082–85; Frank H. Easterbrook, *Justice and Control in Consent Judgements*, 1987 U. CHI. LEGAL F. 19, 30–41.

113. Easterbrook, *supra* note 112, at 30–31.

and fairer. The purpose of this section is to set forth why it is important to save some time for civil trials and to use that time as efficiently as possible even in an era devoted to promoting settlement and other alternatives to trial.

A. A Model of Just Settlement

1. The Basic Model of Settlement

John Gould, William Landes, and Richard Posner have developed a simple model to explain the circumstances under which a case should settle.[114] That model concludes that a case should settle if the plaintiff's minimum demand is less than the defendant's maximum offer. The plaintiff's minimum demand will be what the plaintiff believes he or she is likely to receive as a result of trial minus the net cost of trial over settlement. What the plaintiff is likely to receive at trial depends upon the probability of victory multiplied by the amount of the judgment if he or she wins. The net cost of trial over settlement is the difference between paying counsel to prepare and try the case and paying counsel a presumably smaller amount to document the settlement. If P_p is the plaintiff's assessment of the probability of victory, J is the amount of the judgment, C is the cost of trial, and S is the cost of settlement, then the plaintiff's minimum demand will be P_pJ (expected outcome of trial) - $(C - S)$ (net cost of trial over settlement). Only if the plaintiff receives that amount in the settlement has he done as well as he expects to do at trial.

The defendant's maximum offer depends upon similar considerations. Only if the defendant can pay less than what he expects to lose as a result of trial will it be rational for the defendant to settle. The defendant's expected loss from continuing to litigate is the expected judgment, or the probability the defendant assigns to a plaintiff victory (P_d) multiplied by the amount of the judgment (J) plus the net cost of going to trial. That net cost is the difference between the cost of paying counsel for litigating the case to conclusion (C) versus documenting the settlement (S). The defendant's maximum offer therefore is $P_dJ + (C - S)$.

Algebraically, the settlement range is represented as follows. The case will settle only if the plaintiff's minimum demand is less than the defendant's maximum offer, or only if:

$$P_pJ - (C - S) < P_dJ + (C - S).$$

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114. John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1972); Posner, *Legal Procedure*, *supra* note 16. For applications and tests of the model, see Priest, *supra* note 16; Patricia Munch Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345 (1983); W. Kip Visusi, *The Determinants of the Disposition of Product Liability Claims and Compensation for Bodily Injury*, 15 J. LEGAL STUD. 321 (1986); Donald Wittman, *The Price of Negligence Under Differing Liability Rules*, 29 J.L. & ECON. 151 (1986); Elizabeth Hoffman & Matthew L. Spitzer, *Experimental Law and Economics: An Introduction*, 85 COLUM. L. REV. 991 (1985). The successful tests of the theory should come as no surprise. The theory tracks closely what lawyers do in practice. "In coming to a negotiation strategy and evaluation of the worth of a case, many lawyers attempt to use a rough mathematical formula of sorts." ROGER S. HAYDOCK ET. AL., FUNDAMENTALS OF PRETRIAL LITIGATION at 655 (1992). For a recent contrarian view see Stephen McG. Bundy, *The Policy In Favor of Settlement In An Adversary System*, 44 HASTINGS L.J. 1, 50 (1992).

Equivalent formulations are:

$P_pJ - C + S < P_dJ + C - S$ and

$J(P_p - P_d) < 2(C - S)$.

This simple model assumes that the amount of the judgment, the cost of trial, and the cost of settlement are all known and the same for each side. Even if they are not equal, the model demonstrates what factors will determine whether a case will settle: J (the stakes), $(P_p - P_d)$ (the difference in the probabilities of victory as perceived by each party), C (the cost of trial), and S (the cost of settlement). Settlement is less likely the higher the stakes and the greater the difference in the parties' expectations (assuming each party is optimistic). Settlement becomes more likely as the cost of trial exceeds the cost of settlement by greater amounts.

In an ideal world, all cases settle. The goal of our procedural system is to produce "just, speedy, and inexpensive" resolutions of disputes.[115] The ideal procedural system thus would be one that immediately and costlessly creates the just result whenever a dispute arose.[116] How could that happen? If both parties know what the outcome of the trial will be, then the parties can agree to that result and split between them the savings from not having to try the case. The parties settle immediately, no suit will be filed, and all parties are better off. Something very much like this presumably happens with those disputes that settle before anyone files suit. To understand why there are lawsuits, and why trials are important, one must understand what it means for a settlement to be just.

2. The Just Settlement

That a case settles says nothing about the justice of the particular settlement reached. One must also be concerned with the quality of the result, with the extent to which the result is "just".[117] A just settlement is one based upon the parties' underlying rights and obligations.[118] A settlement which occurs simply because other means of dispute resolution are costly or their results are unpredictable is unjust.[119] Neither is a settlement "just" if it is coerced by a stronger adversary or extreme circumstances.[120] For an example of a just

115. FED. R. CIV. P. 1.

116. Easterbrook, *supra* note 112, at 19.

117. Resnick, *Failing Faith, supra* note 20, at 540; *see also* Alschuler, *supra* note 20, at 1820 ("Americans currently settle many of their disputes for the wrong reasons. Adjudication would provide a fairer way of resolving some of these disputes.").

118. Maurice Rosenberg, *The Federal Rules After Half a Century*, 36 ME. L. REV. 243, 245 (1984) ("[a] just determination under Rule 1 is one that responds to the merits of the case and strives to uphold the side that has the support of the facts and the law."). Those who advocate settlement of suits "stress the capacity of settlement to achieve results that conform more closely to those contemplated by the substantive law." Bundy, *supra* note 114, at 37.

119. Easterbrook, *supra* note 112, at 25 (where dispute resolution services are costly and their results are random, settlement would be rational but "we would deplore the fact that these settlements (like the legal system they mirrored) would not do much for those who had been wronged."). *See also* Alschuler, *supra* note 20, at 1825 (criticizing the "lawlessness" of our jury system because it produces too much variance in assessing damages).

120. Judge Kaufman states:

> Distributional inequities—the fact that some parties have ample resources available to finance lengthy litigation and others do not—mean the weaker party is frequently coerced into acquiescence. Any outcome that results from one party's

settlement, suppose that the facts of an accident are undeniable, and the rule of law clearly imposes liability on the potential defendant. Any settlement that departed significantly from full compensation would be unjust.[121] In the vast majority of other cases, however, there will be some inescapable uncertainty about how the facts and the law work to yield a result in each particular case no matter how well the system works.[122] For those cases, a just settlement is one that closely approximates the average verdict. Rather than risk an all-or-nothing verdict in the case, the parties rationally and justly could decide to settle on the basis of their assessments of what that average would be.[123]

Any system or policy that promotes settlement must be evaluated with this criterion in mind. Settlement for the sake of settlement may lead to "speedy" and "inexpensive" results. But the court system should give equal if not greater weight to the "just" determination of every action.[124]

B. The Causes of Negotiation Failure or Unjust Settlements

1. The Parties' Expectations

The foregoing model of settlement predicts that settlement is unlikely if each party is optimistic about its chances at trial. It confirms the common sense conclusion that a wide divergence in the parties' evaluation of the case will make a negotiated resolution difficult. At least in the early stages of a dispute, the parties' expectations tend to be overly optimistic.[125] A large part of the lawyer's role is to bring those expectations more in line with reality.[126]

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brute bargaining power is neither acceptable nor just. To the extent that excess delay produces settlements, it does so unfairly. Yet this happens with some regularity.

Kaufman, *supra* note 34, at 28.

121. "A party certain to win (at no cost to himself) at trial would not settle for less, but because everyone may want to get things out of the way a settlement may be advantageous even to the other party. Perfect justice produces perfect settlements." Easterbrook, *supra* note 112, at 26.

122. In his study of jury verdicts in Cook County, Illinois, George L. Priest found that even when the legal rules are clear there is a level of "permanent uncertainty" with respect to how that legal rule will be applied. Priest, *supra* note 16, at 201.

123. Easterbrook, *supra* note 112, at 22–24.

124. FED. R. CIV. P. 1.

125. Robert H. Mnookin & Lewis A. Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 975 (1979) ("The exact odds for any given outcome in court are unknown, and it has been suggested that litigants typically overestimate their chances of winning.").

126. A recent study of the American Bar Association made the point in this way: [O]ne way a lawyer should assist his client to evaluate options is:

> To the extent that the lawyer's experience in the present case or in prior cases provides him or her a basis for assessing the likelihood of particular legal or factual contingencies, advising the client of the lawyer's predictions and the precise bases for the predictions (consistent with maintaining the confidentiality of other clients)
>
> ...
>
> The determination of an appropriate settling point requires that a lawyer:
>
> (i) Evaluate the various alternatives to negotiation, by considering:
>
> (A) the range of possible consequences of each alternative, and the probable impact of each alternative in the client's situation and objectives;
>
> (B) The range of possible costs of each alternative, and the probability that such costs would be borne;

How do attorneys give realistic evaluations of the probable outcome of the case? That process requires information and expertise. The information is necessary to deal with three types of uncertainty. First, lawyers through investigation and discovery must learn what the evidence will be. Indeed, a primary benefit of wide-open discovery touted by its proponents was the opportunity it would create to enable the lawyers better to predict the result of trial and therefore make it easier to arrive at just settlements.[127] Second, counsel must know or learn, if possible, how the potential fact finder has reacted to similar evidence in the past. For example, lawyers handling police brutality cases would be quite eager to know how juries in the relevant community have handled such cases in the recent past and what type of evidence was presented. Many trial lawyers subscribe to jury verdict reporters in order to stay abreast of the reception that cases are receiving in their local courthouses.[128] Third, lawyers must know the state of the applicable law in order to predict the legal effect of the evidence they can produce. Precedent is crucial to prediction: bargaining goes on "in the shadow of the law."[129]

The stock of information that the lawyer either has or can discover is not enough. The lawyer must also have the experience and training necessary to turn that information into a useful prediction. Not every lawyer has this expertise. One commentator has written that "experienced trial lawyers routinely amaze new associates with the accuracy of their predictions."[130] Some studies, however, indicate that lawyers, and even judges, differ widely in their assessments of the value of hypothetical cases.[131] Without the ability to predict accurately from the stock of information available, lawyers are not helpful to their clients in determining acceptable settlement ranges.

The lawyers for each side perform these information gathering and evaluation functions. If both sides have access to the same information, and are equally able and willing to give their clients frank assessments of the probable outcome at trial, one would expect the probabilities assigned by each side to

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(C) The range of risks that each alternative entails.

American Bar Association Legal Education and Professional Development—An Educational Continuum 180–81, 185–86 (1992); *see also* Stephen McG. Bundy and Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 365–66 (1991) ("Professional knowledge will generally improve client decisionmaking. Parties with lawyers should be able to make better estimates of the likelihood that they will prevail, of probable remedies, and of expected costs.").

127. Brazil, *Adversary Character*, *supra* note 86, at 1302; *see also* Bundy & Elhauge, *supra* note 126, at 366. ("[L]egal advice should increase the discoverable or commonly available information that both parties identify. This should cause the parties' perceptions of the disputed facts (and expected trial outcomes) to converge."); HAYDOCK, ET AL., *supra* note 113, at 653 (settlement in a complex case is unlikely before significant discovery occurs).

128. Legal Newsletters in Print (1992) (listing 31 newsletters regarding jury verdicts in print).

129. Mnookin & Kornhauser, *supra* note 125, at 952–56; *see also* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 369–71 (1986) [hereinafter Posner, *Summary Jury Trial*]; William M. Landes & Richard A. Posner, *Adjudication As a Private Good*, 8 J. LEGAL STUD. 235, 236 (1979) ("A court system (public or private) produces two types of service. One is dispute resolution — determining whether a rule has been violated. The other is rule formulation — creating rules of law as a by-product of the dispute settlement process.").

130. HAYDOCK ET AL., *supra* note 114, at 656.

131. ROGER S. HAYDOCK, NEGOTIATION PRACTICE §§ 2, 3, at 24 (1984) (different predictions by lawyers of hypothetical case); Elliott, *supra* note 8, at 317 (different assessments of hypothetical case by judges).

converge. If they do, barring other problems, the case should settle on just terms. But the settlement process can and will break down if the stock of information or the expertise of the lawyers in evaluating that information is lacking.

How will the system break down? The less able the lawyers are to assess the probabilities of victory, the more random their predictions will become. The two sides will diverge significantly more often if they are distributed randomly than they will if both sides are able to predict outcomes with some reliability. One likely result is that there will be more litigation.[132] A second result is that the settlements that are reached may not be just. If expectations are truly random, it would be merely fortuitous if the parties' expectations not only happened to converge in a particular case but also converged on the average, truly expected but unknown, verdict.

2. The Costs of Settlement

If costs of settlement are high, then settlement becomes less likely. Algebraically, this is clear because the right side of the settlement inequality, $2(C - S)$, becomes smaller as the costs of settlement (S) rise. This is true because as settlement costs rise relative to the costs of continuing to litigate, the parties have less savings to share by settling. There simply is less incentive to buy peace when its price relative to war rises.

The costs of settlement depend upon a number of factors. For present purposes, the one that is crucial is the cost of ascertaining and evaluating the information necessary to predict the outcome of the case if it is not settled. Discovery is a tool for settlement as well as for trial preparation; it is also the most costly component of litigation.[133] Lawyers with trial experience and the consequent ability to predict outcomes more accurately can charge more. Jury verdict reporters are expensive. These components to the costs of settlement have the potential, if they are high enough, to prevent what otherwise would be an advantageous agreement between the parties. This result is nothing other than a specific example of the general principle that high transactions costs impede the resolution of disputes by agreement.[134]

3. The Costs of Continuing to Litigate

The remaining component of the settlement model is the cost of continuing to litigate instead of settling (C). As that cost rises, the right side of the inequality also rises and settlement becomes more likely. If the parties see that continuing to litigate will be so costly as to be self-destructive, they will have tremendous (albeit possibly differing) incentives to settle. A system that wished solely to promote settlement could simply make the cost of continuing to litigate infinite, and every case would settle.

The problem with such a system would not be the number of settlements, but their quality. As discussed earlier, a settlement is "just" only if it closely approximates the result, or at least the average or expected result, that trial

132. Priest, *supra* note 16 at 200 (1987) ("as the parties are able to make more accurate and therefore less divergent predictions of the outcome ... the number of litigated disputes decreases.").

133. Trubeck, *supra* note 16, at 91 (Table 3).

134. Ronald H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960).

would produce. If the cost of continuing to litigate *(C)* is infinite, then the case will settle no matter what the parties' predictions of the outcome are or how accurate they may be. The merits of the case simply become irrelevant when the costs of continuing to litigate are prohibitive. One study has confirmed that, where there is no realistic chance that a case will go to trial, settlements will follow but will bear no relationship to the underlying merits of the dispute.[135] This is why 92% of lawyers handling large cases admit that discovery decisions were guided in part by the desire to apply "economic pressure on another party."[136] When parties settle simply because continued litigation is prohibitively expensive, the quality of justice suffers.

The unjustness of settlement under these circumstances is not difficult to perceive. If the merits do not matter to the terms of the settlement, what will? The determining factors will be the bargaining power of the parties:

> High transaction costs of delay and direct expense are the enemies of justice; when these costs become high enough, people who have been injured or had their rights violated may despair of vindication, choosing instead to "lump it." To the extent that delay and expense produce settlements, they can do so unfairly: some plaintiffs are "being coerced by the cost of justice into accepting far less than their due, while some defendants are yielding to opportunistic litigants who unabashedly wield the expenses of litigation as weapons to extort undeserved settlements."[137]

Thus, the costs of continuing to litigate matter a great deal in the system's ability to promote just settlements.

The model of settlement exposes the factors that can impede settlement or make settlement unjust. How the decline in the number of civil trials, and in particular the substitution of alternative dispute resolution for trial, will affect the number and quality of settlement depends upon application of the insights provided by the foregoing model of settlement.

C. The Effect of the Dwindling Supply of Civil Trials on Just Settlements

1. The Formulation of Expectations

As discussed above, the lawyers for parties to a dispute formulate their predictions of the likely outcome at trial by applying their expertise to the stock of available information about the treatment of similar cases. The dwindling supply of civil trials impedes this process by reducing the amount of available information — the trial results from similar cases — and by steadily eroding

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135. Janet Cooper Alexander, *Do The Merits Matter? A Study of Settlements In Securities Class Actions*, 43 STAN. L. REV. 497 (1991). *See also* Elliott, *supra* note 8, at 326 (shortening the waiting time for trial may bring about more just settlements). Professor Alschuler has concluded that delay systematically disadvantages plaintiffs because it is defendants who benefit from the status quo. Alschuler, *supra* note 20, at 1823.

136. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 857.

137. Kaufman, *supra* note 34, at 5 (quoting Irving R. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 2 (1976)). Derek Bok made the same point over ten years ago. Derek Bok, *The President's Report*, 1981–82 (Harvard University 1983) ("[M]any ...who are in the system are often compelled by the high costs and delay to settle early for less than satisfactory amounts.").

the availability of counsel who are competent to predict what may happen at trial.

a. The Diminishing Stock of Trial Results

Less trial time means fewer trials, and fewer trials mean that parties evaluating their settlement positions have less information with which to work. Litigation is not static. New types of disputes emerge and litigants need information about how fact finders will handle them before the litigants will be in a position to make a rational settlement decision.[138] For example, in the litigation over liability for the Dalkon Shield, the Ninth Circuit recognized that settlement would be much easier after "a few verdicts."[139] In the standard economic model of settlement, this lack of information causes the parties' expectations to diverge and more cases to be tried until an "equilibrium" amount of information is available.[140]

That analysis is too optimistic, however. It presupposes an elastic instead of a dwindling supply of civil trial time. The amount of information generated by trials today may well be so small that the system is out of equilibrium. Federal courts are trying fewer cases today than they did twenty years ago when there were far fewer judges and far fewer civil cases. With civil trial time in such short supply, parties have no choice but to wait longer to try their case or to settle in the face of less-than-optimal uncertainty. Waiting longer does nothing to expand the number of trial results generated by the system. All it does is skew the results that do emerge toward those cases in which parties can afford to wait. Settling despite inadequate information simply increases the likelihood that the settlement will be unjust either because the predictions of outcome become random or because the party in the better bargaining position can dictate the terms of the settlement.[141]

Increasing the numbers of dispositions on the pleadings or by summary judgment, as some have advocated,[142] and as some courts have begun to do,[143] is an inadequate substitute. These dispositions provide precedent on legal aspects

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138. *See generally*, Priest, *supra* note 16, at 200–02.

139. *In Re* Northern Dist. of Cal., Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 856 (9th Cir. 1982), *cert. denied, sub. nom.*, A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).

140. Easterbrook, *supra* note 112, at 26; Posner, *Summary Jury Trial, supra* note 129, at 388.

141. Judge Posner has noted a similar inelasticity of supply at the appellate level. As a result of dramatic increases in the number of federal appeals, and the less than proportionate increase in the number of appellate judges, the appellate courts have curtailed oral argument and taken a number of other steps that, in Judge Posner's opinion, have reduced the quality of justice coming from the appellate courts. RICHARD A. POSNER, THE FEDERAL COURTS 129 (1985).

142. Richey, *Rule 16 Revisited, supra* note 76, at 536–37 (praising a proposed amendment to Rule 16 to add to the subjects to be discussed at pretrial conferences "the appropriateness and timing of summary adjudication under Rule 56").

143. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986) (pleadings decisions have become more popular even though they are useful only in a handful of cases). Summary judgment also has experienced a limited revival in recent years following the Supreme Court's statement that it "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). *See also* Richard L. Marcus, *Completing Equity's Conquest? Reflections On the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 739–49 (1989) [hereinafter Marcus, *Equity's Conquest*].

of the case such as what allegations state a claim upon which relief can be granted[144] and what the appropriate legal result is on undisputed facts.[145] They tell us nothing about how a fact-finder, particularly a jury, will react to particular types of cases where the evidence conflicts in a material way. Disposing of such cases on legal bases without fact finding would violate both the Federal Rules of Civil Procedure and the constitutional right to jury trial.[146] Because they assist us with only legal uncertainties, dismissals on the pleadings and summary judgments are not complete solutions.

The power of additional trials to produce valuable information should not be underestimated. In George Priest's study of jury trials in Cook County, Illinois, he predicted and then confirmed empirically that the close cases, the ones that are most difficult to predict and which thus have the most value for the next generation of potential litigants, are the ones that will go to trial.[147] This is a natural result of the economic model of settlement. For cases to go to trial, there must be a significant divergence in the predictions of counsel about the potential outcome. If the case is routine, it is unlikely that counsel will take such divergent views of the case.[148] Lawyers in such cases are bargaining in the long shadow of known law and very likely results. The lawyers' predictions about cases should only diverge when the case is not routine, which is precisely the situation in which a result will produce new, and therefore more valuable, information. Trials have an impact "vastly disproportionate to their number."[149]

The ironic effect on settlement from having too few trials is not merely an abstract academic result. Studies of Priest's data indicate that lawyers assimilated new information generated by trial of novel cases in less than a year.[150] When the legal standard changed and created uncertainty, more cases went to trial, but within a year those new results became the basis for prediction and settlement, and the number of trials needed on that issue declined. Today, without the ability to expand the number of trials to generate the necessary information, lawyers are desperately searching for private substitutes. One substitute is the use of mock juries to learn how jurors might respond to a new case.[151] This technique, of course, is costly and unreliable because of the small sample size.[152] Another indicator of the trial lawyers' desperate search for information about what a jury might do with their cases is the proliferation of jury verdict reporters. The number of such publications jumped from eighteen in 1987 to thirty-one in 1992.[153] This information does not come cheap. For

144. FED. R. CIV. P. 12(b)(6).
145. FED. R. CIV. P. 56.
146. U.S. Const. Amend. VII. *See also* Marcus, *Equity's Conquest*, *supra* note 143, at 727.
147. Priest, *supra* note 16, at 199.
148. Mnookin & Kornhauser, *supra* note 125, at 997 (noting the small percentage of auto accident cases that are tried).
149. Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT 61 (Robert E. Litan ed. 1993).
150. Robert Cooter, *Why Litigants Disagree: A Comment on George Priest's "Measuring Legal Change,"* 3 J.L. ECON. & ORG. 227, 232 (1987).
151. Posner, *Summary Jury Trial*, *supra* note 129, at 372.
152. *Id.*
153. *Legal Newsletters in Print, 1987–1992.* The number of such reports between 1987 and 1992 was 18 (1987), 20 (1988), 20 (1989), 28 (1991), and 31 (1992). *Id.* It is interesting

example, a subscription to the Florida Jury Verdict Reporter will tell a lawyer what Florida juries are doing at a cost of $225 per year.[154] Lawyers need and use this information. The system simply is not generating enough of it.

b. The Disappearance of the Trial Lawyer

Less trial time means not only that fewer cases will be tried, but also that fewer lawyers will have trial experience. As the number of trials has decreased, the number of lawyers involved in litigation has increased dramatically.[155] Thousands of American lawyers practice nothing but litigation, yet have little or no trial experience. The era of the "litigator" is here, while the day of the "trial lawyer" is passing.[156]

The significance of this trend is that, just as counsel are required to predict the outcome of suits using less information, they are less equipped to do so. An entire generation of litigators has insufficient trial experience upon which to draw in evaluating a case, and consequently are not able to train new litigators in any skills other than discovery.[157] Any predictions these lawyers make about what a jury will do with a particular case become more and more divorced from reality and therefore more and more random. Consequently, cases settle, if at all, on terms that are unjust because they are not based in any reliable way on the underlying probabilities of result at trial.

Lawyers have responded to their lack of experience and their inability to get any by trying to find substitutes. For example, one popular way to learn how to evaluate cases and settle lawsuits is to attend seminars on the subject. One well-known program purports to give lawyers "a comprehensive understanding of the risks of a lawsuit — expressed in the business language of probabilities and potential outcomes" in order to prevent "plaintiffs settling for too little, defendants for too much, or good settlements being missed."[158] According to the promoter, this program alone has reached over 6300 lawyers, at the steep price of $695 for a one-day session or $995 for the two-day session.[159] The popularity and expense of such programs are true signs of the times because lawyers must have these skills and can get them nowhere else. In this way, as well as by reducing the amount of available information about trial results, the dearth of trials has made just settlement of suits less likely.

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to note how the number jumped in the first year after passage of the Civil Justice Reform Act, with its emphasis on alternative dispute resolution. *See* 28 U.S.C. § 473 (1992).

154. Florida Jury Verdict Reporter promotional brochure (on file with the author).

155. By one recent estimate, the size of the "litigation bar" had doubled since 1970. Bundy, *supra* note 114, at 32.

156. *Id.*; HAYDOCK ET AL., *supra* note 114, at 651; Resnick, *Failing Faith, supra* note 20, at 522 ("With the new procedural opportunities came a new set of lawyers, 'litigators', who did their work (motions, deposition, and interrogatory practice) during the pretrial process and who were to be distinguished from 'trial lawyers', who actually conducted trials.").

157. Brazil, *Views From the Front Lines, supra* note 85, at 239 ("[B]ig case litigators who devote huge percentages of their professional time to discovery develop great expertise in discovery techniques but lose or never develop skills as trial counsel. When such attorneys become responsible for training younger litigators, the only expertise they can teach is in methods of discovery.").

158. Marc B. Victor, *Litigation Risk Analysis, Evaluating, Managing, and Communicating the Risks and Uncertainties of Litigation* (promotional brochure on file with the author).

159. *Id.*

2. The High Cost of Continuing to Litigate

As discussed above, the high cost of continuing to litigate is an important factor in producing settlements that have little, if anything, to do with the merits of the underlying dispute.[160] The dwindling amount of time devoted to trials has driven up one cost of continuing to litigate: the cost of waiting. Reformers in recent years have recognized the importance of this fact by repeatedly calling for judges to set early trial dates.[161] If the judges were able to do so, the costs of continuing to litigate would decline in at least two significant ways. First, the parties would have less time to conduct discovery and therefore might do less of it.[162] Second, the cost of waiting for disposition would go down and trial would become a legitimate threat. Early trial dates have the superficially perverse effect of appearing to make settlement less likely, as the cost of continuing to litigate relative to settlement *(C - S)* falls. An early trial date will have that effect,[163] although it will be partially offset by the galvanizing effect a trial date has on lawyers who can and should settle a case but put it off until they reach the courthouse steps.[164] More importantly, the reintroduction of the spectre of trial makes the potential outcome of trial relevant to the negotiations again, and thus the negotiations are more likely to produce a just result.[165]

The problem is that the trial date can neither galvanize parties nor make them consider the merits of the case seriously if it is not believable. That is why all the reforms call for judges to establish early, *firm* trial dates.[166] Judges cannot establish and stick to early firm trial dates for their civil dockets unless something is done either to expand the amount of time devoted to the civil docket or a way is found to use that time more efficiently to try more cases. One technique being tried is to assign "short" cases to a special calendar and permit any judge with available time to try that case when its date comes.[167] The results are not in, however, and the applications of that technique are limited. The lack of adequate time to try civil cases thus makes settlement more likely, but considerably less just, because it makes trial an uncertain, distant prospect.

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160. Alexander, *supra* note 135, at 524.

161. *E.g., Agenda for Civil Justice Reform, A Report From the President's Council on Competitiveness* 7, 19 (Aug. 1991). The American Bar Association supports this proposal "commensurate with other case management techniques and realistic availability of judges." LIT. NEWS at 6 (Dec. 1991); *see also Justice For All, supra* note 82, at 17.

162. Brazil, *Adversary Character, supra* note 86, at 1311 n.78 (discovery consumes a significant percentage of litigation resources and that percentage increases in direct proportion to the size and complexity of the case). Robert F. Peckham, *A Judicial Response To the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 258 (1985) (early trial date forces parties to establish priorities).

163. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 533 (1989).

164. James L. McCrystal & Ann B. Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 U. TOL. L. REV. 239, 246 (1980) (describing how the use of videotape evidence makes an early trial date possible and trial scheduling easier, with the result that "the videotape docket merely accelerates the time when those cases susceptible of settlement will be terminated").

165. Alexander, *supra* note 135, at 524.

166. *E.g.*, JUSTICE FOR ALL, *supra* note 82, at 17.

167. United States District Court for the Northern District of Illinois, Local Rule 2.30(J).

3. The Cost of Settlement

As discussed in Part II, a third consequence of the dwindling supply of civil trial time has been the many efforts to encourage settlement and to replace the adjudication that the system cannot provide with alternative means to resolve disputes by agreement. It is important to recognize how the various mechanisms of alternative dispute resolution (ADR) encourage settlement. Each is a way of transmitting or creating for parties and lawyers the information they need to assess the likely outcome of the case and formulate bids and offers as the model of settlement predicts. Early, neutral evaluation enables an experienced, respected trial lawyer to hear about and evaluate the case early on in order to give the parties a more realistic view of their chances.[168] Court-annexed arbitration provides the parties with an actual, though nonbinding, award that a panel makes after hearing evidence.[169] Summary jury trial gives the parties a subsidized mock jury to use as their "crystal ball" to see how the real jury in their future will handle the case if they do not settle.[170] Mediation permits the parties to hear the views of a disinterested third-party who provides a frank evaluation of the parties' dispute.[171] All of these techniques lower the cost of settlement *(S)* by assisting the parties in formulating the expectations necessary to decide whether and at what price to settle. They make settlement more likely for each individual case by lowering the cost of settlement relative to the cost of continuing to litigate *(C - S)*. They ameliorate, to some extent, the effects of the small number of trials that occur and the inexperience of counsel. In this sense, ADR is not a cure but a symptom of a system that is not generating enough information or expertise to enable parties to settle on their own.

The problem is that settlement is not a perfect substitute for trial. Take, for example, a case that is sufficiently novel that previous verdicts and judgments do not provide much information about how it will come out.

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168. *N.D. Ill. Preliminary Report*, *supra* note 38 at 73 ("The evaluator attempts to give the parties a realistic appraisal of their respective positions and either helps develop a rational case management plan or assists the parties in settlement."); *see also* Kaufman, *supra* note 34, at 12–13 (describing early neutral evaluation as "a pre-trial evaluation by an experienced neutral attorney who assesses the case and discusses it with all parties and counsel." The evaluator "frankly assures the strength and weaknesses of arguments and evidence, and offers a non-binding evaluation of the case" in order to give counsel "a more realistic assessment of a case's merit" and to deflate "rosy expectations.").

169. Court-annexed arbitration is the "involuntary assignment of eligible cases to a hearing by experienced local attorneys who serve as arbitrators" and who make an "award" which becomes final unless one of the parties requests trial *de novo* within a stated time period. Kaufman, *supra* note 34, at 17–18. "The hearing provides an ideal opportunity to assess the strengths and pitfalls of the suit. If the process is perceived as fair and the award regarded as a reasonable estimate of a likely trial verdict, many parties — even those dissatisfied on the merits — will accept the outcome." *Id.* at 20. *See also* Alschuler, *supra* note 20, at 1839.

170. Judge Thomas D. Lambros, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 468 (1984). *See also* Posner, *Summary Jury Trial*, *supra* note 129, at 369 ("The idea behind the summary jury trial is to facilitate settlement by giving parties and counsel a sense of how a jury is likely to evaluate their case.").

171. One example, although it comes from an appellate court, is the Civil Appeals Management Plan (CAMP) of the United States Court of Appeals for the Second Circuit, in which a staff attorney mediates cases before they are set for briefing and argument and in which the mediator is permitted to give "a frank assessment of the merits." Kaufman, *supra* note 34, at 11.

Without any further information, the parties may be so uncertain about how the trial will come out that their predictions of the outcome diverge significantly. That case would go to trial if trial time were available. Suppose instead that it is sent to a summary jury trial. Although the summary jury is only one jury and thus may not perfectly predict what a real jury would do, perhaps it would give the parties enough information to settle. The statistics indicate that this is a likely result.[172] Suppose further that the cost of the summary jury trial was $10,000, and an actual trial would have cost $100,000. It appears that ADR has provided a quick, cheap substitute for trial.

That is an illusion, for two reasons. The case may merely be the first of its kind. Suppose there are twenty similar disputes that have not yet been filed. Alternative dispute resolution could take care of them too, albeit at a cost of $200,000 (20 cases x $10,000 cost of summary jury trial). These potential litigants could not use the results of the first case to guide settlement of their case because settlements are not public information. The negotiated settlements that follow summary jury trial do not appear in the jury verdict reporters. If the first case had gone to trial, however, it is possible that the verdict, which would have been public, would have guided the subsequent cases to settlement (by giving counsel a basis for more convergent reductions about outcome) at a cost considerably below the cost of summary jury trials. One trial can obviate the need for many lawsuits. One ADR proceeding settles one case.[173]

Furthermore, there is little reason to believe that the negotiated results of ADR proceedings are just. Some surveys have indicated a high degree of participant satisfaction.[174] However, if ADR is being used as a *substitute* for a trial that realistically can occur, if at all, only in the very distant future, then the parties may learn more about the probabilities associated with their particular case, but those probabilities are irrelevant to the terms of settlement.[175] As demonstrated, a very high cost of continuing to litigate *(C)* makes the underlying merits of the suit, and the aided or unaided prediction of the parties, irrelevant. Settlement will occur if the prospect of trial is so dim that the cost of waiting is very high.[176] In this scenario, ADR is not merely inefficient, as it was in the previous example; it is an irrelevant waste of time. Other factors, particularly the relative bargaining strength of the parties, will determine the term of the settlement.[177] Such a settlement is by definition unjust.

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172. Judge Lambros reported that of 149 cases he sent for the summary jury trial, one went to trial. Lambros, *supra* note 170, at 472.

173. Judge Kaufman recognizes this concern but discounts it except in cases where there is a "need to ensure that the adjudication of important public rights and duties remains public." Kaufman, *supra* note 34, at 30. The need for guidance from courts and juries for resolving private duties is no less important, however, and George Priest's research indicates that cases the parties voluntarily submit to trial will tend to be those with the greatest value in this regard. Priest, *supra* note 16, at 199.

174. Kaufman, *supra* note 34, at 22.

175. There is also some thought that ADR is less than perfect even in the individual case in giving parties a true picture of their prospects. Easterbrook, *supra* note 112, at 24–25 (citing Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 432–35, 438–39 (1986)).

176. The results of one survey indicate that settlement will not happen quickly even under these circumstances. Brazil, *Views From The Front Lines*, *supra* note 85, at 229.

177. This may explain why potential repeat defendants, who may have more bargaining power, support ADR's more private results. Resnick, *Failing Faith*, *supra* note 20, at 538.

Finally, ADR as a substitute for trial is shortsighted. It may be that for a time experienced trial lawyers can, as arbitrators or mediators, draw on their experience and the accumulated stock of trial results and help parties come to a just settlement. They can in some cases help litigators with little trial experience realistically evaluate their cases.[178] But when these experienced trial lawyers pass from the scene, who will be left to give any prediction about what might happen in the unlikely event of a trial? There may be no one left with personal experience upon which to draw. Furthermore, the stock of information available today about trial results will erode over time as different disputes arise and community attitudes change. Alternative dispute resolution in the future, without some attempt to preserve adequate time for trials, will be the blind leading the blind concerning the unimaginable.

Alternative dispute resolution thus is not a substitute for adjudication. It can assist the parties with breakdowns in negotiation that arise for other reasons,[179] but it cannot provide the information or the impetus that trials, and the looming prospect of trials, provide. There is no substitute. It is unlikely that the amount of civil trial time will expand in the near future; however, there may be room for more efficiency in the way that time is used. The next section explores this possibility.

IV. THE THEORETICAL POTENTIAL FOR TIME LIMITS

Time limits are a way to try to use the limited amount of civil trial time more efficiently. To encourage their use presupposes that some trial time is wasted and therefore trials should be shorter. The anecdotal evidence for this proposition is legion. One federal judge has written that "[p]ost-trial interviews with jurors invariably disclose complaints about the lawyers' prolixity and tendency to present too much evidence."[180] Another judge has devoted an entire article to tips for his fellow judges, such as rigid adherence to a daily schedule, on how to shorten jury trials.[181] This section discusses why trials will tend inherently to last too long and why, at least theoretically, time limits are superior to other means of seeing that trials last no longer than they should.[182]

178. Peckham, *Judicial Response, supra* note 70, at 276 (early neutral evaluation intended to "serve as a 'reality check' for naive clients or inexperienced litigators and as a catalyst and starting point for meaningful early settlement talks") (quoting W. BRAZIL ET AL., THE EARLY NEUTRAL EVALUATION PROGRAM: BASIC ELEMENTS AND RATIONALE 2 (unpublished tentative draft)).

179. One such problem is the reluctance to be the first one to mention settlement and be perceived as weak. Edwards, *supra* note 104, at 670 ("[T]oo many lawyers view the suggestion of compromise as an admission of weakness and therefore delay the initiation of negotiations with the hope that the onus of suggesting settlement will fall on opposing counsel."). Alternative dispute resolution solves this problem by having the suggestion of compromise come from the arbitrator, mediator, or judge. An order that the parties confer for settlement, however, accomplishes the same result. ADR can do some good with another problem, which is the posturing and other "strategic" behavior by lawyers attempting to gain an advantage in negotiations. WAYNE D. BRAZIL, SETTLING CIVIL SUITS 44 (1985).

180. William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 578 (1990) [hereinafter Schwarzer, *Reforming Jury Trials*].

181. Gus J. Solomon, *Techniques for Shortening Trials*, 65 F.R.D. 485 (1974).

182. Roger W. Kirst posed the question as follows: "What is the marginal value to society of each individual hour of trial? We don't have a clear standard for how long a jury trial needs to be, but a trial that is interesting from beginning to end is a rarity." Kirst, *supra* note 17, at 337.

A. What Does it Mean for a Trial to Last Too Long?

A trial has lasted long enough when additional evidence is not worth the cost of hearing it. Evidence has worth precisely to the extent that it helps the fact finder avoid error,[183] or in the terms of the Federal Rules of Evidence, to the extent that it makes a relevant disputed fact more likely to be true or not true.[184] Yet there are costs associated with every extra minute of trial, including the cost of running the court, the cost to the parties of their trial counsel, and the cost to others who are waiting their turn. A trial has lasted long enough when the marginal value of the remaining evidence is less than the marginal cost of its submission.[185]

Not all evidence has the same probative value. Some facts are extremely helpful to the fact finder, such as reasons for bias in a witness.[186] Other proof has some, but lesser, value, such as character evidence. It might have some tendency to buttress or impeach the witnesses' testimony, but its contribution is small.[187] In the extreme, evidence has no persuasive force at all and thus it has zero value for the fact finder. Indeed, the presentation of such irrelevant evidence might confuse the fact finder and thus make error more likely. In such a case the marginal value of the evidence is negative.

Some costs of hearing evidence are obvious. The public cost of running a federal court has been estimated to be $890 per hour.[188] Estimates of the yearly cost of one federal district judgeship, most recently pegged at one million dollars per year,[189] confirm that "[t]he judge's time is the most expensive

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183. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.1, (4th ed. 1992) (hereinafter POSNER, ECONOMIC ANALYSIS OF LAW).

184. FED. R. EVID. 401.

185. Both the Federal Rules of Civil Procedure and the Federal Rules of Evidence already embody the concept of balancing marginal costs and benefits. Under FED. R. CIV. P. 26(b)(1), the court may limit discovery if the amount or frequency of discovery sought is inappropriate according to the needs of the case. Under FED. R. EVID. 403, the Court may exclude relevant evidence where its probative value is outweighed by other factors, including "waste of time or undue delay." Judge Schwarzer has employed a similar analysis in discussing discovery reform. One of his proposals would have severely limited discovery and resulted in what he termed "occasional" failure of essential information to come to light. He responded with economic analysis: "[b]ut the question must be asked, whether the marginal value of preventing such occasional failures is worth the great cost of unrestrained discovery." William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 182 (Dec.-Jan. 1991).

186. One study of jurors' evaluation of evidence found that jurors treated such evidence as highly significant. JURY COMPREHENSION REPORT, *supra* note 5, at 14–15. In an antitrust case in which several former employees of a party testified against the party, the researchers found that "testimony from witnesses who had been fired was given little weight on the assumption that they probably held some animosity toward their former employer." *Id.* In another case studied by the same group, "[j]urors discounted the testimony of some former employees, such as a lieutenant 'because it was very evident from the beginning that he had a grudge with the department, so, that took him completely out of the running.'" *Id.* at 11.

187. *See* McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924, 928–29 (7th Cir. 1984) (character evidence not admissible because of its slight probative value).

188. Seneca Resources Corp. v. Moody (*In re* Moody), 135 B.R. 260, 261 (S.D. Tex. 1991).

189. Schmitt, *supra* note 35, at B12. A previous study, now more than ten years old, estimated that the annual costs of supporting a federal judge and his or her staff were $752,000. J. KAKALIK AND A. ROBYN, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES 64 (1982).

resource in the courthouse."[190] The parties of course have the cost of counsel, which at least for hourly-rate lawyers is a positive marginal cost. A less obvious, but important, cost is the wait that other litigants must endure for every hour taken by a case ahead of them.[191]

The marginal value and cost of evidence is depicted in Figure 1. If one arranges the probative evidence in order from the most probative down to that which has zero, and eventually negative, probative value,[192] and if one assumes that the marginal costs of hearing more evidence are constant (so much per hour for the judge, the lawyers, the court reporter, etc.), then the optimum amount of evidence to be heard is at point A.[193] Any amount of evidence beyond A is not worth hearing because its marginal cost is greater than its marginal benefit. Any amount less than A is not enough because some evidence that has more value than cost is not heard. Note that to the right of point A some evidence has probative value but should not be permitted. This depiction is nothing more than a confirmation of "the reality that we cannot afford to decide every case based on the fullest possible information"[194] and that some relevant evidence is a waste of time.[195] It exposes the fallacy of the Eighth Circuit's conclusion that "it may be an abuse of the trial court's discretion to exclude probative, non-cumulative evidence simply because its introduction will cause delay."[196] Evidence just beyond point A is probative and non-cumulative but should be excluded.

190. Resnick, *Managerial Judges*, *supra* note 6, at 423. Federal judges have written in a similar vein that "[c]ourt time is a valuable and limited resource;" Pierre N. Leval, *From the Bench: Westmoreland v. CBS*, 12 LITIG. 7, 8 (Fall 1985), and that it is "a public commodity which should not be squandered." United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. Ky. 1986) (quoting D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 128 (1985)).

191. Posner, *Summary Jury Trials*, *supra* note 129, at 392 (advocating that parties should "bear a larger fraction of the total costs of trial, including the queuing costs that trials impose on other parties").

192. This arrangement is convenient for present purposes but is artificial. It is not how the evidence would be presented at trial. For a discussion of how the order of presentation of evidence affects the analysis, *see infra* part IV(C).

193. For very long trials, marginal costs could be rising. For example, if more cases are filed than are disposed of during such a trial, the "bottleneck" created by the wait causes the total costs of waiting for trial to rise, even if it is constant for each litigant. The assumption that marginal costs are constant is made because it is simpler and yields the same result as would an assumption of rising marginal costs.

194. Elliott, *supra* note 8, at 321.

195. FED. R. EVID. 403.

196. Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987).

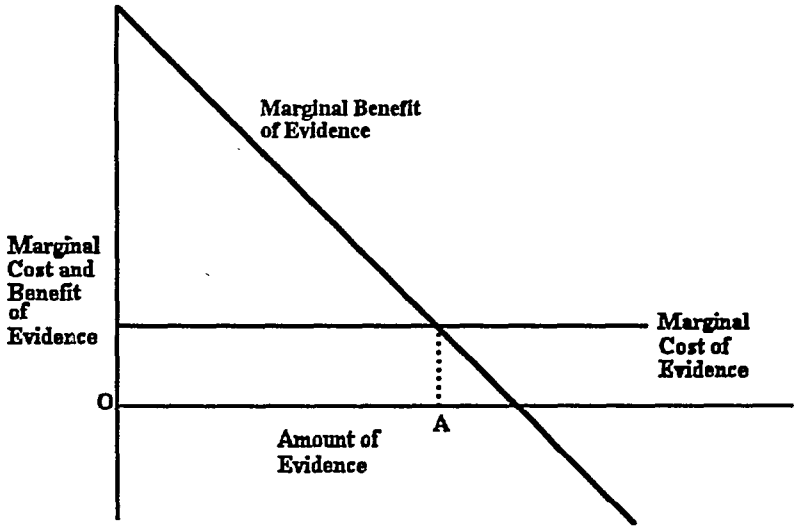

FIGURE 1

B. Why Trials Will Inherently Last Too Long

Without court intervention, trials have an inherent tendency to last past point A. The reason is that litigants and their attorneys do not make decisions about the amount of evidence to offer with the true marginal cost and benefits in mind.

1. Private Costs v. Public Costs

Not all costs of using additional trial time are borne by the litigants, the users of that time. Because they do not pay the costs of operating the courts, litigants who make their private calculation of how much trial time they will use without the true cost in mind will use too much.[197] Litigants also obviously do not pay the queuing costs of those who wait their turn for trial.[198] This problem is no secret to the judiciary. In *United States v. Reaves*, the court noted that he could not "rely on the attorneys to keep expenditures of time in trying a case within reasonable bounds" because "[t]he perspectives of the court and the attorneys in trying a case differ markedly."[199] In *SCM Corp. v. Xerox Corp.*, the court became impatient with the slow progress of a private antitrust plaintiff attempting to recover treble damages:

> While that is an entirely legitimate objective it is entitled to pursue under the antitrust law, the essentially private nature of reaching that objective must be weighed by a court in determining to what extent the public

197. Trubeck et al., *supra* note 16, at 79.
198. Posner, *Summary Jury Trial*, *supra* note 129, at 392.
199. United States v. Reaves, 636 F. Supp. 1575, 1578 (E.D. Ky. 1986).

> functions of a public tribunal should be diverted by continued litigation of this case.[200]

In both cases, the court imposed time limits because of the divergence between the parties' perceptions of the costs of trial and the true, public cost.[201]

Figure 2 shows schematically the effect of the litigant's failure to take into account the true cost of their efforts. At all points, the litigant's perceived marginal cost — perhaps measured solely by their attorneys' fees and their valuation of their own time — is less than the true marginal cost. As a result, the litigants will use the larger amount of evidence represented by point B rather than the optimal amount of point A. Because Congress thus far has been unwilling to impose "user fees" on litigants that cover the true costs of running the courts,[202] and because the parties who are waiting their turn to go to trial cannot be expected to negotiate with those at the head of the line to reallocate trial time,[203] too much evidence is introduced. The judges' attempts in *United States v. Reaves* and *SCM Corp. v. Xerox Corp.* to shorten the trial were attempts to eliminate the evidence between points B and A and thus at least come closer to the optimum amount of evidence.

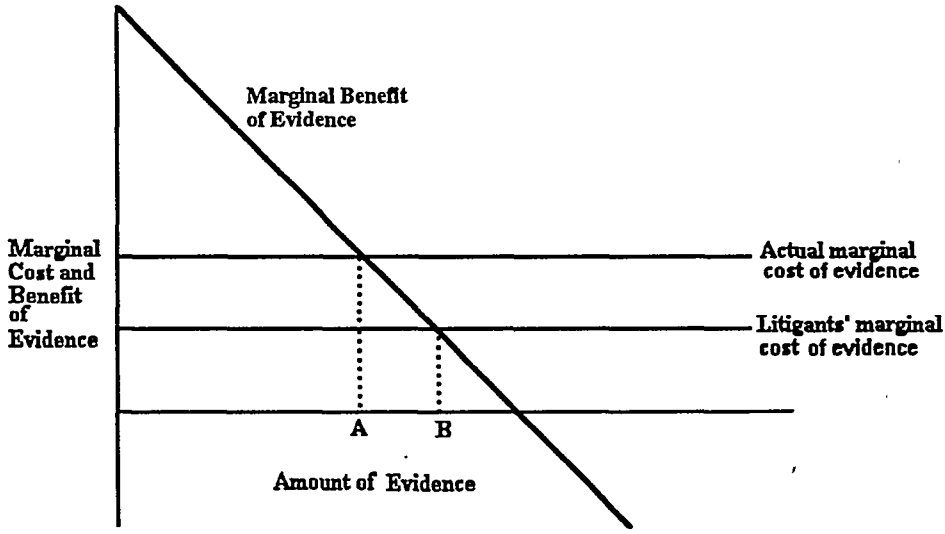

FIGURE 2

200. SCM Corp. v. Xerox Corp. 77 F.R.D. 10, 14 (D. Conn. 1977).
201. *Id.* at 15; *Reaves*, 636 F. Supp. at 1579.
202. *See* Posner, *The Federal Courts, supra* note 141, at 94–95.
203. *See* POSNER, ECONOMIC ANALYSIS OF LAW, *supra* note 183, at § 3.8 (using example of a factory that pollutes excessively because it does not bear the entire cost of the pollution and transactions costs are high). In the use of trial time or in the pollution example, we could reach the optimal result if the parties could negotiate costlessly, but in both cases the transaction costs are likely to be high because of the large number of people involved. *See* Coase, *supra* note 134.

2. The Trial Lawyers' Incentives

Lawyers, not litigants, decide how much evidence to introduce.[204] Indeed, one study concluded that not only are lawyers the principal decision makers with respect to how much time will be spent on a case, but also that active client participation has "no effect whatsoever" on the number of hours invested in a case.[205] Trial lawyers have incentives and tendencies apart from those of their clients that cause trials to last too long.

a. Underestimate of Actual Cost

Just as the litigants fail to take account of all the costs of using trial time, trial counsel are less sensitive to certain costs than they should be. One such cost is the lawyer's own fee. In the extreme, the mercenary lawyer may view a higher fee as a benefit rather than a cost of additional trial time. Lawyers simply tend to spend too much time and too much of their client's money in handling a case.[206] Some lawyers may "work the file" to justify additional fees when such additional work is unnecessary or not worth the cost.[207] Such work usually occurs in discovery rather than trial,[208] but even in trial, lawyers may not be as sensitive to the "cost" of their own fee as they would be if they were paying it rather than receiving it. Most clients are not sophisticated enough to judge how much time should be spent. If the temptation to work the file overcomes him, the lawyer in control of the amount of evidence will perceive costs to be lower than they actual are, and trials will last too long.

Another cost that lawyers may not fully consider is the non-monetary cost that each day of trial exacts from their client. Lawyers who make at least part of their living in trial become insensitive to the stress the experience causes for their clients.[209] These non-monetary costs of litigation are real and should be taken into account by trial counsel.[210] If these costs are ignored, then once again the costs as perceived by counsel will at all points be lower than the total costs, and trial will last too long, to a point like point B in Figure 2.

b. Overestimate of Value of Additional Evidence

If the trial lawyer overestimates the value of additional evidence, then the trial will also last too long. Figure 3 shows a perceived value of evidence that is

204. *E.g.*, Zurich Accident & Liability Ins. Co. v. Kinsler, 81 P.2d 913, 917 (Cal. 1938) ("[I]t is well established law that the attorney has complete charge and supervision of the procedure that is to be adopted and pursued in the trial of the action.").

205. Trubeck et al., *supra* note 16, at 94, 105.

206. Elliott, *supra* note 8, at 330. *See also* Trubeck et al., *supra* note 16, at 78 ("[L]itigation investments that may be highly lucrative for lawyers may not be optimal for clients, and vice versa.") (citing Earl Johnson, Jr., *Lawyer's Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 575–76 (1980–81)). For another example of the divergence in lawyer and client incentives, see Evans v. Jeff D., 475 U.S. 717 (1986).

207. D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986).

208. Elliott, *supra* note 8, at 330; *see also* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985) (In the pretrial process, lawyers will "leave no stone unturned, provided, of course, they can charge by the stone.").

209. For a general discussion of lawyers' unfortunate tendency not to take into account the human toll of litigation, see Peter D. Baird, *Bedside Manners and Desktop Distractions*, 13 LITIG. 33 (Winter 1987).

210. Trubeck et al., *supra* note 16, at 78.

higher than the true value at all points. Trial counsel will offer all the evidence left of point C, with the result that the evidence between A and C will be offered when it is not worth the time and trouble it takes to offer it. Lawyers will tend to overvalue evidence because they are risk averse and because they do not have sufficient trial experience to know how to value it.

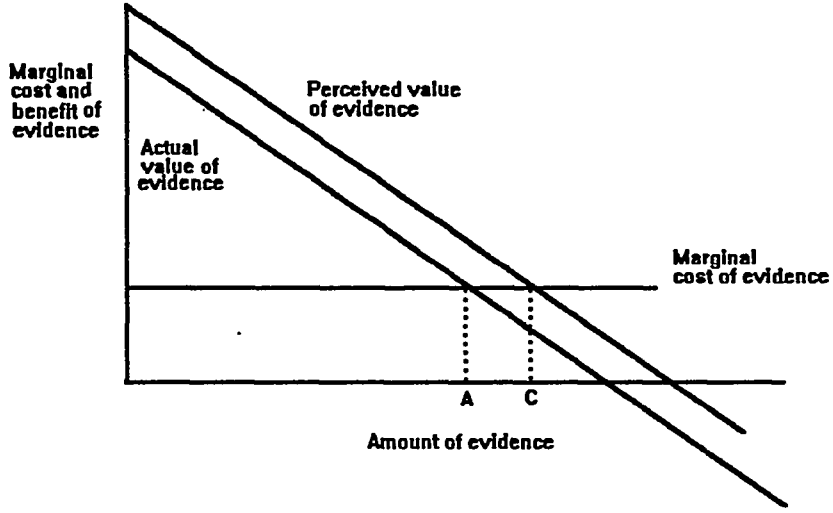

FIGURE 3

The federal judges who regularly observe this syndrome can describe it best. Judge William Schwarzer has lamented that "lawyers, if permitted, will try every issue, present every witness and offer every exhibit that might possibly persuade a jury to return a verdict in their favor."[211] Judge Patrick Higginbotham's response to the same observation has been to urge trial lawyers to avoid it:

> Shoot with rifles, not with shotguns. While lawyers must work hard to prepare their cases as thoroughly as possible, they must not offer into evidence everything they have learned about the case. The point of learning all you can about a case is to sort out those matters that are important. Insistence upon dealing with minutiae loses many a lawsuit.[212]

Judge Anne C. Conway of the Middle District of Florida noticed immediately upon taking the bench that in trial even experienced lawyers have trouble leaving out less important evidence and that "[o]verkill seems to be the order of procedure."[213] Jurors in an ABA study of jury comprehension also complained repeatedly and even bitterly that lawyers spent too much time and

211. Schwarzer, *Reforming Jury Trials*, *supra* note 180, at 577.
212. Patrick E. Higginbotham, *How to Try a Jury Case: A Judge's View*, *reprinted in The Litigation Manual*, at 131 (1983).
213. Conway, *supra* note 34, at 50.

included too much evidence in their attempts to prove their cases.[214] Whatever trial lawyers think about their selection of evidence, their audience believes that they value it too highly.

There are several potential explanations for this tendency. One is that lawyers are risk averse; they are simply afraid to leave anything out because of the possibilty that the last piece of evidence may tip the scales in their favor.[215] Trial lawyers apparently are more willing to risk losing because they confuse or bore the jury than they are willing to risk losing because they left out the piece of evidence that they think would have made the difference. They lack the courage or self-confidence to make the hard decision to pare down the evidence.[216] Some of this fear may stem from the spectre of malpractice liability,[217] although tactical decisions made at trial generally cannot suffice to state a malpractice claim.[218] One judge ascribes the tendency to an allegedly common experience of every young trial lawyer, the loss of a case because of the omission of a crucial piece of evidence.[219]

The risk aversion also may arise from most litigators' lack of trial experience.[220] The litigator who suddenly finds himself or herself in the maelstrom of trial has no experience and little training from which to draw the courage to omit less persuasive evidence. If one does not know which theory, testimony, or exhibit is most likely to carry the day, then one loads up the shotgun, shoots everything one has, and hopes something finds its target. The

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214. JURY COMPREHENSION REPORT, *supra* note 5, at 25–33. One of the jurors who served on one of the trials studied by the ABA Special Committee left a poem in the jury room that expressed his or her feelings about the volume of evidence:

> Oh, give me a break, just a ten minute break
> When I don't have to sit and listen to this shit,
> Oh, give me a chance to get up and dance,
> For it's such a bore, I long for the door.

Id. at 24.

215. Kirst, *supra* note 17, at 338.

216. Frederick B. Lacey, *Proposed Techniques for Streamlining Trial of Complex Antitrust Cases: Pro and Con*, 48 ANTITRUST L.J. 487, 494 (Spring 1980). Judge Lacey expressed the point in forceful terms with respect to antitrust trials which tend to be long and complicated:

> Every trial lawyer must have courage and self-confidence: this is especially true of the antitrust trial lawyer. Too much evidence is placed in the record in the typical antitrust case. Too often, trial counsel seemingly take the view that it is too risky not to offer all available evidence. "Better to put it in than leave it out," goes the trial philosophy. I urge you to be more willing to make the hard decision: do I *really* need this testimony or this exhibit? Is it, on a necessity scale of one to ten, at seven or above, or is it six or below where, while of some interest to the fact finder, it is not of critical importance? This would be my starting point in dealing with trial residuals. Have the courage and self-confidence to eliminate all but the essentials of your proofs.

Id.

217. Some excessive discovery occurs because of such fears, and therefore it is at least possible that the use of excessive evidence at trial arises for the same reasons. *See* Brazil, *Views from the Front Lines*, *supra* note 85, at 244 (over-discovery stems in part from fear of malpractice claims). For a foreign perspective on this problem, *see* Rondel v. Worsley, 3 ALL E.R. 993, 999 ("I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity, which would not only be harmful to the client but against the public interest in prolonging trials.").

218. *E.g.*, Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 383 (D.D.C. 1985), *aff'd*, 809 F.2d 930 (D.C. Cir.), *cert. denied*, 481 U.S. 1049 (1987).

219. United States v. Reaves, 636 F. Supp. 1575, 1576 (E.D. Ky. 1986).

220. *See supra* section III(B)(1).

result can be interminable presentations at trial. One trial lawyer's decision to include all the evidence led a juror to count every tile in the ceiling just to avoid screaming at the lawyer; after the trial, the judge and the juror found that their tile counts coincided.[221] Another judge reports the calling of ten firemen to prove that a house burned down and a parade of fifteen bank patrons to prove a bank robbery by a man whose mask prevented identification.[222] Lawyers are confusing quantity with quality,[223] and the training of trial lawyers must include some attention to efficiency as well as technique.[224]

Whatever the reason, lawyers are overestimating the marginal value of additional evidence. As a result of this tendency (depicted in Figure 3) and the tendency to underestimate costs (depicted in Figure 2), trials are lasting too long. There is room to use this precious supply of trial time more efficiently.

C. The Advantages of Time Limits

If trials will inherently tend to last too long, then the question is how courts can best overcome this tendency and move the amount of evidence from point *C* back toward the optimum at point *A* in Figure 2. Time limits are one possibility. The amendment to Rule 16 to authorize time limits is intended to augment the court's existing authority under Federal Rules of Evidence 403 to exclude particular items of evidence if their probative value is exceeded by consideration of undue delay and 611(a) to control the mode of presenting evidence.[225] Assuming for the moment that the court is able to determine an appropriate length of time for a given trial and to enforce the limit efficiently and fairly,[226] time limits have a number of advantages over the other devices.

1. Time Limits v. Rule 403

Under Federal Rule of Evidence 403, the district court already has the power to weigh the marginal value of particular pieces of evidence against their cost.[227] One superficially appealing possibility would be to permit the lawyers free rein until they offered evidence that the court found not worth the time and then to shut down that party's presentation on the assumption that the trial had reached point A in Figure 1. That idea would work if lawyers presented their evidence in descending order of its probative value. That assumption is untrue, however, and as a result the application of Rule 403 to shorten trials will be more cumbersome.

Trial lawyers are trained not to present all their best evidence at the beginning of trial but rather to concentrate the most persuasive evidence at the beginning *and* the end of trial.[228] The effect of this strategy for present

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221. Higginbotham, *supra* note 212, at 133.
222. *Reaves*, 636 F. Supp. at 1576.
223. *Id.* at 1579.
224. Kirst, *supra* note 17, at 337.
225. *Proposed Amendments*, *supra* note 2, at 71.
226. The practicalities of how the court can do this are discussed in part V, *infra*. For the moment, the question is whether time limits theoretically are a superior device for controlling the length of trial.
227. *E.g.*, McCluney v. Jos. Schlitz Brewing Co., 728 F.2d 924, 928–29 (7th Cir. 1984) (probative value of character evidence outweighed by time it would take to hear).
228. The writers on trial technique are unanimous on this point. For example, Professor Thomas Mauet instructs students to "[s]tart with a strong, important witness" and to "[f]inish with a strong witness..." THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 18

purposes is to change the schematic depiction of the marginal value of evidence. Instead of a steadily declining function, the marginal value of additional evidence will be U-shaped, with evidence of high marginal value concentrated at the beginning and the end of the case of evidence with high marginal value.

For example, Figure 4 depicts how the marginal value of evidence would change over the course of a trial of a given length when the trial lawyer offers some evidence that is not worth the time it takes to hear it (but not irrelevant or confusing evidence). Its depiction is thus consistent with what one would expect to occur because of the systematic underestimation of costs and overestimation of value described above.[229] The evidence offered between points *X* and *Y* is not worth the time it takes to hear it. Ideally, the trial should be shortened by an amount equal to *(Y-X)*, and we would see a net gain equal to the shaded area, the total excess cost of the evidence over its value.

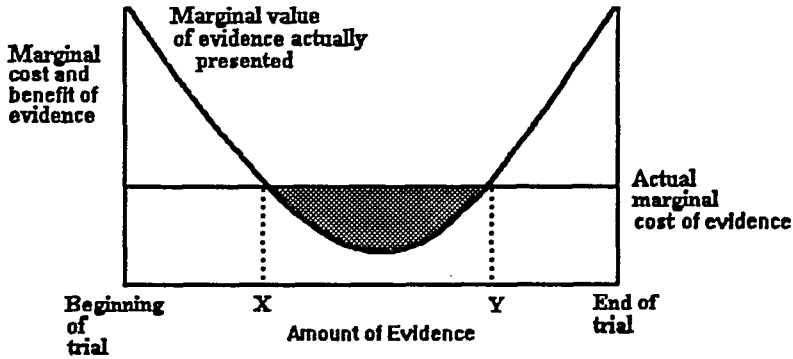

FIGURE 4

The U-shape of the marginal value curve flows not just from trial lawyer strategy. It is also a consequence of — and indeed this is the reason behind the strategy — the way human beings recall information presented to them sequen-

(1980); *see also* RONALD L. CARLSON, SUCCESSFUL TECHNIQUES FOR CIVIL TRIALS 256 (2d ed. 1992); IRVING YOUNGER, THE ADVOCATE'S DESKBOOK: THE ESSENTIALS OF TRYING A CASE 182 (1988) (common method of sequencing witnesses is to start and finish strong and to sandwich weak witnesses between them).

229. This model is an oversimplification in that the marginal value of evidence over the course of a trial would not change in a continuous fashion. Trial lawyers are taught not to concentrate their best efforts at the beginning and end of trial but also to do the same, to the extent possible, over the course of a day or court session. Also, other factors in addition to the suspected greater impact of the first and last witnesses affect the order of proof. FRANCIS X. BUSCH, LAW AND TACTICS IN JURY TRIALS 343 (1949); PAUL BERGMAN, TRIAL ADVOCACY IN A NUTSHELL 67 (1979). Nevertheless, this simplified model of how the value of evidence changes over the course of the trial is useful for demonstrating the advantage of time limits over piecemeal regulation of the evidence.

tially, as is done in a trial. We tend to remember the first bits of information (this is the "primacy effect") and the last bits of information (this is the "recency effect") that we hear.[230] The primacy and recency effects have been verified in so many different settings that "they have almost achieved the status of an empirical law."[231] Thus, even if all the evidence in the trial had the same intrinsic probative value, the fact finder would be more likely to remember the evidence at the beginning and the end of the case and thus it would have more probative value, despite its intrinsic value. The marginal value function would still have its U-shape. The choice by trial lawyers to place their best evidence at the beginning and end of the case will exaggerate an existing tendency.

Thus, if the court merely waits until the first piece of evidence appeared not to be worth the time it took to hear it and then prevented that party from presenting any more evidence, the court will exclude too much evidence. In Figure 4, this would happen at point *X*, and the evidence to the right of point *Y*, all of which has a marginal value greater than its marginal cost, would be excluded. This happened in *Miles v. Olin Corp.*[232] The plaintiff's lawyer was cross-examining an expert who had testified about why the gun that injured the plaintiff had fired when it did. Relying on the recency effect, the lawyer went through his examination but held back an allegedly crucial bit of impeaching evidence: that the expert had lied about whether any court had ever refused to accept him as an expert.[233] The district court terminated the examination because so much of it was of little value (somewhere between point *X* and *Y* in Figure 4), and as a consequence the jury never heard the highly relevant impeachment evidence (which presumably would have been somewhere to the right of point *Y*). The Fifth Circuit Court of Appeals upheld the district court's decision, regardless of "whatever surprises Miles [the plaintiff] still had to spring on the witness."[234] The dangers of using Rule 403 in this manner routinely are clear. As long as trial lawyers follow their training and respect the primacy and recency effects, too much highly probative evidence would be excluded.[235]

Rule 403 instead will have to be applied to each item of evidence as it is offered so that the court can balance the probative value against the time it will take to hear the evidence. Once the court has heard the individual item of evidence, however, excluding it is at best a partial victory and at worst an utterly hollow exercise because the time will have already been wasted.[236] Even if the court requires pretrial disclosure of all the anticipated evidence, and is

230. JEANNE ELLIS ORMOND, HUMAN LEARNING, THEORIES, PRINCIPLES, AND EDUCATIONAL APPLICATIONS 149 (1990).

231. MARGARET C. ROBERTS, TRIAL PSYCHOLOGY 24 (1987).

232. Miles v. Olin Corp., 922 F.2d 1221, 1229 (5th Cir. 1991).

233. *Id.* at 1228–29.

234. *Id.* at 1229.

235. Of course, if the lawyers know before trial that the court will adopt this procedure, they will adapt their presentations. The likely effect would be that they would steer so clear of introducing evidence that the court could use to terminate their presentation that some probative evidence worth the time would be excluded, much like a person who is near a cliff will not go right to the edge but rather will leave a little room for error. In this scenario, the trial is actually too short, and the fact finder does not hear all the evidence that it should.

236. Leval, *supra* note 190, at 7 ("[T]he judge ordinarily does not know the testimony of a witness until he has heard it. ...[E]valuation of the importance of testimony can be difficult in a complicated case, and more time may be spent in explanations than is saved by the cut-off order.").

ready to "scrutinize the witness list ... with a beady eye and ruthlessly prune redundant or marginal evidence,"[237] it is difficult for the court to discern in advance, particularly in a complicated case, the probative value of particular pieces of evidence.[238] The court is more likely to err in its evaluation of the value of the evidence than is counsel (assuming counsel is competent) because the lawyers will have much greater familiarity with the details of the case than the court possibly could. To overcome this obstacle and accurately judge the importance of particular evidence, the court might actually have to spend *more* time than would be saved by exclusion of the evidence.[239]

This weighing of evidence piece by piece is not only fraught with the danger of error that can only be overcome by self-defeating investments of the court's time, it is also such an intrusion into trial counsel's role that it is likely to undermine the appearance of the fairness of the proceeding. Our system's "basic principle is that the parties, not the judge, have the major responsibility for and control over the definition of the dispute."[240] The reason for this principle is the assumption that an adversary presentation is more likely to overcome the fact finder's natural tendency to judge quickly matters about which he or she actually knows little.[241] The court can preserve the actual and perceived value of adversary justice by setting an appropriate time limit and then leaving it to trial counsel to make the strategic decisions about what evidence to produce and in what order.[242]

The effect of the right time limit is to force lawyers to prune away the evidence with probative value less than its true marginal cost. Figure 5 depicts this effect. With a time limit, the lawyers will eliminate the evidence in the shaded area and move more quickly to the evidence they were saving for the end of trial to take advantage of the recency effect. In *Miles v. Olin Corp.*, perhaps the plaintiff's lawyer would have sprung his surprise sooner if the court had imposed a time limit.

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237. McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990).

238. Schwarzer, *Reforming Jury Trials, supra* note 180, at 579; Leval, *supra* note 187, at 7.

239. Leval, *supra* note 190, at 7 ("[M]ore time may be spent in explanations than is saved by the cut-off order.").

240. Resnick, *Managerial Judges, supra* note 6, at 382.

241. Lon L. Fuller and John D. Randall, *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A. J. 1159, 1160 (1958). *But see* John H. Langbein, *The German Advantage in Civil Procedure,* 52 U. CHI. L. REV. 823 (1985) (arguing for a more inquisitorial and less adversarial procedure at least in the gathering of evidence).

242. In SCM Corp. v. Xerox Corp., the court concluded: "[I]n a protracted case such as this, the purpose of [Rule 403] can best be achieved by considering time in the aggregate and leaving to counsel the initial responsibility for making individualized selections as to the relative degree of probative value from the mass of evidence available." 77 F.R.D. 10, at 13.(D. Conn. 1977). *See also* United States v. Reaves, 636 F. Supp. 1575, 1580 (E.D. Ky. 1986) (with time limits, "the goal of preserving the court's resources is achieved while the traditional autonomy of counsel to present their own case, subject to the exigencies of that goal, is preserved"); Leval, *supra* note 190, at 7.

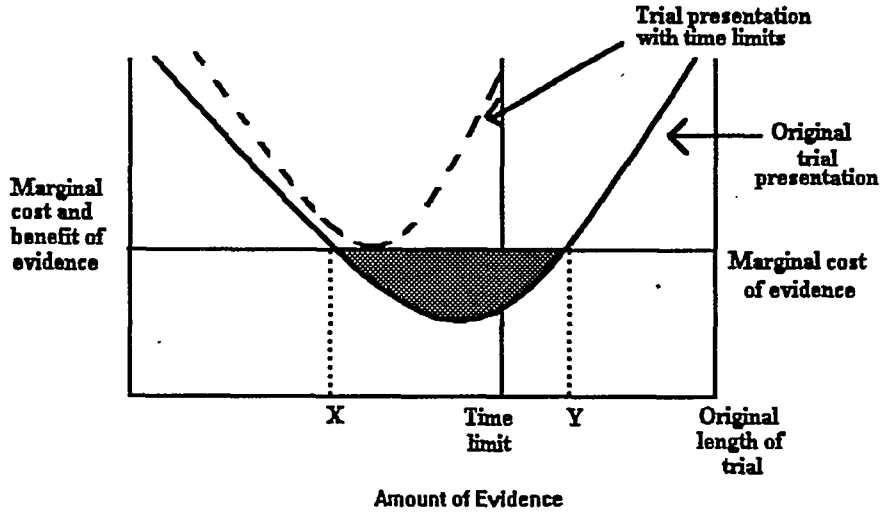

FIGURE 5

Thus, the use of time limits (assuming they can be established in a non-arbitrary manner and enforced without enormous cost) has distinct advantages over the piece-by-piece application of Rule 403. Time limits save the court the trouble of overcoming counsel's superior knowledge of the case, and thereby increase both the probability that no errors will occur (the lawyers are more likely to choose the most probative evidence since they know the case better) and the perception of the parties that justice is being done.

2. Time Limits v. Rule 611(a)

Another reaction to the tendency of trial lawyers to take too much time at trial has been for district judges to use their power under Federal Rule of Evidence 611(a) to compel lawyers to use more efficient procedures for the presentation of evidence than the traditional question-and-answer method.[243] For example, Judge Schwarzer requires that witnesses "whose direct testimony will involve considerable expository matter but no significant issues of credibility", prepare their direct testimony in writing.[244] Judge Schwarzer has held one attorney in contempt for refusing to prepare such a statement.[245] Judge Charles Richey of the District Court for the District of Columbia follows a similar practice.[246] Another technique is to use videotape to present evidence more efficiently because objections can be ruled on in advance and because the

243. FED. R. CIV. P. 43(a) ("In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.

244. WILLIAM W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION 435 (1982).

245. *See* Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193 (9th Cir. 1979).

246. Richey, *Modern Management*, *supra* note 4, at 73.

scheduling of trial need not take account of the witnesses' availability.[247] The hope is that, by presenting the same evidence in more efficient ways, trials can be shorter.

These innovations serve the salutary purpose of overcoming the inertia of doing trials the same old way. Yet two problems remain. First, forcing counsel to present evidence in a particular manner has as much potential for intruding upon counsel's strategic decisions, and the perception of fairness in an adversary system, as the piecemeal rejection of evidence under Rule 403. The lawyer in *Chapman v. Pacific Telephone & Telegraph* felt strongly enough about her right to decide how to present her case to suffer contempt.[248] Second, imposition of a particular method of presenting evidence may save some time but does nothing to guarantee how those savings will be spent. Instead of delivering those savings to the court in the form of a shorter trial, counsel might well succumb to the temptations and narrow incentives already described.[249]

A time limit will permit the parties to take advantage of more efficient trial techniques and yet will preserve the savings for use by other litigants. With a time limit, trial counsel will have the incentive to use their time efficiently and to present evidence in novel ways in order to pack more persuasive punch into their limited time.[250] The savings from the time limit will remain in the court's hands for use in other cases. The time limit technique also saves the court the trouble of choosing what methods of presentation will be used. This will not only save the court time but preserve the perception of adversary justice where counsel make the strategic decisions about what evidence to present and how to present it. For all those reasons, time limits are a more attractive way of using trial time efficiently than Rule 611(a).

All these considerations support the Advisory Committee's conclusion that because Rules 403 and 611(a) "typically would be invoked as a result of developments during trial" time limits "can provide the parties with a better opportunity to determine priorities and exercise selectivity in presenting evidence than when limits are imposed during trial."[251] Realizing this potential, however, requires careful consideration of the practicalities of when and how judges should use time limits. Those practical considerations are the subject of the next section.

V. PRACTICAL CONSIDERATIONS OF IMPLEMENTING TIME LIMITS

Time limits have the potential to help federal courts use their scarce trial time in a more efficient manner. It is unclear, however, how to implement the concept in practical and fair ways. Judges who have used time limits have been

247. McCrystal & Maschari, *supra* note 162, at 241; Lucien v. McLennand, 95 F.R.D. 525 (N.D. Ill. 1982); Harry J. Zeliff, *Hurry Up and Wait: A Nuts and Bolts Approach to Avoiding Wasted Time in Trial*, 28 JUDGE'S J., Summer 1989, at 18; B. Paul Cotter, Jr. *Trial by Technology, What's New in Litigation Tools*, 29 JUDGE'S J., Fall 1990, at 8.

248. *Chapman*, 613 F.2d at 196 n.1.

249. *See supra* part IV(B)(2).

250. For example, in United States v. Hardage, 750 F. Supp. 1460, 1527 (W.D. Okla. 1990), the parties stipulated to the use of time-saving techniques in connection with the imposition of time limits on the trial.

251. *Proposed Amendments*, *supra* note 2, at 71–72.

happy with the results.[252] By learning the lessons that emerge from their experiments with time limits and by anticipating some problems that might emerge from their routine use, federal courts can turn the theoretical potential for time limits into real savings. Three major issues require resolution: (i) what cases should have limits; (ii) how the limits are to be chosen; (iii) and how the limits are to be monitored and enforced.

A. The Selection of Cases

Imposing any time limit on a trial in a rational manner will require the district judge to learn a great deal about the issues and the evidence in the case. The court could not hope to discern at what point the marginal value of additional evidence will exceed its marginal cost without taking the time and effort to learn what the evidence will be and its significance to the issues in the case. Time invested in this process of course is itself time taken away from other duties and thus must be weighed against the potential time to be saved. There may be a threshold length of trial below which it is inefficient for the court to learn enough to impose an appropriate time limit.

Most trials in federal court last fewer than three days. For example, in 1992 74% of all trials fell into this category.[253] Shorter trials are the ones where the investment of time necessary to set an appropriate time limit is least likely to pay off. Even a high percentage savings in a short trial does not free much time. The vast majority of trials, therefore, are not good candidates even for consideration of time limits.

That does not mean, however, that using limits could not have a substantial impact. Although most civil *trials* are short, by far most *trial days* are spent in longer trials. In 1992, approximately 64% of all federal civil trial days were spent on cases that lasted four days or more.[254] If time limits are used for trials expected to last in excess of four days, they have the potential to make the use of most civil trial time more efficient. Longer trials are the ones in which the potential savings are greatest, and where the judge's necessary investment of time is most likely to pay off. By looking closely at a quarter of the cases, the court can reach two-thirds of the trial time. Here is where the court interested in time limits should concentrate its efforts.

B. The Selection of the Time Limit

The discussion to this point has assumed that the district judge is capable of discerning how long a trial should take and choosing an appropriate time limit. To impose arbitrary limits that sacrifice justice in the individual case in the name of speed "is to sacrifice too much of one good — accuracy of factual determination — to obtain another — minimization of the time and expense of litigation."[255] This is the biggest problem with time limits.[256] Avoiding such arbitrariness requires that the district judge carefully collect information

252. *E.g.*, Harris v. Marsh, 679 F. Supp. 1204, 1235 n.43 (E.D. N.C. 1987); United States v. Reaves, 636 F. Supp. 1575, 1577 (E.D. Ky. 1986); Leval, *supra* note 190, at 7–8.

253. 1992 *Annual Report*, *supra* note 22, Table C–7 (on file with the author and with the Administrative Office of the United States Courts).

254. This figure is an estimate derived from 1992's Table C–8.

255. McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990).

256. Leval, *supra* note 190, at 8; *see also* Elliott, *supra* note 8, at 317 (describing wide divergence among federal judges in their handling of a hypothetical case).

necessary to make an informed decision and then exercise his or her discretion with some sensitivity to the needs of the particular case.

1. The Collection of Information

The court needs detailed information about a case before it can hope to arrive at an appropriate time limit. One way a court could begin is to require counsel to estimate how long the trial will take, as local rules in some districts already require in connection with the pretrial order.[257] One federal judge recently noted, however, how bad lawyers are at such estimates (albeit in the context of a criminal case):

> Lawyers practicing criminal law, both prosecution and defense, have a peculiar concept of time. If they ask for 10 minutes to make an argument, they really need an hour. A witness whose testimony is predicted to be "short" will be on the stand up to a full day. An estimate of three days for trial easily becomes at least a week of testimony. My challenge is to decide whether I should double or triple all time estimates. Based on my experience thus far, I am more than a little concerned about the "six to eight week" criminal trial scheduled to begin in January. I can see me and the lawyers spending half a year together.[258]

There are at least two reasons why counsel would not be adept at such estimates. The first is that it does not matter if they are wrong as long as the court is prepared to permit what was estimated to be a three-day trial to last over a week. The lawyer can be careless, and even cavalier, about making time estimates that have no consequences. The second is that, as already noted, many lawyers handling litigation today do not have significant trial experience and thus may not be able to estimate reliably even if they try. This problem is perhaps best addressed by requiring a certain level of trial experience before a lawyer is permitted to be lead counsel in a federal case.[259]

The problem of carelessness is solvable immediately, however. The court simply needs to let the parties know that the *maximum* amount of time they will receive is the amount they request or estimate they will need. For example, the court could require counsel sixty days before trial to estimate how long they anticipate the trial should take. If all parties agree that three days or fewer are necessary, then the court need not and should not spend additional time evaluating the needs of the case. It can be scheduled for a short trial, and the court can be fairly confident that not an enormous amount of time will be wasted, at least not enough to justify further judicial efforts to discern the optimum amount of time. Such a procedure will work, however, only if those parties who all agree that the trial will be short know before they estimate the length of trial that the court will hold them to the estimate and award no *more* than they request.[260]

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257. *E.g.*, N.D. ILL. LOCAL R., at 112 (1992).

258. Conway, *supra* note 34, at 4.

259. *See, e.g.*, N.D ILL. LOCAL R. 3.00(B) (1992) (admission to trial bar requires a minimum of "four qualifying units of trial experience" as defined in the rule).

260. Courts that have used time limits have often begun the process by asking for counsel's estimates. *See* SCM Corp. v. Xerox Corp.,77 F.R.D.10, 11 (D. Conn. 1977); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1170 (7th Cir. 1983); Leval, *supra* note 190, at 8. Once the lawyers know the estimates matter, one can expect that they will be inflated for all the same reasons that lawyers will tend to overuse trial time. The point of starting with their estimates is simply to make a first cut to eliminate from any further

The court will need more detailed information from parties who request more than three days and thus become potential candidates for time limits. As the Advisory Committee has noted, "the court should impose [time limits] only after receiving appropriate submissions from the parties outlining the nature of the testimony expected to be presented through various witnesses, and the expected duration of direct and cross-examination."[261] Pending amendments to the Federal Rules of Civil Procedure will require parties to disclose within thirty days of trial the name, address, and telephone number of each witness the party expects to call or may call at trial and the identities of exhibits that the party expects to introduce or may seek to introduce if the need arises.[262] Other parties then will have fourteen days to file objections.[263] It is but another small step to require them to summarize the content of the expected testimony and exhibits, to explain the significance of the proof to the issues actually in dispute in the case, and to estimate how long particular direct testimony will take. Judges who have imposed time limits have required such detailed submissions,[264] and indeed at least one judge has recommended that lawyers better serve their clients by preparing such a proof outline whether the court requires it or not.[265] For example, in *MCI Communications Corp. v. American Telephone & Telegraph Corp.*, Judge Grady ordered the parties to submit detailed lists of witnesses, summaries of their testimony and a precise estimate of the length of time for trial before he set the time limits that the Seventh Circuit eventually affirmed.[266]

The time necessary for the direct case is not all the information the court needs, however. After the parties exchange their lists and estimates, each side will need to summarize the major points on which they expect to cross-examine the other side's witnesses, explain the significance of these points to the issues actually in dispute at the trial, and estimate how long the cross-examination will take if the witness does not stall or obstruct the questioner.[267] Such a submission should be required when each party submits its objections to the other side's expected exhibits. With this information in hand, the court can begin to evaluate how long the trial should take. How to perform that evaluation is the next question.

2. The Exercise of Discretion

The difficult decision about how much time a trial should take must be reasonable as well as informed.[268] There is, of course, no mathematical formula for setting the time limit. As the Seventh Circuit wrote when it approved of the limits imposed in *MCI v. AT&T*, "[t]he circumstances of each individual case

consideration those cases — the ones that will last three days or fewer — where the potential time savings do not justify further investment of the court's time.

261. *Proposed Amendments*, *supra* note 2, at 72.

262. *Id.* at 76–77.

263. *Id.* at 77.

264. *SCM Corp.*, 77 F.R.D. at 11; Leval, *supra* note 187, at 8; *MCI*, 708 F.2d at 1170–71. Judge Charles Richey's standard pretrial order requires a statement of all facts each party intends to prove, annotated to the elements that must be proven or defeated at trial. Richey, *Rule 16 Revisited*, *supra* note 76, at 118.

265. Conway, *supra* note 34, at 50–51.

266. *MCI*, 708 F.2d at 1170.

267. How to deal with such tactics and other gamesmanship is one of the subjects of part V(C)(1), *infra*.

268. *Proposed Amendments*, *supra* note 2, at 72.

must be weighed by the trial judge, who is in the best position to determine how long it may reasonably take to try the case."[269] This type of judgment call is familiar to federal judges, however. It is difficult for the judges to determine how long the lawyers should have to prepare a case, and how much discovery should be done,[270] but they have been doing precisely this type of analysis since the 1983 amendments to Rules 16 and 26. Rule 16(b) requires the court, after consulting the parties, to enter a scheduling order limiting, among other things, the time for discovery.[271] Rule 26(b)(1) requires the court to limit the frequency or extent of discovery if the court finds that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."[272] The use of discretion to set an appropriate time limit for trial is thus merely a new context for the exercise of a familiar type of discretion.

Some district courts are already gaining additional expertise in a similar exercise as they evaluate cases for their complexity for the purpose of assigning them to different "tracks" for case management and discovery.[273] Although some districts do not even attempt to identify the relevant factors in making this determination,[274] the others consider the number of parties, the number of claims and defenses, the consequent volume of evidence, the complexity of the factual issues, and the technical complexity of the subject matter.[275] The courts thus are calibrating the procedures in the case to its complexity, measured by the volume of necessary evidence and the technical expertise necessary to understand it. Thus, not only is the balancing of these considerations a familiar exercise from the courts' ten years of experience with Rule 26(b), but also

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269. *MCI*, 708 F.2d at 1172.

270. *See* Resnick, *Managerial Judges*, *supra* note 6, at 419.

271. FED. R. CIV. P. 16(b) states:

> Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
>
> (1) to join other parties and to amend the pleadings;
>
> (2) to file and hear motions; and
>
> (3) to complete discovery.
>
> The scheduling order may also include
>
> (4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
>
> (5) any other matters appropriate in the circumstances of the case.

This part of Rule 16 will be changed slightly under the proposed amendments under consideration now, but in ways that are not material to this discussion. *See* 61 U.S.L.W. 4371 (U.S. Apr. 27, 1993).

272. FED. R. CIV. P. 26(b)(1). The proposed amendments change this part of Rule 26 to make the balancing even more explicit. The new rule will require the court to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefits." 61 U.S.L.W. 4374 (U.S. Apr. 27, 1993).

273. The Southern District of California, the Southern District of Florida, the Northern District of Georgia, the Southern District of New York, the Northern District of Ohio, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Eastern District of Texas, the Northern District of West Virginia, and the District of Wyoming all assign cases to different "tracks" according to complexity. CIVIL JUSTICE PLANS, *supra* note 3.

274. These districts include the Southern District of New York and the Eastern District of Texas.

275. CIVIL JUSTICE PLANS, *supra* note 3.

from the more recent experience under case management tracking. This experience should help the courts decide how long a case should take.

The courts that have imposed time limits used these same factors of volume of evidence and technical complexity. A long time limit was appropriate in *Westmoreland v. CBS*.[276] General William Westmoreland brought this suit against CBS for claiming in a documentary about the Vietnam War that he underestimated enemy troop strength to justify optimistic assessments of the progress of the war. The volume of evidence was vast, with potential witnesses numbering in the hundreds, if not the thousands.[277] A long time period for that trial was justified. Similarly, the court in *Juneau Square Corp. v. First Wisconsin National Bank* blocked out three months for trial of an antitrust case because of "the complexity of the case and the great quantity of evidence to be presented."[278] At the other extreme, the court in *In re Galaxy Assoc.* allotted each side five hours to present evidence because the court's pretrial rulings had reduced the volume of evidence that was relevant to the proceeding.[279] The volume of evidence to be presented thus is one important guide in establishing a proper time limit. One fact that will affect the volume of evidence is the number of parties, each with a right to be heard, and a court may have to consider a longer time for trial in multi-party cases.

Technical complexity of the subject matter is also a factor courts must consider, and some courts already are doing so. For example, the district judge in *McKnight v. General Motors* had to decide how much time to allot for a race discrimination case that involved no technical issues.[280] The court imposed a total limit on the trial of twenty-five hours.[281] *MCI v. AT & T*, however, to some extent required educating jurors about the technology of long-distance telephone services.[282] The court gave each side twenty-six days to present its evidence.[283] The more technically complex a case is, the longer we can predict it will take to educate the jury properly. Longer time limits are appropriate.

The Court should be in a position to make these assessments much more easily as the time for trials nears and the parties make the pretrial disclosures regarding the evidence they intend to offer. The focus for determining the proper time limit should be on the needs of the particular case under all the circumstances, with emphasis on the factual and technical complexity of the case. That informed discretion is the only way to make the time limits imposed fair and reasonable.

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276. The case is not reported but Judge Leval discusses his view of the case in Leval, *supra* note 190, at 7–8.
277. *Id.* at 7.
278. *Juneau Square Corp.*, 475 F. Supp. at 465; *see also* SCM Corp. v. Xerox Corp.,77 F.R.D. 10, 11 (D. Conn. 1977) (30,000 factual allegations in case in which court limited plaintiff to six months in which to present its case).
279. *In Re Galaxy Assoc.*, 118 B.R. at 10.
280. *McKnight*, 908 F.2d 104.
281. *Id.* at 115.
282. *MCI*, 708 F.2d at 1170.
283. *Id.* at 1170–71.

C. Enforcement of the Time Limit

1. Time-Keeping

If time limits are to be imposed they must be enforced. The NBA, of course, solved its time-keeping problem by mounting a large ticking digital clock above the scoreboard at both ends of the court. In court, a more dignified method is needed. The Seventh Circuit doubts that any method will work:

> [W]e disapprove of the practice of placing rigid hour limits on a trial. The effect is to engender an unhealthy preoccupation with the clock, evidenced in this case by the extended discussion between counsel and the district judge at the outset of the trial over the precise method of time-keeping — a method that made the computation of time almost as complicated as in a professional football game.[284]

Trial is complex enough without adding unnecessary complications about how to time the presentations of each party. Courts must find a method that is fair but not too complicated.

At one extreme is the "stopwatch" method in which the court does everything it can to make sure that the party using the time is charged for it. Time spent examining a witness on direct or cross, or using any other method to present or impeach evidence, counts against that party. This is simple enough. The system becomes complicated with respect to objections. Under this system the "[t]ime taken to argue all objections made by a party which are overruled by the Court shall be deducted from the objecting party's time [and] [t]ime for objections which are sustained will be deducted from the time of the proponent of the evidence."[285] Thus, a party gambles with its time whenever it offers or objects to evidence. The time spent on the objections is charged to the losing party. The system is finely tuned but extremely complicated to implement. Not only must someone — presumably the clerk — start a stopwatch running whenever an objection is made, but also *after* the court rules on the objection the clerk must go back and charge the time in accordance with the ruling. Such a system is too cumbersome, and indeed it surpasses the complexity of starting and stopping the clock whenever a football player goes out of bounds or makes a first down. The courts must find something simpler.

At the other extreme is an "hourglass" system in which each side is charged for the time spent on the witnesses it calls, including the time for the other side's cross-examination and any objections.[286] This system is exceedingly simple in that it requires the clerk to change which side is being charged only twice in the usual case, when the plaintiff rests and the defense begins, and when the defense rests and rebuttal begins. The problem with such a simple approach is that it gives both sides tremendous incentive to drag out cross-examination because it counts against the other side.[287] It puts each counsel in the position of spending some of the other side's precious time. As a result, at

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284. Flaminio v. Honda Motor Co., 733 F.2d 463, 473 (7th Cir. 1984).

285. United States v. Hardage, 750 F. Supp. 1460, 1528 (W.D. Okla. 1990); *see also* United States v. Reaves, 636 F. Supp. 1575, 1580-81 (E.D. Ky. 1986) (also imposing this type of time limit).

286. Leval, *supra* note 190, at 8.

287. *Id.*

the least any timekeeping system must charge the cross-examiner if the time limit system is to have any appearance of fairness.[288]

A third alternative provides a reasonable and workable compromise between the "stopwatch" and the "hourglass" methods. Under this method, each party uses its own time to present direct testimony and to cross-examine the other party's witnesses. To this extent, it is like the "stopwatch" method and prevents the manipulation of time limits by an excessively long cross-examination. However, the time taken for objections is counted against the party offering the evidence.[289] The clerk does not have to start and stop the timekeeping other than when a witness is passed or a new one is called, and there is no necessity to backtrack after the court rules and assign the time to the losing party. If the objection to the evidence is sustained, there is nothing unfair about imposing the time used on the proponent of the inadmissible evidence. Only when the objection is overruled is there a possibility for unfairness.

It may be that lawyers will attempt to manipulate the time limits by making more objections, but the court can take care of that problem without complicating the timekeeping rules. Judge Leval has expressed confidence that "the inventive minds of counsel will develop time-dictated tactics of gamesmanship" if time limits are applied widely.[290] If the court uses this third method of time-keeping, the time for arguing even unsuccessful objections will count against the party offering the evidence. A lawyer who is willing to urge numerous objections, therefore, may be able to lower his adversary's amount of time artificially.

The court, however, possesses inherent power to control and punish misbehavior in trial. In an extreme situation the court can use its contempt power to put a stop to repeated obstructional objections.[291] A novel approach of one federal judge has been to warn attorneys ahead of time that if one side uses dilatory tactics the court will deduct time allotted to one side and award it to the other.[292] A less extreme remedy would be simply to award more time to the party who suffered the delay. Threats such as these are more credible than that of contempt, which is appropriate only in extreme circumstances.[293] They also address the particular misbehavior more directly. Judge Leval is correct that trial lawyers will attempt to manipulate the time limits to their advantage, but the tactic of doing so by repeated objections is readily identifiable and remediable. It should not deter the court from using time limits when they are otherwise appropriate.

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288. *Id.* at 8; Schwarzer, *Reforming Jury Trials*, *supra* note 180, at 579.

289. This is the method that the court used in McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990). Judge Posner was indignant about General Motors' witnesses having to hurry because GM used up almost all its time cross-examining the plaintiff's witnesses. It is hard to understand what Judge Posner considered unfair when GM's counsel knew the cross-examination time would be counted.

290. Leval, *supra* note 190, at 8; *see also Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509, 536 (1979) (time limits are appropriate only when the judge prevents delaying tactics).

291. *See, e.g.*, Commonwealth of Pa. v. Local Union 542, International Union of Operating Engineers, 552 F.2d 498, 502 (3d Cir. 1977).

292. United States v. Hardage, 750 F. Supp. 1460, 1527 (W.D. Okla. 1990).

293. *See, e.g.*, Eaton v. City of Tulsa, 415 U.S. 697, 699 (1974) (*per curiam*).

2. Flexibility

One of the important issues for the implementation of time limits is how flexible they should be. The Seventh Circuit has criticized time limits because they were inflexible[294] and approved limits that were flexible.[295] The Eighth Circuit has held that "limits should be 'sufficiently flexible to accommodate adjustment if it appears during trial that the court's initial assessment was too restrictive.'"[296] A district court in an opinion strongly favoring time limits ordered that "[a]ll time limits, provided for herein may be adjusted by the court, in its discretion."[297] Judge Leval, in commenting on the *CBS v. Westmoreland* case, advocated letting the lawyers know "there may be a little leeway" in the time limits.[298] Judge Phillips of the Western District of Oklahoma took a different approach when he ordered that "[n]o departures from this total time period will be entertained or granted."[299] A lawyer who perceives the time limit as flexible is less likely to tame his or her verbose instincts, just as the trial lawyer who does not see a trial date as realistic is not likely to be prepared. A flexible time limit may thus be self-defeating because it loosens the attorney from the very discipline it is attempting to impose before the trial starts. Also, if the court announces as the time limit approaches that it is prepared to extend it, the court risks making mincemeat of the lawyers' presentation. Remember that the *order* in which evidence is presented is important and is the subject of much strategic thinking by trial lawyers.[300] A lawyer who wants to finish strong but still meet his limit will leave out the less persuasive evidence first. If, as he approaches the climax of the trial he learns he has the option to add more evidence, he will have to finish in a weaker manner or forego the opportunity. The court's kindness in being flexible is no blessing.

Firm, believable time limits better serve the purposes of the limits and give the trial lawyer the comfort of planning the order of presentation in a known time period. As discussed above, the one circumstance in which the court should consider being flexible with the limits is when it perceives one side is attempting to manipulate them.

3. Preservation of Error

Parties will have objections to particular time limits imposed. Courts must make some provision for registering those objections and making an appropriate record for appellate review. This has been a serious problem thus far in time limit cases. Three times federal appellate panels have criticized the use of time limits but have found that the error was not preserved properly. In *Johnson v. Ashby*, the Eighth Circuit disapproved the use of time limits but held the losing party waived the objection by not making an offer of proof before the close of the evidence when the trial court could still cure the

294. McKnight v. General Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990).
295. MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1171 (7th Cir. 1983).
296. Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987).
297. United States v. Reaves, 636 F. Supp. 1575, 1581 (E.D. Ky. 1986).
298. Leval, *supra* note 190, at 8.
299. United States v. Hardage, 750 F. Supp. 1460, 1527 (W.D. Okla. 1990).
300. *See* part IV(C)(1), *supra.*

problem.[301] In *Flaminio v. Honda Motor Co.*, the Seventh Circuit upheld the trial court's judgment for the defendant because "the plaintiffs have failed to indicate what evidence they would have put in, or cross-examination they would have conducted, if they had had more time."[302] Most recently, the Seventh Circuit in *McKnight v. General Motors Corp.* noted that GM, which lost in the trial court, asked only for an additional thirty minutes and made no attempt to demonstrate what it would have done with that extra time.[303]

Usually courts handle objections to the exclusion of evidence by offers of proof.[304] The court excuses the jury and hears the evidence that is to be excluded. The problem with offers of proof in the context of time limits is that they defeat the very purpose of the court's ruling. The time taken in court to hear the offer of proof lengthens the proceedings by however long it takes to make the offer. Another way of preserving error in less time is necessary if time limits are to work.

The best way to handle this problem would be to use the *written* descriptions of the evidence each party wants to offer. As discussed above, the trial court will need to have the parties' descriptions of such evidence in hand before it decides upon a time limit. Once the court imposes a limit, the parties can decide how to use the time allotted. On appeal, they will have a written record of what evidence they wanted to offer and what evidence they were able to offer. They will then be able to point out to the Court of Appeals what evidence had to be left out and to argue why it was an abuse of discretion for the trial court to force them to leave this evidence out by the use of an inappropriate time limit. The parties will be able to preserve error without defeating the purpose of the time limits, and the record should be clear for the Court of Appeals. The need for a workable system of preserving error is not an insurmountable obstacle to the use of time limits.

Each of these practical issues for the enforcement of time limits will be somewhat new at first if courts begin to use the limits more often. Yet there are solutions to all of them. The need is great for courts to use what little civil trial time they have more efficiently, and the potential is there for time limits to contribute to that goal. The details of enforcement should not dissuade the trial courts from the attempt.

VI. CONCLUSION

Federal district judges are called upon to do many things. One of the most important ones is to preside over civil trials, yet the criminal side of the docket and the pretrial demands of the civil docket have cut into the time they have available to do so. Neither type of pressure is likely to decrease soon.

Something, however, must be done to dispose of the civil cases. Increasingly, parties must find a substitute for trial through settlement and alternative dispute resolution. As long as trial remains a distant, unlikely, prospect, however, the settlements reached are not likely to be fair. Trial must become a realistic alternative in order for settlements to be just. If there is

301. *Johnson*, 808 F.2d at 676.
302. *Flaminio*, 733 F.2d at 473.
303. *McKnight*, 908 F.2d at 115.
304. FED. R. EVID. 103(a)(2).

room to shorten trials and not sacrifice justice in the cases that are tried, courts should do so.

Trials without judicial intervention will tend to last too long. The parties do not take into account the costs to the system or to other litigants when they calculate how long to take in trial. Furthermore, the goals of and pressures on the attorney, who is, after all, the one who controls how much and what kind of evidence to offer, have the same tendency to cause trials to last too long. Private incentives will cause valuable time to be wasted in trial, and where it is practicable to do so, the court should limit trials to the proper length and thereby free up more time in which to try more cases.

Setting time limits itself is a costly exercise, however, and courts should not invest the resources necessary to do so where the savings would not be significant. For cases that are estimated to last in excess of four days the investment may well be worth it, especially if the court waits until the pretrial conference stage and then relies heavily on the parties' revelation of the amount, type, and significance of the evidence they intend to offer. Time limits set in this way may be able to realize some of the time savings that are both needed and are theoretically possible.

The quality of basketball in the NBA improved tremendously once the shot clock was introduced. The purpose of this article has been to demonstrate why Rule 16's new "shot clock" for federal civil trials will have analogous benefits. They are not the savior of the system that Danny Biasone's invention was to the NBA, but they can play at least a small role in improving the operation of the civil side of the federal courts.