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Michael L. Seigel

University of Florida Levin College of Law, seigel@law.ufl.edu

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PRAGMATISM APPLIED: IMAGINING A SOLUTION TO THE PROBLEM OF COURT CONGESTION

*Michael L. Seigel**

I. INTRODUCTION

Somehow the unfortunate trend has arisen among attorneys to make almost every case a BIG CASE. There is a tendency to want to present the evidence not once, but many times over, and to adduce needlessly cumulative evidence not only on the controverted issues but also on those which are all but uncontested. Advocates tend to confuse quantity of evidence with probative quality. Nothing lulls an attorney to the passage of time like the sound of his or her own voice. Few attorneys can tell you what time it is without describing how the clock was made.¹

"An antitrust suit remains a piece of litigation; it is not a life's work."²

* Associate Professor of Law, University of Florida. A.B., Princeton University, 1981; J.D., Harvard University, 1984. I would like to thank Craig R. Callen, Gary A. Rosen, Edward L. Rubin, Eileen A. Scallen, Christopher Slobogin, and William R. Sneed III, for their comments on earlier drafts of this article. I am particularly indebted to Professor Richard L. Marcus for generously sharing his considerable expertise in complex litigation and civil procedure with an interloper from the criminal arena. Finally, I wish to express my appreciation of the fine research assistance of Danielle R. May.

1. *United States v. Reaves*, 636 F. Supp. 1575, 1579 (E.D. Ky. 1986) (Bertelsman, J.).

2. *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 14 (D. Conn. 1977) (Newman, J.) (quot-

The frustration of the judiciary is patent. As their per capita caseloads have risen, judges have worked frantically to keep up. They have become case managers,³ shoving litigants through the system with the constant refrain: hurry up and settle this case.⁴ They have limited the time for trials, sometimes in mid-stream.⁵ They have set up fora for forms of alternative dispute resolution ("ADR"), including mediation,⁶ "early neutral evaluation,"⁷ and court-annexed arbitration.⁸ They have even created some innovative settlement techniques, such as the Summary Jury Trial.⁹ Judges have done all this and more, *to no avail*. The most recent statistics reveal that per capita judicial caseloads are still on the rise,¹⁰ and the length of time be-

ing *SCM Corp. v. Xerox Corp.*, No. 77-15807, slip op. at 4 (D. Conn. Oct. 31, 1975), order denying SCM's motion to compel production of documents).

3. See 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 (1985) (arguing in favor of judicial management of cases).

4. See *id.* at 267 ("The primary purpose of status and pretrial conferences is to plan and structure the pretrial and trial stages of litigation . . . Case management simply brings cases to settlement or to trial sooner than if their progress were left entirely to the impetus of the parties."); see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 *U. CHI. L. REV.* 306, 322-24 (1986) (contending that the goal of managerial judging quickly evolved from making litigation more efficient to settling cases). See generally Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982) [hereinafter Resnik, *Managerial Judges*]. Judge Peckham takes issue with Professor Resnik's view (adopted in the text) that judicial management of cases is primarily directed at promoting settlement. Peckham, *supra* note 3, at 266-67.

5. See, e.g., *SCM Corp.*, 77 *F.R.D.* at 11-12, 15 (ordering plaintiff, fourteen weeks after the start of trial, to complete its case in six months).

6. See Peckham, *supra* note 3, at 274-77 (discussing the process of mediation).

7. See Wayne D. Brazil et al., *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 *JUDICATURE* 279 (1986) (describing the Northern District of California's "early neutral evaluation" program); Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 *FORDHAM L. REV.* 1, 12-13 (1990) (discussing early neutral evaluation).

8. See Kaufman, *supra* note 7, at 17-22 (describing court-annexed arbitration); Diane P. Wood, *Court-Annexed Arbitration: The Wrong Cure*, 1990 *U. CHI. LEGAL F.* 421, 432-41 (describing the increasing use of arbitration in federal courts).

9. The Summary Jury Trial was designed by Judge Thomas Lambros. See Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 *F.R.D.* 461, 463 (1984).

10. In 1980, the number of civil cases *pending* in the federal courts per judgeship was 361. See 1990 *DIR. ADMIN. OFF. U.S. CTS. ANN. REP.* 7 (Table 5) [hereinafter 1990 *REPORT*]. The same figure for 1990 was 421. *Id.* The number of cases *filed* in federal court, however, has declined steadily since 1985. See *id.* (showing decline in commenced cases from 273,670 in 1985 to 217,879 in 1990). This decline has been the result of three factors: reductions in the number of cases filed by the federal government to recover benefit overpayments and defaulted student loans; reductions in the number of cases filed against the

tween the filing of a civil lawsuit and its disposition is no shorter today than it was ten years ago.¹¹ It is therefore not surprising that judges have, from time to time, simply lost their cool.¹²

Legal scholars have long taken notice of the perceived problem of court congestion; it has been an unending source of material for scholarly inquiry.¹³ The substance of scholars' reactions fall into sev-

federal government for benefits; and, in 1990, a reduction in the number of diversity cases filed as a result of the increase in the jurisdictional amount from \$10,000 to \$50,000. *See id.* at 6-9.

11. The median disposition time for civil cases that went to trial in federal court in 1980 was 20 months. *See* 1980 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 393 (Table C-5) [hereinafter 1980 REPORT]. In 1990, the median disposition time was 19 months. *See* 1990 REPORT, *supra* note 10, at 157 (Table C-5).

Professor Priest has come to a similar conclusion regarding court congestion and the general failure of reform measures to cure it. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 527 (1989) [hereinafter Priest, *Private Litigants*].

12. The two remarks quoted at the outset of this Article are examples of statements made by judges who were clearly exasperated by the length of the litigation they were superintending. *See supra* text accompanying notes 1-2. In another case, a federal district court judge ordered a dismissal because, after he warned the parties that they needed to secure the presence of enough witnesses to keep the case flowing, the plaintiff ran out of witnesses at 3:30 p.m. on the first day of trial. *See* Beary v. City of Rye, 601 F.2d 62, 64-65 (2d Cir. 1979) (describing events in the trial court). In the course of reversing the district court's order, the Second Circuit stated: "This appeal is an example of a trial court's permitting its zeal for clearing its calendar to overcome the right of a party to a full and fair trial on the merits." *Id.* at 63.

13. *See* HANS ZEISEL ET AL., DELAY IN THE COURT (1959); Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter, *Landscape*]; Kaufman, *supra* note 7; Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199 (1991) (reviewing WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991)); George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161 [hereinafter Priest, *Role of the Jury*]; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) [hereinafter Resnik, *Adjudicatory Decline*]; Resnik, *Managerial Judges*, *supra* note 4; Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985); Larry L. Sipes, *Reducing Delay in State Courts—A March Against Folly*, 37 RUTGERS L. REV. 299 (1985).

The concern with court congestion has been the catalyst for the development of a new field of legal scholarship focused on Alternative Dispute Resolution ("ADR"). Scholarly output in this area has been tremendous. For example, a bibliography of American books and articles on the subject of dispute resolution for the two year period 1987-88 contains 1,608 entries. CAROLE L. HINCHCLIFF, *DISPUTE RESOLUTION: A SELECTED BIBLIOGRAPHY* (1991). In addition, at least two periodicals have been created to deal only with issues related to ADR, the OHIO STATE JOURNAL ON DISPUTE RESOLUTION published by the Bureau of National

eral distinct categories. Some have attempted to prove statistically that the problem does not exist.¹⁴ Others have touted ADR or modifications of the present civil trial system as presenting a way out.¹⁵ Many have lamented the changes they believe to be the result of overcrowded court dockets, such as managerial judging,¹⁶ the ever-increasing use of ADR,¹⁷ and the relentless push for settlement.¹⁸

Although their differences are overwhelming, the vast majority of the judges and scholars who have addressed the issue of court congestion share one thing in common: the assumption that, when ADR fails and settlement talks stall, the end result will be a "full-blown" jury trial.¹⁹ There is irony in this: on the one hand, the assumption

Affairs (BNA) and ALTERNATIVES TO THE HIGH COST OF LITIGATION published by the Center for Public Resources. See also sources cited *infra* notes 15, 17 & 113.

As noted elsewhere, evidence scholars have been conspicuously absent from the vast scholarly dialogue concerning court congestion and ADR. See Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995 (1994); see *infra* text accompanying notes 88-90.

14. See Galanter, *Landscape*, *supra* note 13, at 17-27, 30, 37-45; Sarat, *supra* note 13, at 331-35.

15. See, e.g., Alschuler, *supra* note 13, at 1845-54 (arguing for a two-tier trial system for civil disputes); Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399, 419-20 (concluding that court-annexed arbitration should be modified but not eliminated); Richard McMillan, Jr. & David B. Siegel, *Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME L. REV. 431 (1985); Priest, *Role of the Jury*, *supra* note 13, at 191-99 (suggesting the use of bench trials for routine civil cases); Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. FLA. L. REV. 19 (1985).

16. See Alschuler, *supra* note 13, at 1832-36; Elliott, *supra* note 4, at 424-31. Although Professor Elliott expresses his beliefs that managerial judging has made litigation more efficient, *id.* at 315-16, and may even promote substantive justice in some kinds of cases, *id.* at 327-34, he concludes that "as a comprehensive strategy for dealing with the effects on inappropriate incentives in litigation, managerial judging is more stopgap than final solution." *Id.* at 334.

17. See, e.g., 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 (1989) (undertaking a comprehensive look at the alternatives and concluding that the civil jury trial ought to be preserved as the primary mode of adjudication); Wood, *supra* note 8, at 451-55 (questioning whether court-annexed arbitration is achieving its goals and is worth its inherent costs).

18. The classic statement on this point is Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073-75 (1984). See also Marc Galanter, ". . . A Settlement Judge, not a Trial Judge:" *Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 8-10 (1985) [hereinafter Galanter, *Judicial Mediation*] (arguing that judges' increasing involvement in settlement negotiations has not increased settlement rates).

19. In light of the fact that there is presently no such thing as a jury trial that is not "full-blown," the frequent use of this term in ADR literature is quite interesting. Professor Alschuler considers it a "disparaging modifier" and notes that "adjudication is not a dirty word." Alschuler, *supra* note 13, at 1817.

is based on the perception that a "full-blown" jury trial is the epitome of justice; on the other hand, it is this very event that they are so anxious to avoid. At any rate, despite the intense scrutiny legal actors and commentators have given to the issue of court congestion in recent years, few have taken a hard look at the jury trial itself.²⁰ Can we improve the efficiency of jury trials? If so, would this reduce the problem of court congestion? Is there any reason to favor this approach over those that seek to avoid jury trials altogether?

This Article attempts to answer these difficult questions. It does so by articulating and then employing a methodology suggested by recent scholarly ruminations about the philosophy of pragmatism and its implications for legal scholarship and practice. Although pragmatism does not provide "right answers" to questions of legal doctrine—indeed, it rejects the notion that such things exist—it does provide some guidance in formulating the search for workable solutions to legal dilemmas. This is, however, a controversial proposition, and so this Article begins with its defense.²¹ Once that task is accomplished, the Article will extrapolate some concrete methodological tools from the tenets of pragmatism.²² Finally, the Article will employ this methodology to argue for the development of an "Abbreviated Jury Trial" ("AJT").²³

Because a great deal of preliminary theory and analysis will be undertaken before the AJT concept is fully developed, the reader is entitled to a preview. The first step in designing a dispute resolution technique is identifying the normative goals of an adjudicatory system. This Article posits that these goals are: (1) efficiency; (2) just or "accurate" results; (3) acceptable results; (4) public and on-the-record

20. This is not an accident. Those who would be most qualified to evaluate the efficiency of the jury trial—evidence scholars—have been preoccupied by what I have identified elsewhere as "foundational rationalism," the never-ending pursuit of "accurate" verdicts. See Seigel, *supra* note 13, at 998-1001.

21. See *infra* part II.A.

22. See *infra* part II.B. I note that the two parts of this Article—the discussion of legal pragmatism and the proposal for the Abbreviated Jury Trial ("AJT")—are quite distinct. To a large degree, each part stands on its own, and I invite readers who are interested in only one or the other to limit their reading accordingly. There is, however, an important synergy that results from presenting the two subjects as parts of a single work. The abstract methodological insights derived from the philosophy of pragmatism come to life when they are employed in making the case for an AJT, and the concrete project of designing the AJT is strengthened by being preceded by a discussion of the philosophical underpinnings of the methodology employed.

23. See *infra* parts III and IV.

proceedings; and (5) fact-finding by an impartial third party.²⁴ The second step is assessing the need for an alternative process by examining the degree to which the current system—characterized by “full-blown jury trials” at one end of the spectrum and private settlement of cases at the other—consistently attains these goals. The results of such an assessment come as no surprise. Jury trials do reasonably well when measured by the yardsticks of accuracy, openness, and impartiality, but they fail miserably against the yardstick of efficiency.²⁵ Settlement, on the other hand, is efficient, but it is conducted and concluded in private, and it does not even purport to have an adjudicatory component. Most traditional forms of ADR are simply tools to produce settlement; even those that purport to do more, such as binding arbitration, tend to sacrifice the goals of openness and impartiality.²⁶ The conclusion: something else is needed.

Thus arriveth the AJT. Appreciation of the AJT requires an openness to the feasibility of something radically different from current practice. First, to be worth the trouble, the AJT would have to be considerably more efficient than current jury trials. This could be accomplished only by uniting responsibility with power. Presently, judges are responsible for moving their dockets along, but lawyers retain most of the power over the pace of litigation. For efficient results, the cost of delay must be placed on the lawyers. The AJT would accomplish this task by being severely time-restricted. Early in the pre-trial stage, the judge would set the length of each side’s case. These limits would then be strictly enforced. Each attorney would bear the responsibility of tailoring her presentation to fit the time allotted.²⁷

For the time-limited AJT to be fair, trial procedures would require drastic alteration. Thus, in an AJT, each party’s case would be, in essence, a multi-media presentation by counsel, interspersing argument with evidence. Most of the evidence would consist of highlights from videotaped depositions of various witnesses. The remaining evidence would be tangible, such as documents and summaries. The attorney would explain the evidence, and its significance, as she presented it to the jury. At the close of the plaintiff’s presentation, the defense would take its turn. Plaintiff would then have the opportunity

24. See *infra* text accompanying note 116.

25. See *infra* part III.C.1.

26. See *infra* part III.C.4.

27. See *infra* text accompanying notes 137-40.

to make a short rebuttal presentation, if necessary. After receiving instructions from the judge, the jury would retire for deliberations.²⁸

Some changes in pre-trial discovery would be required to accommodate AJTs. For example, the rules of civil procedure would require amendment to provide for the routine videotaping of "trial depositions,"²⁹ and to specify that the purpose of such depositions would be to obtain direct and cross-examination excerpts for use at trial. The most important amendment would be the requirement of an information exchange several weeks before trial. Each party would be required to provide the other side with its "trial plan," and it would be prohibited from deviating from this plan at trial. The exchange of detailed trial information would protect the parties from surprise and provide them with a means of combatting the presentation of false or inaccurate information at trial. It would also ensure that the parties engaged each other's main contentions in front of the jury.³⁰

Obviously, special rules of evidence would govern AJTs. The rule against hearsay would be altered to permit the introduction of videotaped depositions without regard to the availability of the declarants. The hearsay rule for AJTs would also permit attorneys to proffer background information about witnesses and identify and authenticate documents and tangible objects. In addition, rules regarding relevancy would be abandoned, on the theory that lawyers under severe time constraints would naturally choose their most relevant evidence.³¹

Is the AJT feasible? Envisioning it requires a great deal of imagination in order to overcome the cognitive imprint of our current trial paradigm. The remainder of this Article attempts to justify such a radical paradigm shift.

II. NEOPRAGMATISM AND LEGAL SCHOLARSHIP

A. *Legal Neopragmatism*

In recent years, a number of philosophers³² and legal scholars³³

28. See *infra* text accompanying notes 163-65.

29. These would be in addition to, or in lieu of, "discovery" depositions. See *infra* text accompanying notes 153-58.

30. See *infra* text accompanying notes 169-71.

31. See *infra* text accompanying note 170.

32. The two contemporary philosophers who have had the greatest impact on legal scholarship are Richard J. Bernstein and Richard Rorty. Their major works include: RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM* (1983); RICHARD J. BERNSTEIN, *PHILO-*

have revived an interest in the philosophy of pragmatism and have explored its implications for legal scholarship and practice. These "neopragmatists"³⁴ have employed their philosophy for two relatively distinct purposes. Most often, they have used pragmatism as a tool to describe the practice of law and legal scholarship. In this vein,

SOPHICAL PROFILES (1986); RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (1982) [hereinafter RORTY, CONSEQUENCES]; RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989) [hereinafter RORTY, CONTINGENCY]; RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); see also Thomas Morawetz, *Understanding Disagreement, The Root Issue of Jurisprudence: Applying Wittgenstein to Positivism, Critical Theory, and Judging*, 141 U. PA. L. REV. 371, 443 (1992) (attributing the revival of pragmatism to Rorty); Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752, 1754 (book review) (same).

33. See RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 37-123 (1990) (explaining the contours of his pragmatic orientation to the law) [hereinafter POSNER, PROBLEMS]; PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds., 1991); Steven J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989) (setting forth a philosophy of practical reason); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (using practical reason as a tool in explicating the process of statutory interpretation); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987) (attacking foundationalism in First Amendment jurisprudence and suggesting instead the use of practical reason); Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569 (1990); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) [hereinafter Grey, *Holmes and Pragmatism*]; Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988) [hereinafter Posner, *Skepticism*] (describing a skeptical outlook about law informed by pragmatism and practical reason); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 4-5 n.8 (1984) (describing his position as "irrationalism" but noting that "[a] better term might be pragmatism"); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward An Adequate Theory*, 57 COLO. L. REV. 45 (1985) (arguing that practically-based means-ends rationality is an adequate method of legal justification).

34. The main roots of legal pragmatism can be traced to the philosophy of Charles Peirce, William James, and John Dewey. See JOHN DEWEY, ESSAYS IN EXPERIMENTAL LOGIC (Dover Publications 1953) (1916); JOHN DEWEY, EXPERIENCE AND NATURE (2d ed. 1958); JOHN DEWEY, LOGIC: THE THEORY OF INQUIRY (1938); John Dewey, in MY PHILOSOPHY OF LAW 71 (Julius Rosenthal Foundation, Northwestern University ed., 1987); JOHN DEWEY, THE QUEST FOR CERTAINTY (1929); WILLIAM JAMES, PRAGMATISM AND FOUR ESSAYS FROM THE MEANING OF TRUTH (Ralph B. Peiry ed., World Book Publishing Co. 13th prtg. 1967) (1909); 5 CHARLES S. PEIRCE, *What Pragmatism Is*, in COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 272 (Charles Hartshorne & Paul Weiss eds., Harvard Univ. Press 1960) (1934). The modern pragmatists, to whom I have attached the label "neopragmatists," differ from their predecessors primarily in their rejection of logical positivism, that is, the belief that the scientific method has a special claim to the generation of "truth." See Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990) [hereinafter Rorty, *Banality of Pragmatism*]; see also Grey, *Holmes and Pragmatism*, *supra* note 33, at 789-91 (noting that neopragmatists reject the logical positivist orientation of their predecessors).

neopragmatic scholars have criticized what they see as the last vestiges of Langdellian formalism in legal thought.³⁵ At the same time, they have criticized the nihilism of the school of jurisprudence known as Critical Legal Studies ("CLS").³⁶ On occasion, however, some neopragmatists have also attempted to spell out various programmatic implications of their philosophy.³⁷ These attempts have drawn fire, even from some who identify themselves as pragmatic.³⁸

The basic principles of legal neopragmatism have been described in detail elsewhere³⁹ and need only be summarized here. The fundamental teachings of neopragmatism are (1) antifoundationalism; (2) the inescapability of subjectivity;⁴⁰ (3) the existence and validity of rational methods of decision-making, collectively termed "practical reason," apart from the scientific methodologies of empiricism and deductive logic; and (4) instrumentalism. In the context of legal inquiry, antifoundationalism is the belief that one cannot base any significant area of legal doctrine upon a single dominant value or grand theory; rather, difficult legal decisions are inevitably the result of a complex mix of empirical and normative judgments. A foundationalist theory, such as "the purpose of evidence doctrine is to maximize the accuracy of trial verdicts," simultaneously proves too little and too much. In other words, if the theory were followed to the letter, some specific outcomes would be patently absurd. On the other hand, as to some issues the foundationalist principle is indeterminate; the principle plus deductive logic fails to produce a definitive answer regarding the optimal configuration of doctrine or outcome of a case.⁴¹

35. The type of formalism attacked by neopragmatists has been termed "foundationalism." See Grey, *Holmes and Pragmatism*, *supra* note 33, at 799; see also *infra* text accompanying note 41.

36. See, e.g., John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 332-33 (1986).

37. See Stanley Fish, *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, in PRAGMATISM IN LAW AND SOCIETY 47-57 (Michael Brint & William Weaver eds., 1991) (distinguishing the pragmatist account of how the law works from pragmatic programs—which "ask[] the question 'what follows from the pragmatist account?'""); see also *infra* text accompanying notes 53-65.

38. See *infra* text accompanying notes 66-74.

39. One of the most thorough and thoughtful explications of neopragmatism can be found in Grey, *Holmes and Pragmatism*, *supra* note 33, at 793-815; see also Seigel, *supra* note 13, at 1025-45.

40. This neopragmatist belief is also called contextualism. See Grey, *Holmes and Pragmatism*, *supra* note 33, at 799.

41. See Seigel, *supra* note 13, at 1009-25; see also Eskridge & Frickey, *supra* note 33, at 324-25; Farber & Frickey, *supra* note 33, at 1618-27.

The second tenet of neopragmatism follows from the first. The non-existence of metaphysical first principles means that all judgments about legal doctrine are necessarily personal and subjective. In every imaginable situation, a legal decision-maker (or a scholar recommending doctrinal change) must pick and choose from a multitude of empirical and normative possibilities. There is no objective escape-route; indeed, the choice to appeal to an objective basis for a decision is itself a subjective determination. In addition, the so-called objective basis for many decisions turns out to be foundational, meaning that avoidance of its absurdity or indeterminacy requires making implicit and unarticulated subjective judgments.⁴²

The neopragmatist does not take from these insights a message of nihilism or despair.⁴³ Instead, the third main tenet of pragmatism holds that, despite the lack of foundations, legal actors make "rational" decisions all the time.⁴⁴ They do so by employing the methods of practical reason, which include "anecdote, introspection, imagination, common sense, intuition, . . . empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, . . . [and] 'experience.'"⁴⁵ To the extent that a particular decision commands a consensus among interested observers, it can appropriately be labeled "correct" or "just." Nevertheless, neopragmatists contend that the set of "correct" or "just" outcomes is subject to change over time. This occurs through a process of conversation or dialogue among members of the interested community.⁴⁶

Finally, neopragmatists generally agree that the value of legal doctrine is essentially instrumental; what is "right" or "good" is what works. Neopragmatists insist "that propositions be tested by their consequences, by the difference they make—and if they make none,

42. See Seigel, *supra* note 13, at 1021-22, 1026-29.

43. See Allan C. Hutchinson, *The Three 'Rs': Reading/Rorty/Radically*, 103 HARV. L. REV. 555, 560 n.15 (1989) (reviewing RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989)) (noting that "Rorty's non-foundationalism rejects nihilism or relativism as much as absolutism").

44. See Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 MICH. L. REV. 710, 714-16 (1988).

45. Posner, *Skepticism*, *supra* note 33, at 838. Professor Rorty states that neopragmatism means "freedom from anxiety about one's scientificity." Rorty, *Banalities of Pragmatism*, *supra* note 34, at 1815.

46. As Rorty has said: "A liberal society is one which is content to call 'true' (or 'right' or 'just') whatever the outcome of undistorted communication happens to be, whatever view wins in a free and open encounter." RORTY, *CONTINGENCY*, *supra* note 32, at 67; see also Seigel, *supra* note 13, at 1028-29.

set aside."⁴⁷ Because foundationalist principles are eternally elusive, neopragmatists believe that legal decisions ought to be judged by their actual effects on real people, not by their conformity with abstract concepts or their contribution to theoretical elegance. As Professor Grey has eloquently stated, "[p]ragmatism is freedom from theory-guilt."⁴⁸

Neopragmatist thought has attracted its share of critics. Some scholars—such as those associated with CLS—have argued that neopragmatism is nothing more than a lame defense of the status quo.⁴⁹ Others have argued that neopragmatism inevitably slides into pure relativism;⁵⁰ they contend that practical reason is contentless,⁵¹

47. Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1660 (1990) [hereinafter Posner, *Pragmatism?*]. William James has stated that the pragmatic method means "[t]he attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts." JAMES, *supra* note 34, at 47.

48. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990); *see also* Rorty, *Banality of Pragmatism*, *supra* note 34, at 1819 ("I agree with Grey when he says: 'Pragmatism rejects the maxim that you can only beat a theory with a better theory No rational God guarantees in advance that important areas of practical activity will be governed by elegant theories.'").

Professor Grey points out, however, that pragmatism—at least in its Deweyan strand—is not purely instrumental: activities, no matter how "instrumentally conceived, are to be evaluated by their intrinsic satisfactions or frustrations as well as by their consequences." Grey, *Holmes and Pragmatism*, *supra* note 33, at 854-55.

49. *See* Jay M. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724, 731 (1988); Hutchinson, *supra* note 43, at 565-69 (criticizing Rorty for espousing "liberal complacency" rather than "radical optimism"); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1878 (1988) ("Politically, the practical reason movement is . . . at least incrementalist, if not directly supportive of the status quo.").

50. *See* Alan Bloom, *THE CLOSING OF THE AMERICAN MIND* (1987); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

51. *See* Nancy Levit, *Practically Unreasonable: A Critique of Practical Reason*, 85 NW. U. L. REV. 494, 496 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)) (describing Posner's version of practical reason as scientifically unreasonable because it classifies common sense as good judgment and "relies on untutored and nonreflective techniques of reasoning"); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 290 n.132 (1991) (noting that practical reason assumes that there are sensible answers to issues that should be universally acknowledged without the benefit of logical argument); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434-37 (1990) (arguing that the pragmatist appeal to intuition, dialogue, and contextualism does not amount to a coherent method of decision-making).

At least one neopragmatist has responded to this criticism by attempting to identify with more sophistication the content of practical reason. *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 554-59 (1992) (examining the findings of scientists working in the field of artificial intelli-

and that consensus is an empty and potentially dangerous measurement of justice and truth.⁵²

Undaunted by such criticism, some neopragmatists have gone even further. They have attempted to set forth, in varying degrees of detail, programmatic implications of neopragmatist thought. The neopragmatist programs fall into two distinct categories: (1) pragmatic prophesies; and (2) pragmatic attitudes and methodologies.⁵³ The first category consists of agendas for social change articulated by various pragmatists.⁵⁴ The substantive content of any particular strand of pro-

gence that indicate the existence of a sophisticated cognitive ability to recognize patterns which could be part of practical reasoning).

52. See, e.g., Singer, *supra* note 32, at 1763 (arguing that Rorty's version of pragmatism, which "identifies truth with whatever beliefs become dominant in our society . . . identifie[s] reason with the status quo. This is because his description of politics leaves no room for subcommunities or for disagreements within the dominant culture about social justice.").

53. See generally Seigel, *supra* note 13. For my purposes, attitudes and methods can be lumped together because they are different degrees of the same phenomenon. One's attitude toward a problem contributes to the manner in which one sets out to address it. The manner in which one addresses a problem, to the extent consciously systematized, is one's methodology.

54. Rorty, *Banality of Pragmatism*, *supra* note 34, at 1815. See Cornel West, *The Limits of Neopragmatism*, 63 S. CAL. L. REV. 1747, 1750 (1990). Readers should note that I use the term prophetic pragmatism as it is employed by Rorty rather than West. West's view of prophetic pragmatism is, under Rorty's implicit (and my explicit) definition, impure; it meshes together a vision of social organization and change with a particular view of pragmatic methodology:

Prophetic pragmatism gives courageous resistance and relentless critique a self-critical character and democratic content; that is, it analyzes the social causes of unnecessary forms of social misery, promotes moral outrage against them, organizes different constituencies to alleviate them, yet does so with an openness to its own blindneses and shortcomings.

Id. at 1750. Rorty, on the other hand, identifies prophetic pragmatism as "a visionary tradition to which, as it happened, a few philosophy professors once made particularly important contributions." Rorty, *Banality of Pragmatism*, *supra* note 34, at 1819. He specifically cites the "left-looking social prophecies" of John Dewey as an (admirable) example of prophetic pragmatism. *Id.* at 1815-16.

Rorty himself has engaged in prophetic pragmatism. RORTY, CONTINGENCY, *supra* note 32, at 3-22; see also Lynn A. Baker, "Just Do It": Pragmatism and Progressive Social Change, in PRAGMATISM IN LAW & SOCIETY 100-05 (Michael Brint & William Weaver eds., 1991); Hutchinson, *supra* note 43, at 560-69 (discussing Rorty's political theorizing). As Baker summarizes it, Rorty's prophecies consist of "three interrelated hopes: that suffering and cruelty will be diminished; that freedom will be maximized; and that 'chances for fulfillment of idiosyncratic fantasies will be equalized.'" Baker, *supra*, at 100 (footnotes omitted). Baker also identifies what she calls a "processual strand" of Rorty's prophetic pragmatism. *Id.*

According to Rorty, pragmatism in all but its prophetic version is by now banal. Rorty, *Banality of Pragmatism*, *supra* note 34, at 1813; see also *id.* at 1819 (stating that "pragmatism's philosophical force [has been] pretty well exhausted"). I disagree with this

phetic pragmatism is not itself pragmatic—as most neopragmatists are quick to point out. This is as it must be: if a pragmatist held out any particular vision of society as the “right” one, he would, of course, be committing a blatant violation of pragmatism’s principle of antifoundationalism.⁵⁵

Neopragmatists have also attempted to draw attitudinal or methodological implications from their philosophical insights. Cornel West, for example, has identified what he calls the “critical temper” that flows from pragmatic philosophy. “The critical temper promotes a full-fledged experimental disposition that highlights the provisional, tentative, and revisable character of our visions, analyses, and actions.”⁵⁶ Similarly, Joseph Singer argues that acceptance of pragmatism should lead to “thinking about truth and justice as essentially contested concepts.”⁵⁷ According to Singer, we should “build conflict and a questioning attitude into our reasoning process itself[, which] . . . requires a sense of distance from one’s own preconceptions, a questioning, skeptical attitude toward inherited values and institutions, and a willingness to learn from others with different perspectives.”⁵⁸ In a significantly more conservative vein, Daniel Farber has contended that pragmatism helps us realize that some legal problems are quite difficult, requiring “all of our intelligence and creativity to devise an acceptable solution.”⁵⁹ He argues that pragmatism encourages “incremental decisionmaking rather than global remedies” and, although not strictly utilitarian, “it does prompt a healthy concern about the societal impact of law.”⁶⁰

Perhaps the most ambitious attempt to draw methodological implications for legal scholarship from pragmatism (and other philosophical schools sharing common themes) has been carried out by Edward Rubin.⁶¹ Rubin asserts that legal scholarship should “explore

position, at least to the extent that I believe that pragmatism has a role to play in shaping the methodology of legal scholarship. See *infra* text accompanying notes 75-87.

55. Rorty, *Banality of Pragmatism*, *supra* note 34, at 1816-19; cf. Baker, *supra* note 54, at 103-06 (noting that Rorty makes his proposals for progressive social change not as an antifoundationalist but as a prophet).

56. West, *supra* note 54, at 1751. As noted above, West does not separate out this methodological or attitudinal component from other elements of what he labels prophetic pragmatism. See *supra* note 54.

57. Singer, *supra* note 32, at 1763.

58. *Id.*

59. Farber, *supra* note 33, at 1342.

60. *Id.* at 1343.

61. Rubin, *supra* note 49. Rubin delineates what he labels “the critique of methodolo-

and contrast the pragmatic implications of conflicting normative positions."⁶² Scholars' discourse ought to consist of "prescriptive arguments based on consciously acknowledged normative positions."⁶³ He counsels legal scholars to be more "self-aware," contending that self-awareness would enable them to recognize that doctrinal arguments do not dictate social norms, but are simply "discursive strategies" for implementing them.⁶⁴ Rubin also argues that additional self-awareness would permit legal scholars to make more extensive but controlled use of empirical data.⁶⁵

The various attempts by scholars to extrapolate methodological ramifications from the philosophy of pragmatism have drawn some severe criticism. For example, Stanley Fish—who claims to possess a "deeply pragmatist view of the law"⁶⁶—has written:

[O]nce pragmatism becomes a program it turns into the essentialism it challenges; as an account of contingency and of agreements that are conversationally not ontologically based, it cannot without contradiction offer itself as a new and better basis for doing business [A]wareness of contingency allows one neither to master it (as if knowledge of an inescapable condition enabled you to escape it) nor to be better at it (a quite incoherent notion) [I]f you take the antifoundationalism of pragmatism seriously . . . you will see that there is absolutely nothing you can do with it.⁶⁷

To illustrate his point, Fish discerns from Rorty's writings an injunc-

gy," which he defines as the common theme that can be found in a wide variety of twentieth-century philosophical thought. *Id.* at 1835-37. In addition to the teachings of the American pragmatists and neopragmatists, Rubin includes within the scope of his analysis

the phenomenology of Husserl, Schutz, and Merleau-Ponty, the linguistic analysis of the later Wittgenstein, followed by Peter Winch, A.R. Louch, and, in some sense Thomas Kuhn, the hermeneutics of Heidegger, Ricoeur, and Gadamer, the critical theory of the Frankfurt School and Habermas and, to some extent, the poststructuralism of Foucault and Derrida.

Id. at 1835-36 (footnotes omitted).

Rubin claims that the essential problem with legal scholarship is its "unity of discourse" with lawyers and judges. *Id.* at 1881. His prescriptions for better scholarship follow from this insight. *See id.* at 1880-91.

62. *Id.* at 1893.

63. *Id.*

64. *Id.* at 1895-96. Rubin suggests that such self-awareness would enable legal scholars to compare the probable success of altering the law through doctrinal argument with other methods of achieving legal change, such as legislation or administrative regulation. *Id.* at 1895-97.

65. *Id.* at 1896-97.

66. Fish, *supra* note 37, at 55.

67. *Id.* at 63.

tion to sharpen the "pragmatist skill" of "imaginative identification," that is, the "ability to envisage, and desire to prevent, the actual and possible humiliation of others."⁶⁸ Fish translates this skill into the attitude of "tolerance" and argues that "expansions of sympathy[] cannot be planned, and cannot be planned *for* by developing a special empathetic muscle [T]olerance . . . is not a separate ability, a virtue with its own context-independent shape, but is rather a way of relating or attending whose shape depends on commitments one already feels."⁶⁹ In other words, as Fish sees it, a blanket injunction to be tolerant is a foundational principle that, as such, is in conflict with pragmatism's antifoundationalism and is meaningless without context.

Lynne Baker has also questioned whether pragmatism is useful in the achievement of progressive social change.⁷⁰ She notes that the widespread acceptance of pragmatism could "yield a more 'revisable' culture[.]" but warns that "'revisability' alone does not increase the likelihood that any changes that occur in the society will be in the direction of progress."⁷¹ In addition, Baker points out, a prophet⁷² who lays claim to metaphysical notions such as truth or God might be more successful in motivating others to attempt change than the pragmatist who promises only a contingent vision of a new world.⁷³ Finally, Baker discounts the usefulness of antifoundationalism to the personal motivation of a prophet:

But is it really useful to prophets to conceptualize their own vision, the societal change they advocate, as being part of a larger, endless evolutionary process? Not necessarily [A]n antifoundationalist conception of social change as evolution may dilute both the prophet's belief in his own vision and his motivation to effect social change. It is one thing to believe . . . that the status quo is neither necessary nor the best possible state of affairs; but

68. *Id.* at 64 (quoting RORTY, *CONTINGENCY*, *supra* note 32, at 93).

69. *Id.* at 65-66.

70. Although she does not explicitly identify herself as a neopragmatist, Baker's pragmatic orientation is clear. First, her comment on Rorty's philosophy is generally very favorable. *See, e.g.*, Baker, *supra* note 54, at 107 (reinterpreting Rorty's claim to limited prophetic imagination to mean that "more accurately, Rorty's quite substantial prophetic imagination simply does not extend this far"). Second, she evaluates Rorty's claims for a postmetaphysical culture on "*Rorty's own pragmatist terms.*" *Id.* at 108.

71. *Id.* at 110.

72. Baker defines a "prophet" as "an interpreter or leader with a vision of a better world." *Id.* at 103. Although more modest than what Baker may have in mind, I think it is fair to include within the term "prophet" scholars who argue for changes in existing legal doctrine.

73. *Id.* at 110-11.

quite another to believe that the better world one envisions and would work toward achieving is also a contingency, a mere resting point in a larger evolution.⁷⁴

At least in the context of legal scholarship, both Fish and Baker are wrong, though the reasons for this are as different as their positions. First, Fish's claim that methodologies, such as the use of imaginative identification, are meaningless without context does not withstand scrutiny. Although it is true that the same person will approach different situations with varying degrees of empathy, the "baseline" level of empathy that different people employ in approaching all problems is also subject to variation. Can there be any doubt that some people are, in general, better listeners and care-takers than others? In Fish's terms, such people possess a better developed "empathetic muscle" than those who might be characterized as cold-hearted or self-involved. Moreover, rhetoric—generated from within or received from without—can have a profound effect on an individual's overall level of tolerance. If internally motivated, individuals can consciously work at being better listeners, at taking the time to imagine themselves in the shoes of those whose views they do not initially understand or with which they initially disagree. They can also be convinced by the rhetoric of others. If this were not so, how could one explain the inspiration to action fueled by the great rhetoricians in history, such as Dr. Martin Luther King, Jr.? Fish's contention that people change their minds essentially at random, and not as a result of reflection or rhetoric, simply does not comport with reality.⁷⁵

Note, however, that empathy or tolerance is only consistent with pragmatism when viewed as an attitude or methodology, not as an ultimate or absolute principle. There are undoubtedly some positions with regard to which tolerance would be an unfortunate response. Racism is one example. This fact, though, is not in conflict with the general pragmatic exhortation that individuals should strive to start conversations from a position of tolerance and empathy, even if they ultimately reject an opposing point of view. For the pragmatist, the important thing is that raising one's overall level of empathy will

74. *Id.* at 113. Baker concludes that "antifoundationalism might [only] be useful to especially intellectual prophets who need to extricate themselves from philosophical or theoretical hassles." *Id.* at 114.

75. This latter criticism of Fish's position has been made by E.D. Hirsch, Jr. See E.D. Hirsch, Jr., *Comment on Paper by Stanley Fish*, in *PRAGMATISM IN LAW & SOCIETY* 85-87 (Michael Brint & William Weaver eds., 1991).

probably be of help in formulating and carrying out a plan of social change. In the case of racists, it is undoubtedly better to try to understand their view of the world before attempting to persuade them to modify it.

Baker's critique of the value of neopragmatic insights to the achievement of social change is probably applicable in some contexts, but it does not seem germane to legal scholarship.⁷⁶ Through devices such as *stare decisis* and canons of statutory interpretation, law places great weight on the past and has a built-in affinity for the status quo. As a result, stasis is a strong and undeniable part of legal culture. For instance, judges who strike out in new directions are pejoratively labeled "activist." Furthermore, ancient legal terms, such as "malice aforethought" and "premeditation" in the law of homicide, remain part of the common law and are incorporated into "modern" codifications, even though they are effectively contentless.⁷⁷ In law school, it is not uncommon to teach doctrine and method through the use of cases that are decades if not centuries old.⁷⁸

Given this state of affairs, the pragmatic realization that all human decisions are contingent—including those labeled "legal"—results not in demoralization and paralysis, as Baker fears, but in a sense of liberation and empowerment.⁷⁹ The deep-seated conviction that our

76. In Baker's defense, it is pretty clear that she has something more grandiose than legal scholarship in mind when she discusses whether antifoundationalism would assist a prophet in achieving social change. Specifically, she has under consideration the two kinds of prophets emphasized in Rorty's writings: authors of narratives and leaders of separatist groups. See Baker, *supra* note 54, at 111-15.

77. For example, the California Penal Code, which is in large part a faithful codification of the old common law of homicide, defines murder as "the unlawful killing of a human being . . . with malice aforethought." CAL. PENAL CODE § 187(a) (West 1988). It turns out, however, that the requirement of "malice aforethought" dictates proof of neither malice nor forethought. Rather, it has come to mean homicide when there is a deliberate intention to take a life, "when no considerable provocation appears" or when committed with "an abandoned and malignant heart." CAL. PENAL CODE § 188 (West 1988). Similarly, in Pennsylvania, the premeditation necessary for first degree murder can occur in an instant; in reality, legal "premeditation" requires no premeditation at all. See, e.g., *Commonwealth v. Carrol*, 194 A.2d 911 (Pa. 1963).

78. For example, the seminal case in criminal law on a number of issues, including justification and excuse, is *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

79. In making this broad claim, I am influenced by my own sense of liberation when, during my first year of law school, I became convinced that, as to their deconstruction of legal doctrine (what Rubin would call their "critique of methodology"), my CLS professors—such as Gerald Frug and Duncan Kennedy—were right. Not surprisingly, my reaction is the one anticipated by Rorty. As Professor Hutchinson notes,

Rorty seeks to nurture a stronger sense of historical contingency so as to empower people rather than to cow them by the understanding that there are no antecedent

culture is "revisable," that nothing has to be the way it is, can help a legal scholar push forward against the law's considerable inertia. Furthermore, recognition of the fact that any sought-after goal is itself contingent does not, as Baker predicts, dampen the spirit of one seeking social change through law. The "even better" social arrangement is, by definition, unimagined (and probably unimaginable). Its mere theoretical existence is a very weak source of despair. In short, contrary to Baker's view, antifoundationalism seems to be a useful frame of mind for those who endeavor to change society through legal scholarship.

The same is true for pragmatism's antimetaphysical stance. Baker is perhaps correct that appeals to metaphysical entities might help a prophet achieve social change—when the appeals are to a non-pragmatic mass audience.⁸⁰ But in the context of legal scholarship, it seems farfetched to believe that the mere invocation of God, truth, or reason would cause others to accept the legitimacy of one's social vision. Rather, legal scholars are certain to look beyond metaphysical claims and assess the "cash value" of another scholar's position. On the other hand, one particular metaphysical notion—"The Law"—acts as a brake on the development of forward-looking legal scholarship. Despite the successes of legal realism, CLS, and legal pragmatism, much contemporary legal scholarship still purports to examine what "The Law" requires in a given context rather than undertake an examination of what the law ought to require to achieve stated social goals. Self-conscious recognition that "The Law" does not exist ex-

truths or essential scripts to follow. By recognizing past truths as merely old contingencies, people can "get out from under inherited contingencies and make [their] own contingencies."

Hutchinson, *supra* note 43, at 559 (quoting RORTY, *CONTINGENCY*, *supra* note 32, at 97) (alteration in original).

80. Rorty, however, anticipates this argument and rejects it outright:

[The argument in question] amounts to the prediction that the prevalence of ironist notions among the public at large, the general adoption of antimetaphysical, antiessentialist views about the nature of morality and the rationality of human beings, would weaken and dissolve liberal societies. It is possible that this prediction is correct, but there is at least one excellent reason for thinking it false. This is the analogy with the decline of religious faith. That decline, and specifically the decline of people's ability to take the idea of postmortem rewards seriously, has not weakened liberal societies, and indeed has strengthened them As it turned out, . . . willingness to endure suffering for the sake of future reward was transferable from individual rewards to social ones, from one's hopes for paradise to one's hopes for one's grandchildren.

RORTY, *CONTINGENCY*, *supra* note 32, at 85 (footnote omitted).

cept as a contingent human construct would probably help legal scholars achieve and maintain an explicitly normative discourse. Though there may be good reasons for lawyers and judges to worry about what the law is, legal scholarship is most valuable as an enterprise directed at deliberating over what the law ought to be.⁸¹

Having outlined the contours of neopragmatism and defended the proposition that it can yield useful insights into the methodology of legal scholarship without being internally inconsistent, the next step is to give specific content to the pragmatic methodology that will be employed in this Article. That task is taken up in the next section.

B. *Neopragmatic Methodology for Legal Scholarship*

The methodological ramifications of legal neopragmatism follow directly from its teachings. To begin with, the spirit of antifoundationalism counsels scholars against devoting their time to extensive debates over the validity of first principles and favors that they direct their professional energies toward the solving of real social and legal problems. This prescription should not be interpreted to bar neopragmatists from participating in purely intellectual inquiries or theoretical debates, for these endeavors are of obvious value to the improvement of the human condition. It suggests, however, that scholars' discourse ought to focus on two projects: (1) articulating and justifying the (often conflicting) normative goals that legal doctrine ought to pursue, and (2) identifying the best methods for the achievement of these goals. In order to accomplish the former project, scholars need to be very explicit in identifying the normative positions, or values, that underlie their work.⁸² The latter project may be

81. Cf. Rubin, *supra* note 49, at 1904-05 (urging that scholars develop a "distinctive voice" and "independent research agenda" apart from legal decision-makers such as judges, legislators, and administrators to contribute in a relevant way to legal scholarship).

82. I thus explicitly reject the notion put forward by some CLS scholars that normativity is an evil that ought to be avoided in legal scholarship. See, e.g., Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933 (1991); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991). In my view, the fundamental problem with protests against normative legal scholarship is that they ignore the inherent normativity of non-academic legal discourse. Legislatures and judges do not have the luxury of disregarding the normative question: what should the law be? They must answer this question with or without the assistance of legal scholars. A categorical anti-normativist position thus must rest upon one or more of the following premises: (1) legal scholars have "more important" work to do than assist judges and legislatures in determining what the law ought to be; (2) legal scholarship has no effect on the shape of the law because judges and legislatures do not pay attention to it; (3)

accomplished through the use of appropriate techniques of practical reason, such as analogy and anecdote, or, when appropriate, through a carefully planned and patient course of social scientific research.⁸³

Scholars should also take from antifoundationalism an attitude of skepticism toward global or grandiose solutions to legal problems abstracted from real world concerns. Instead, scholars ought to be prepared to examine relevant real world situations in detail and to keep in mind that different contexts might require different problem-solving strategies.⁸⁴ What is right for one kind of legal dispute might not be right for another; what works in one part of the country, or in one administrative agency, might not work in another. The legal scholar who ignores differences for the purpose of simplification might end up with an elegant theory, but he will fail the pragmatism's instrumental test of proposing something that will, in fact, work. Like all human endeavors, academic pursuits should be measured "by their consequences, by the difference they make—and if they make none, [they should be] set aside."⁸⁵

Additionally, pragmatism reminds us of the inescapability of subjectivity. In accordance with this precept, legal scholars ought to be very explicit about their subjective orientation to the problems that they seek to address. In some cases, this might necessitate that the scholar set forth narratives of her personal experiences, and perhaps the experiences of others, that are relevant to her views. Self-conscious examination of subjectivity cannot, of course, overcome it,⁸⁶ but it can increase one's sensitivity to the fact that convictions are

judges and legislatures would do a better job of determining the shape of legal doctrine if left to their own devices; or (4) it does not matter what "the law" is, because legal outcomes are based on things other than legal doctrine, such as relationships of power.

Although each of these propositions is partially true, none is categorically so. This counsels only that legal scholars examine their scholastic choices critically and self-consciously, not that they abandon normative scholarship altogether. See generally Margaret J. Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991).

83. I note that this general prescription for legal scholarship is in accord with that put forward by Professor Rubin. See *supra* text accompanying notes 61-65. I also note that on a previous occasion I have warned about the misuses of empirical research in legal scholarship. See Seigel, *supra* note 13, at 1043-44.

84. As Hutchinson points out, the pragmatic requirement of situated decision-making is not met simply by immersion in the relevant doctrinal tradition; rather, it requires paying attention to "the actual social context in which disputes arise [and] to the political consequences of decisions." Hutchinson, *supra* note 43, at 576-77.

85. Posner, *Pragmatism?*, *supra* note 47, at 1660.

86. Fish is quite right that the idea is incoherent. See *supra* text accompanying note 67.

shaped—and perhaps skewed—by experience. In addition, a frank account of the circumstances contributing to a scholar's vision provides other participants in an academic dialogue the opportunity for more effective evaluation of that vision.⁸⁷

Neopragmatism also emphasizes the contingent nature of social arrangements. This should not only encourage scholars to challenge the status quo, it should also cause them to recognize that better social arrangements are most likely to be developed over time and through a process of trial and error. Thus, neopragmatist scholars ought to be comfortable suggesting that their visions of social and legal change be implemented on an experimental basis, and that these changes be evaluated over some explicit period of time. In addition, whenever possible, scholars ought to recommend concrete ways through which the success of their proposals can be measured. Ideally, authors ought to follow-up their initial scholarship by reporting on the results of any experimental implementation of their recommendations.

With all this in mind, it is time to turn our attention to the problem of court delay in civil cases.

III. APPLYING NEOPRAGMATIC METHODOLOGY TO THE PROBLEM OF COURT CONGESTION

A. *Statement of Personal Perspective*

In accordance with the neopragmatic methodology outlined above, this section represents an attempt to provide readers with my subjective orientation to the issue of civil litigation delay. I first became interested in the problem of civil litigation delay when I was doing research for an earlier article critiquing modern evidence schol-

87. Scholars should also respond to the inescapability of subjectivity by attempting to transcend the narrowness of their own point of view through empathetic listening. They should exercise their "empathetic muscle." See *supra* text accompanying note 69. A dialogue among individuals listening carefully to each other is much more likely to generate good results than one in which the participants' minds are already made up. Of course, mere empathy is not enough. As Singer points out:

We cannot pretend to know everything and we cannot pretend to speak for others.

To define "we" as including everyone, we must engage with others, not abstractly, but in fact; we must work with others whose experiences differ from our own in ways that remake the power relationship between us.

Singer, *supra* note 32, at 1780 (citing ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 178-85* (1988)).

arship.⁸⁸ In that piece I argued that evidence scholars, in thinking and writing about the Anglo-American system of adjudication, have focused too narrowly on the goal of verdict accuracy to the exclusion of other important goals of the system, and to the detriment of the discourse within the evidence community.⁸⁹ As partial proof of my theory, I documented modern evidence scholars' apparent failure to notice that only a tiny fraction of cases are actually adjudicated, as indicated by their near-total lack of participation in the scholarly debates concerning ADR.⁹⁰ Upon completion of that article, I became determined to "put my money where my mouth is;" that is, to examine the American adjudicatory system and the alternatives to it from the perspective of a scholar whose primary interest is the law of evidence.

I approach this task with an urban, middle-class background. I am a product of a big-city public school system and an ivy league post-secondary education. On two occasions, once while I was in high school, and once while I was in law school, I participated in "abbreviated" trials in small claims court. The first time I participated as a litigant and the second time as an advocate. Prior to law teaching, I clerked for a federal appellate court and then practiced as a federal prosecutor, specializing in organized crime, for about five years. During that time, I participated in approximately eight criminal jury trials ranging in length from three days to about seven weeks. My experience with civil litigation was limited to representing the government in one or two civil forfeiture actions in which I filed complaints, conducted very limited discovery, and participated in settlement negotiations.

Over the years, I occasionally witnessed portions of civil trials as I waited my turn in federal court, and I talked periodically with friends and law school classmates about their lives as civil litigators.⁹¹ Recently, I testified as an expert witness in a Section 1983 case in state court. Finally, as a scholar, I have read extensively about civil litigation and discovery, as indicated by the sources referenced in the footnotes of this Article.

88. See Seigel, *supra* note 13.

89. *Id.* at 1015-25.

90. See *id.* at 1018.

91. Prior to the time that I decided to become a law professor, I thought seriously about switching from prosecution to civil litigation. I feared, however, that I would find the professional life of a civil litigator—which I see as primarily consisting of extensive preparation for events that rarely take place (i.e., trials)—more frustrating than rewarding.

B. Statement of the Problem

An important task for the neopragmatist legal scholar is to ensure that he properly and carefully diagnoses the problem he seeks to address.⁹² In the context of this Article, this pragmatic requirement translates into a critical examination of the heretofore casual assumption that there is a crisis of delay and congestion in American civil justice systems. This assumption breaks down into two parts: the empirical supposition that delay and congestion exist and, assuming that they do, the normative conclusion that this delay and congestion pose a problem for the system, its participants, and society at large.

The first place to look in undertaking an examination of these assumptions is the pertinent scholarly discourse and empirical literature. Most scholars and judges who have written in the area seem to think that courts are crowded and slow,⁹³ and the available statistics lend strong support to their case. In federal court, for example, the median time from filing to trial in 1990 was nineteen months, almost double the 1950 figure.⁹⁴ Ten percent of all civil cases terminated in 1990, including those dismissed and settled pre-trial, had been pending more than twenty-nine months.⁹⁵ In addition, although the number of federal judges has increased significantly over the years, this increase has not kept pace with the number of cases filed. In 1950, for instance, litigants filed approximately 254 new cases per judge;⁹⁶ by 1980, the number had risen to 327;⁹⁷ and in 1990, the figure was 381.⁹⁸ As a result, the size of the average federal judge's civil docket has increased by almost 164 percent in the last forty years, reaching about 424 cases in 1990.⁹⁹

92. See *supra* text accompanying notes 82-87.

93. See Kaufman, *supra* note 7, at 1 ("[T]he nation's courts fall further and further behind the promise of . . . '[a] just, speedy, and inexpensive delineation of every action.'") (quoting FED. R. CIV. P. 1); Priest, *Private Litigants*, *supra* note 11, at 527 ("Litigation delay has proven a ceaseless and unremitting problem of modern civil justice.").

94. 1990 REPORT, *supra* note 10, at 157 (Table C-5); 1950 DIR. ADMIN. OFF. U.S. CTS. ANN. REP. 152 (Table C-5) [hereinafter 1950 REPORT].

95. 1990 REPORT, *supra* note 10, at 157 (Table C-5).

96. 1980 REPORT, *supra* note 11, at 126 (Table 3).

97. *Id.*

98. 1990 REPORT, *supra* note 10, at 133 (Table C showing 217,879 civil case filings for the twelve month period ending June 30, 1990); *id.* at 307 (Table X-1A showing 571 federal judgeships).

99. 1990 REPORT, *supra* note 10, at 307 (Table X-1A showing 571 federal judgeships); *id.* at 133 (Table C showing 242,346 civil cases pending); 1980 REPORT, *supra* note 11, at 126 (Table 3 showing 55,603 civil cases pending before 215 judges). Judge Kaufman undertook a similar comparison between the years 1949 and 1989 as he reflected on his forty

Docket crunch and litigation delay are generally worse in state courts. In the Los Angeles Superior Court, for instance, the median time between the filing of a civil action and trial grew from 4.5 months in 1942 to 41.5 months in 1982.¹⁰⁰ Worse yet, in Providence, Rhode Island, the median delay between complaint and adjudication was more than four years in 1984.¹⁰¹ In Chicago, during the twenty year period from 1959 to 1979, the length of time from incident to trial grew steadily, with the overall average (mean) delay being 5.68 years.¹⁰² Although these jurisdictions are at the extreme, the average state court system is not faring much better. After reviewing the pertinent data, Professor Alschuler concluded that "a waiting period of two and one-half years between the filing of a lawsuit and its disposition by jury trial now appears routine even in small city jurisdictions."¹⁰³

Caseloads of this magnitude and delays of this length certainly appear to present a legitimate problem, and perhaps a crisis, in American courts. Taking federal courts as an example, with four hundred cases on each judge's docket, and about four hundred new cases being filed each year per judge, federal judges must dispose of about four hundred cases a year, each year, simply to stay afloat. This amounts to the termination of between one and two cases every business day.¹⁰⁴ It is not surprising that numbers like these have caused judges to become more managerial, taking an active role in moving cases along and pushing parties to settle. Furthermore, managerial judging is only one of several negative phenomena associated with court congestion.¹⁰⁵ For instance, how often can judges who are burdened with enormous caseloads afford to write a thoughtful opinion about the complex legal issues that might arise in a particular case?¹⁰⁶

years on the federal bench. See Kaufman, *supra* note 7, at 1, 2-3 & n.14.

100. See MOLLY SELVIN & PATRICIA A. EBENER, INSTITUTE FOR CIVIL JUSTICE, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 27 (1984).

101. See BARRY MAHONEY ET AL., NATIONAL CTR. FOR STATE COURTS, IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS: PRELIMINARY FINDINGS FROM CURRENT RESEARCH 8 (1985).

102. See Priest, *Role of the Jury*, *supra* note 13, at 193.

103. Alschuler, *supra* note 13, at 1822.

104. Of course, judges have been unable to maintain this pace, which is why their caseloads have been rising over the years.

105. The dangers of requiring judges to be case managers is the subject of Judith Resnik's thoughtful and comprehensive article on the issue. See Resnik, *Managerial Judges*, *supra* note 4, at 374. This issue is discussed in more detail below. See *infra* text accompanying notes 192-93.

106. In addition, the burden on judges has, in my opinion, also impacted negatively on

Delay in the courts also affects the experience of the individuals and entities who resort to the judicial system for resolution of their disputes. The mere fact that parties must wait years before their position in a dispute is vindicated is a qualitative diminution of justice. Moreover, to the extent that evidence becomes less trustworthy over time, delay results in less accurate outcomes.¹⁰⁷ In addition, as oth-

their attitude toward the attorneys who appear before them. At the outset of this article I quoted one judge who was honest enough to express his views in a published opinion. *See supra* text accompanying note 1. More often, judges' frustrations find expression in less official and usually undocumented ways.

A story from my practice illustrates this point. One of the largest and most important cases I tried as a prosecutor was *United States v. Gambino*, 728 F. Supp. 1150 (E.D. Pa. 1989), *aff'd*, 926 F.2d 1355 (3d Cir.), *cert. denied*, 112 S. Ct. 415 (1991). The case involved an international drug conspiracy conducted by alleged members of the Sicilian Mafia. It resulted in two trials, one approximately four weeks in length and one approximately seven weeks in length, which together ended in the conviction of eleven defendants. The Chief Judge of the United States District Court for the Eastern District of Pennsylvania, referred to here as "Judge B" out of respect and courtesy, presided over the two trials as well as an extensive set of pre-trial hearings.

Including the time I spent providing legal assistance during the investigation, the case represented the better part of two years of my professional life. As it turned out, Judge B scheduled the sentencing of a number of the defendants at a time when I was trying another case in the same courthouse. To accommodate his court day, Judge B scheduled these sentencings for either 9:30 a.m. or 4:00 p.m. After all of my work, I wanted to participate in the sentencing hearings. I asked Judge B to move the hearings one half-hour each—to 9:00 a.m. and 4:30 p.m. That way, I could attend at least part of each hearing before or after I had to appear in court on the other case. The rest could be left to co-counsel.

Judge B refused my request. I was stunned. By that time, he knew me quite well, and I thought he would surely grant me this simple courtesy. I decided to ask the other judge if he could accommodate me in any way. I did so by letter, and, out of courtesy, I sent Judge B a copy.

Much to my dismay, Judge B reacted by writing me a three page letter describing the court's caseload and lambasting me for having the audacity to expect the court to accommodate the schedule of an Assistant United States Attorney. But he did not stop there. He effectively punished me by *copying the letter to all of the other judges in the district*. Because he did not recount my specific request, the impression left by this letter was that I had asked for some outrageous favor from the court. I spent a week trying to figure out how to re-establish my reputation in the courthouse in light of this attack.

After much consternation, I decided to do nothing. I figured that any attempt to communicate my side of the story to the other judges would only make the Chief Judge angrier, an outcome I could not afford. A few days later, another judge in the district—before whom I had never appeared—wrote me a letter instructing that I *never* request a continuance in his courtroom.

Perhaps I am wrong, but I believe that in earlier times, before the pressure of huge caseloads dominated their professional lives, judges were more accommodating of the lawyers who appeared before them.

107. *See* David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 74 (1981) ("Either party may legitimately worry that a crucial witness will forget the facts, disappear, or die before a

ers have pointed out, the burden of delay does not fall equally on all litigants.¹⁰⁸ Delay is probably least troublesome for large ongoing business concerns; to them, litigation is just a cost of doing business that can be factored into each year's operating budget. But for smaller concerns, and for individuals, the price of delay can be tremendous. Personal injury plaintiffs, for example, are harmed by continuation of the status quo during the pendency of a lawsuit; they may have medical and other expenses that cannot be met until judgment is entered (and collected). Some defendants will also be harmed by delay. Consider, for example, a physician who is named in a non-meritorious malpractice suit; she must wait until the conclusion of the case for vindication of her reputation, and she may suffer serious consequences, such as loss of respect by colleagues or loss of patient following, in the meantime.

The problem of civil litigation delay is thus one that merits attention.¹⁰⁹ The next section explores the parameters of a possible

case comes to trial.").

108. *Id.* at 74; see also Fiss, *supra* note 18 at 1076.

109. Some commentators have come to a different conclusion—or at least have appeared to do so. For example, both Marc Galanter and Austin Sarat have challenged the notion that we are experiencing a "litigation crisis" in this country. See Galanter, *Landscape*, *supra* note 13; Sarat, *supra* note 13. A close look at their analysis, however, reveals that it is only tangentially related to the concerns addressed in this Article. Both Sarat and Galanter attempt to document that Americans do not file an excessive number of lawsuits relative to the number of potential disputes that arise from their social and economic activity and when compared with litigation rates from other eras and other countries. All this might be true, but it does not have much to do with the question whether judges are adequately dealing with the disputes that do end up in the courthouse.

In addition, though, Sarat does express some skepticism about the degree of the burden presently facing our courts. See Sarat, *supra* note 13, at 330. He relies, in part, on the findings of Professor Clark. Writing in 1981, Clark demonstrated that the average duration of civil cases in the federal courts was much worse in the early part of the twentieth century, and that "delay has stabilized at between 0.9 and 1.3 years" after World War II. Clark, *supra* note 107, at 80. Presumably, Clark's figures are different from those set forth above, see *supra* text accompanying notes 94-102, because he computed the *average* duration of *all* civil cases while I referenced the *median* duration of *only those cases that go to trial*.

Even assuming that Clark's statistics are accurate, I do not think that they successfully refute the proposition that court congestion is a problem. First, his statistics are for federal court only; much of the problem exists in state courts. Second, a year-long delay is nothing to be happy about, even if it has historical roots. Third, Clark's statistics do not refute the proposition that parties who seek actual adjudication—i.e., a trial—must wait longer to get it. Fourth, and most interestingly, I do not think that a "litigation year" in 1940 is equivalent to a "litigation year" in 1993. The difference comes from the progress we have made in the speed of travel and communication during this interval of time. In the 1940s, lawyers and litigants relied on first class mail, manual or electric typewriters, carbon copies, manual filing systems, and trains. In the 1990s, we have fax machines, overnight mail, computers, laser

solution.

C. Normative and Empirical Underpinnings of the AJT

In recent years, judges, scholars, and other interested parties have suggested a variety of solutions to the problem of court congestion and delay.¹¹⁰ Courts have implemented a number of these solutions, such as the judicial management of cases,¹¹¹ court-annexed arbitration,¹¹² Summary Jury Trials,¹¹³ and the restriction of diversity jurisdiction,¹¹⁴ with only modest success. Some other proposals, such as Alschuler's Two-Tiered Trial System,¹¹⁵ have yet to be tried.

Despite the proliferation of ideas, this Article suggests that a new reform proposal, the Abbreviated Jury Trial ("AJT"), be added to the mix. The essential reason is this: the AJT would achieve a unique and, at least in some contexts, superior balance among the normative goals of our civil justice system. As a "more efficient" jury trial, the AJT would attempt to further the following normative objectives simultaneously: (1) the efficient resolution of disputes; (2) the production of accurate juridical outcomes; (3) the production of socially

printers, and jet planes. A one year delay in 1993 is thus qualitatively different than it was in 1943.

Let me illustrate this point with an analogy. I would guess that fifty years ago, before the advent of the interstate highway system, travel between New York and Philadelphia (roughly ninety miles) took about four hours. In the 1990s, on the Wednesday before Thanksgiving, the trip takes about the same length of time because one must "crawl" on severely overcrowded highways. Despite the similarity in the duration of these trips, the nature of the experience for the travelers is obviously very different.

110. Clark suggests that two basic approaches have been taken toward the problem of court delay: the "judicial-professional" approach, which divides among individuals who favor increasing the number of judges and those who favor restricting access to the courts; and the "bureaucratic-administrative" response, which holds that better management of cases can effectively reduce delay. See Clark, *supra* note 105, at 74-78. During the twentieth century, strategies derived from both of these approaches have been implemented, at least to some degree. *Id.* at 77-78 (noting increasingly bureaucratic nature of the federal courts); see *id.* at 86-88 (tables showing the rise in the number of federal judges during the twentieth century).

111. See Resnik, *Managerial Judges*, *supra* note 4, at 374.

112. See Kaufman, *supra* note 7, at 17-22 (describing court-annexed arbitration).

113. See Kaufman, *supra* note 7, at 13-17; Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986); Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 368-69 (1986).

114. Effective in 1990, Congress increased the jurisdictional amount for diversity cases from \$10,000 to \$50,000. This led to a fifteen percent decline in diversity filings during the fiscal year ending June 30, 1990, which was an important factor in an overall decline in civil case filings of seven percent. See 1990 REPORT, *supra* note 10, at 8-9.

115. See Alschuler, *supra* note 13.

acceptable outcomes; (4) the public adjudication of disputes, meaning the maintenance of a system characterized by cases in which facts are found on the record during proceedings accessible to other litigants and the general public; and (5) decision-making by a fair, impartial, and non-governmental entity.¹¹⁶

Listing these normative objectives, although a critical step in scholarship conforming to the neopragmatic methodology outlined above,¹¹⁷ is easy. The analysis that follows takes up the much more difficult (and equally pragmatic) tasks of justifying the importance of each normative goal¹¹⁸ and describing in detail how an abbreviated jury trial procedure would seek to achieve them.¹¹⁹

1. The Efficient Resolution of Disputes

The AJT proposal rests on two fundamental premises: first, that the pace of civil litigation can be improved by designing a dramatically shorter jury trial; and second, that the only realistic means of ensuring a shorter trial is by fixing its length in advance through the

116. I have previously discussed in the abstract the importance of these normative goals to the formation and evaluation of evidence doctrine. *See* Seigel, *supra* note 13, at 1015-20; *cf.* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 845-59 (1984) (discussing a long list of values underlying adjudicatory procedures).

117. *See supra* text accompanying note 82.

118. The subsequent analysis does not address the goal of efficiency. The justification for the goal of maintaining an efficient dispute resolution system has already been made in the context of explaining why court congestion is a legitimate problem. *See supra* text accompanying notes 92-107.

119. I think it important to note that the AJT is not the only possible method of solving the court congestion problem in a manner potentially consistent with the objectives of the civil justice system stated in the text. Other possible solutions would include the creation of a sufficiently comprehensive and generous social welfare system to replace personal injury litigation, or the legalization of controlled substances, which would dramatically reduce the number of criminal trials, thereby freeing up significant additional judicial resources for civil litigation. My reasons for promoting the AJT over these possible solutions to the court congestion problem and others like them are several—and are derived from nothing more profound than my limitations as a human and scholar. First, other possible solutions to the congestion problem involve normative positions and empirical assumptions that I have not investigated and do not feel comfortable defending. In contrast, the AJT requires consideration of issues raised by the process of litigation itself, an area in which, as a former trial lawyer and current evidence professor, I have considerably more expertise. Second, as I made clear in my statement of subjectivity, my ruminations about the AJT arise out of my belief that evidence scholars ought to be involved in the process of designing and testing alternative methods of dispute resolution. Thus the AJT is a procedural solution relying in large part on a redesign of evidence rules. Finally, I do not care to invest a large amount of time and effort in a futile endeavor; my intuitive sense is that I am significantly more likely to achieve change by offering courts a new method of dispute resolution than by arguing for hotly contested changes in substantive civil or criminal law.

imposition of severely limited and strictly enforced time constraints on each party's courtroom presentation.

The proposition that a reduction in the length of jury trials would translate into a reduction in overall civil litigation delay is, perhaps, counterintuitive. After all, it is well documented that the bulk of litigation delay—months or even years—occurs during the pre-trial stage of a case.¹²⁰ By way of comparison, the average civil jury trial is only three or four days long.¹²¹ On this point, however, analyses of the civil trial system have yielded two critical, and related, findings. First, the slow pace of litigation is a matter of ingrained legal culture. In any given jurisdiction, lawyers quickly learn unwritten rules about how long a case typically gets strung out before it actually goes to trial, and they act accordingly.¹²² Second, the most effective means of resolving a civil dispute is a firm trial date.¹²³ As some commentators have noted, trial is a “doomsday event.” When a lawyer knows his time is up, he will pull his case together and either settle it or, if necessary, proceed in court.¹²⁴

120. See, e.g., REPORT TO THE PEOPLE OF PHILADELPHIA FROM THE OFFICE OF THE DISTRICT ATTORNEY 99 (1970-71); Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 10 (1992); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 639.

121. This is a very rough figure because there appears to be considerable variation in the average length of trials around the country. In Chicago, the mean trial length for all civil cases tried between 1959 and 1979 was 3.8 days. Priest, *Role of the Jury*, *supra* note 13, at 174 (Table 1). In contrast, a 1985 estimate of the average length of civil jury trials in Los Angeles was fourteen days. Sipes, *supra* note 13, at 314-15. At the other end of the spectrum, the average length of civil trials in Portland, Oregon in 1982 was only 1.9 days, although this represented a sixty percent increase over the 1972 figure. See Sipes, *supra* note 13, at 315.

122. For example, the National Center for State Courts, after conducting an extensive study of civil litigation delay, concluded:

[B]oth quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the “local legal culture.” Court systems become adapted to a given pace of . . . litigation. That pace has a court backlog of pending cases associated with it. It also has an accompanying backlog of open files in attorneys’ offices. These expectations and practices, together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation.

THOMAS CHURCH ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* 54 (1978).

123. See Sipes, *supra* note 13, at 311 (“[T]he single most effective stimulant to settlement . . . is the scheduling of a firm and unavoidable trial date in the near future.”).

124. See, e.g., Kaufman, *supra* note 7, at 15-16 (noting that a Summary Jury Trial is a doomsday event which, like real trials, causes parties to examine their case closely and inten-

In response to these findings, many courts have improved their monitoring of pre-trial processes, and delay that once was caused by dilatory discovery and other pre-trial practices has been reduced in many jurisdictions.¹²⁵ But, as noted above, court congestion has not improved. This is because judges cannot change the fact that, no matter how many cases are ready for trial at any given time, only one case can be tried in each available courtroom, while the remainder languish. Moreover, when more than one case is scheduled to start trial on a given day, lawyers tend to discount the doomsday nature of that trial date in terms of both their preparation for trial and their willingness to enter into serious settlement negotiations.¹²⁶ The court calendar, it turns out, is the bottleneck in the process of resolving civil disputes.

If employed on a significant basis, AJTs would improve the pace of civil litigation by substantially increasing the number of trials a court could schedule in a year. Let us assume that AJTs would consume, on average, sixty percent less time than full-blown jury trials, and that they were substituted for such trials, fifty percent of the time.¹²⁷ Under such conditions, AJTs would automatically increase the number of cases a court could dispose of in a year by thirty percent. But the effect of a fixed-length jury trial on the pace of litigation would probably be even greater. Given that the duration of AJTs would be known in advance, courts could schedule firm trial dates for them, back-to-back. Thus, at any given time, a greater number of lawyers would be facing doomsday than present trial procedures permit.¹²⁸

sify their settlement efforts).

125. See Sipes, *supra* note 13, at 312 (noting that "court control of the pace of litigation during all pretrial stages has produced dramatic improvements in shortening the time required to bring disputes to a conclusion"); see also Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505, 517-19 (1984) (Tables 1 and 2) (examining statistics from six federal district courts indicating that pre-trial judicial management decreases case disposition times and increases settlements). I should note, however, that some kinds of judicial intervention in the pre-trial process, particularly judicial activism in promoting settlement, appear to have been largely ineffectual. Galanter, *Judicial Mediation*, *supra* note 18, at 8-10.

126. See Sipes, *supra* note 13, at 315 (observing that longer trials result in the reduction of the number of cases both tried and settled).

127. These numbers are discussed in greater detail below. See *infra* text accompanying notes 137-40.

128. Professor Priest has argued that reforms aimed at the reduction of delay between the time of filing and the time of trial will not reduce the backlog of cases over the long run because there is an inverse relationship between the length of delay and parties' willingness to accept settlement. In other words, when cases start to move faster, more parties choose to

How could one guarantee a system marked by short fixed-length trials? The only feasible method is to place the burden of time limits squarely on the shoulders of trial lawyers. The other available option—judicial management of courtroom litigation—has failed miserably, which should have come as no surprise. No matter how far a judge delves into the management of a case, she will always be at the mercy of the lawyers for information about their legal theories and the evidence necessary to prove them. If counsel claims that five witnesses are needed to prove essential facts, the judge can legitimately challenge his representation only if she knows the content of the witnesses' testimony, their credibility, and the importance of their testimony to the attorney's case. Acquiring this information is extremely burdensome; in most cases it would consume more of the court's time than it would take to let the five witnesses testify before the jury.¹²⁹

On the other hand, limiting a party's evidence without a thorough grasp of its alleged significance is risky because, if the judge

go to trial, slowing the pace of the system down once again. He calls this the "equilibrium hypothesis." See Priest, *Private Litigants*, *supra* note 11, at 531-57.

My response to Priest is twofold. First, as he recognizes, the equilibrium hypothesis does not preclude the possibility that a given reform could bring a system to a new equilibrium point characterized by less congestion. See *id.* at 557. This limitation on the importance of Priest's hypothesis appears to be confirmed by the fact that the length of delay experienced by courts across jurisdictional boundaries is subject to significant variation; the equilibrium hypothesis is obviously not accounting for one or more factors affecting the pace of litigation. See Geoffrey P. Miller, *Comment: Some Thoughts on the Equilibrium Hypothesis*, 69 B.U. L. REV. 561, 567 (1989). Second, as Priest notes in a later article, the equilibrium hypothesis does not apply if a proposed reform would also increase the settlement rate. See Priest, *Role of the Jury*, *supra* note 13, at 198-99 (arguing that elimination of the civil jury in a large number of cases would affect the pace of litigation by shortening trials and increasing settlement rate). AJTs would increase the settlement rate because they would create a full scale doomsday event—the exchange of trial plans—prior to a firm trial date. See *infra* text accompanying notes 171-76.

129. See, e.g., Frederick B. Lacey, *Proposed Techniques for Streamlining Trial of Complex Antitrust Cases: Pro and Con*, 48 A.B.A. ANTITRUST L.J. 487 (1979). Judge Lacey relates that he required counsel in a complex case to submit

their preliminary proposed findings of fact, annotated to names of proposed witnesses, exhibits . . . depositions, answers to interrogatories, and admissions. I . . . then had each side criticize each proposed finding of fact of his adversary. These were submitted to me in book form In numerous instances, disputes disappeared. In other cases, the critique would state that only a particular phrase within a lengthy proposal was disputed. Elimination of that phrase eliminated that dispute. Stipulations in great numbers resulted, and the parties were thereby saved the necessity of producing substantial evidence at trial.

Id. at 488. By placing the burden of wasted time on the litigants, the AJT would achieve the same result without this huge expenditure of judicial resources.

miscalculates, she may be reversed on appeal for abuse of discretion¹³⁰ or violation of due process.¹³¹ Reversal would, of course, mean trying the entire case all over again. Thus, under the current system, judges are under tremendous pressure to give lawyers considerable latitude in presenting evidence to support their case.¹³²

Lawyers, of course, have little or no reason to speed litigation along. Consider first, the economic incentives. Lawyers who bill by the hour are happy to be in court because the clock is running. Some even charge a premium for court time; for them, prolonging a trial is especially rewarding. Many other civil litigators are paid on a contingency basis; after investing in a case, they are motivated to win, not rush. Only lawyers who have accepted a flat fee for a trial arguably

130. See, e.g., *Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st Cir. 1991) (finding abuse of discretion for limiting parties to the presentation of one witness each). On two occasions, the Seventh Circuit has noted its disapproval of arbitrary limits on the parties' courtroom presentations, but it avoided reversal. *McKnight v. General Motors Corp.*, 908 F.2d 104, 114-15 (7th Cir. 1990) (holding that defendant failed to preserve the issue on appeal), *cert. denied*, 499 U.S. 919 (1991); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (holding that plaintiff failed to show prejudice from the time restriction).

131. Although courts have not yet looked at the issue from the perspective of due process, at least one scholar believes that this constitutional guarantee may be implicated by arbitrary time or witness limits. See John E. Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 U.S.F. L. REV. 237, 250-59 (1992).

132. Despite the disincentives, some courts have imposed strict time limits for the presentation of proof. See *Juneau Square Corp. v. First Wis. Nat'l Bank*, 475 F. Supp. 451, 465-66 (E.D. Wis. 1979) (holding time limits imposed on the parties to be reasonable), *aff'd*, 624 F.2d 798 (7th Cir.), *cert. denied*, 499 U.S. 1013 (1980); *MCI Communications Corp. v. AT&T Co.*, 85 F.R.D. 28, 29-32 (N.D. Ill. 1979) (imposing strict time limits on parties in upcoming litigation), *aff'd*, 708 F.2d 1081, 1170-73 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983); *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 15-16 (D. Conn. 1977) (limiting plaintiff's case in antitrust action to six months).

In line with this growing trend, the December 1993 amendments to Federal Rule of Civil Procedure 16(c) added subparagraph (15) which explicitly authorizes a judge to enter a pre-trial order "establishing a reasonable limit on the time allowed for presenting evidence." Although this amendment represents movement in the right direction, it fails to take the critical step of shifting the burden of shorter trials from the judge to the parties. The advisory committee's note to Rule 16(c)(15) makes clear that the judge is responsible for ensuring that time limits are "reasonable" in light of the parties' need and desire to present evidence, which means that trial courts' decisions to limit the proof in a case remain subject to being second guessed by courts of appeal. The comments also state that time limits should be imposed only after the court expends the time and energy necessary to examine all of the proposed evidence in the case. FED. R. CIV. P. 16(c)(15) advisory committee's notes.

In contrast, the AJT would operate under the assumption that if parties were told near the outset of the litigation that they would have a specific amount of time in which to present their evidence, and if the rules of evidence were significantly changed to facilitate a more efficient trial, the court could enforce its time limits strictly without fear of reversal. The burden would be on the parties to fit their presentations into the allotted time.

want to see it end as quickly as possible, although winning is still more important to their long term economic well-being than trimming hours, a point that is probably not lost on most of them.

Second, in their pursuit of victory, trial lawyers have good reason to introduce every last bit of evidence even remotely relevant to their case. The odds of losing a case by putting on too much proof are extremely low,¹³³ while the possibility of losing it by failing to introduce a bit of marginal but available evidence—though also low—is a litigator's nightmare.¹³⁴ Additionally, a litigator has typically lived with a case for years before it comes to trial; such familiarity often causes lawyers to lose perspective, to be unable to differentiate between critical and tangential evidence. Finally, civil litigators rarely get to try a case before a jury. When they are presented with this opportunity, they are naturally inclined to savor every minute of it.

Lawyers also make intentional strategic decisions that cause trials to be inefficient. As one judge has noted, litigators sometimes try to bury the weakness of some aspects of their case in an avalanche of evidence in support of other points.¹³⁵ Even more significant, lawyers sometimes use the rules of evidence as a strategic sword, forcing their opponent to jump through evidentiary hoops on issues that they know to be essentially uncontested. The result is extreme inefficiency in the way cases are tried.¹³⁶

133. The odds are not so low as to preclude this possibility. For example, sometimes a minor defendant's best strategy in a multi-defendant case is to "hide" from the jury. Alternatively, a lawyer who grossly "overtries" her case by presenting large amounts of cumulative evidence risks creating resentment and ill-will among at least some members of the jury.

134. As Judge Bertelsman has observed:

It would seem that early in the career of every trial lawyer, he or she has lost a case by leaving something out, and thereupon resolved never again to omit even the most inconsequential item of possible evidence from any future trial. Thereafter, in an excess of caution the attorney tends to overtry his case by presenting vast quantities of cumulative or marginally relevant evidence.

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

135. *Reaves*, 636 F. Supp. at 1578 ("If [an attorney] believes he can win th[e] case by proliferating the evidence of the favorable, but relatively uncontested matters so that the weaker aspects of the case will be camouflaged, it is asking too much of our fallen nature to expect him voluntarily to do otherwise.")

136. An example from my practice helps make this point. In the second *Gambino* trial, see *supra* note 106, the prosecution introduced about fifty surveillance photographs showing the defendants meeting each other, and other individuals, on street corners in Philadelphia and New York. Defense counsel insisted that the government's witnesses not be permitted to refer to any of the individuals in the photographs by name unless the witness had personal knowledge of the individual's identity, which was the defense's prerogative under Federal Rule of

Trials can be shortened, then, only by placing the burden of trial length on the individuals who have the means to control it—the lawyers. And the only real way to shift this burden is to give each lawyer a fixed amount of time in which to present his case. Shorter trials would lead to the faster resolution of disputes and less burdensome court dockets. The normative goal of increasing efficiency would be achieved.

Thus, the AJT format might operate something like this. Early in the course of litigation, shortly after the decision was made to proceed by AJT,¹³⁷ the court, in consultation with the parties, would

Evidence 602. Defense counsel further insisted that the photographs not be admitted in evidence or shown to the jury until all the individuals in them were identified, which was arguably their right under Federal Rules of Evidence 102, 401, and 402. Because most of the government's surveillance witnesses were FBI agents who knew the identity of the photographed individuals only as a result of being briefed by other agents, the defense objections made introduction of the photographs extremely cumbersome and time consuming. Several days worth of court time was spent authenticating the photographs. During much of this time, witnesses testified to the identity of individuals in the pictures while the pictures—not yet in evidence—were hidden from the jury.

One defendant took the witness stand. On cross examination, I asked her to identify all of the individuals in the photographs in quick succession. In a matter of minutes, the witness identified scores of individuals and, in the process, revealed that the government's identifications had been completely accurate. The rules of evidence had permitted the defense to require days of confusing testimony for the government to prove minutes of straight-forward information. Defense counsel had made the strategic decision to disrupt the government's case as much as the rules would allow.

I recognize that there is less room for this kind of strategy in civil litigation, where the rules of civil procedure require the parties to narrow the scope of their disagreement prior to trial. *See, e.g.*, FED. R. CIV. P. 36 (addressing requests for admissions). But the existence of these rules cannot completely eliminate strategies that are designed to disrupt an opponent's proof—which lengthen the amount of time it takes to try the case. *See supra* note 106.

137. At least in its experimental stages, AJTs should be employed only with the prior consent of all litigants. If AJTs lived up to their claim of providing a faster and less expensive means of dispute resolution than full-blown jury trials without a perceptible reduction in the accuracy and acceptability of verdicts, an increasing number of litigants would voluntarily submit to the summary procedure. At some juncture, though, as the AJT became an accepted form of adjudication, it would make sense to empower courts, on motion of a party, to order that a particular case be resolved by means of an AJT. This would allow use of the AJT in cases in which one party would otherwise pursue a strategy of delay as a means of preserving a favorable status quo.

I do not anticipate, however, that the AJT would ever totally displace the other forms of dispute resolution, from alternatives such as mediation and arbitration to the "full-blown jury trial." Pragmatism counsels against formulating a unitary answer to a multifaceted problem, *see supra* text accompanying note 55, which appears to be sound advice in this setting. Each of the existing forms of dispute resolution offers a unique balance among the normative goals of the system, and each has its place in that system. Indeed, as the various methods of ADR become more common, scholars might think about establishing guidelines to assist judg-

determine the length of each side's courtroom presentation. For the AJT to be a meaningful alternative, the length of time allotted for it would normally be no more—and hopefully significantly less—than fifty percent of the time necessary for a conventional jury trial. Additionally, capitalizing on the economies of scale, the time reduction for an AJT would increase as the anticipated trial length increased. For instance, a five day conventional trial might result in a two day AJT, whereas a two week (ten day) conventional trial would be fit into a three day AJT. At the far end, there would be a presumption that no AJT would last longer than two weeks. Thus trials that might take three or even six months in their “full-blown” mode would in the normal course be fit into a two week AJT.¹³⁸

The court would have to allocate AJT hours among the parties. In many instances, this allocation would not be equal; the party with the burden of proof would normally need more time to put on its case. The critical feature of the AJT would be this: once the court determined the length of time for a party's presentation, this decision would not, absent the most extreme circumstances, be subject to alteration. Rather, trial counsel would be responsible for tailoring her presentation to fit the predetermined time allotment. If the clock were to run out before counsel's presentation was complete, it would be counsel's problem, not the court's.

In order to be effective, AJTs would need to operate in lieu of conventional jury trials, not as a prelude to them. Thus, the verdict rendered in an AJT would have the same effect as the verdict rendered after a full-blown jury trial. The losing party would, of course, have a right of appeal, but it would not be entitled to a trial *de novo* regulated by the conventional rules of evidence. This would prevent AJTs from becoming yet another settlement technique, which is inevitable if parties have the right to a trial *de novo*.¹³⁹ It also means that AJTs would not operate in the shadow of conventional trials, in which case the AJT's summary procedures would serve little purpose.

es in the task of “litigation triage,” that is, the task of determining early in litigation the process that is most likely to resolve a dispute in a manner most beneficial to the litigants and the public.

138. If these time limits seem a bit arbitrary, it is because they are. A fundamental premise lurking underneath the AJT is that, with sufficient freedom from the current rules of evidence, lawyers could make effective presentations in any reasonable amount of time allotted to them.

139. We do not need another settlement technique. We need a more efficient means of adjudication. See *infra* text accompanying notes 192-202.

With a right to trial de novo, attorneys would simply discount AJT outcomes to the extent that the evidentiary mix of a conventional trial might be different.¹⁴⁰

2. Ensuring Accurate Verdicts

Efficiency in the civil jury system is important, but it should not be purchased at the price of inaccurate verdicts.¹⁴¹ In this regard, the AJT is founded on the following premises: (1) with sufficient changes in the rules regulating pre-trial discovery and the admission of evidence, parties could adequately present a case in less than half the time needed for a conventional jury trial, and; (2) means substantially less cumbersome than the application of the current rules of evidence could be effective in ensuring that the adjudicatory process (a) does not become tainted by inaccurate or untruthful information and (b) does not lose the benefits of an adversarial encounter.

The first of these premises is surprisingly easy to defend. In comparison with almost all other methods of modern communication, the cumbersome nature of jury trials is astonishing. Consider, for example, feature length movies and television documentaries. Through these media, extremely complex stories are told in a very short period of time, and these stories are comprehended by the very same individuals who serve on petit juries. If the rules permitted it, there is no inherent reason why litigants' stories could not be communicated in the courtroom with similar impact and efficiency.

Nor is it possible to distinguish non-adjudicatory settings from all others by the importance of the decisions being made, or by the adversarial nature of the process. An example from the business world can illustrate this point. Assume that a company is trying to decide whether to introduce a new product into the market. To assist in making this decision, the company vice-president might ask a team

140. I am not the first scholar to propose the imposition of strict time limits on civil jury trials. See, e.g., Roger W. Kirst, *Finding a Role for the Civil Jury in Modern Litigation*, 69 JUDICATURE 333, 338 (1986) (arguing for strict time limits, coupled with "fewer issues, more efficient presentation of evidence, and a changed style of litigation"). I believe, however, that I am the first to articulate a robust justification for such a proposal and to present a fully-developed picture of the changes in the rules of evidence and procedure that would be essential to its success.

141. This normative statement requires no elaborate justification. If anything, I anticipate that the AJT will be criticized for failing to provide sufficient protection against inaccurate verdicts. Such an attack will arise out of what I have elsewhere characterized as evidence scholars' excessive preoccupation with the goal of verdict accuracy. See Seigel, *supra* note 13, at 1008.

of subordinates to research the issue and make recommendations. The employees would presumably conduct studies, gather facts, interpret evidence, and reach a set of conclusions. During this process, some on the research team might disagree with their colleagues and develop a minority position. At the appropriate time, the subordinates would present their findings and recommendations to the vice-president, probably through an audio-visual presentation. If a minority position had developed, the vice president would be presented with conflicting, adversarial points of view. How long would the presentation last? In most cases, it would probably span a couple of hours or, if the decision were extremely critical, perhaps a few days. On the basis of this information, the vice-president would make a final decision, perhaps risking millions of dollars in the process.

Presently, trials do not resemble television documentaries or business presentations because of the rules of evidence. The primary function of the rules is to further the accuracy of trial verdicts.¹⁴² The rules achieve this goal, however, by impeding the kind of direct and concise communication that takes place outside of the adjudicatory setting. The AJT is based on the conviction that a trade-off between accurate verdicts and effective courtroom presentations is not inevitable.¹⁴³

The AJT would increase efficiency without overly sacrificing accuracy by seeking to capitalize on two revolutionary changes that have affected civil litigation during the twentieth century: civil discovery, which came into being when the Federal Rules of Civil Procedure were enacted in 1938; and videotape technology, which became routine and inexpensive during the 1970s and 1980s.

142. *Id.*

143. Thus, the AJT proposal only partially assumes, in the words of Professor Resnik, "that the quantum of information produced by adjudication is unnecessary—that outcomes every bit as good can be produced with less data, less formality, and fewer constraints." Resnik, *Adjudicatory Decline*, *supra* note 13, at 554. Some of the information communicated during full blown jury trials is unnecessary because trial lawyers have little incentive to examine the proof with an eye toward eliminating the excess. *See supra* text accompanying notes 135-36. The AJT seeks to give them this incentive. But the AJT also seeks to permit a more direct form of communication between advocate and fact finder, not by eliminating formality and constraints, but by replacing some of the formality and constraints that presently regulate litigants' courtroom presentations with pre-trial safeguards. In so doing, however, the AJT proposal does reject Professor Landsman's argument that the slow pace of adjudication caused by rules of procedure and evidence is essential to the integrity of the process. *See* Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 *BUFF. L. REV.* 487, 499-501 (1980).

Discovery has permanently altered the landscape of litigation. As a result of discovery, civil trials are no longer pure adversarial clashes during which parties learn about, and react to, their opponent's case. Instead, post-discovery trials mostly consist of presenting to a third party—the jury—evidence that the parties already know quite well. The witnesses' testimony is generally a repeat of their deposition testimony, and the documents and other tangible evidence introduced at trial have been produced and meticulously examined by the parties at an earlier time.¹⁴⁴

At the same time, videotape technology has fundamentally altered the possible methods through which deposition testimony can be preserved. For generations, the traditional form of preserving testimony has been, of course, transcription by a court reporter. When this was the only method of preservation, repetition of deposition testimony at trial made sense: it was needed to provide the jury with the opportunity to observe the witnesses' demeanor. With the advent of videotape technology, this is no longer the case. Although it is not identical, if properly recorded and replayed, videotaped testimony is sufficiently close to the live event to eliminate the necessity of repetition.¹⁴⁵

This latter claim is supported by solid empirical research. In *Videotape on Trial*, Professors Miller and Fontes report the findings of a series of fourteen studies conducted over a period of four years examining a multitude of issues raised by the use of videotape in the civil fact-finding process.¹⁴⁶ Unlike some social scientists,¹⁴⁷ Miller

144. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (stating that the discovery rules were intended to enable the parties "to obtain the fullest possible knowledge of the issues and facts before trial"); see also Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6 (1983) ("The Federal Rules of Civil Procedure were designed to effect a revolution in litigation by broadening the availability of discovery. They did so . . ."). In fact, the recent trend has been in the direction of instituting faster and more automatic pre-trial discovery. For instance, the December 1, 1993 amendments to the Federal Rules of Civil Procedure instituted mandatory pre-trial disclosure of all experts, witnesses, and exhibits to be used at trial. FED. R. CIV. P. 26(a)(1)-(3); see also Theodore J. Hamilton, *The 1993 Amendments to the Federal Rules of Civil Procedure: How the Changes Will Affect Your Life*, FLA. B.J., May 1994, at 36, 38-39.

145. See GERALD R. MILLER & NORMAN E. FONTES, *VIDEOTAPE ON TRIAL* (1979); see also James L. McCrystal & Ann B. Maschari, *Will Electronic Technology Take the Witness Stand?*, 11 TOLEDO L. REV. 239 (1980) (advocating pre-recorded videotaped trials); Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 535-36 (1991).

146. See MILLER & FONTES, *supra* note 145, at 7, 10.

147. See Seigel, *supra* note 13, at 1040.

and Fontes were extremely sensitive to the nuances and legal complexities of the trial setting; they consulted extensively with lawyers and judges as they planned their research.¹⁴⁸ They also took great care to account for the methodological problems that inhere in jury simulations. For example, they routinely sought to replicate the findings of one study with a second one, often with a different design.¹⁴⁹ As a result of their research, Miller and Fontes came to the following conclusions, among others:

(1) The use of videotape in the courtroom does not significantly affect juror verdicts.

(2) The use of videotape in the courtroom does not significantly affect the monetary awards to plaintiffs made by jurors.

(3) The use of videotape significantly affects the amount of trial-related information retained by jurors during a trial, with jurors retaining more information from taped testimony, particularly when it is presented monochromatically.

...

(7) The use of videotape in the courtroom to prevent witness testimony does not significantly affect juror judgments of the veracity of the testimony presented.

...

(9) Within the province of the simple production techniques studied in this research, characteristics of the witness appear to exert more impact on juror response than do production decisions. Stated differently, the presentation skills of the witness are more important than variations in such factors as a number of cameras and types of shots *given* the relatively rudimentary techniques studied.¹⁵⁰

Although additional study of the impact of video technology on the fact-finding process, especially in the context of the AJT format, is undoubtedly warranted,¹⁵¹ the work of Miller and Fontes provides firm ground for believing that a trial process characterized by extensive reliance on videotape can, with proper oversight, regularly produce accurate verdicts.¹⁵²

148. See MILLER & FONTES, *supra* note 145, at 61.

149. See *id.* at 52 (Table 2.1).

150. See *id.* at 211-12.

151. See *infra* text accompanying notes 168, 186-87.

152. MILLER & FONTES, *supra* note 145, at 207-17. *But see* Marcus, *supra* note 17, at 762-63 (coming to the opposite conclusion). In a thorough analysis of the issue, Professor Marcus argues that live trials "convey a texture and intensity" that cannot be matched by the presentation of videotaped evidence; the latter "would often lack significant emotive elements" of the former. *Id.* at 762-63. He supports this argument by reference to the fact that "movies

Thus an essential element of an AJT would be the courtroom presentation of portions of videotaped depositions. To accommodate this, the rules governing discovery would require modification.¹⁵³ In addition to all of the usual methods of discovery, the rules for AJTs would authorize parties to videotape "trial depositions," which would be depositions specifically tailored to create and preserve witnesses' testimony for courtroom use.¹⁵⁴ Trial depositions would begin with a direct examination conducted by the proponent of the witness's testimony, followed by cross-examination by the opponent. Simple rules regarding camera angles and shots would prevent parties from deviating from a straightforward recording of a deponent's testimony.¹⁵⁵ In addition, as is the case with discovery depositions, the traditional rules of evidence would be in force.¹⁵⁶ Parties could make evidential-

and television are not the same as legitimate theater." *Id.* at 763.

Having made almost the identical argument in print myself, I obviously have a great deal of sympathy for Marcus' point of view. Seigel, *supra* note 13, at 1042-43 & n.203. But, after reflection, I have concluded that the difference between live testimony and videotape, though undeniable, is not sufficiently great to forgo the enormous efficiency gains that are made possible by using videotape in an abbreviated trial procedure.

153. The AJT format would have little impact on the discovery process or pre-trial procedures generally. It is therefore compatible with either a hands-off attitude toward judicial intervention in the pre-trial management of cases or with active judicial involvement. The trend, of course, has been in the latter direction, especially in connection with complex litigation. *See, e.g.*, Edward F. Sherman, *Restructuring the Trial Process in the Age of Complex Litigation*, 63 TEX. L. REV. 721 (1984) (reviewing WILLIAM W. SCHWARZER, *MANAGING ANITRUST AND OTHER COMPLEX LITIGATION: A HANDBOOK FOR LAWYERS AND JUDGES* (1982) and WAYNE D. BRAZIL ET AL., *MANAGING COMPLEX LITIGATION: A PRACTICAL GUIDE TO THE USE OF SPECIAL MASTERS* (1983)). The AJT could also be coupled with innovative proposals regarding the pre-trial stage of litigation, such as a fast-track alternative with accelerated procedures. *See* McMillan & Siegel, *supra* note 15, at 438-54.

154. Many jurisdictions already provide for the videotaping of depositions, at least in some circumstances. *See, e.g.*, FED. R. CIV. P. 30(b)(2) (permitting "sound-and-visual" recording). Some courts have required it in specific cases. *See, e.g.*, *Rice's Toyota World, Inc. v. Southeast Toyota Distrib., Inc.*, 114 F.R.D. 647 (M.D.N.C. 1987) (granting plaintiff's request that all depositions be videotaped). The key here is that, for AJTs, the videotaping of trial depositions would be routine.

Professor Marcus criticizes the widespread imposition of videotaped depositions on cost grounds. *See* Marcus, *supra* note 17, at 748, 775. The only source he relies upon for this point is Michael H. Graham, *Nonstenographic Recording of Depositions: The Empty Promise of Federal Rule 30(b)(4)*, 72 NW. U. L. REV. 566 (1977). Given the revolution in video technology since 1977, Professor Graham's article seems hopelessly out of date. In my opinion, the reason why depositions are not routinely videotaped today is not the added cost involved, but the fact that videotaped depositions are generally not admissible at trial. If AJTs were otherwise perceived as an attractive dispute resolution technique, I do not believe that the cost of videotaping depositions would stand in their way.

155. *See* MILLER & FONTES, *supra* note 145, at 214.

156. *See* FED. R. CIV. P. 30(c) ("Examination and cross-examination of witnesses may

ry objections to their opponent's questions of the witness. These objections would preserve the record, but—except when issues of privilege were implicated—the questions would be answered.¹⁵⁷ Later, if an objectionable portion of the testimony were included in the opponent's "trial plan,"¹⁵⁸ the complaining party could ask for a ruling from the court.

In addition to the direct task of creating testimonial evidence for re-play at trial, trial depositions would represent the record upon which a party's entire AJT presentation would be based. As discussed below, counsel would be permitted to take a number of shortcuts during an AJT; for instance, counsel could proffer facts to authenticate a document.¹⁵⁹ But, absent stipulations, all of the information proffered at an AJT would have to be based upon evidence established by admissible means prior to trial.¹⁶⁰ Most of this would be evidence created through the trial deposition process. Thus, trial depositions would need to be quite thorough.

Responsibility for arranging a trial deposition would rest with the proponent of the evidence. In many cases, this would probably re-

proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath . . .").

It ought to be noted that, despite this language, the typical discovery deposition is quite different from trial testimony. In most depositions, cross-examination comes first and direct examination, if there is any, is used to clear up matters, not make a comprehensive record. This is one reason that "trial depositions" would require explicit recognition in the setting of AJTs.

The one traditional rule of evidence concerning witness testimony that might be loosened or eliminated for trial depositions is the prohibition of narrative testimony. See ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 6.14 (1991). Allowing narrative testimony would enable witnesses, especially parties, to "tell their story" to the jury, which fits the spirit of the AJT format. This modification could be accomplished at a negligible cost because objectionable material could be edited out of trial depositions prior to their use in the courtroom. See *infra* text accompanying note 174.

157. This is comparable to the procedures presently governing discovery depositions under the Federal Rules of Civil Procedure:

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections.

FED. R. CIV. P. 30(c); see also FED. R. EVID. 1101(c) (noting that the privilege rule applies at all stages of a case).

158. See *infra* text accompanying notes 174-77.

159. See *infra* text accompanying note 168.

160. See *infra* text accompanying note 169.

quire deposing the witness for a second time.¹⁶¹ On occasion, however, parties might agree to economize on trial preparation by combining a witness's discovery and trial depositions. The critical determination would be whether the case was sufficiently simple, or the discovery process sufficiently far along, for both parties to feel comfortable conducting trial-like examinations of the witness.¹⁶²

The mere replaying of witness depositions at trial, though likely to improve efficiency to some degree, would certainly not justify cutting the length of a trial in half.¹⁶³ To achieve such a revolutionary change, courtroom presentations during an AJT would need to be as efficient as television documentaries or business presentations. This could be accomplished only by permitting attorneys to make complete and uninterrupted presentations to the jury. Moreover, the benefits of such a format would be maximized only if the attorneys' presentations interspersed the three types of information that, in the conventional jury trial, are presented to the jury in isolated steps: introductory remarks (presently limited to the opening statement); evidence (presently the body of the case); and argument (presently not permitted until closing argument). This would enable each lawyer to tell his client's story directly, supporting that story with evidence as it unfolded.¹⁶⁴ Pre-planned, unified, and coherent presentations by the parties would also facilitate juror comprehension of a case presented

161. This would, of course, require amendment of Federal Rule of Civil Procedure 30(a)(2)(B), which requires leave of court to depose a witness more than once.

162. There is good reason to believe that, as trial lawyers became comfortable with the AJT, they would link discovery and trial depositions together, thereby minimizing any additional pre-trial time necessary for AJT preparation. First, the rules governing discovery and trial depositions would be identical; the unique characteristics of the discovery deposition are simply the result of pre-trial strategy, which would be quite different in the context of the AJT. In addition, parties would have a strong incentive to minimize the cost of trial depositions by linking them with the process of discovery.

To the extent that a second round of depositions were necessary, the pre-trial process for an AJT would, of course, be longer (and more costly) than that for conventional trials. But much of this additional time and expense would be recovered as a result of the significantly shorter trial. In addition, the time and cost would be shifted from the courts to the private litigants.

163. In my opinion, the main reason that previous calls for the use of videotape as a means of streamlining the conventional trial process, *see, e.g.,* McCrystal & Maschari, *supra* note 145, at 241-44, have gone unheeded, *see* Marcus, *supra* note 17, at 746, is because participants in the trial process accurately perceived that the efficiency gains from this change alone would be too small to justify the (mostly non-monetary) costs incurred along the way.

164. The AJT format is thus consistent with the recent scholarship delineating a "story model" of juror decision-making behavior. *See, e.g.,* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519 (1991).

in a much reduced period of time.

Accordingly, although most of the rules of evidence that govern conventional jury trials would be equally applicable to AJTs, some would require significant alteration. First, AJTs would necessitate a change in the conventional ordering of proof. Something similar to traditional opening statements might be retained so that the jury would learn, at the outset of the case, the position of each side. Following this, however, plaintiff would present her case uninterrupted. Counsel for plaintiff would introduce the first witness and play relevant excerpts from the witness's videotaped trial deposition. Plaintiff could choose to play excerpts of the cross-examination of the witness, but she would not be required to do so. After the videotape of the witness's testimony was complete, plaintiff's counsel might want to explain to the jury the significance of the testimony—in other words, to make a short argument. Following this, plaintiff's counsel would introduce the next piece of evidence, be it excerpts from another videotape or a document or some other form of physical evidence. At the close of her case, plaintiff would have the opportunity to make a brief summary argument. It would then be time for the defendant's presentation, followed by plaintiff's rebuttal, if any, and the judge's charge to the jury.

With the current trial paradigm so firmly entrenched in our psyches, it is hard for us to conceive of a system in which a witness's cross-examination would be separated in time from his direct testimony. But a process incorporating this separation could function very well. Let us assume that part of a defendant's case rested on the argument that plaintiff's two main witnesses are liars. This would simply become a segment in defendant's story about the case.¹⁶⁵ Likewise, plaintiff could anticipate defendant's witnesses and put on a segment about the inaccuracy or untruthfulness of their anticipated testimony in his case-in-chief, or he could save this segment for rebuttal.¹⁶⁶

165. Defense counsel might start off his presentation by saying:

Members of the jury. Our witnesses are going to tell you what really happened. Why did plaintiff's witnesses tell you something different? It's because they lied. After I show you what the truth is, I'll play for you excerpts from the cross-examination of plaintiff's witnesses to show you why they were lying.

166. Although a party would not be required to present cross-examination during its presentation, it would be obliged to make certain that its presentation was not unfair or misleading as a result of being incomplete. If this were the case, the opposing party could object to the presentation under Federal Rule of Evidence 106 or the more general notion of "completeness." Presumably, most such objections would occur pre-trial in reaction to an

The hearsay rule would also require modification for AJTs. Most obviously, a videotaped deposition would be admissible during an AJT in lieu of live testimony, regardless of the availability of the declarant.¹⁶⁷ But this would not be the most significant change. For AJTs to be characterized by truly efficient and effective presentations of information to the jury, attorneys would need the ability to proffer directly two general types of evidence. First, in introducing a witness's videotaped testimony, an attorney would be permitted to provide some background facts, thereby enabling him to confine the actual video presentation to the heart of the matter. Second, attorneys would be authorized to proffer the facts surrounding the authentication of documents and other physical evidence, meaning that physical evidence would be admissible during an AJT without any testimony at all.¹⁶⁸

Several rules would be needed to prevent attorneys from proffering inaccurate or untruthful evidence. Absent a stipulation, an attorney would be empowered to proffer evidence only if it was contained in the pre-trial record, i.e., in a videotaped deposition or other admissible evidence. If one side sought to make reference to facts not contained in the record, the other side would have a valid basis for objection and, if necessary, for having the proffer stricken.¹⁶⁹ In addition, prior to an AJT, the attorneys might be required to swear that all of the information that they intended to proffer, as indicated in

opponent's "trial plan." See *infra* text accompanying notes 171-176.

167. At present, depositions may be used by any party if the witness is unavailable. FED. R. EVID. 804 (a), (b)(1); FED. R. CIV. P. 32(a)(3). Interestingly, Federal Rule of Civil Procedure 32(a)(3)(B) permits the use of a deposition in lieu of live testimony if a witness is located more than one hundred miles from the place of the trial or hearing. This provision appears to be a nullity in the face of Federal Rules of Evidence 803 and 804, which fail to contain a corresponding exception to the hearsay rule.

168. It might make sense to permit attorneys to show pictures (slides, perhaps, or still video shots) of witnesses whose testimony they are replacing by proffer in order to bring the AJT presentation to life.

With the help of Professor Marcus, my research uncovered one case in which the parties agreed to a process resembling an AJT. The lawyers for the winning side were so pleased with the innovative procedures that they published an article describing their experience. See C. Michael Buxton & Michael Glover, *Managing a Big Case Down to Size*, LITIGATION, Summer 1989, at 22-25. The case involved a complex antitrust claim alleging a ten year conspiracy; discovery consisted of 300 depositions and 4 million pages of documents. *Id.* at 22. Through the use of AJT-like techniques, a trial that probably would have lasted the better part of a year was submitted to the jury in just eight weeks. *Id.*

169. To facilitate judicial control over matters of this sort, parties would be required to annotate their trial plan, see *infra* text accompanying note 171, with the location of all proffered evidence.

their trial plan, was supported by the pre-trial record. Attorneys who breached this sworn statement would be subject to contempt of court proceedings and an ethics investigation. Finally, a rule could be created permitting a motion for a new abbreviated trial on the grounds that opposing counsel's presentation was not faithful to the underlying record in some significant and prejudicial way.

Yet another change in evidentiary rules governing AJTs would concern the issue of relevance. For an AJT, the basic rules of relevance, such as Federal Rules of Evidence 401 and 402, could be suspended. The time-limited format would provide the lawyers with sufficient incentive to avoid the presentation of unnecessary evidence. If a party were foolish enough to present irrelevant evidence, he would automatically bear the cost—because he would be wasting his own precious time. Of course, a rule against the introduction of unduly prejudicial evidence, such as Federal Rule of Evidence 403, would still be required.

One additional alteration of present procedures would be required to bring the AJT to life. One of the major benefits of live trials is the ability of each adversary to respond to the evidentiary presentation of her opponent. Dependent upon the presentation of pre-recorded testimony, and operating with severe time constraints, AJTs would be robbed of this spontaneous adversarial clash. Parties would find it necessary to select the excerpts of videotaped depositions, and to fashion the arguments surrounding them, in advance. Without attention, the pre-planned nature of the AJT could cause the parties' courtroom presentations to amount to "ships passing in the night." In other words, if the parties were left in the dark regarding their counterpart's theory of the case, they would on occasion fail to address each other's main contentions. Accurate fact finding would suffer dramatically as a result.¹⁷⁰

This outcome could be avoided by requiring the parties to exchange (and to file with the court) "trial plans" shortly before the start of an AJT.¹⁷¹ A trial plan would be a detailed account of the

170. I believe that the failure to tackle this issue is another significant reason why McCrystal and Maschari's call for pre-recorded videotaped trials has largely been ignored by courts and scholars alike. See *supra* notes 145, 163.

171. At least in notorious cases, the trial plans might be filed under seal to prevent the case from being literally "tried in the press." Cf. FED. R. CIV. P. 30(f) (providing that discovery depositions be sealed and filed with the court). At some point, however, the trial plans, and the attached exhibits (including the videotapes) would be unsealed—even in cases that settled prior to the AJT—unless one of the parties objected and could demonstrate good

party's intended presentation before the jury. It would include, in the correct order: (1) summaries of the party's arguments; (2) precise references to the portions of videotape testimony the party anticipated playing for the jury; (3) outlines of attorney proffers of authenticating facts and other information; and (4) documents and other physical evidence the party intended to offer at trial.

The precision and scope of the trial plan cannot be overemphasized.¹⁷² The exchange of plans would be, in effect, the doomsday event now represented by trial. Since all of the testimony and evidence would already be in existence, it would leave nothing to chance. There would also be no work product protection at this stage of the litigation. The attorney would be required to reveal, through the summaries of her argument, her theory of the case.¹⁷³ Moreover, in order to provide the opposition with adequate notice of the contours of her case, counsel's trial plan could be neither underinclusive nor overinclusive. The prohibition against overinclusiveness would be necessary to prevent parties from camouflaging their real case in a mountain of evidence.

Enforcement of the thoroughness of a party's plan would be simple. During the AJT, each party would be prohibited from offering evidence not indicated in his trial plan. Upon objection, the judge would merely have to check her copy of the plan to see if the proffered evidence or argument was admissible. A bit trickier—but far from impossible—would be enforcement of the requirement that the trial plan not be overinclusive. This could be policed by having each

cause to keep the plans under seal. In this manner, AJTs would counter some of the problems associated with secret settlements. *See supra* text accompanying notes 196-97.

172. The trial plan described in the text is not that much more burdensome than the pre-trial submissions required today by many courts in connection with full blown jury trials. *See* FED. R. CIV. P. 16(f) (governing pre-trial conferences and submissions); *see also* Marcus, *supra* note 17, at 744 ("Active courts commonly require elaborate pretrial submissions from the parties, often including lists of uncontroverted and controverted facts, summaries of the direct testimony of witnesses, and premarking of all exhibits . . ."); 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, 85-88 (1983) (setting forth sample order requiring parties to file comprehensive pre-trial briefs which would specify, *inter alia*, all legal claims and the evidence to support them, proposed findings of facts and conclusions of law, stipulations, hypothetical questions of expert witnesses, and a description of all exhibits).

173. *Cf. In re San Juan Dupont Plaza Hotel Fire Litig. v. Plaintiff's Steering Comm.*, 859 F.2d 1007 (1st Cir. 1988) (discussing at length the relationship between a court's authority to manage litigation under Federal Rules of Civil Procedure 16 and 26 and parties' work product protection and holding, *inter alia*, that the latter does not preclude the former).

party include in his plan estimates of the duration of the various segments of his presentation, the aggregate of which could not exceed his total time allotment.

In addition to ensuring an adversarial clash, the exchange of plans could also facilitate pre-trial consideration of all of the major evidentiary issues in the case. This would be accomplished by the enactment of a rule requiring the parties to file objections to the content of each other's plan shortly after the exchange.¹⁷⁴ The trial judge would rule on these objections prior to trial by reviewing the necessary videotaped testimony and exhibits in chambers, at her convenience.

To preclude parties from loading their trial plans with objectionable evidence so as to confound an opponent, parties could be prohibited from substituting new evidence for any evidence contained in a trial plan subsequently ruled inadmissible by the court. In light of the time restricted format of the AJT and the rule that a trial plan not be overinclusive, this prohibition would mean that including potentially objectionable evidence in a trial plan would be a very risky proposition. If the court were to strike this evidence, the party would pay the high price of forfeiting the time that the stricken evidence would have consumed at trial.¹⁷⁵

After the court ruled on all of the pre-trial motions and objections, and just prior to trial, the parties would exchange and file "rebuttal plans." For the defendant, this would indicate any changes

174. One would expect a great number of cases to settle around this period of time. The exchange of trial plans would lay the litigants' cards on the table; if one side's case amounted to a bluff, it would be painfully apparent upon review of that party's trial plan.

Indeed, the AJT format could be combined with court-annexed arbitration at this point very effectively. Parties could be encouraged (or required) to present their abbreviated case to an arbitrator prior to bringing it into the courtroom for presentation to a jury. They would have little incentive to forgo such an opportunity, for it would represent a "dress rehearsal" of the upcoming trial. As a result, even more cases would settle prior to the use of any court time. Although settlement has its drawbacks, *see infra* text accompanying notes 188-200, any realistic system of efficient dispute resolution is going to require a high settlement rate. *See supra* note 128.

175. In some circumstances, an exception to this rule might be required in the interests of fairness. For example, a party might choose an expert whose testimony is objected to and later stricken under Federal Rule of Evidence 702. The court might give the proponent of the stricken testimony the chance to depose another expert and substitute that expert's testimony in the trial plan prior to an AJT. In addition, parties might seek to avoid the harshness of this rule by requesting the court to rule *in limine* on the admissibility of specific evidence. In the context of the AJT, *in limine* would mean prior to the filing of the trial plans. Of course, judges could decline to make such *in limine* rulings, forcing trial counsel to decide whether to risk including the evidence in the trial plan or not.

he sought to make to his original plan in light of his review of the plaintiff's trial plan. For the plaintiff, it would indicate any changes and also outline the arguments and evidence he intended to present during his rebuttal case, if any. Objections to these plans would probably have to wait until the AJT was underway.¹⁷⁶

3. Acceptable Verdicts

AJTs would be a failure if they were to yield verdicts unacceptable to the parties and the general public.¹⁷⁷ Acceptability of verdicts is, of course, closely related to verdict accuracy.¹⁷⁸ But this relationship is necessarily a complex one; only those who know "what really happened" can assess verdict accuracy directly and, even then, their assessment will be colored by their subjective perceptions of reality. Accordingly, it is much more likely that the acceptability of AJT verdicts would be judged on the basis of whether participants in the process, as well as observers, came to believe that AJTs were fair. To some extent, this would be measured by the same yardstick used to measure verdict accuracy: a determination of whether the AJT's safeguards against tainted evidence and improper argument were adequate.¹⁷⁹ But success of the AJT would also require the legal community, and ultimately the public, to become comfortable with the very idea of a time-limited, multi-media trial. It is this latter point that is addressed here.¹⁸⁰

Given the strength of our current trial paradigm, it is understandably difficult to conceive of living in a world in which lawyers would be responsible for fitting the presentation of their cases into fixed periods of time. Visions of disaster dance through our heads: individuals running around the courtroom to save time;¹⁸¹ lawyers

176. Even with the provisions concerning the exchange of trial plans, I cannot argue with Professor Marcus's conclusion that trial by videotape will "fall short of the live trial, in terms of interaction, since there is no chance for on-the-spot questioning of the witness." Marcus, *supra* note 17, at 769. However this fact is not a strong indictment of the AJT procedure. The AJT would not eliminate the spontaneous questioning of witnesses, it would simply move this spontaneity one step back—to the trial deposition. Spontaneous interchanges would thus be captured on videotape, available for replay before the jury.

177. The importance to the legal system of generating acceptable verdicts is discussed at length in Seigel, *supra* note 13, at 1001-09.

178. See Marcus, *supra* note 17, at 777 ("The second acceptance factor is perceived accuracy.").

179. Cf. *id.* at 776 (noting that "procedures may serve to make the decision acceptable to the litigants, perhaps even if they are not happy with the outcome" and that parties need to feel that they have had a fair chance to tell their story).

180. The former issue has already been taken up. See *supra* part III.B.2.

181. Of course, this vision is based on present reality. See *McKnight v. General Motors*

being cut off in mid-sentence; judges dismissing cases because a party did not have sufficient time to make out a *prima facie* case.¹⁸² How could the output of a system characterized by events of this sort ever produce acceptable results?¹⁸³

Part of the answer to this question rests on the conviction that these events would be very rare—and would probably constitute attorney malpractice. If a lawyer knew in advance that she had a fixed length of time to prove her case, and if the rules of evidence permitted her to estimate accurately the length of her courtroom presentation, the lawyer would fit her case into the time provided. There is a simple reason for this: lawyers want to win their cases. They would not win AJTs by running around the courtroom or by being so sloppy in their pre-trial preparation that they failed to present fundamental facts to the jury during their allotted trial time. Given sufficient incentive, humans consistently demonstrate a remarkable ability to adapt to new conditions.¹⁸⁴

Acceptance of AJTs would also require participants in the process and the public at large to shift “due process” paradigms in con-

Corp., 908 F.2d 104, 115 (7th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (describing that “witnesses ran to and from the stand in a desperate effort to complete their testimony before” the amount of time the trial judge had allocated to each side expired).

182. We have already witnessed the dismissal of a case for insufficient evidence where the court limited the parties to the testimony of only one witness each. *See Secretary of Labor v. DeSisto*, 929 F.2d 789, 794-96 (1st Cir. 1991); *supra* text accompanying note 130.

183. *Cf.* Marcus, *supra* note 17, at 787 (worrying that strict time limits risk “siphoning off so much meat of the case that what remains for the trial is merely the husk, and not the heart of the dispute”).

184. *McKnight*, 908 F.2d at 104, and *DeSisto*, 929 F.2d at 789, do not disprove this point. Currently, courts are imposing time and proof constraints on lawyers on an arbitrary and ad hoc basis. Lawyers are not mentally prepared to assume the burden of a time-limited presentation; moreover, the rules of procedure and evidence have not been amended to facilitate a more predictable and streamlined trial. As a result, time-limited trials are not really being given a fair chance at acceptance and success.

My recent experience as an expert witness provides some insight into this point. I was hired by plaintiff’s counsel in a Section 1983 case involving an alleged false arrest. Counsel originally estimated that his case-in-chief would take two weeks to present to the jury. Pre-trial preparation indicated that my direct testimony would consume about two hours of court time. When the case began, the judge summarily informed counsel for both parties that they would have a total of one week to try the case. It was much too late for either side to pare down its case in any thoughtful fashion. They simply hurried along as best they could. For example, without any additional preparation, my direct testimony was reduced to a half hour. Although counsel tried to cover the high points, I felt that my testimony was chaotic and confusing. If plaintiff’s counsel had known of the time limit in advance, he could have easily tailored my testimony and the rest of his case to fit that limit without jeopardizing the effectiveness of his presentation.

nection with the system of civil justice. At present, the system is founded on the notion that judges are responsible for providing the parties with as much time as they need to prove their case. Under this paradigm, judicially imposed time limits, though not unheard of, are necessarily flexible.¹⁸⁵ But there are a great many processes in life that are thought to produce fair outcomes despite inflexible time limits. Consider, for example, law school examinations. Most law professors give exams that require students to work under tremendous time pressure. Despite this constraint, professors believe that their exams provide a fair measure of students' abilities. Moreover, with the exception of the disabled, professors do not feel responsible for making individual adjustments to ensure that each student has a fair opportunity to demonstrate his or her abilities on the examination. Quite the contrary; if a student were to ask for more time, the professor would deny the request. The burden to meet the time limit is strictly on the students.

An example of this phenomenon can also be found in law practice. Appellate briefs are uniformly page-limited and appellate argument is extraordinarily brief. Despite this, one rarely hears a lawyer complaining, "If I only had five more pages (or ten more minutes) I would have won that case." Rather, it is a generally accepted part of the process that the lawyer must pick and choose among a multitude of facts and legal theories in order to make the most persuasive presentation, given the page and time constraints.

A loose analogy can also be made to sporting events. At present, trials are conducted like the game of baseball; there is no clock, only a set of rules. Like judges, baseball umpires might try to hurry the game up (they might show their impatience when a manager takes too long to discuss a situation with his pitcher, for instance), but they have very little effect on the game's duration. In any event, we accept as fair the judgment that the team with more runs at the end of nine innings (or more in the event of a tie) is the winner.

Many other sporting events, such as football games, are controlled by the clock. Regarding these games, we accept as fair the outcome after the clock has run out. We do not hear fans complain-

185. See *McKnight*, 908 F.2d at 115 (disapproving of the imposition of arbitrary and inflexible time limits); *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 473 (7th Cir. 1984) (disapproving of "rigid" hour limits on a trial); *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 15-16 (D. Conn. 1977) (imposing limits, but noting the possibility of more time for plaintiff's case if absolutely necessary).

ing that they were cheated because, if the clock had run five more minutes, their team would have won. Rather, fans blame their team for not winning the game in the allotted period of time.

There is no inherent reason why we could not change our view of trials and think of them as time-limited, just like football games. Indeed, the same can be said for the game of baseball. The imposition of time limits on baseball games would initially strike us, of course, as odd and potentially unfair. ("What do you mean my team would lose if it were down by a run in the bottom of the ninth with no outs and the bases loaded . . . because the clock ran out?") But after a while we would expect baseball players to adjust their play to take the clock into account and, of course, they would. The only difference between trials and baseball is the fact that, as to the latter, there is no good reason to superimpose a clock on the game. In the case of trials, there is.

The use of videotape as an integral part of the AJT appears to be less worrisome on acceptability grounds than the time-limited format. Videotape is currently used in trials in a variety of ways, including to present the testimony of unavailable witnesses.¹⁸⁶ Additionally, more and more trials are themselves being recorded or broadcast live to television viewers in their own homes.¹⁸⁷ The main threat to the acceptability of multi-media AJTs would no doubt arise from the possibility that some lawyers might get so comfortable with the abbreviated format that their presentations would take on the feel of slick, professional docudramas. Simple rules placing constraints on the process, however, such as the prohibition of fancy editing techniques, would probably suffice in preventing this problem from getting out of hand.

186. See FED. R. CIV. P. 30(b) (authorizing videotape recording of depositions); FED. R. CIV. P. 32(c) (authorizing use of a videotaped deposition at trial if the witness is unavailable); FED. R. EVID. 804(a) (defining unavailability for purposes of the hearsay rule); FED. R. EVID. 804(b)(1) (setting out the hearsay exception for former testimony, including depositions).

187. The major developments in the area include the advent of Court TV, which is largely devoted to the broadcasting of live court proceedings, and the Cable News Network ("CNN"), which occasionally broadcasts portions of high publicity trials. See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 797-807 (1993) (describing the history and objectives of Court TV); Robert J. Hawkins, *O.J. Case 'Breaking News' on CD-ROM*, SAN DIEGO UNION-TRIB., Aug. 25, 1994, at Night & Day 43 (describing Court TV's coverage of the O.J. Simpson case and CNN's release of a CD-ROM disc on the same matter).

4. Adjudication, Not Settlement

The AJT would be a method of adjudication, not settlement. As such, it would be characterized by: (1) fact-finding; (2) third-party decision-making; (3) on the record proceedings; and (4) a public trial.¹⁸⁸ The decision to design the AJT as an adjudication is deliberate and, of course, it requires justification.

In many instances, there is nothing wrong with settlement. If parties assess the outcome of a case similarly, and they voluntarily choose to avoid the cost and uncertainties of litigation, it is usually in their best interests, as well as in the interests of society and the adjudicatory system, for them to settle their dispute prior to trial.¹⁸⁹ Furthermore, there is generally nothing wrong with pre-trial techniques designed to facilitate settlement. Such techniques, such as court-annexed arbitration, mediation, Summary Jury Trials, and Mini-Trials, encourage settlement in two ways. First, they constitute doomsday events, in the sense that attorneys must prepare for them in a manner similar to their preparation for trial. As a result, attorneys are in a position to assess the strengths and weaknesses of their case and to come to some preliminary conclusions about its value.¹⁹⁰ Second, these settlement techniques provide the attorneys, as well as the litigants, with a third-party's assessment of the case. This information can be the starting point for settlement negotiations.¹⁹¹

Some methods of facilitating settlement, however, are not so benign. Judicial arm-twisting, which is becoming an ever more common event, is extremely problematic.¹⁹² As Judith Resnik has pointed out, managerial judging means a substantial increase in the number

188. See Landsman, *supra* note 143, at 490.

The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a forensic setting, is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.

Id.; see also Resnik, *Adjudicatory Decline*, *supra* note 13, at 545 (emphasizing that adjudication takes place in public, so that "government-empowered individuals . . . have some accountability both to the immediate recipients of the decisions and to the public at large").

189. See Alschuler, *supra* note 13, at 1821 ("So long as civil settlement represents a reasonably knowing, reasonably voluntary allocation of resources by the parties most affected by this allocation, it is preferable to litigation.").

190. See Kaufman, *supra* note 7, at 15, 20.

191. *Id.* at 14, 20.

192. Indeed, it was once thought inappropriate for judges to be involved in settlement negotiations at all. Now, the rules of civil procedure expressly provide for a judicial role in the process. See Galanter, *Judicial Mediation*, *supra* note 18, at 1-2; Resnik, *Managerial Judges*, *supra* note 4, at 380-85.

of informal, off-the-record, non-public contacts between judges and parties. This raises the possibility, and inevitably the reality, of the abuse of judicial power. For instance, during these contacts the judge learns many of the facts about the case informally, which is a source of potential prejudice if the case goes to trial. More importantly, when the judge expresses his opinion of the case—which he may need to do to spur a settlement—the parties are automatically caught in a dilemma. If they resist settlement, they run the risk of having a hostile judge who is convinced that they are wasting his time preside at trial. On the other hand, they may sincerely disagree with the judge's evaluation of the case.¹⁹³

It is not simply the specter of judicial impropriety that makes settlement a sometimes problematic event for the litigants. Parties can be coerced to settle as a result of factors unrelated to the merits of their claim or defense. In some instances, a party might settle a case for much less than it is worth because he cannot afford, either financially or psychologically, or both, to await his day in court. The cost of litigation can also force a litigant of relatively modest means to settle, especially if he faces a giant who can afford to use pre-trial processes as an opportunity for the "strategic infliction of waste."¹⁹⁴

Settlement can also be contrary to the public interest. In some cases a litigant settles precisely because he seeks to avoid a public airing of the dispute.¹⁹⁵ Sometimes, of course, a party legitimately wishes to protect its privacy. But often, the avoidance of the formal and public fact finding of a trial is intended to keep the public in the dark about potential harms caused by a party's activity or product.¹⁹⁶ The private disposition of a case is especially deleterious to other litigants who may remain ignorant about potential discovery material and even evidence as a result of being unable to make use

193. See Resnik, *Managerial Judges*, *supra* note 4, at 407-13; see also Alschuler, *supra* note 13, at 1835-36. But see Flanders, *supra* note 125, at 507-14 (contending that pre-trial management of cases does not lead to abuse of judicial power).

194. Alschuler, *supra* note 13, at 1830; see also *id.* at 1822-31; Fiss, *supra* note 18, at 1076-78.

195. See Resnik, *Adjudicatory Decline*, *supra* note 13, at 536 (noting that some litigants "seek shelter in ADR as a means of resolving their disputes safe from public scrutiny").

196. See Laura Macklin, *Promoting Settlement, Foregoing the Facts*, 14 REV. L. & SOC. CHANGE 575, 595-99 (1986) (detailing the benefits of judicial fact determination and noting the openness of the process and its results). Parties typically stipulate to, and judges routinely approve, protective orders under Federal Rule of Civil Procedure 26(c) designed to ensure that the information obtained through discovery does not become public. See Marcus, *supra* note 144, at 9-11.

of work done and information gathered by their predecessors.¹⁹⁷ In most instances, settlement also circumvents the entry of judgment, thereby denying future litigants the benefits of collateral estoppel or *res judicata*.

Settlement also eliminates the formal resolution of many legal issues that would have provided guidance for future conduct by individuals facing similar situations.¹⁹⁸ Indeed, settlement permits parties to circumvent the law, thereby generally weakening the rule of law.¹⁹⁹ In addition, it permits a party to resolve a case without having to take any blame; to pay money without having to admit liability. If not immoral, this is at best an amoral resolution of the matter. Finally, in a more general sense, settlement avoids the cathartic and cleansing function served by well publicized trials. Parties to a dispute are denied their "day in court." Members of the public are denied their chance to learn about, contemplate, and come to terms with the behavior of their fellow citizens. They are robbed of the opportunity to experience the sense that justice has been served—or a sense of outrage that it has been denied.²⁰⁰

For these reasons, the AJT proposal is an attempt to make civil litigation more efficient not by avoiding adjudication, but by making

197. Litigants might be able to learn the details of prior settlements through discovery. See Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 987-99 (1988) (discussing arguments and precedents for and against discovery of settlement information); Kristina M. Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 REV. LITIG. 665 (1993).

198. See Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 15-31 (1987) (discussing the importance of generating substantive rules from dispute resolution in order to protect third parties and to provide the public with behavioral guideposts). A recent and notorious case in which a private settlement resulted in the failure of important litigation to provide the interested community with much-needed behavioral norms occurred in connection with the professional regulation of lawyers. In the wake of the collapse of the Lincoln Savings and Loan Association, the federal government threatened to bring suit against Kaye Scholer, a well known New York law firm. Many in the profession watched this case closely, believing that it would be a titanic struggle that would establish new norms for attorney behavior, particularly vis-a-vis the federal government. Shortly after the government filed suit, however, the parties reached a settlement. Kaye Scholer agreed to pay \$41 million, \$21 million above the limits of their insurance coverage. This was a shocking development to many, but because the case had been settled so quickly, none of the legal or ethical issues were aired, let alone resolved. See Amy Stevens & Paulette Thomas, *Legal Crisis: How a Big Law Firm Was Brought to Knees By Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1.

199. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-79 (1986) (expressing concern that ADR "will replace the rule of law with nonlegal values").

200. See Seigel, *supra* note 13, at 1018-21.

the process of adjudication more efficient. If the AJT were successful, more cases would be subject to a public, on-the-record proceeding through which an impartial entity would declare who was right and who was wrong.²⁰¹ Many cases would still be settled, of course, but—because AJTs would also help reduce the backlog of civil cases—fewer disputes would be settled for the wrong reasons. Indeed, the ultimate normative aspiration ought to be a system in which judges, rather than feeling compelled to push settlement at all costs, feel free to counsel against or reject an occasional settlement because it is not in the public interest.²⁰²

5. Jury Trials

One scholar who has studied the problem of civil justice delay, George L. Priest, concluded that the solution lies in constraining the jurisdiction of the civil jury.²⁰³ Priest's argument proceeds as follows. Empirical evidence shows that juries decide a huge number of very routine cases. These cases, which do not implicate complex or conflicting societal values or difficult political judgments, could be satisfactorily resolved by a judge. Estimates are that bench trials would be up to forty percent more efficient than jury trials, so an increase in bench trials would increase the rate of adjudication and, due to the increase in doomsdays, the rate of settlement. But the use of bench trials would have an even greater effect on the pace of civil litigation because judges act more predictably than juries. Thus, some cases that go to trial under the jury system would settle in the face of a bench trial because parties do not waste money litigating cases when they agree on the probable outcome.²⁰⁴

Priest's empirical observations are probably correct. Nevertheless, as its name makes clear, the Abbreviated Jury Trial would retain a commitment to the use of juries in civil cases. The rejection of Priest's recommendation arises out of a profound disagreement with his normative conclusion that juries are an unnecessary burden in

201. Professor Marcus fears that, even if public, some summary processes might be so cryptic that they would "undermine the values protected by the public's right of access." Marcus, *supra* note 17, at 779. He makes the valid point that, if the public cannot understand summary proceedings, it cannot evaluate the outcomes produced by them. *Id.* This problem would not plague AJTs because they would be sufficiently detailed and textured to communicate all important aspects of a dispute to any interested observer.

202. At present, judges are empowered to reject settlements only in the context of class action suits. See FED. R. CIV. P. 23(e).

203. Priest, *Role of the Jury*, *supra* note 13, at 191-200.

204. *Id.*

routine civil cases. Many others have examined the institution of the jury in great detail and have debated the costs and benefits thought to accrue from its use; these issues need not be repeated here.²⁰⁵ At bottom, the AJT is based on the belief that trial by jury is the only process that offers at least the hope of protecting citizens against biases that are inevitable in a system of civil justice.²⁰⁶

The behavior of litigants indicates agreement with this claim. At present, parties can voluntarily choose to try their case before a judge or, through arbitration, in front of a panel of experts. Some do, but many others opt for a jury trial. It is difficult to believe that parties submit to trial by jury because they think that it will be more efficient or result in a more accurate outcome than the alternatives. Rath-

205. Some scholars appear to agree with Priest that the jury is an institution hardly worth saving. See e.g., Albert W. Alschuler, *The Vanishing Civil Jury*, 1990 U. CHI. LEGAL F. 1, 24 (holding out the possibility of jury trials but concluding: "As the civil jury and the civil trial approach the vanishing point, we must again find impartial decisionmakers who will listen."). Others are more non-committal. See Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 86 (concluding that the history of the civil jury is one of "the declining effectiveness of an esteemed institution"); Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 117 ("Both those who argue for an extension of [the jury's] egalitarian sway and those who view it as an unjustifiably irrational relic have strong arguments."). Many scholars, however, have forcefully defended the institution of the jury. See Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 632 n.87 (1994) (arguing that jurors are better fact finders than judges because the fact-finding process is one of induction: "those '12 persons' are a tremendous reservoir of knowledge, learned over their entire lives, who perhaps possess sufficient humility to actually listen to the stories [told by the parties] without prejudging the outcome"); Ronald J. Allen, *Unexplored Aspects of the Right to Trial by Jury*, 66 WASH. U. L.Q. 33, 35 (1988) (noting the importance of the jury as a democratic institution); Peter W. Culley, *In Defense of Civil Juries*, 35 ME. L. REV. 17, 17 (1983) ("[T]he [a]uthor believes strongly that the civil jury has continuing vitality and that many commonly held beliefs about shortcomings of the jury system are not justified."); Marc Galanter, *The Civil Jury as a Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 257 (concluding, after a comprehensive look at the role of civil juries, that the litigation system ought to be improved "by refining and enlarging the use of the civil jury, not by eliminating it"); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065-66 (1964) (setting forth empirical data indicating that jury verdicts are consistent with the judge's view of the appropriate outcome in seventy-nine per cent of cases studied, with the difference stemming from the jury's "sense of equity").

206. But see Roy L. Brooks, *A Critical Race Theory Critique of the Right to a Jury Trial Under Title VII*, 5 U. FLA. J.L. & PUB. POL'Y 159, 165-68 (1993) (arguing that, under Critical Race Theory analysis, defendants' right to jury trial in discrimination cases hurts plaintiffs because the jury is likely to be racist). Brooks notes that

race critics would have to concede that at least some judges are "naturally" racist. But perhaps critical race theorists are willing to take their chances with a single decisionmaker who just may be more enlightened than other judges and who, in any event, has to commit his or her reasoning to writing.

Id. at 167. I am not convinced.

er, it seems much more plausible that civil litigants who choose a jury trial do so because they sense that a jury is more likely to be fair and impartial than a government employee or a group of industry experts.²⁰⁷

Priest's observation that judges are more predictable than juries really proves this point. As anyone who has litigated knows, judges become well known for their built-in biases—for being pro-government, pro-business, pro-plaintiff, and so on. It is on the basis of such biases that a judge's baseline reaction to a set of facts can be predicted in advance of trial. To the party on the losing side, this "predictability" feels a lot more like injustice. For all of its faults, the jury system minimizes (though it does not eliminate) the possibility that the adjudicatory system will incorporate wholesale biases against parties of one kind or another.²⁰⁸

Many cases, of course, can be satisfactorily resolved by means of a bench trial or arbitration. Given that these techniques are more efficient than conventional jury trials, and perhaps in some cases more accurate, they ought to be available to litigants as alternative forms of dispute resolution.²⁰⁹ But fairness dictates that parties to even the most routine forms of litigation ought to have an ultimate right to trial by jury.

IV. CONCLUSION

Given that AJTs would mark a radical departure from current practice, they might, in accordance with the teachings of neopragmatic methodology, be subject to systematic empirical study prior to their ubiquitous use in real courtrooms.²¹⁰ A series "laboratory" studies could compare juror reactions to a simulated case presented in conventional and abbreviated formats. Another series of controlled studies might be more ambitious, perhaps "referring out" a case to a group of practicing attorneys. One set of attorneys would be instructed to prepare the case for a conventional trial; the other set would prepare for an AJT. Eventually the two types of trials could be held in front

207. See Landsman, *supra* note 143, at 494 n.26 (noting that the significant number of litigants who opt for jury trials share a belief in the neutrality of juries).

208. See *id.* at 493-94 (arguing that juries are the preferred decision makers in an adversary system because it is more likely to be neutral than "the solitary judge whose biases frequently influence the decisions he renders").

209. This statement reflects pragmatic sensitivity to the fact that different situations may require different responses. See *supra* text accompanying note 84.

210. See *supra* p. 587.

of different sets of simulated jurors, perhaps with actual trial judges presiding. Comparison of a number of variables could be made between the two formats, such as: the number of hours expended in preparation; the length of the courtroom proceedings; attorney satisfaction with the procedures; judicial reaction to the abbreviated format; juror comprehension of the facts; and juror satisfaction with the process.

In addition, or perhaps in the alternative, AJTs could be employed in a few real cases on a trial basis by agreement of the parties. Researchers could conduct field studies in connection with these AJTs, measuring, in addition to other variables, the parties' satisfaction with the procedure. As experience with the abbreviated process grew, it might be modified to accommodate unanticipated problems. Ultimately the success of AJTs would be measured by the eagerness of jurisdictions to add them to their dispute resolution menu.