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The Style and Substance of Civil Procedure Reform: Comparison of the United States and Italy

RICHARD B. CAPPALLI*

I. INTRODUCTION

The United States and Italy have long struggled with delay and expense in civil cases.¹ In 1990, both countries approved major legislation confronting civil delay: the Civil Justice Reform Act of 1990² in the United States and Law 353 of 1990³ in Italy.

While the techniques employed by Italians to improve their legal system have not been successful, U.S. methodology has produced a reasonably quick civil justice system in the national courts. The average U.S. litigant who entered the U.S. courts in 1989 reached the trial courts in fourteen months⁴ and had a final appellate judgment ten months later.⁵ In contrast, his Italian counterpart remains in court for fifteen years.⁶ Thus, the "Italian style"⁷ seems to have failed, while the "American style" has

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1. See Edwin M. Lemert, *Juvenile Justice Italian Style*, 20 LAW & SOC'Y REV. 509, 535-36 (1986) (asserting that there is significant delay in Italian juvenile justice courts). See generally Oscar G. Chase, *Civil Litigation Delay in Italy and the United States*, 36 AM. J. COMP. L. 41 (1988).

2. Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-482 (1990)).

3. Law of Nov. 26, 1990, No. 353, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE [THE NEW CODE OF CIVIL PROCEDURE] 45-80 (Giuseppi Vinci ed., 1990).

4. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS (yearly court-by-court judicial workload profiles) [hereinafter FEDERAL COURT MANAGEMENT STATISTICS].

5. *Id.* at 29. Further review by the U.S. Supreme Court occurs too rarely to be counted.

6. See *infra* note 30.

7. See John H. Merryman, *The Italian Style I: Doctrine*, 18 STAN. L. REV. 39 (1965) [hereinafter Merryman, *The Italian Style I*]; John H. Merryman, *The Italian Style II: Law*,

succeeded. Consequently, the lessons to be learned are mostly for the Italians.

This Article will compare the elements and style of civil procedure reform in Italy and the United States. Part II of this Article discusses civil reform in Italy. First, it describes the process of procedural reform in Italy and explains the specific rule amendments. Next, it provides a general analysis of the original texts that delineate the main actors, how the actors ascertained the civil justice problems existing in the national court system, and the methods the actors employed to confront them. Part III of this Article discusses the U.S. style of civil reform, from the evolution of the reform statute to the subsequent drafting of particular sets of procedures aimed at reducing excessive cost and delay. Finally, Part IV draws general conclusions that may be instructive for future reformers.

II. ITALIAN CIVIL JUSTICE REFORM: BUILDING FROM THE TOP DOWN

A. *General Observations*

The Italian civil justice system resembles the U.S. system in the abstract.⁸ Cases are filed, proofs are taken, and judgments are rendered in trial courts (*tribunali*). Small matters are relegated to speedier, less formal inferior courts: justices of the peace and *pretori*.⁹ Judgments are appealable to intermediate courts,¹⁰ and questions of jurisdiction and law may be raised to the Supreme Court (*Corte Suprema di Cassazione*).¹¹ Nevertheless, some

18 STAN. L. REV. 396 (1966); John H. Merryman, *The Italian Style III: Interpretation*, 18 STAN. L. REV. 583 (1966).

8. For a general discussion of the Italian legal system in the English language, see MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* (1967); G. LEROY CERTOMA, *THE ITALIAN LEGAL SYSTEM* (1985). The only English-language reference work on Italian civil procedure is MAURO CAPPELLETTI & JOSEPH M. PERILLO, *CIVIL PROCEDURE IN ITALY* (1965). The 1990 Amendments discussed in this Section have substantially outdated this work. For primary reference works in Italian, see CRISANTO MANDRIOLI, *CORSO DI DIRITTO PROCESSUALE CIVILE [COURSE IN THE LAW OF CIVIL PROCESS]* (7th ed. 1989); *DIRITTO PROCESSUALE CIVILE [LAW OF CIVIL PROCESS]* (Edizioni Simone ed., 6th ed. 1992).

9. See generally SEBASTIANO CORRADO, *STATISTICA GUIDIZIARIA [JUDICIAL STATISTICS]* ch. 2 (1986).

10. CODICE DI PROCEDURA CIVILE [C.P.C.] arts. 339-59 (Italy).

11. C.P.C. arts. 360-91.

significant distinctions exist at the trial level. For example, in Italy proofs are taken at several hearings, pre-trial discovery is not authorized, and no civil juries exist.¹²

Statutes and executive decrees establish Italian procedural law and the norms of judicial organization.¹³ In contrast, judicial bodies primarily form procedural law in the United States.¹⁴ Italy's basic Code of Civil Procedure¹⁵ ("C.P.C.") was enacted as Royal Decree No. 1443¹⁶ and Royal Decree No. 1368.¹⁷ A third Royal Decree organized the judiciary.¹⁸ Together, these decrees contain over 1,200 articles that closely regulate every procedural step and standard. Thus, little is left to the discretion of attorneys and judges. A dramatic example of this comprehensive regulation is the article that instructs judges how to write judgments by specifying the elements to be contained therein.¹⁹

The Italian Parliament has periodically modified this basic structure. An important amendment occurred in 1973, when Parliament added special provisions to remove labor disputes from the increasingly clogged, costly, and time-consuming civil justice system and to provide a simpler, speedier resolution process.²⁰ This "fast-track" process exemplifies the major overhaul of 1990 and 1991.²¹

12. See CAPPELLETTI ET AL., *supra* note 8, at 127-30. Further distinctions between the two procedural systems will be noted throughout this Article.

13. The Italian procedural codes predate the 1948 Constitution of Italy. Articles 70-77 of the 1948 Constitution require laws to be created by Parliament and, if by the Executive ("Government"), on a non-emergency basis pursuant to specific delegations of authority from Parliament (*decreto-legislativo*). See GIANDOMENICO FALCON, DIRITTO PUBBLICO [PUB. L.] 213-16 (2d ed. 1988). Consequently, post-1948 civil procedure in Italy has been created primarily by Parliament.

14. See, e.g., 28 U.S.C. § 2072(a) (1990) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . .").

15. C.P.C.

16. Royal Decree of Oct. 28, 1940, No. 1443, Gazz. Uff. No. 253, Oct. 28, 1940 (supp.).

17. Royal Decree of Dec. 18, 1941, No. 1368, Gazz. Uff. No. 302, Dec. 24, 1941 (supp.) ("Implementing and Transitional Provisions of the Code of Civil Procedure").

18. Royal Decree of Jan. 30, 1941, No. 12, Gazz. Uff. No. 28, Feb. 4, 1941.

19. C.P.C. art. 132. The judgment must contain the following: the name of the sentencing judge; the names of parties and attorneys; the arguments of parties and the public minister; the procedural steps in the case; the factual and legal grounds supporting the decision; the ruling; the length of the case; and the judge's signature. *Id.*

20. C.P.C. arts. 409-41, as added by Law of Aug. 11, 1973, No. 533, Gazz. Uff. No. 253, Oct. 28, 1940.

21. See, e.g., SENATE SECOND PERMANENT COMMITTEE (JUSTICE), 10th Legis., Transcript of Session of Jan. 11, 1989, at 64-65 (remarks of Sen. Acone), reprinted in 10 DOCUMENTI GIUSTIZIA [JUDICIAL DOCUMENTS] (Bruno Capponi & Gianfranco Manzo

B. The Crisis

On November 26, 1990, the Italian Parliament approved a massive set of amendments to the Code of Civil Procedure.²² This new legislation responded to a profound crisis in the Italian civil justice system.²³

Unfortunately, no materials document the professed crisis. While the Italian government maintains records of gross figures regarding caseloads,²⁴ background materials do not document where, how, and why the system was crumbling. In thousands of pages of primary²⁵ and secondary materials,²⁶ one finds a near

eds. 1991).

22. Law of Nov. 26, 1990, No. 353, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 45-80.

23. See Giuliano Vassalli, *Provvedimenti urgenti per il processo civile* [*Urgent Measures for Civil Process*], reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 33.

24. See ISTITUTO NAZIONALE DI STATISTICA, *STATISTICHE GUIDIZIARIE: ANNO 1989* [*JUDICIAL STATISTICS: YEAR 1989*] (1991). This is a 718-page compendium of data concerning civil, criminal, and administrative proceedings in Italy. All of the information concerns inflow and outcomes, with nothing reported on internal events within the cases. For example, one can see the yearly volume of litigation flowing into the various trial and appellate courts, the number of yearly dispositions, and the number of cases remaining on the docket. These statistics are reported both in terms of gross numbers and by court of appeal districts. *Id.* at 31 tbl. 1.1, 43-44 tbls. 2.1-2.3. The statistics present no data that details why backlogs are increasing at a particular level or in a particular district. For a description of the statistical reporting forms used in the Italian courts, see CORRADO, *supra* note 9, at 66-68. The Procuratore General of the Court of Cassation publishes, in a weekly journal, an annual status report of the caseload in Cassation. See, e.g., Vittorio Sgroi, *Relazione Sull'Amministrazione della Giustizia* [*Report on Administration of Justice*], 48 *IL MONDO GIUDIZIARIO* [*THE JUDICIAL WORLD*], Feb. 22, 1993, at pt. V.

25. The principal legislative documents are reprinted in *DOCUMENTI GIUSTIZIA*, *supra* note 21. This publication is unpaginated, and it contains the following written reports: REPORT OF ATTORNEY-GENERAL GIULIANO VASSALLI, *PROVEDIMENTI URGENTI PER IL PROCESSO CIVILE* [*URGENT MEASURES FOR CIVIL PROCESS*], Senate, 10th Legis. (Aug. 8, 1988) (reporting on Bill 1288) [hereinafter VASSALLI REPORT]; REPORT OF SENATORS ACONE & LIPARI, SENATE SECOND PERMANENT COMMITTEE (JUSTICE), 10th Legis. (Jan. 11, 1989) (reporting on Bill 1288 as introduced by Government) [hereinafter ACONE-LIPARI FIRST REPORT]; REPORT OF SENATORS ACONE & LIPARI, SENATE SECOND PERMANENT COMMITTEE (JUSTICE), 10th Legis. (Aug. 1, 1989) (reporting on Bill 1288 as amended by special subcommittee) [hereinafter ACONE-LIPARI SECOND REPORT]; REPORT OF SENATORS ACONE & LIPARI, SENATE SECOND PERMANENT COMMITTEE (JUSTICE), 10th Legis. (Feb. 23, 1990) (reporting on Bill 1288 as approved by Senate Justice Committee) [hereinafter ACONE-LIPARI THIRD REPORT]; REPORT OF VIRGINIO ROGNONI, CHAIRMAN, HOUSE SECOND PERMANENT COMMITTEE (JUSTICE), 10th Legis. (May 15, 1990) (reporting on Senate Bill, renumbered Bill 4638) [hereinafter ROGNONI REPORT].

total absence of statistical documentation regarding, for example, caseloads per judge, disposition rates, disposition times by case category, and the amount of time that cases remain on the docket. Except for a few figures documenting delays in the trial courts²⁷ and the Court of Cassation,²⁸ most information regarding Italian civil delay consists of adjectives and anecdotes.²⁹ Nevertheless, the primary actors of the reform legislation have uniformly recognized that cases tend to linger “eternally” on the Italian civil docket.³⁰

In addition, DOCUMENTI GIUSTIZIA contains verbatim transcripts of the following committee meetings: Senate Judiciary Committee meetings held Jan. 11, 1989, Jan. 18, 1989, Aug. 1, 1989, Nov. 15, 1989, Nov. 16, 1989, Nov. 22, 1989, Nov. 29, 1989, Dec. 13, 1989 (morning), Dec. 13, 1989 (afternoon), Dec. 14, 1989, Jan. 16, 1990, and Oct. 31, 1990; House Judiciary Committee meetings held May 15, 1990, May 23, 1990, June 5, 1990, June 6, 1990, June 20, 1990, July 31, 1990, Sept. 26, 1990, Sept. 27, 1990, and Oct. 3, 1990. DOCUMENTI GIUSTIZIA also reprints the 353d public session of the Italian Senate, Feb. 28, 1990 (afternoon). See DOCUMENTI GIUSTIZIA, *supra* note 21. The Superior Council on the Judiciary (*Consiglio Superiore della Magistratura*) offered views on Bill 1288. See 8 FORO ITALIANO pt. V, cols. 245-49 (1989) [hereinafter CSM SECOND REPORT]. The Council also commented on an earlier bill (Bill 2214—the “Rognoni Bill”). See DOCUMENTI GIUSTIZIA, *supra* note 21 [hereinafter CSM FIRST REPORT].

26. For secondary works on the 1990 Amendments, see CLAUDIO CONSOLO ET AL., *LA RIFORMA DEL PROCESSO CIVILE* [REFORM OF CIVIL PROCESS] (1991); Andrea Proto Pisani, *La Nuova Disciplina del Processo Ordinario di Cognizione di Primo Grado e d'Appello* [*The New Rules of Process for Ordinary Proceedings at the Trial and Appellate Levels*], in V FORO ITALIANO cols. 249-334 (1991); Giacomo Oberto, *Il Giudizio di Primo Grado Dopo la Riforma del Processo Civile* [*Trial Court Proceedings After Civil Process Reform*], 4 *Giur. It.* cols. 313-27 (1991); FRANCESCO BARTOLINI, *IL NUOVO PROCESSO CIVILE* [THE NEW CIVIL PROCESS] (La Tribuna-Accenza ed., 1993).

27. See DOCUMENTI GIUSTIZIA, *supra* note 21, at 62 (Feb. 28, 1990) (statement of Sen. Battello) (stating that the average case length exceeds eight years; average length at trial is 1,136 days); *id.* at 67 (Sen. Filetti) (stating that there are 1,700,000 cases pending at the trial level).

28. See *id.* at 21 (Dec. 13, 1989) (statement of Sen. Covi) (describing a four-year delay in Cassation); *id.* at 67 (Feb. 28, 1990) (describing a 42,000-case backlog in Cassation).

29. See, e.g., *id.* at 4 (May 23, 1990) (statement of Deputy Bargone) (stating that trial judges have more than 100 cases scheduled for a single session); CSM FIRST REPORT, *supra* note 25, at col. 422 (stating that judges have over 1,000 assigned cases). Workload, by itself, does not determine case-processing time. See BARRY MAHONEY, NATIONAL CENTER FOR STATE COURTS, *CHANGING TIMES IN TRIAL COURTS* 193 (1988) (three-year study of case processing in eighteen urban trial courts).

30. See, e.g., ACONE-LIPARI FIRST REPORT, *supra* note 25, at 24 (noting the “frightful backlog accumulating in judicial offices”); DOCUMENTI GIUSTIZIA, *supra* note 21, at 2 (Jan. 18, 1989) (remarks of Sen. Filetti) (describing the Italian system as eternal delays of biblical length); *id.* at 399 (remarks of Deputy Bargone) (describing how civil justice delay is causing victims to turn to street justice offered by criminal enforcers).

According to common opinion, the crisis of delay was caused by a set of 1950 reforms³¹ that permitted lawyers to string out cases by adding claims, issues, and proofs during the course of litigation,³² and even on appeal.³³

C. The Reform Process

Solutions to the civil justice problem began to emerge as early as 1981, when noted scholars and legislators drafted reform texts.³⁴ The reform process accelerated in August 1988, when law

The case backlog was increasing steadily in Italy's primary trial courts:

	1987	1988	1989
Preture	611,674	709,979	790,027
Tribunali	931,673	1,005,847	1,022,688

ISTITUTO NAZIONALE DI STATISTICA, *supra* note 24, at 32 tbl. 1.1.

From pending, filed, and terminated case data, one can calculate a median delay index that indicates the amount of time the median case remains on a court's docket. See CORRADO, *supra* note 9, at 72; Chase, *supra* note 1, at 45 (citing David S. Clark & John H. Merryman, *Measuring the Duration of Judicial and Administrative Proceedings*, 75 MICH. L. REV. 89, 92-93 (1976)). In 1980, a case tried in the tribunal, reviewed by the court of appeals, and then decided by Cassation required 2,934 days, or eight years. See CORRADO, *supra* note 9, at 72 tbl. 5 (tribunal—966 days; court of appeals—807 days; Cassation—1,161 days). The Clark-Merryman duration formula can be applied to later statistics to ascertain Italy's situation ten years later. See ISTITUTO NAZIONALE DI STATISTICA, *supra* note 24, at 32 tbl. 1.1. In 1990, a case that followed a full appeal cycle would be litigated for 5,740 days, or 15.7 years, as follows: tribunal—1,304 days; court of appeals—1,339 days; Cassation—2,411 days. *Id.* This data supports the comments of the Italian legislators regarding the civil justice crisis.

31. Law of July 14, 1950, No. 581, Gazz. Uff. No. 253, Oct. 28, 1940. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 3-4 (Jan. 18, 1989) (remarks of Sen. Filetti) (Grandi Code of 1940-42 despoiled by counter reform of 1950). Because of pressure from the Italian bar, the 1950 law abolished mandatory time limits, leaving Italian trial judges at the mercy of lawyer tactics. See Giovanni A. Micheli, *Preliminary Instruction in Europe: The Italian Experience, with some Comparative Data*, in COURT CONGESTION 83, 88, 90, 104 (1971).

32. See, e.g., IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 126 (providing that parties can modify claims and defenses, produce new documents, and ask for more proof hearings any time before remission to panel). In the old Civil Code, this provision was contained in Article 184. See *id.*

33. See, e.g., IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 163 (providing that parties can introduce new defenses and new documents and ask for proof-takings on appeal). In the old Civil Code, this provision was contained in Article 345(1). See *id.*

34. For concise descriptions of the reform measures proposed in the decades preceding approval of Law 353, see *Introduzione alle "Riforme Urgenti" del Processo Civile [Introduction to the "Urgent Reforms" of Civil Process]* in DOCUMENTI GIUSTIZIA, *supra* note 21, at 5-9; ACONE-LIPARI FIRST REPORT, *supra* note 25, at 3-4; DOCUMENTI GIUSTIZIA, *supra* note 21, at 8-9 (Jan. 18, 1989) (statements of Sen. Battello); CSM SECOND REPORT, *supra* note 25, at cols. 393-95.

professor and Attorney General Giulano Vassalli introduced and explained Senate Bill 1288,³⁵ which carried the approval of the Italian cabinet.³⁶ This Bill was referred to the Senate Justice Committee, which assigned two other law professors, Senators Lipari and Acone, to draft a report on the Bill.³⁷ On January 11, 1989, the two professors rendered a detailed report to the Justice Committee.³⁸ The Committee's chairman then appointed a special committee of twelve senators, and charged them with the responsibility of studying and improving Bill 1288.³⁹ This special committee worked through the spring and summer of 1989 and reported to the Senate's Justice Committee on August 1, 1989.⁴⁰ On November 15, 1989, the Justice Committee commenced a two-month debate of each article and voted on Bill 1288 as revised by the special committee.⁴¹ On February 23, 1990, Professors Acone and Lipari submitted another report on Bill 1288, this time to the Senate President.⁴² Five days later, the Senate approved Bill 1288.⁴³

Between May and October of 1990, in nine reported sessions, the Justice Committee of the House of Deputies worked on Bill 1288.⁴⁴ On October 3, the House of Deputies unanimously approved the Senate text with only minor modifications.⁴⁵ These House amendments, reverted to the Senate Justice Committee, and

35. See VASSALLI REPORT, *supra* note 25, at 8-32.

36. See Costituzione [COST.] art. 71(1) (Italy), which is the Council of Ministers ("The Italian Constitution vests a power to introduce legislation in the 'Government.'") See also COST. art. 92(1).

37. See DOCUMENTI GIUSTIZIA, *supra* note 21, at 2 (Jan. 11, 1989)(statement of Senate Judiciary Committee Chairman, Senator Covi).

38. ACONE-LIPARI FIRST REPORT, *supra* note 25.

39. DOCUMENTI GIUSTIZIA, *supra* note 21, at 21 (Jan. 18, 1989).

40. ACONE-LIPARI SECOND REPORT, *supra* note 25. No record of the special committee's deliberations exist. See Luigi Scotti, *Presentazione [Preface]*, in DOCUMENTI GIUSTIZIA, *supra* note 21.

41. See DOCUMENTI GIUSTIZIA, *supra* note 21, meetings of Nov. 12, 1989, Nov. 22, 1989, Nov. 29, 1989, Dec. 13, 1989 (morning), Dec. 13, 1989 (afternoon), Dec. 14, 1989, Jan. 16, 1990, Jan. 17, 1990.

42. ACONE-LIPARI THIRD REPORT, *supra* note 25.

43. See DOCUMENTI GIUSTIZIA, *supra* note 21, at 75 (352d Public Meeting, Feb. 28, 1990).

44. See DOCUMENTI GIUSTIZIA, *supra* note 21, meetings of May 15, 1990, May 23, 1990, June 5, 1990, June 6, 1990, June 20, 1990, July 31, 1990, Sept. 26, 1990, Sept. 27, 1990, Oct. 3, 1990.

45. See *id.* at 10 (Oct. 3, 1990).

voted into law on the last day of October, became known as Law 353.⁴⁶

A bill restructuring the lowest level Italian courts, the conciliators, complemented Law 353.⁴⁷ One of the main civil justice reforms of the bill was the downward transfer of simple, repetitive, low value cases from the clogged tribunals to the *pretori* and *conciliatori*.⁴⁸ The *conciliatori* had been in disarray, having little work and low reputation.⁴⁹ On November 21, 1991, Law 374⁵⁰ revitalized this post.⁵¹

D. Caveats

Before reviewing the 1990 Italian reforms, it is important to note a fundamental procedural difference from the U.S. process, which directly impacts on delay and cost. The Italian civil justice system presumes that a plaintiff has proof "in hand" at the outset of his suit. Only limited document discovery is permitted.⁵² Because proof is generally "in hand," little should happen during the processing of the case to change its essential nature. The focus of the procedural reformer, then, is to induce the litigants to assert their factual and legal propositions as early and as clearly as possible. In this manner, delays caused by redefinition and addition of issues may be avoided.

In contrast, the U.S. procedure presumes that parties who file claims have some proof to justify the initiation of litigation,⁵³ but

46. See *id.* at 48 (Oct. 31, 1990).

47. Law of Nov. 21, 1991, No. 374, reprinted in V FORO ITALIANO, *supra* note 26, at cols. 588-98 (1991).

48. See Andrea P. Pisani, *L'istituzione del giudice di pace [The Institution of Justice of the Peace]*, V FORO ITALIANO, *supra* note 26, at col. 582. The caseload of the conciliators was steadily decreasing:

1987	91,820
1988	86,747
1989	81,102

ISTITUTO NAZIONALE DI STATISTICA, *supra* note 24, at 31 tbl. 1.1.

49. See *id.*

50. Law of Nov. 21, 1991, No. 374, reprinted in V FORO ITALIANO, *supra* note 26.

51. See *infra* part II.E.1.

52. See C.P.C. art. 118 (allowing for inspection of persons and things by judge when the inspection is indispensable to ascertain facts); *id.* art. 210 (allowing for an order to exhibit indispensable documents and things); *id.* art. 94 (requiring specific identification of the document or thing). See generally CAPPELLETTI & PERILLO, *supra* note 8, § 8.48 at 234-38.

53. See FED. R. CIV. P. 11(b) ("after an inquiry reasonable under the circumstances . . . contentions . . . are warranted by existing law . . . [and] have evidentiary sup-

do not yet have access to mechanisms to gather other relevant proofs. Discovery procedures offer this access. This initial lack of proof creates an efficiency problem because, as parties unearth facts through discovered documents and witnesses, new facts and legal issues emerge and cause a constant redefinition of the lawsuit. Thus, issue management is considerably more difficult in the United States than in Italy. Additionally, the complex discovery rules in the United States create multiple controversies not found in countries without discovery procedures. This difference in procedure causes costs and delays that require different responses for reform.

The difference in discovery rules favors Italy with regard to cost and delay issues. Italy's fee structure for compensating attorneys, however, seems to cause unnecessary cost and delay. In Italy, maximum charges are established by law for work actually performed. Each step of the proceeding earns a specified fee for the litigant's attorney, including a separate fee for each appearance in court.⁵⁴ This fee structure creates an economic incentive for lawyers to complicate and prolong lawsuits.⁵⁵ In contrast, U.S. contingency fees encourage plaintiffs' lawyers to settle before investing unnecessary time and resources in litigation.⁵⁶

Similarly, procedures used for tactical delay or expense vary among the U.S. and Italian legal systems simply because of a difference in rules. For example, while the Italian legal system is plagued by jurisdictional appeals because the system is conducive to misuse by tactical delay,⁵⁷ the U.S. prohibition of interlocutory appeals⁵⁸ eliminates this particular problem.

port").

54. See CAPPELLETTI & PERILLO, *supra* note 8, at 62.

55. See DOCUMENTI GIUSTIZIA, *supra* note 21, at 46 (Jan. 11, 1989) (statements of Assistant Attorney General Coco).

56. See Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 536 (1978); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1135-36 (1970).

57. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 6-7 (Jan. 18, 1989) (statements of Sen. Filetti).

58. See, e.g., 28 U.S.C. § 1291 (1990) (stating that only "final decisions" of district courts are appealable).

In sum, although the two legal systems face the same delay and cost problems, the differences in procedure mandate different responses for reform.⁵⁹

E. The Main Italian Reforms

1. Passing the Buck

Due to massive existing caseloads, Italian procedural scholars doubted that a streamlined trial process would significantly unclog the tribunals.⁶⁰ Consequently, attention quickly focused on transferring entire categories of cases to inferior trial levels.⁶¹

The Italian trial courts are differentiated by the type of case and the amount in controversy. The conciliators, now called justices of the peace, have jurisdiction to adjudicate small claims of 5,000,000 *lire* or less (approximately \$3,125) and cases involving automobile and boating incidents of up to 30,000,000 *lire* (approximately \$18,750).⁶² Justices of the peace also have jurisdiction over small land use, nuisance, and condominium maintenance disputes.⁶³ In 1991, the Italian legislature increased this jurisdiction from a meager 1,000,000 *lire* threshold (about \$690), which provided little caseload relief for the other trial courts.⁶⁴ Parliament sought to dignify this lowest level by changing the magistrates' title from "conciliator" to "justice of the peace."⁶⁵ The 4,700 justices of the peace⁶⁶ became known as law graduates;⁶⁷ these officials were in the last phase of their careers,

59. This Article focuses on the style of legal reform and, therefore, considers only the procedural response to cost and delay in the civil justice system, and not the budgetary scope of the problem. In both countries, lack of sufficient courts, personnel, and machinery is a constant source of judicial crisis. See, e.g., J. Michael McWilliams, *Dwindling Judicial Resources*, 79 A.B.A. J. 8 (July 1993); DOCUMENTI GIUSTIZIA, *supra* note 21, at 68 (Feb. 28, 1990) (statement of Sen. Filetti).

60. See, e.g., Pisani, *supra* note 48, col. 581.

61. See VASSALLI REPORT, *supra* note 25, at 3.

62. C.P.C. art. 7, as amended by Law of Nov. 21, 1991, No. 374, art. 17, reprinted in V FORO ITALIANO, *supra* note 26, at cols. 588-98.

63. *Id.*

64. See IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 86 (former art. 7).

65. Law of Nov. 21, 1991, No. 374, arts. 1, 17, 45, reprinted in V FORO ITALIANO, *supra* note 26, at cols. 588, 591, 597.

66. *Id.* art. 3, reprinted in V FORO ITALIANO, *supra* note 26, at col. 588.

67. *Id.* art. 5(1)(g), reprinted in V FORO ITALIANO, *supra* note 26, at col. 589.

primarily between the ages of fifty and seventy five years old.⁶⁸ Justices of the peace earn up to \$750 per month for criminal hearings, up to \$375 monthly for civil hearings, and \$35 per civil judgment or successful conciliation⁶⁹—not enough compensation to detract from the “honorary” nature of the post.⁷⁰ The justice of the peace cases follow a simplified process, allowing a maximum of two hearings, and emphasize conciliation and quick decisions.⁷¹ Parties may represent themselves in cases involving no more than 1,000,000 *lire* (about \$690) and, with the justice’s permission, in other cases.⁷² In small cases involving 2,000,000 *lire* (about \$1380) or less, the justice decides on grounds of “equity.”⁷³ In larger disputes, the parties can agree to an “equity” ruling.⁷⁴ In both situations, the equity decision is unappealable.⁷⁵

The downward shift of caseload responsibility characterizes the Italian Government’s effort to decongest the main trial courts, or tribunals. Rather than augmenting the number of career judgeships at the main trial level, the government increased the responsibilities of auxiliary staff, such as justices of the peace.⁷⁶ Presumably, the modest daily and per-case stipends would decrease the public cost of providing justices at this level.

Similarly, the maximum jurisdiction of a higher level trial judge, or *pretore*, has quadrupled from five million to twenty million *lire* (about \$12,500).⁷⁷ The introduction of the “oral argument—oral decision method” further streamlined the trial proce-

68. *Id.* art. 5(1)(e), reprinted in V FORO ITALIANO, *supra* note 26, at col. 589.

69. *Id.* arts. 11(1), 11(2), reprinted in V FORO ITALIANO, *supra* note 26, at col. 590.

70. *Id.* art. 11(1), reprinted in V FORO ITALIANO, *supra* note 26, at col. 590 (“The position of justice of the peace is honorary.”).

71. C.P.C. art. 320, as amended by Law of Nov. 21, 1991, No. 374, art. 29, reprinted in V FORO ITALIANO, *supra* note 26, at col. 594.

72. C.P.C. art. 82, as amended by Law of Nov. 21, 1991, No. 374, art. 20, reprinted in V FORO ITALIANO, *supra* note 26, at col. 593.

73. C.P.C. art. 113(2), as amended by Law of Nov. 21, 1991, No. 374, art. 21, reprinted in V FORO ITALIANO, *supra* note 26, at col. 593.

74. C.P.C. art. 114.

75. C.P.C. art. 339(3), as amended by Law of Nov. 21, 1991, No. 374, art. 33, reprinted in V FORO ITALIANO, *supra* note 26, at col. 595.

76. Some scholars doubt that Italian law schools are generating enough qualified students to significantly increase the bench in a responsible fashion. See, e.g., Pisani, *supra* note 48, at cols. 581-82. In Italy, a judgeship is a career position that commences with the successful completion of a difficult, competitive examination. See Joseph M. Perillo, *The Legal Professions of Italy*, 18 J. LEGAL EDUC. 274, 290 (1966).

77. C.P.C. art. 8, as amended by Law of Nov. 21, 1991, No. 374, art. 18, reprinted in V FORO ITALIANO, *supra* note 26, at col. 592.

ture at this level.⁷⁸ This concept involves the rendering of an immediate decision, with a brief verbal rationale, immediately following oral argument.⁷⁹ "The oral argument—oral decision method" was recommended by the Superior Council of the Judiciary (*Consiglio Superiore della Magistratura*) as a means to circumvent the "judgment-writing bottleneck," a main cause of delay in the justice system.⁸⁰ Consequently, each *pretore* now has the option of either taking the slower briefing and judgment-writing route⁸¹ or using the quicker oral argument—oral decision method. Thus, the *pretore* now has a "fast route" for resolving the simpler cases.

As a result of the amendments made by Law 374/1991, enacted a year after Law 353/1990, the Italian tribunal is now reserved for cases involving damages exceeding twenty million *lire*.⁸²

2. "Put Up or Shut Up"

Italian civil lawsuits are perceived as endless sagas characterized by suspensions, extensions, and constant additions of new issues and proofs. Sufficient accounts of endless litigation exist⁸³ to justify reforms directed at limiting the life span of a lawsuit. Still, empirical evidence analyzing delay based on the type of lawsuit, delay caused by the courts, and the circumstances surrounding delay would help to analyze the problem. The Italian Government does not generate data to facilitate such specific understanding.⁸⁴ Thus, the Italian reformers isolated the instances and causes of delay based on personal experience, second-hand reports, and logic. The reformers concluded that the source

78. C.P.C. art. 315, as amended by Law of Nov. 26, 1990, No. 353, art. 39, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 156.

79. *Id.*

80. See CSM FIRST REPORT, *supra* note 25, at cols. 408-09.

81. C.P.C. art. 314, as amended by Law of Nov. 26, 1990, No. 353, art. 38(2), Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 156.

82. C.P.C. art. 8, as amended by Law of Nov. 21, 1991, No. 374, art. 18, reprinted in *V FORO ITALIANO*, *supra* note 26, at col. 592.

83. See, e.g., CAPPELLETTI ET AL., *supra* note 8, at app. B (translated transcript of a simple tort case with almost 50 hearings).

84. C.P.C. art. 8, as amended by Law of Nov. 21, 1991, No. 374, art. 18, reprinted in *V FORO ITALIANO*, *supra* note 26, at col. 592.

of these delays was a liberal 1950 reform that enabled lawyers to extend the life of a lawsuit by adding new issues and proofs throughout the "instruction" stage.⁸⁵ Moreover, Italian trial judges' inability to sanction a party who ignored deadlines exacerbated the delay.⁸⁶

To compress lawsuits, the Italian reformers adopted a "put up or shut up" tactic under which code provisions imposed action deadlines and duties upon parties, while waivers of claims and defenses served as sanctions to stimulate action. For example, the Italian defendant must include all counterclaims, affirmative defenses, and technical exceptions in a timely-filed answer to the complaint (*comparsa di risposta*), or these claims and defenses are automatically waived.⁸⁷ In the summons-complaint (*citazione*), the plaintiff sets a date for the first organizational hearing (*udienza di trattazione*) and warns the defendant that a failure to file his answer at least twenty days before the first hearing will result in a loss of counterclaims and special defenses.⁸⁸ The only new claims and exceptions permitted at the initial hearing are those made by the plaintiff in response to the defendant's counterclaims.⁸⁹ Claims and exceptions in the complaint may only be "made more precise" and "modified" with the judge's permission.⁹⁰ Similarly, the defendant, must name third parties in his answer to the complaint and summon them or waive the right to do so.⁹¹ Plaintiffs are also at risk of loss because they must ask

85. See Law of July 14, 1950, No. 581, Gazz. Uff. No. 253, Oct. 28, 1940. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 3-4 (Jan. 18, 1989) (remarks of Sen. Filetti) (Grandi Code of 1940-42 despoiled by counter reform of 1950). Because of pressure from the Italian bar, the 1950 law abolished mandatory time limits, leaving Italian trial judges at the mercy of lawyer tactics. See Micheli, *supra* note 31, at 83, 88, 90, 104.

86. See, e.g., C.P.C. art. 152(1) ("The deadlines for the completion of procedural acts are established by statute; only if a statute so provides may a judge extinguish a claim or defense for failure to comply with deadlines the judge sets.").

87. C.P.C. arts. 167(2), 171(2), as amended by Law of Nov. 26, 1990, No. 353, arts. 11, 13, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 120, 122.

88. C.P.C. art. 163(7), as amended by Law of Nov. 26, 1990, No. 353, art. 7, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 118.

89. C.P.C. art. 183(4), as amended by Law of Nov. 26, 1990, No. 353, art. 17, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 126.

90. *Id.*

91. C.P.C. arts. 167(3), 269(2), as amended by Law of Nov. 26, 1990, No. 353, arts. 11, 29, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA

the trial judge's permission to bring in third party defendants against counterclaims no later than the first hearing.⁹² This is in contrast to the 1950-1992 regime, when lawyers could rewrite claims and defenses and add third-parties almost at will.⁹³ Senator Acone described these action-forcing measures as a requirement for parties to "empty their sack" by the end of the first hearing.⁹⁴

Similarly, a defendant must promptly challenge the court's subject matter jurisdiction and venue, or these challenges are waived. Neither the parties nor the court itself may raise such challenges after the first hearing.⁹⁵ Prior to the 1990 reform, the trial judge could raise any of these objections at any time, and the parties could raise the lack of subject matter jurisdiction at any time.⁹⁶ The defendant, however, had to challenge venue at his first opportunity.⁹⁷

3. The Judge-Manager

The Italian reformers adopted the "managerial judge" approach. Although this approach is now popular in the United States,⁹⁸ the legislative record is barren of references to the U.S. experience. A quote from Senator Lipari, one of the chief reformers, catches the purpose and essence of the new judicial duty:

CIVILE, *supra* note 3, at 120, 144.

92. C.P.C. art. 269(3), *as amended by* Law of Nov. 26, 1990, No. 353, art. 29, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted in* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 144.

93. *See* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 126 (former arts. 183-184).

94. DOCUMENTI GIUSTIZIA, *supra* note 21, at 15 (Feb. 28, 1990).

95. C.P.C. art. 38(1), *as amended by* Law of Nov. 26, 1990, No. 353, art. 4, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted in* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 93.

96. *See* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 93 (former art. 38(1)).

97. *See id.* at 93 (formerly art. 38).

98. *See, e.g.,* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986); Paul R. J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES' J. 34 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Alvin B. Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1978).

As to preparation (*trattazione*) of the case, in every procedural order which is structured on the basis of the principles of orality, concentration and immediacy, the preparatory hearing plays a fundamental role . . . during which the judge must from the start eliminate from the discussion the superfluous and the futile and, assuming he does not succeed in leading the parties to conciliation on all points, reduce the controversy to those few essential questions which have a true need to be decided.⁹⁹

The reformers doubled the time between service of the complaint upon the defendant and the date of the first hearing to a minimum of sixty days,¹⁰⁰ with the defendant's answer due on the fortieth day (twenty days before the hearing).¹⁰¹ The underlying purpose is to streamline a case and encourage more efficient litigation by requiring each party to invest time initially to narrow and refine issues.¹⁰² Thus, the defendant has at least forty days to frame a careful response to the complaint, the plaintiff has twenty days to respond to the answer at the first hearing, and the "instructing" judge, who gets the pleadings promptly upon his appointment,¹⁰³ can adequately prepare for his managerial functions at the first hearing. These duties include questioning the parties, attempting a settlement, and narrowing and clarifying the issues.¹⁰⁴ Refined pleadings are to be filed no later than thirty

99. ACONE-LIPARI FIRST REPORT, *supra* note 25, at 10. The management approach stems from a realization that civil justice is a "public function" and rejects the "common mistaken philosophy" that civil courts serve only private interests. CSM FIRST REPORT, *supra* note 25, at cols. 401-02.

100. C.P.C. art. 163(1), *as amended* by Law of Nov. 26, 1990, No. 353, art. 8, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted* in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 118.

101. C.P.C. art. 166, *as amended* by Law of Nov. 26, 1990, No. 353, art. 10, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted* in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 120.

102. See DOCUMENTI GIUSTIZIA, *supra* note 21, at 33 (Jan. 11, 1989) (statement of Sen. Acone). This approach is consistent with U.S. empirical research:

The point at which a court begins to become involved in monitoring the progress of litigation and in scheduling future events is important. Faster courts take cognizance of cases at the commencement of a lawsuit, and have mechanisms to enable periodic monitoring and early setting of schedules for future events.

MAHONEY, *supra* note 29, at 194.

103. See C.P.C. art. 168(3), *as amended* by Law of Nov. 26, 1990, No. 353, art. 12, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted* in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 121.

104. See C.P.C. art. 183, *as amended* by Law of Nov. 26, 1990, No. 353, art. 17, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted* in IL NUOVO CODICE DI PROCEDURA, *supra* note 3, at 125-26.

days from the first hearing,¹⁰⁵ and the amended pleadings control the shape of the lawsuit thereafter.¹⁰⁶ This clear delineation of the issues will, according to the reformers, enable the judge to exercise his managerial powers wisely.¹⁰⁷

Yet, Italian legislators may have legislated in vain, due to a lack of specific information about the dynamics of litigating a civil case in their trial courts. The large caseloads facing the Italian trial bench,¹⁰⁸ combined with inadequate support personnel,¹⁰⁹ may prevent the individualized case management contemplated by the reform. The attempt at conciliation may be as *pro forma* as always,¹¹⁰ and the attorneys may soon ignore their duty to come to the first hearing with a thorough knowledge of the facts.¹¹¹ The use of pleading techniques that focus on subtleties, such as permitted "modifications"—as compared to prohibited "additions"—may generate new, costly, and time-consuming areas of controversy, especially in view of the potential loss of claim or defense.¹¹² The legislators lacked data that would enable them to predict how Italian judges will exercise their power to excuse a

105. C.P.C. art. 183(5), as amended by Law of Nov. 26, 1990, No. 353, art. 17, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 126.

106. C.P.C. art. 189, as amended by Law of Nov. 26, 1990, No. 353, art. 23, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 128 (proposed findings by parties must stay within the limits set by pleadings).

107. See VASSALLI REPORT, *supra* note 25, at 4.

108. See, e.g., ISTITUTO NAZIONALE DI STATISTICA, *supra* note 24, at 31 tbl. 1.1 (at end of 1989, 1,022,688 cases pending in tribunals); Oberto, *supra* note 26, at cols. 317-19 (expressing doubts about the efficacy of new management duties).

109. See Chase, *supra* note 1, at 54; PIERO PAJARDI, PER QUESTI MOTIVI . . . VITA E PASSIONE DI UN GIUDICE [FOR THESE REASONS . . . LIFE AND PASSIONS OF A JUDGE] 33, 72 (1986); Perillo, *supra* note 76, at 294 (stating that "[j]udicial law clerks are inexistent").

110. See PAJARDI, *supra* note 109, at 15 (E.g., when the question "Will you settle?" is the only effort at conciliation by the parties); Micheli, *supra* note 31, at 86-87 (describing conciliation provisions as being in "total oblivion" and "obsolete"). Data support these conclusions. In 1989, only 3,817 cases out of 295,674 dispositions ended by conciliations in the *tribunali*. See ISTITUTO NAZIONALE DI STATISTICA, *supra* note 24, at 31 tbl. 1.1, 32 tbl. 1.3.

111. C.P.C. art. 183(2), as amended by Law of Nov. 26, 1990, No. 353, art. 17, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in *IL NUOVO CODICE DI PROCEDURA CIVILE*, *supra* note 3, at 125-26 (inference of contrary proof may be drawn from a lawyer's failure to know facts at a first hearing).

112. See CONSOLO ET AL., *supra* note 26, at 92 (distinguishing "material" versus "secondary" facts); Oberto, *supra* note 26, col. 315 (analyzing valid and invalid pleading amendments).

party's pleading, appearance, and proof errors,¹¹³ or how they will exercise their power to permit pleading modifications. A lengthy regime of party control¹¹⁴ may not readily be supplanted by tough managerial judging. This is particularly true, given that the legislature constantly waffled between the right to be heard and the right to a speedy, efficient trial.¹¹⁵ This ambivalence is characterized by the concept of a "non-authoritarian" manager-judge.¹¹⁶

The Italian appellate system, like many civil law regimes,¹¹⁷ permitted attorneys to raise new arguments freely, and even to present new proofs on appeal.¹¹⁸ If this tradition were to continue, the effort to promote dignity, finality, and efficiency in the trial courts would be contradicted. Consequently, Law 353 limited new proofs on appeal to those that the appellate panel found "indispensable" to a just result, or when such proofs could not have been offered for reasons not attributable to the offering party.¹¹⁹

4. Divide and Conquer

Based on the theory that three minds are better than one,¹²⁰ Italy, like other civil law countries, normally provided for a three-judge trial court.¹²¹ One of the three judges was designated "instructing" judge¹²² and was responsible for refining the issues and taking proofs.¹²³ When this "packaging" phase was com-

113. C.P.C. art. 184(1), *as amended by* Law of Nov. 26, 1990, No. 353, art. 19, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted in* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 127.

114. *See* Micheli, *supra* note 31, at 105 (stating that "the litigation followed the pace given to it by the attorneys"); Perillo, *supra* note 76, at 295 (asserting that lawyers resent bureaucratic interference by judges).

115. *See* VASSALLI REPORT, *supra* note 25, at 4.

116. *Id.* (stating that a judge is a non-authoritarian collaborator).

117. *See* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW §§ 8-50 (1982).

118. *See* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 163 (former art. 345(2)). Parties could propose new exceptions, produce new documents, and ask for new proof-takings. *Id.*

119. C.P.C. art. 345(3), *as amended by* Law of Nov. 26, 1990, No. 353, art. 52, Gazz. Uff. No. 281, Dec. 1, 1990, *reprinted in* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 163.

120. *See* PIERO PAJARDI, ESSERE GIUDICE OGGI [TO BE A JUDGE TODAY] 182 (1990).

121. *See* C.P.C. art. 48, *reprinted in* IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 411-12.

122. C.P.C. art. 168(1).

123. C.P.C. art. 174.

plete, the instructing judge remitted the case file to the full panel.¹²⁴ The parties had the right to oral argument to supplement their briefs.¹²⁵ At the hearing, the instructing judge related the issues, facts, and relevant law to his or her colleagues¹²⁶ and voted first.¹²⁷

In the 1992 Italian reform, the Italian legislature hotly debated the question of converting to a unicameral bench.¹²⁸ Many believed, without empirical proof, that the three-judge panel system was ineffective because the panel invariably followed the lead of the instructing judge who had worked on the case for months.¹²⁹ Others believed that the input of three colleagues produced more sound results, particularly on points of law, applications of fact to law, and factual inferences.¹³⁰ While establishment of a monocratic bench had been proposed in earlier bills, the government declined to tackle this major issue in its proposal for reform—Bill 1288.¹³¹ The Senate Judiciary Committee opted for the single-judge system in light of the “enormous number of civil cases currently pending before the trial courts,”¹³² reserving three-judge courts for civil cases of special complexity.¹³³ Single judges would try the vast bulk of civil cases, including petitions to execute judgments.¹³⁴ This change also eliminated a frequent

124. C.P.C. art. 189, *as amended by Law of Nov. 26, 1990, No. 353, art. 23, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, supra note 3, at 129.*

125. *See IL NUOVO CODICE DI PROCEDURA CIVILE, supra note 3, at 146 (former art. 275(2)).* After the 1992 reform, argument before single judges or the panel convened for special cases became an option at the parties' discretion. *See C.P.C. art. 190(2), as amended by Law of Nov. 26, 1990, No. 353, art. 25, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, supra note 3, at 130 (oral argument before a single judge); C.P.C. art. 275(2), as amended by Law of Nov. 26 1992, No. 353, art. 32, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, supra note 3, at 146 (oral argument before panel).*

126. *See IL NUOVO CODICE DI PROCEDURA CIVILE, supra note 3, at 146 (former art. 275(1)).*

127. C.P.C. art. 276(3).

128. *See, e.g., ROGNONI REPORT, supra note 25, at 5.*

129. CONSOLO ET AL., *supra note 26, at 577.*

130. *See, e.g., VASSALLI REPORT, supra note 25, at 4.*

131. *Id.* at 3.

132. ACONE-LIPARI THIRD REPORT, *supra note 25, at 7-8.* The Italian judicial leadership strongly advocated the monocratic trial bench. *See CSM FIRST REPORT, supra note 25, at cols. 397-99; CSM SECOND REPORT, supra note 25, at cols. 248-49.*

133. C.P.C. art. 48(2), *reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, supra note 3, at 411-12 (listing nine types of cases to be heard by three-judge panels).*

134. *Id.* art. 48(4).

cause of cost and delay—interlocutory appeals of the instructing judge's proof rulings. For post-reform three-judge cases, parties are precluded from appealing proof rulings until the entire case is remitted to the panel.¹³⁵

5. Cracking the Whip

The 1990 reform imposes a series of deadlines on trial judges at points during the process at which judges were reputed to be responsible for delay. For example, a judge must render judgment within sixty days of the deposit of the last brief.¹³⁶ Additionally, the trial judge cannot "buy time" on a busy calendar by scheduling hearings farther and farther into the future. The 1990 Amendments prohibit a judge from postponing the first hearing for more than 45 days.¹³⁷ No similar controls exist, however, on setting dates for proof-taking sessions.¹³⁸ Thus, cases may continue to stretch out for years as Italian judges strive to cope with growing caseloads. Imposing deadlines on busy judges may be unproductive because no sanctions accompany the violation of these deadlines.¹³⁹ These deadlines may also create unrealistic expectations for parties and increase criticism of the Italian bench.

6. The Games Are Over

The Amendments also try to preclude some notorious delay tactics practiced by the Italian bar. For example, the old Code permitted attorneys to challenge the trial court's subject matter jurisdiction by raising objections, however frivolous, in the Court

135. Compare IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 124 (former art. 178(2)) with C.P.C. art. 178(2), as amended by Law of Nov. 26, 1990, No. 353, art. 15, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 124.

136. C.P.C. art. 190(1), as added by Law of Nov. 26, 1990, No. 353, art. 25, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 129; C.P.C. art. 275(1), as amended by Law of Nov. 26, 1990, No. 353, art. 32, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 146.

137. C.P.C. art. 168(5), as amended by Law of Nov. 26, 1990, No. 353, art. 12, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 121.

138. See C.P.C. arts. 183(5), 184, as amended by Law of Nov. 26, 1990, No. 353, arts. 17, 18, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 126.

139. See sources cited in *supra* notes 133-34.

of Cassation.¹⁴⁰ These special appeals automatically suspended the trial pending final action by Cassation¹⁴¹—a lengthy delay given the huge workload of the court.¹⁴² Law No. 353 changed the Code by permitting the trial judge to refuse to suspend proceedings at that level while considering whether the jurisdictional challenge is “manifestly unfounded.”¹⁴³ Similarly, motions to reconsider, which are infrequently granted, no longer suspend proceedings or execution of judgments.¹⁴⁴

A distinct but comparable change is that a defendant with a clear, uncontested obligation to pay a portion of a plaintiff's claim can no longer delay payment of his admitted obligation simply because the plaintiff is requesting other sums that are contested. Now, the plaintiff can receive a partial judgment for the uncontested amount, which is immediately executable.¹⁴⁵

Another abusive tactic favored by Italian lawyers was the filing of frivolous appeals simply to defer execution of a meritorious judgment. This delay was possible because appeals suspended the execution of the judgment,¹⁴⁶ with minor exceptions,¹⁴⁷ and the judgment-debtor could thus postpone payment of a legitimate debt while the appeals ran their course. The reformers countered this practice by making judgments executable unless an appellate judge suspends the execution for “sufficient reason.”¹⁴⁸ This

140. C.P.C. art. 41(1).

141. See IL NUOVO CODICE DI PRODECURA CIVILE, *supra* note 3, at 170 (former art. 367(1)).

142. See DOCUMENTI GIUSTIZIA, *supra* note 21, at 42 (Jan. 11, 1989) (remarks of Sen. Acone) (stating that there were over 10,000 judgments appealed to Cassation in 1989); *id.* at 3 (Jan. 18, 1989) (statement of Sen. Filetti) (describing the 33,000 case backlog in Court of Cassation).

143. C.P.C. art. 367(1), as amended by Law of Nov. 26, 1990, No. 353, art. 61, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 170.

144. See C.P.C. art. 391(4), as added by Law of Nov. 26, 1990, No. 353, art. 67, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 176; C.P.C. art. 398(4), as amended by Law of Nov. 26, 1990, No. 353, art. 68, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 178.

145. C.P.C. art. 186, as added by Law of Nov. 26, 1990, No. 353, art. 20, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 127.

146. See IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 148 (former art. 282(1)).

147. See *id.* (former art. 282(2)).

148. See C.P.C. arts. 282, 283, 337, 351, as amended by Law of Nov. 26, 1990, No. 353, arts. 33, 34, 49, 56, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI

reform may backfire, however, if appeals continue to be taken as a matter of course, with the execution issue—itsself subject to appeals—adding more cost and delay to the process. The reformers also doubled the legal rate of interest from five percent to ten percent as a general deterrent against delays based on the economics of income earned on capital.¹⁴⁹

The most notorious delay tactic in Italy prior to the reform was the “no show”—failing to appear as required by a judge’s scheduling order or by the rules. The 1990 reformers have taken a hard line on this practice, although not as hard as in the United States.¹⁵⁰ Prior to the reform, if both parties failed to appear at the first hearing, a second hearing was automatically scheduled.¹⁵¹ Then, the case is immediately removed from the docket.¹⁵² The matter may, however, be refiled before the same judge within one year of such removal.¹⁵³

F. The Italian Style of Reform

The Italian procedural reform of 1990 was a technical product created by lawyer-legislators under the guidance of their law professor colleagues.¹⁵⁴ The essential manner of reform was to hypothesize about the cause of the delay under the current code of procedure and to make the changes dictated by logic and intuition.¹⁵⁵ The subject of civil process was perceived as a “scientific

PROCEDURA CIVILE, *supra* note 3, at 148, 161, 165.

149. CODICE CIVILE [C.C.] art. 1284 (Italy), as amended by Law of Nov. 26, 1990, No. 353, art. 1, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 45.

150. Compare FED. R. CIV. P. 41(b) (dismissal for failure to comply with court order; “on merits” if judge desires); see also *id.* at 55 (judgment against a party that fails to defend).

151. See IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 125 (former art. 181(1)).

152. C.P.C. art. 181(1), as amended by Law of Nov. 26, 1990, No. 353, art. 16, Gazz. Uff. No. 281, Dec. 1, 1990, reprinted in IL NUOVO CODICE DI PROCEDURA CIVILE, *supra* note 3, at 125.

153. C.P.C. art. 307(1).

154. These professors included Acone and Lipari. See ACONE-LIPARI FIRST REPORT, *supra* note 25; ACONE-LIPARI SECOND REPORT, *supra* note 25. ACONE-LIPARI THIRD REPORT, *supra* note 25.

155. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 37-38 (Jan. 11, 1989) (remarks of Sen. Macis) (“doctrinal and scientific reasoning . . . juridical science”); *id.* at 58-59 (Feb. 28, 1990) (statement of Sen. Casoli) (learned “procedural science” at feet of the master, Professor Piero Calamandrei).

ic" matter,¹⁵⁶ relatively free of "political" viewpoints.¹⁵⁷ Thus, even when a legislator announced his political party's views, the issues and solutions he introduced were typically free of polemics and demagoguery. A Communist or Republican lawyer-legislator would speak in the style of a proceduralist, rather than a prose-lytizer.¹⁵⁸

The primary creators of the 1990 reform were the twelve Senators on the special committee,¹⁵⁹ led by law professors Acone and Lipari, who were the Justice Committee's reporters (*relatori*). Assistant Attorney General Coco, a career magistrate, presented the Government's views on each Senate and House change everyday.¹⁶⁰

The Government's reform draft, Bill No. 1288, was introduced by law professor and then-Attorney General Giuliano Vassalli on August 8, 1988.¹⁶¹ This proposal was modest in scope; the government was unprepared to propose a monocratic trial bench,¹⁶² for example, or a significant expansion of the jurisdiction of the *pretori* or the conciliators.¹⁶³ Subsequent months witnessed a substantial expansion of the reform, however, initiated mostly by the Senate subcommittee.¹⁶⁴ The reform, which became quite revolutionary, was conceived by all as a "technical," "limited" intervention, rushed along for more than eight years to cope with an exigent crisis.¹⁶⁵ In the future, a systematic codification of procedural structures and principles that followed more "scientific" approaches would be required. Many lawyer-legislators, steeped in the code tradition, were uncomfortable with

156. *Id.*

157. *See id.* at 29 (Feb. 28, 1990) (statement of Sen. Lipari).

158. *See id.* at 38-39 (statement of Sen. Macis) (stating the position of the Communist Group).

159. *See id.* at 21.

160. *See id.* at 45.

161. For a copy of the government proposal, see VASSALLI REPORT, *supra* note 25, at 8-31. For a discussion of earlier proposals, see ACONE-LIPARI FIRST REPORT, *supra* note 25, at 3-4, 8.

162. *See* VASSALLI REPORT, *supra* note 25, at 3-4; ACONE-LIPARI FIRST REPORT, *supra* note 25, at 38.

163. *See* VASSALLI REPORT, *supra* note 25, at 3.

164. *See* DOCUMENTI GIUSTIZIA, *supra* note 21, at 23 (Jan. 17, 1990) (statement of Attorney General Vassalli).

165. *Id.* at 8 (Jan. 18, 1989) (statement of Sen. Battello) (a "tiny" reform nevertheless of "great importance").

piecemeal amendments and preferred some grand, interrelated design.¹⁶⁶

The reformers relied primarily on logic, intuition, and personal experience. The debates, as well as secondary literature, are remarkably void of quantitative data about the functioning of the civil justice system. The legislature knew that the problem it needed to address¹⁶⁷ was a general stultification and "paralysis"¹⁶⁸ of the civil justice process. Although legislators made statements capable of empirical validation at various levels of the process, they failed to provide statistical support. For example, Attorney General Vassalli dogmatically asserted that the three-judge panel does not cause delay,¹⁶⁹ a proposition that is dubious on its face and begs verification. The reformers believed that jurisdictional appeals, which suspend the trial, would invite and cause abuse by delay-seeking debtors.¹⁷⁰ Not a single fact is offered in support of this suspicion. A further example of unverified statements about the "reality" of the Italian civil justice system is Senator Lipari's assertion, in his prepared remarks on the Vassalli bill, that interlocutory appeals to the three-judge panel of the instructing judge's proof rulings were infrequently utilized and, thus, could safely be eliminated.¹⁷¹ Yet, Senator Lipari could not know the incidence of such interlocutory appeals, because the Italian system does not gather information on internal events in civil litigation. Other legislators complained of judges' practice of delaying hearings and rulings for years;¹⁷² their complaints also lacked support.

The lack of data regarding the functioning of the Italian court system also forced reformers to presume that the same problems existed to the same degree in all Italian courtrooms. For example,

166. See, e.g., *id.* at 27 (Jan. 11, 1989) (statement of Sen. Lipari) (stating that reform by means of a systematic code is preferable); *id.* at 18 (Feb. 28, 1990) (statement of Attorney General Vassalli); ACONE-LIPARI SECOND REPORT, *supra* note 25, at 5 (stating that partial reform is not an "alibi" for avoiding global reform).

167. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 3 (Jan. 11, 1989) (statement of Committee Chairperson Covi).

168. See, e.g., ACONE-LIPARI FIRST REPORT, *supra* note 25, at 3 (citing actual paralysis of civil process).

169. See VASSALLI REPORT, *supra* note 25, at 3.

170. See, e.g., *id.* at 2.

171. See ACONE-LIPARI FIRST REPORT, *supra* note 25, at 10.

172. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 43 (Jan. 11, 1989) (statement of Sen. Correnti).

when Senator Lipari spoke of lawyers and judges using "creases in procedure" to slow down a case and the lack of strong ethics in the bar to combat tactical delay,¹⁷³ he spoke necessarily of all of Italy—from the courtrooms of Trieste in the north, to those of Palermo, a thousand miles to the south and totally dissimilar in history, culture, and tradition. Empirical studies in the United States demonstrate that the "local legal culture" strongly influences courtroom behavior and judges' tolerance.¹⁷⁴ Thus, the premise that lawyers behave similarly across a vast territory is suspect and may produce dysfunctional reforms.

The Italians occasionally lamented the absence of modern, computer-based data-gathering mechanisms. Senator Lipari noted that Italy lacked "culture and sensibility" favoring computerization.¹⁷⁵ Thus, lawyers were forced to search court records page by page for information that was easily retrievable from a computer database.¹⁷⁶

Architects of the Italian legal reform compensated for the lack of empiricism with their experience and expertise. Legislative debates and reports, as well as outside contributions, reflected an academic style, including several Latinisms common to Italian legal literature and lecture.¹⁷⁷ All contributors to the debate operated from a position of technical comfort. The debates reflect a mastery of the legal code that has been inculcated in the law schools and honed in the courts. Although individual lawyer-legislators might profess deference to the reporter-professors,¹⁷⁸ each possessed intimate knowledge of the procedural code, personal or second-hand experiences in its malfunctioning, and a wealth of ideas for improvement. The reform became more detailed and expansive through the exchange of ideas.¹⁷⁹ Although it is impossible to trace the inspiration of each of the ninety-two articles ultimately comprising Law 353, it appears that many scho-

173. See ACONE-LIPARI FIRST REPORT, *supra* note 25, at 26.

174. Thomas Church, Jr., et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, 2 ST. CT. J. 4 (1978).

175. See ACONE-LIPARI FIRST REPORT, *supra* note 25, at 26.

176. *Id.*

177. *Id.* at 29 (statement of Sen. Lipari) ("extreme technicality of the discourse").

178. DOCUMENTI GIUSTIZIA, *supra* note 21, at 45 (Jan. 11, 1989) (statement of Sen. Co-co) (stating that the Acone-Lipari Report was the source of his "inferiority complex").

179. The groups contributing to the reform process included the Italian Association of Students of Civil Process, Democratic Judiciary, Superior Council of the Judiciary, Group of Independent Left, and the Communist Party. *Id.* at 3, 30.

lars and groups, including the bench, contributed significantly to the final product. While legal technicians, particularly the university scholars, dominated the process,¹⁸⁰ legal experts from all branches of the profession collaborated their efforts to reform Italian procedure. Legislators constantly mentioned and ultimately adopted the ideas and proposals of the Superior Council of the Judiciary. The Senate Judiciary Committee regularly consulted judges as it reworked the Vassalli draft.¹⁸¹ The Italian Parliament, recognizing that an excluded, hostile bench and bar could subvert any reform, invited widespread input from the entire legal community.¹⁸²

Although the Italian reformers lacked knowledge about the operational impact of the rules of procedure, they clearly demonstrated their textual mastery. The legislative discussions reflect an extraordinary command of the history and content of the various articles of procedure under review, along with relevant doctrine and jurisprudence. Furthermore, reporters Acone and Lipari were fully cognizant of the details of a dozen or so different reform proposals. The conversations of the legislators resembled a roundtable drafting session, with each proposal, phrase, and word the subject of microscopic attention.

III. UNITED STATES CIVIL JUSTICE REFORM: BUILDING FROM THE "BOTTOM UP"¹⁸³

A. *The Empirical Framework*

Legal realism prevalent in the United States constantly calls for empirical studies of the behavior of courts.¹⁸⁴ If law is no

180. Law Professors Acone, Lipari, and Vassalli dominated the process directly; in addition, references to ideas of other procedural scholars were frequently interjected into the debates. See, e.g., DOCUMENTI GIUSTIZIA, *supra* note 21, at 8 (Dec. 13, 1989) (statement of Sen. Covi) (discussing the ideas of the proceduralist Professor Tarzia).

181. See *id.* at 22 (Dec. 13, 1989) (statement of Sen. Lipari) (citing conversations with judges of Court of Cassation).

182. See *id.* at 96 (Jan. 18, 1989) (statement of Committee Chairperson Covi).

183. S. REP. NO. 416, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6806.

184. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 829-34 (1935) (calling for redirection of research); Maurice Rosenberg, *The Impact of Procedure—Impact Studies in the Administration of Justice*, 51 LAW & CONTEMP. PROBS. 13, 30 (1988) (calling for empirical research on a "vast range of . . . significant subjects").

more than "what the courts . . . do in fact,"¹⁸⁵ then the law student must have ample information about court operations and rulings. Thus, the U.S. judicial system increasingly utilizes a well-developed and organized system of data gathering.¹⁸⁶ Both practitioners and academics have embraced the techniques of social scientists in pursuit of legal truth.¹⁸⁷ Indeed, lawyers are inclined to emulate social scientists more often than philosophers, particularly in operational areas like civil procedure,¹⁸⁸ and interdisciplinary teams are commonly assembled for empirical projects.¹⁸⁹

This emphasis on empiricism results in constant scrutiny of the operations of U.S. courts. The Administrative Office of the United States Courts periodically monitors federal courts,¹⁹⁰ while the National Center for State Courts publishes an annual report on the state courts.¹⁹¹ In addition, The Institute for Civil Justice of the Rand Corporation,¹⁹² The Federal Judicial Cen-

185. Oliver Wendell Holmes, Jr., *Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

186. A bibliography published in 1988 listed 316 empirical studies in U.S. civil procedure. See Michael Chiorazzi, *Empirical Studies in Civil Procedure: A Selected Annotated Bibliography*, 51 LAW & CONTEMP. PROBS. 87 (1988).

187. *But see* Rosenberg, *supra* note 184, at 13.

Many lawyers and judges appear to believe that thinking like a lawyer means relying on law books, logic, speculation, argument and—when it comes to addressing questions of soci[etal] reality—invoking intuition Lawyers are suspicious or fearful or both when they confront the methods and findings of the social sciences.

The many research projects he himself describes, and their visible impacts, underline Professor Rosenberg's pessimism. See *id.* at 17-27. As the dean of U.S. procedural research, Professor Rosenberg continues to trumpet the call.

188. The acquisition and use of social science skills by the academic lawyer is exemplified by Professor Marc Galanter of the University of Wisconsin. See ASSOCIATION OF AMERICAN LAW SCHOOLS, DIRECTORY OF LAW TEACHERS 1992-93, at 390 (1992). For the most notable among his many published works, see 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).

189. See, e.g., David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

190. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: SUPPLEMENTAL TABLES (annual publication containing 92 statistical tables); FEDERAL COURT MANAGEMENT STATISTICS, *supra* note 4.

191. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS (annual publication).

192. Rand Corporation's major cost and delay studies include: JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983) (reviewing efficiency, accuracy, and litigant satisfaction with the court-administered arbitration program); PATRICIA A. EBENER ET AL., COURT EFFORTS TO REDUCE PRETRIAL DELAY: A NATIONAL INVENTORY (1981) (reviewing state court techniques used to reduce pretrial delay); JOHN B. JENNINGS, THE DESIGN AND EVALUATION

ter,¹⁹³ and the National Center for State Courts¹⁹⁴ conduct

OF EXPERIMENTAL COURT REFORMS (1971) (analyzing individual court reforms and advocating the use of controlled, small-scale experiments); JAMES S. KAKALIK ET AL., *AVERTING GRIDLOCK: STRATEGIES FOR REDUCING CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT* (1990) (noting the causes of and strategies for reducing delay in the Los Angeles Superior Courts); JAMES S. KAKALIK & NICHOLAS M. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* (1986) (reviewing total and component costs of resolving tort lawsuits in courts of general jurisdiction); JAMES S. KAKALIK & ABBY EISENSHAT ROBYN, *COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR PROCESSING TORT CASES* (1982) (reviewing the factors that determine how much money is spent and noting court expenditures); E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES* (1989) (examining how tort litigants perceive courts and what factors create the most satisfying results); GEORGE L. PRIEST, *REGULATING THE CONTENT AND VOLUME OF LITIGATION: AN ECONOMIC ANALYSIS* (1983) (examining how shifting litigation costs from one party to another influences the volume of litigation); MOLLY SELVIN & PATRICIA A. EBENER, *MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT* (1984) (reviewing delay history and effective delay-reducing procedures).

193. See generally Russell Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 *LAW & CONTEMP. PROBS.* 31 (1988). The Center's major cost-and-delay studies include: PAUL R. CONNOLLY ET AL., *JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: DISCOVERY* (1978) (reviewing, empirically, the measures judges use to manage and control the civil discovery process); PAUL R. CONNOLLY & PATRICIA A. LOMBARD, *JUDICIAL CONTROLS AND THE CIVIL LITIGATION PROCESS: MOTIONS* (1980) (reporting on the dynamics affecting delay and productivity in district courts' management of motions practice); STEVEN FLANDERS, *CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS* (1977) (studying ten courts to determine what procedures are associated with efficiency, speed, and justice) [hereinafter *CASE MANAGEMENT AND COURT MANAGEMENT*]; STEVEN FLANDERS, *THE 1979 FEDERAL DISTRICT COURT TIME STUDY* (1980) (reporting on the measure of district courts' workloads in order to improve resource allocation); J.L. EBERSOLE, *PLANNING AND ORGANIZING A COURT STUDY* (1973) (describing how to analyze problems of courts and develop and successfully implement plans for change); E. ALLAN LIND & JOHN E. SHAPARD, *EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (1983) (showing that court-annexed arbitration substantially reduces the proportion of cases that go to trial); NORTH AMERICAN ROCKWELL INFORMATION SYSTEMS CO., *SUMMARY OF A MANAGEMENT AND SYSTEMS SURVEY OF THE UNITED STATES COURTS* (1969) (describing how to analyze problems of courts and develop and successfully implement plans for change).

194. Its major cost and delay studies include: THOMAS CHURCH, JR. ET AL., *PRETRIAL DELAY: A REVIEW AND BIBLIOGRAPHY* (1978) (reviewing empirical studies of pretrial delay in general jurisdiction courts, and assessing causes, consequences, and cures); Church et al., *supra* note 174, at 3 (examining elements affecting pretrial delay through a comparison of criminal and civil courts of varying speeds); WILLIAM E. HEWITT ET AL., *COURTS THAT SUCCEED: SIX PROFILES OF SUCCESSFUL COURTS* (1990) (noting profiles of management programs of six successful metropolitan trial courts); BARRY MAHONEY ET AL., *NATIONAL CENTER FOR STATE COURTS, IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS* (1985) (studying case-processing times in eighteen state trial courts of general jurisdiction); MAHONEY, *supra* note 29 (three-year study of case processing in eighteen urban trial courts); ON TRIAL:

empirical research on U.S. court system. The American Bar Association, through its Task Force on Reduction of Litigation Cost and Delay, has helped design a program to reduce judicial delay.¹⁹⁵ It has also publicized judicial experiments and court reform efforts through its Judicial Administration Division.¹⁹⁶ The Institute for Court Management of the National Center for State Courts publishes the *Justice System Journal*, which has featured several seminal empirical works on civil justice delay.¹⁹⁷

B. Civil Justice Reform Act of 1990

It is not surprising, then, that Congress based the Civil Justice Reform Act of 1990 ("Reform Act") on empirical findings.¹⁹⁸ Congress enacted this law to "facilitate deliberat[e] adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."¹⁹⁹

1. The Reform Act²⁰⁰

While the Italian Parliament directly modified the delay- and cost-inducing rules in the Code of Civil Procedure, the U.S. Congress delegated that task to federal court judges and litiga-

THE LENGTH OF CIVIL AND CRIMINAL TRIALS (1988) (examining determinants of trial length in three trial courts).

195. See, e.g., MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, CASEFLOW MANAGEMENT IN THE TRIAL COURT (1987) (summarizing the state of the art in trial court management); AMERICAN BAR ASS'N, DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM (1986); AMERICAN BAR ASS'N, ATTACKING LITIGATION COSTS AND DELAY (1984).

196. See, e.g., Eve Lieber, *Maximum Case Management with Minimum Judge Time*, 25 JUDGES' J. 14 (1986); Ernest C. Friesen, *Cures for Court Congestion*, 23 JUDGES' J. 4 (1984); Hilda R. Gage, *How To Reduce the Docket*, 23 JUDGES' J. 12 (1984); Howard Schwartz, *Delay: How Kansas and Phoenix Are Making It Disappear*, 23 JUDGES' J. 22 (1984).

197. See, e.g., John A. Goerd, *Explaining the Pace of Civil Case Litigation: The Latest Evidence from 37 Large Urban Trial Courts*, 14 JUST. SYS. J. 289 (1991); Thomas W. Church, Jr., *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166 (1978).

198. 28 U.S.C. §§ 471-482 (1990).

199. *Id.* § 471.

200. See generally Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507, 508-12 (1992). For a seemingly bitter tirade against this legislation, including challenges to its empirical foundations and participatory pretensions, see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375 (1992).

tors.²⁰¹ Congress believed that operational rules should be devised from below rather than imposed from above.²⁰² Thus, the Reform Act mandated the creation of ninety-four advisory groups, each representing one federal district court, to draft specially designed delay- and cost-reduction plans.²⁰³ The Act required these committees to be “balanced,” in order to maintain a cross-section of the legal community.²⁰⁴ Thus, they included representatives of major categories of litigants in each court. The committees were to develop their recommendations only after conducting “a thorough assessment of the court’s civil and criminal dockets [that] identif[ied] the principal causes of cost and delay in civil litigation.”²⁰⁵ After determining the particular needs of each court, the committees assessed the needs of the attorneys and their clients.²⁰⁶ The Staff Director of the Senate Judiciary Committee described “user involvement” as the “linchpin” of the Act.²⁰⁷ He also described the information collection and dissemination process as one of unprecedented proportions.²⁰⁸

Never before has every federal district court been required, in effect, to take a look inward to collect data on its performance and to engage in a dialogue on litigation management with lawyers and clients who appear regularly in court.²⁰⁹

It would be difficult to find a better example of U.S. empiricism at work. First, reform must consider the characteristics peculiar to each court as revealed by factual inquiry. The advisory group will rely on its wide range of experiences and special data-gathering efforts to gather the facts.²¹⁰ Ideally, the facts will reveal the “causes” of excessive cost and delay in a particular court and suggest solutions. A Manual for Litigation Management and

201. See 28 U.S.C. § 472 (1990) (development and implementation by district courts, advised by lawyers, of expense and delay reduction measures).

202. See 28 U.S.C. § 471 (1990) (“[S]olutions . . . must include significant contributions by the courts, the litigants, the litigants’ attorneys . . .”).

203. 28 U.S.C. § 478 (1990).

204. *Id.* § 478(b).

205. *Id.* § 472(c)(1).

206. *Id.* § 472(c)(2).

207. See Jeffrey J. Peck, “Users United”: *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 105 (1991).

208. *Id.* at 113.

209. *Id.*

210. See 28 U.S.C. § 472(c) (1990).

Cost and Delay Reduction will synthesize each individual plan.²¹¹ Because empiricists realize that reality never remains constant, they will continuously supervise and improve all plans.²¹²

Congress listed a series of "principles"²¹³ and "techniques"²¹⁴ that the districts "shall consider and may include" for guidance. For the most part, these methods proved successful in various courts across the country.²¹⁵ While many strongly advocated the use of these techniques, Congress did not presume that each or any one of them suited all courts.²¹⁶ In the spirit of "bottom up" reforming, Congress offered these ideas merely as local options.²¹⁷

The Reform Act also reflects the U.S. penchant for public inspection of the performance of government officials in its "sunshine statutes."²¹⁸ Biannual reports must reveal abnormal delays in terminating cases (over three years), in disposing of motions (over six months), and in issuing judgments in bench trials (over six months after submission).²¹⁹

Congress swiftly enacted the legislation. Less than one year passed between introduction of the original reform bill and passage

211. 28 U.S.C. § 479(c)(1) (1990). See LITIGATION MANAGEMENT MANUAL (Federal Judicial Center ed., 1992).

212. 28 U.S.C. §§ 475, 479 (1990).

213. *Id.* § 473(a).

214. *Id.* § 473(b).

215. The list included: creating special procedural tracks according to relative case complexity; early and ongoing pretrial management; setting early, firm trial dates; periodic management conferences for complex cases; voluntary fact disclosure; certificates of good-faith efforts to resolve discovery disputes; referral of disputes to alternative dispute resolution ("ADR") programs; requiring attorneys to develop discovery and case management plans without court intervention; requirements that attorneys appear at pretrial conferences with authority to bind clients (or, for settlement conferences, that clients be readily available to consent); use of neutral evaluations to promote settlement; and requirements that parties agree to their lawyers' requests for postponements. *Id.* § 473(a).

216. See 28 U.S.C. § 102(1) (1990) (problem assessment in the "context" of each district court).

217. Because Congress also wanted some testing, it must include in the plan six of the "principles and guidelines" in ten "pilot" district courts. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105(b), reprinted in Tobias, *supra* note 200, at n.5.

218. See, e.g., 5 U.S.C. § 552b (1990) (stating that federal agency meetings shall be open to public observation).

219. See *id.* § 476 (1990); ADMINISTRATIVE OFFICE OF U.S. COURTS, CIVIL JUSTICE REFORM ACT: REPORT OF MOTIONS PENDING OVER SIX MONTHS, BENCH TRIALS SUBMITTED OVER SIX MONTHS, CIVIL CASES PENDING OVER THREE YEARS ON MARCH 31, 1993, at 5 (14,001 motions; 186 bench trials; 13,224 cases).

of the finalized Reform Act.²²⁰ In contrast, the Italian Parliament considered reforming the code of procedure for more than a decade,²²¹ and worked intensively for two years on the technical language of the bill that amended the code.²²²

Despite its quick enactment, the Reform Act was well-grounded in careful empirical investigation. A polling organization representing all sectors of the federal bar conducted a survey to determine the existence, nature, extent, and causes of federal court delay and costs.²²³ The 1,100 respondents to this survey supported many of the ideas for procedural improvement inventoried in the Reform Act.²²⁴ In addition, pursuant to Senator Joseph Biden's request, the Brookings Institution sponsored a widely-representative task force, which produced a report that influenced the original shape of the legislation.²²⁵ The structuring of the survey and the discussion accompanying the Brookings Task Force's proposals bear the heavy imprint of empirical findings generated by court research in the preceding decades.

2. The Civil Justice Reform Plans

Pursuant to the recommendations of the Brookings Task Force²²⁶ and the mandate of the Reform Act,²²⁷ each of the ninety-four federal courts has completed a study and adopted a plan, containing operational rules and processes, to combat cost and delay.²²⁸ This Article will review the work of two courts: one is representative of a busy metropolitan court; the other typifies

220. See Peck, *supra* note 207, at 106.

221. See *supra* text accompanying note 34.

222. See *supra* text accompanying notes 35-46.

223. See *Procedural Reform of the Civil Justice System* (1989), reprinted in *Hearings on the Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990 before the Senate Judiciary Committee*, 101st Cong., 2d Sess. 91 (1990) [hereinafter *Civil Justice Reform Act*].

224. *Id.* at 96-97, 99.

225. BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989), reprinted in *Civil Justice Reform Act*, *supra* note 223, at 421-73. See Peck, *supra* note 207, at 107.

226. See BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, *supra* note 225, at 438-40.

227. 28 U.S.C. § 471 (1990).

228. For a summary of the plans and reports of thirty-four districts, see JUDICIAL CONFERENCE OF THE UNITED STATES, CIVIL JUSTICE REFORM ACT REPORT: DEVELOPMENT AND IMPLEMENTATION OF PLANS BY EARLY IMPLEMENTATION DISTRICTS AND PILOT COURTS (1992).

the slower, more deliberate pace in a smaller, more tightly knit community.

a. Eastern District of Pennsylvania ("EDPA")

The EDPA followed its congressional instructions to the letter. It issued a report on August 1, 1991,²²⁹ after six months of intense activity by a twenty-two-member advisory group, and adopted a "Civil Justice Expense and Delay Reduction Plan," which came into effect on December 31, 1991.²³⁰ To assess EDPA's past and present performance and to anticipate future developments, the advisory group studied statistical data generated by the Administrative Office of the United States Courts.²³¹ The facts revealed that the court worked diligently to process a significant case load.²³² Facing the largest number of filings²³³ and the third most complex caseload²³⁴ in the nation, the EDPA bench of sixteen active judges, seven below the number of authorized judgeships,²³⁵ processed all cases in a median time of seven months—sixth best nationally.²³⁶ EDPA disposed of cases requiring a trial in a median disposition time of twelve months, twenty-first out of the ninety-four federal trial courts.²³⁷

The EDPA judges, however, faced inherent burdens that impeded their delay-reducing efforts. Their "weighted"²³⁸

229. REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (Aug. 1, 1991), *reprinted in* 138 F.R.D. 167 (1991) [hereinafter EDPA REPORT].

230. UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1991) [hereinafter EDPA PLAN].

231. See EDPA REPORT, *supra* note 229, at 284-302.

232. The EDPA uses an individual calendar system, under which cases are randomly assigned to judges on a rotational basis and each judge is solely responsible for that case from beginning to end. Under such a system, each judge's performance can be subject to statistical analysis. This system has been shown to increase productivity. See Thomas W. Church, Jr., *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 177-78 (1978).

233. EDPA REPORT, *supra* note 229, at 191. In 1990, the court received 9,271 new filings, almost 600 per active judge. *Id.* at 108, 205 (stating that sixteen active judges presided at EDPA).

234. *Id.* at 192-93 (stating that the average weighted caseload was 638 cases per judge).

235. *Id.* at 205.

236. *Id.* at 8.

237. *Id.*

238. The term "weighted" means that the case number was adjusted to reflect the complexity of some cases.

caseload per judge stood at 638, third highest in the United States,²³⁹ and total filings were projected to increase steadily in the next decade.²⁴⁰ The court continued to hear a high percentage (15.4%) of the country's complicated, time-consuming asbestos cases,²⁴¹ which threatened to increase significantly the number of cases that would remain on the court's docket for more than three years.²⁴² Despite EDPA's high productivity rate, the steady increase in case filings and the lack of sufficient staff resulted in backlog.²⁴³ Also, EPDA anticipated that a district policy "adopting" drug and firearm criminal cases from the state system,²⁴⁴ predictions of increased civil rights filings by prisoners,²⁴⁵ and time demands of new sentencing processes²⁴⁶ would add extra strains. In sum, while EDPA had compiled an extraordinary disposition record in the decades preceding 1990, the advisory group perceived constant "threats" to the system's well-being and a "real" risk of retrogression.²⁴⁷

The EDPA advisory group used questionnaires, interviews, public meetings, and its own collective experiences to determine EDPA practices that produced cost and delay and to solicit ideas for reform.²⁴⁸ Ironically, the EDPA group questioned the data generated in this manner²⁴⁹ and generally refused to ground its recommendations on anecdotes and undocumented assertions. For example, lawyers complained of unnecessary judicial conferences and delay in deciding dispositive motions.²⁵⁰ Judges accused lawyers of proliferating motions and arguments to generate billable hours.²⁵¹ The advisory group also heard that EDPA judges were reluctant to impose sanctions because of the time drain caused by briefing and hearing these ancillary matters.²⁵² This type of

239. EDPA REPORT, *supra* note 229, at 192.

240. *Id.* at 288, attachment 5.

241. *Id.* at 197-98.

242. *Id.* at 194.

243. *Id.* at 290, attachment 7 (8,902 pending July 1, 1989; 9,784 pending July 1, 1990).

244. *Id.* at 200-02.

245. *Id.* at 199.

246. *Id.* at 202-04.

247. *Id.* at 191 tbl. 1 (indicating that the median filing-to-disposition times decreased from 32 months in 1970 to 7 months in 1990).

248. *Id.* at 219-22.

249. *Id.* at 185 (citing no pretension of "assured empirical findings").

250. *Id.* at 225.

251. *Id.* at 226.

252. *Id.* at 220.

information, however, was not "hard empirical evidence,"²⁵³ and the group decried, "how little we do know."²⁵⁴

The group did manage, however, to reach a humble²⁵⁵ consensus on a few points: (1) excessive delay generates additional costs as lawyers refamiliarize themselves with files and take marginally valuable depositions;²⁵⁶ (2) early settlements reduce the defendants' billable hours and the fees that plaintiffs' attorneys charge;²⁵⁷ and (3) "the single most serious cause of cost and delay" was inadequate numbers of judges,²⁵⁸ followed by abusive and excessive discovery.²⁵⁹

The EDPA Advisory Group recommended a series of actions based upon its findings. All of the group's recommendations were incorporated into the district's final plan.

The first recommendation was to create a "special track" for complex cases demanding more intensive individual management.²⁶⁰ These "special" cases would be subjected to careful planning and multiple conferences, including one held primarily to discuss settlement.²⁶¹

253. *Id.* at 235.

254. *Id.* at 236.

255. *Id.* at 185-86.

We do not pretend that all of our conclusions are supported by assured empirical findings. We have cast our net wide, bringing in all of the anecdotal experiences of all of the judges in this court, most of the litigants and practitioners before the court and the collect[ed] experience of a widely diversified composite of the trial lawyers of the Eastern District of Pennsylvania. We are satisfied that . . . we have produced a consensus of views of this Advisory Group that represents our best judgment under the mandate the [Reform] Act has given us.

Id.

256. *Id.* at 223.

257. *Id.* at 224.

258. *Id.* at 232-33. Adding judges to a court may cause a decrease in individual judge productivity, leaving the system without improved performance. *See Church et al., supra* note 174, at 191.

259. *Id.* at 234-35.

260. *Id.* at 239-45. *See also* EDPA PLAN, *supra* note 230, at 5-8 (adopting rule for management tracks). A seminal study has demonstrated significant productivity increases resulting from automatic, rigorous judicial case management. *See* CASE MANAGEMENT AND COURT MANAGEMENT, *supra* note 193, at ch. 3.

261. EDPA REPORT, *supra* note 229, at 255-59. *See also* EDPA PLAN, *supra* note 230, at 11-13 (regulating special management process); *id.* at 16 (describing joint discovery-case management plans). Surprisingly, empirical studies do not show a significant correlation between active settlement promotion by judges and increases in productivity. *See* CHURCH, *supra* note 194, at 174-76; CASE MANAGEMENT AND COURT MANAGEMENT, *supra* note 193, at 37-39.

For “standard” cases, pretrial judicial involvement would include a telephonic pretrial conference and a resulting scheduling order setting deadlines for party joinder, pleading amendments, filing and hearing motions, and completing discovery.²⁶² The scheduling order would also set a specific month for trial, normally twelve months from the date of filing, with continuances granted only for compelling reasons.²⁶³ This impending, immovable trial date would encourage lawyers to consider the option of settlement more seriously.²⁶⁴

Despite the reluctance of a significant number of EDPA lawyers,²⁶⁵ the Reform Act’s mandate that “voluntary exchange of information among litigants” be considered²⁶⁶ resulted in a proposal,²⁶⁷ and then a rule which requires early disclosure and supplementation of witnesses, documents, and information bearing significantly on claims and defenses, including disclosure of relevant insurance coverage.²⁶⁸

Because the Reform Act was constructed from actual federal court experiences and practices, it is not surprising that some of its provisions reflect methods already followed by the Eastern District of Pennsylvania. For example, the Reform Act mandated that attorneys should consider negotiating solutions to discovery disputes before seeking court orders.²⁶⁹ The EDPA had already required similar certifications for some time.²⁷⁰ Congress also required district courts to consider the use of alternative dispute resolution (“ADR”). The EDPA had pioneered mandatory arbitration of small claims before lawyer panels²⁷¹ and had already conducted controlled experiments in settlement mediation

262. EDPA REPORT, *supra* note 229, at 247. See also EDPA PLAN, *supra* note 230, at 9.

263. EDPA REPORT, *supra* note 229, at 248-51. See also EDPA PLAN, *supra* note 230, at 9-11.

264. EDPA REPORT, *supra* note 229, at 248.

265. *Id.* at 260.

266. 28 U.S.C. § 473(a)(4) (1990).

267. See EDPA REPORT, *supra* note 229, at 260-62.

268. See EDPA PLAN, *supra* note 230, at 13-15. Some accommodation will have to be made to the federal disclosure rule, FED. R. CIV. P. 26(a)(1), which has significantly different language. See AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, reprinted in 146 F.R.D. 401, 431-36 (1993).

269. 28 U.S.C. § 473(a)(5) (1990).

270. E.D. PA. R. 24(f). See EDPA PLAN, *supra* note 230, at 15.

271. See E.D. PA. R. 8. See generally LIND & SHAPARD, *supra* note 193.

by local lawyers.²⁷² The advisory group declined to recommend more ADR than was already being conducted in the EDPA at that time.²⁷³ A third provision required parties to be present or readily available at settlement conferences. This was suggested by the Reform Act,²⁷⁴ but was already in effect in the EDPA for the final pretrial conference.²⁷⁵ The local rule needed only slight broadening.²⁷⁶

What the advisory group did not recommend is of considerable interest. For example, national statistics indicated that discovery abuse was the most significant cause of excessive civil litigation costs.²⁷⁷ In addition, the Reform Act mandated that EDPA consider controlling the extent of discovery.²⁷⁸ EDPA planners had considered imposing absolute limits on the number of discovery requests and/or the time of a deposition but rejected these limits "because [the planners were] not convinced that such a rule would reduce costs or delay without at the same time limiting the right of the litigant to prepare its case fully."²⁷⁹ Instead, EDPA planners relied upon the sanctions in the federal rules to prevent frivolous and meritless discovery, as long as district court judges would use them.²⁸⁰

The advisory group also declined to implement an expansive role for discovery-case management plans mandated by Congress to be considered and developed by attorneys.²⁸¹ While such plans were appropriate for "special track" cases,²⁸² the advisory group believed that their indiscriminate use would threaten to add costs to simpler cases.²⁸³

272. See E.D. PA. R. 15.

273. EDPA REPORT, *supra* note 229, at 266.

274. 28 U.S.C. § 473(b)(5) (1990).

275. See E.D. PA. R. 21(d)(3).

276. See EDPA PLAN, *supra* note 230, at 17.

277. See *Civil Justice Reform Act*, *supra* note 223, at 95.

278. See 28 U.S.C. § 473(a)(2)(c) (1990).

279. See EDPA REPORT, *supra* note 229, at 251. The EDPA will need to reassess its position in light of new rule limits on the number of interrogatories and depositions. See FED. R. CIV. P. 30(a)(2), 33(a), *reprinted in* AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, *supra* note 268, at 649-50, 672-73.

280. See EDPA REPORT, *supra* note 229, at 251.

281. See 28 U.S.C. § 473(b)(1) (1990).

282. See EDPA REPORT, *supra* note 229, at 255-57; EDPA PLAN, *supra* note 230, at 16.

283. See EDPA REPORT, *supra* note 229, at 269.

Finally, EDPA planners emphatically rejected a congressionally mandated consideration that clients sign-off on requests for postponements.²⁸⁴ This provision reflected a distrust of the attorney-client relationship for which the group could “find no basis.”²⁸⁵

b. The District of South Dakota

The picture that emerged in the District of South Dakota (“DSD”), a sparsely populated, mostly rural jurisdiction, starkly contrasts with the experience of EDPA. The judges and lawyers in DSD needed little procedural reform because the existing machinery already exhibited remarkable judicial efficiency. The advisory group’s sanguine report stated:

[T]he District has a tradition of hardworking Judges and Senior Judges and a District bar that is marked by a high degree of experience, skill and civility Under the traditional model of civil litigation, the lawyers, as adversaries supervised by an impartial court, are the primary vehicles for making the civil litigation system operate in a “just, speedy, and inexpensive” manner In the District for South Dakota, the elements of the traditional model are working skillfully and efficiently.²⁸⁶

The DSD advisory group consisted of two federal judges, ten partners from South Dakota’s major law firms, one legal services attorney, the court clerk, a deputy attorney general, the district’s U.S. Attorney, and one law professor-reporter.²⁸⁷ Clients or client groups, sole practitioners, and public interest lawyers did not serve on the DSD advisory group.²⁸⁸ The group’s consultation included a carefully-designed survey of 495 South Dakota practitioners,²⁸⁹ review of statistical materials, interviews with judges, and

284. See 28 U.S.C. § 473(b)(3) (1990).

285. See EDPA REPORT, *supra* note 229, at 271.

286. CIVIL JUSTICE REFORM ACT ADVISORY GROUP REPORT FOR THE DISTRICT OF SOUTH DAKOTA, *reprinted in* 148 F.R.D. 393, 396 (1993) [hereinafter DSD REPORT].

287. In contrast to Italy, where law professors lead law reform efforts, academics in the United States are typically relegated to the role of reporting the work of judges and practitioners. One suspects that this is because of professors’ distance from actual court operations, suggesting an inability to contribute significantly, and their perceived light workloads, meaning time available for drafting reports.

288. See DSD REPORT, *supra* note 286, app. A, at 413-20.

289. See *id.* app. C, at 423-25 (discussing survey planning, questionnaire preparation, selection of research population, and response rate); *id.* app. C, at 425-39 (reporting survey results).

intra-group communications at four meetings.²⁹⁰ Needless to say, on topics such as excessive litigation costs, the billers (lawyers) found no problems.²⁹¹ The group was not oblivious to its lack of client input; it stated that its future efforts would include participation of "two or more lay persons."²⁹²

The data revealed a situation in South Dakota that was luxurious when compared to the situation in Eastern Pennsylvania. Filings declined, terminations exceeded filings, and the number of pending cases dropped from 519 in 1988 to 448 in 1992.²⁹³ The advisory group observed no trends threatening to disturb this trouble-free docket.²⁹⁴

Excessive delay and workload did not cause problems. Only two cases—one percent of DSD's docket—had been pending for more than three years.²⁹⁵ From filing to disposition, DSD terminated cases in a median time of eight months.²⁹⁶ The District enjoyed the third lightest average caseload in the country—only 209 cases per judge.²⁹⁷ Even more surprising, the caseload per judge was declining.²⁹⁸ Furthermore, the DSD advisory group's study revealed no problem with larger, complex cases.²⁹⁹

Not surprisingly, the Advisory Group recommended few changes, citing the adage "If it ain't broke, don't fix it."³⁰⁰ The group could find no significant reason to establish management tracks, special procedures for complex cases, party sign-off on continuance requests, early neutral evaluation—"an expensive

290. See *id.* app. B, at 420-23.

291. See *id.* at 401 (stating that "[m]ost of the survey data flatly refutes any suggestion that the District is experiencing excessive costs," and asserting that "the experienced lawyers who compose the Advisory Group have not observed either delay or cost problems").

292. *Id.* at 410.

293. *Id.* at 397.

294. *Id.* at 399.

295. *Id.* at 398.

296. *Id.* Although, the planning group called this a "remarkably low time frame," this statement is hyperbolic, as the busy EDPA was beating DSD by a month. See *supra* text accompanying note 236. The national average was also eight months. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS: 1988, at 167 (1988).

297. DSD REPORT, *supra* note 286, at 398.

298. *Id.*

299. *Id.* at 404.

300. *Id.* at 403.

bureaucratic program,"³⁰¹ mandatory discovery exchange—already part of the District's "rich tradition of civility," or mandatory ADR.³⁰²

IV. CONCLUSION

The style of reform determines the "stylists." In Italy, where the actual impact of rules in the courts is vaguely known, the front-line practitioners—trial lawyers—seem to have played a minor role. The judges exerted more influence in reform.³⁰³ The academicians, the chief actors in the 1990 overhaul of the Code, dominated the process directly as legislators and indirectly as advisors.³⁰⁴ Because reform proceeded deductively from the face of the Code, rather than inductively from the reality of the Italian courts, law professors—masters of deduction and logic—naturally assumed a leading role. In the Italian Parliamentary debates, there is a deference to and respect and admiration for professors, bred in the student-professor relationship and bolstered in later years by the dominance of doctrinal thinking.³⁰⁵ In the post-reform years, the academicians maintain their hegemony by means of published glosses on the text³⁰⁶ and lectures to bar associations.³⁰⁷

In stark contrast, U.S. law professors played virtually no role in the creation and implementation of civil justice reform. Advisory groups in the United States excluded professors from the respondent list for the national survey, an instrumental factor in the development of the Reform Act.³⁰⁸ Only five professors sat on the thirty-six member Brookings Task Force on Civil Justice Reform that produced the influential report girding the Reform

301. *Id.* at 405.

302. *See id.* at 404-10.

303. The thoughtful report of the Superior Council on the Judiciary on earlier legislation had a substantial impact on the law that was finally approved. Many of its recommendations were adopted. *See* CSM FIRST REPORT, *supra* note 25.

304. Even the group advising the Superior Council on the Judiciary had substantial participation by the university. *See* CSM FIRST REPORT, *supra* note 25, at cols. 391-92 (stating that six of the eighteen members of the group were professors of civil procedure).

305. *See* JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 59-72 (1969); Perillo, *supra* note 76, at 284 (stating that top lawyers employ "legal dogmatics").

306. *See, e.g., supra* text accompanying notes 178-81.

307. *See, e.g.,* ORDINE AVVOCATI E PROCURATORI DI VENEZIA, *SEMINARI DI STUDIO SUL TEMA: LA RIFORMA DEL PROCESSO CIVILE* [STUDY SEMINARS ON THE THEME: THE REFORM OF CIVIL PROCESS] 5-23, 43-63, 101-14 (1991).

308. *See Civil Justice Reform Act, supra* note 223, at 92 (citing in-depth telephone interviews with 1,047 litigators, corporate counsels and judges).

Act.³⁰⁹ Not a single professor testified at the Senate hearings or submitted written correspondence.³¹⁰ In the two federal district court advisory groups examined, only one law professor appeared in each, as the scribe.³¹¹

This U.S. exclusion of academicians is a predictable outgrowth of U.S. legal realism. Experts on court matters, namely judges and practitioners, master not theory but facts. Their insights are bred by experience. Law professors in the United States, on the other hand, are typically full-time teachers who are prohibited from practicing law in any substantial way. In contrast, the European legal academic typically practices full-time while delivering daily lectures at the university. Thus, the European academic can claim a mastery of fact, legal experiences, theory, and his published works.

The Italians worked on a set of amendments that would uniformly apply to the hundreds of judicial offices in the national system. The lack of court-specific data encouraged the reformers in Italy to presume that substantially similar problems existed throughout the country, and that a single set of solutions would solve these problems. The U.S. reformers, in comparison, have learned from empirical research that each jurisdiction possesses a unique "legal culture" that determines the manner in which cases are processed. This naturally led to a focus on local reforms, represented by the ninety-four court-specific plans generated by the Reform Act. This "precision" in focus contributes to a balkanization of U.S. procedure within the supposedly unitary federal system, a development strongly decried.³¹² Yet, to some extent, the models for improvement displayed in the Reform Act and fleshed out in implementation packets³¹³ and manuals³¹⁴ will maintain some similarity among federal judicial districts because procedure is rooted in the Federal Rules of Civil Proce-

309. See BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM, *supra* note 225, at 469-73 (listing members of the task force).

310. See *Civil Justice Reform Act*, *supra* note 223, at ii-iv.

311. See EDPA REPORT, *supra* note 229, at 168, 317-24 (Professor A. Leo Levin, Reporter); DSD REPORT, *supra* note 286, at 394, 413-20 (Professor David S. Day, Reporter).

312. See Mullenix, *supra* note 200, at 380-82.

313. See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, MODEL CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1992).

314. See *supra* note 211.

dures.³¹⁵ Because case inflow dramatically differs in volume and content, as between the Eastern District of Pennsylvania and the District of South Dakota, a principle of procedural uniformity faces much opposition.³¹⁶ While a single procedural code may theoretically find support as a force unifying a nation, the constant mismatch of theory and practice may prove too costly.

In Italian legal culture, the judge does not receive substantial respect.³¹⁷ Italian legal culture perceives judges as essentially law-applying bureaucrats, much like functionaries processing applications for public assistance.³¹⁸ Highly detailed rules legislatively control Italian judges, and this explains the extraordinary level of detail one finds in the more than twelve hundred articles comprising the Italian Code of Civil Procedure.³¹⁹ Consequently, reform will consist of more and, hopefully, better rules with even greater detail. Italian legal culture perceived judges as contributors to the problem of cost and delay in civil justice. From this perspective, the reformers imposed many more affirmative duties on the judges.³²⁰

In comparison, the federal judiciary in the United States enjoys greater respect. Judges, noted for their hard work and considerable skill, typically come from the top ranks of the legal profession. It is therefore natural for the profession's leaders to vest judges with considerable discretion in managing their case-loads in ways that will meet established goals. In the federal procedural system, one invariably encounters procedures matched with exemption power vested in the judge. Federal judges are

315. See FED. R. CIV. P. 1 (governing "all" suits of a civil nature before federal district courts); see also *id.* at 83 (district court local rules may not be "inconsistent" with Federal Rules of Civil Procedure). Recent amendments to the Federal Rules undercut uniformity by offering districts an "opt out" option. See e.g., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, *supra* note 268, at 431; FED. R. CIV. P. 26(2)(1) ("except to the extent otherwise . . . directed by . . . local rule").

316. See, e.g., S. REP. NO. 416, *supra* note 183, at 15 (plans should meet "needs and demands of local conditions").

317. See generally Mary L. Volcansek, *The Judicial Role in Italy: Independence, Impartiality and Legitimacy*, 73 JUDICATURE 322 (1990).

318. See generally Giuseppe di Federico, *The Italian Judicial Profession and Its Bureaucratic Setting*, 21 JURID. REV. 40 (1976).

319. This detail stems from a deep-seated fear of arbitrariness, as well as an exaltation of certainty in the law, both strains of thought deeply embedded in Italian legal theory. See Merryman, *The Italian Style I*, *supra* note 7, at 61-62.

320. Even in the field of juvenile justice, the Italian emphasis is on the strict application of formal rules and the denial of discretion to judges. See Lemert, *supra* note 1.

expected to employ their wisdom and experience in determining when to vary the application of a general rule in the U.S. federal legal system. Little fear is shown of misuse of such discretionary power because of a generally high regard for the independence, integrity, and skill of the federal judges. In sum, Italian judges apply the rules while, at least in the context of procedure, U.S. federal judges apply guided discretion.

One also senses a distinct, business-like approach in the U.S. manner of reforming civil procedure. This dispute may be analogized to a complex business problem. The product, a just decision, is to be achieved with an optimally efficient use of available resources so that profit, i.e., the generation of additional capacity in the court system, results. The performance of the enterprise is publicly judged by its productivity: disposition rates, median processing times, and so forth. These measures are also used to evaluate the workers on the production line—the judges. Periodic public appraisal is made possible by the generation and publication of annual statistical reports,³²¹ similar to a company's annual reports and periodic earnings statements.

From this perspective, it is natural for the United States to reform its system to expand the judge's role. In addition to neutrally applying legal norms to facts generated by the parties, judges must manage the dispute so that the norm-to-fact process evolves efficiently. Judges must eliminate unnecessary discovery, excise marginal issues quickly, regularly apply short-cuts like summary judgment,³²² avoid repetitive testimony, grant continuances sparingly, impose and enforce deadlines, and punish frivolous assertions. Congress, in 1993, added the word "administered" to Federal Rule 1 to emphasize this judicial role: "These rules shall be construed *and administered* to secure the just, speedy, and inexpensive determination of every action."³²³ The Advisory Committee on the Federal Rules explained that the amendment would "recognize the affirmative duty of the court to exercise the

321. See *supra* note 4.

322. See *Celotex v. Catrett*, 477 U.S. 317, 327 (1986) (summary judgment is an integral part of Federal Rules); JAMES FLEMMING, JR. ET AL., *CIVIL PROCEDURE* 207 (4th ed. 1992) (*Celotex* "reveals a stance much more supportive of summary judgment").

323. See AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FORMS, *supra* note 268, at 535.

authority conferred by these rules to insure that civil litigation is resolved not only fairly, but also without undue cost or delay."³²⁴

This "U.S. model" has considerable risks.³²⁵ The management role of the federal judge constantly threatens his judicial capacity. In the course of controlling the dispute process, the judge makes multiple discretionary "management" choices, such as the setting of deadlines and ruling on lawyers' excuses, that may significantly impact the ultimate law-to-fact decision. The U.S. courts, however, accept this risk because, in viewing the legal system as a whole, norm-to-fact justice cannot be achieved in costly, clogged courts.

A study of the Italian debates and results of civil justice reform sparingly reflects this U.S. model. With median case-processing time having reached fifteen years,³²⁶ the Italian Parliament could not ignore systemic concerns. The Italian response aimed at efficiently organizing a case at the outset.³²⁷ Yet, one senses a futility in the effort. Forcing cases to march more quickly and efficiently by adding rules and details may generate more disputes, more areas of conflicts, and more "creases in the procedure"³²⁸ that crafty lawyers seeking tactical advantage may exploit.

The Italian civil procedure reform of 1992 fully reflects Italy's traditional, positivist approach. This approach views laws as a composite of logically interrelated rules completely independent of other disciplines such as sociology, philosophy, and even history.³²⁹ The hopes of scholars that the "hardened mentality of Italian lawyers"³³⁰ would open up to input from other disciplines and to the value of foreign experiences³³¹ are not fueled by the Italian processes of civil procedure reform; yet, the arid and

324. *Id.*

325. See generally Resnik, *supra* note 98.

326. See *supra* note 30.

327. See *supra* notes 62-77.

328. See *supra* text accompanying note 173.

329. See generally Giovanni Bognetti, *The Judicial Process in Italy*, 8 COMP. L. Y.B. 73, 73-80 (1984); Merryman, *The Italian Style I*, *supra* note 7, at 52-55; di Federico, *supra* note 318, at 44-46.

330. Bognetti, *supra* note 329, at 80.

331. See, e.g., Merryman, *The Italian Style I*, *supra* note 7, at 64-65; Bognetti, *supra* note 329, at 89. One finds in the Italian materials only an occasional reference to developments abroad. See, e.g., CSM FIRST REPORT, *supra* note 25, at col. 397 (noting that France has adopted the single-judge trial court).

superficially technical area of procedure is, perhaps, not a representative field for testing the opening of the Italian legal mind.

Attaining speed and efficiency in the processing of civil cases without compromising justice requires management tools.³³² One such tool is the collection and use of aggregate information about the progress of cases on the docket; not simply case filings and dispositions, but what occurs in between. To move cases along on a firm schedule requires statistical knowledge of the troublespots, such as overly generous grants of continuances or particularly slow-moving judges. Empirical research conducted by U.S. reformers adequately demonstrates this necessity.³³³ This research also shows that, with accurate information and improved management techniques, courts can make dramatic speed and efficiency improvements, even in the face of growing caseloads.³³⁴

The Italian proceduralist does not share the notion that attaining efficiency requires management techniques.³³⁵ The Italian belief that the formation of legal norms should not be influenced by non-legal disciplines, such as business management, seems immovable. Only this can explain the total apathy in hundreds of pages of analysis and debates,³³⁶ about the absence of data concerning the actual operations of Italian courts and an obliviousness to the need for such information. Not surprisingly, the resulting solution was the opposite: more *theoretical* work. The grand rewriting of the Code of Civil Procedure filled everyone's mind as the important next step.³³⁷

The 1992 Italian civil procedure reform was but a stop-gap measure, provoked by the imminent collapse of the civil courts. The Italian legal system must formulate the next-generation code systematically, on new analytical grounds. Failure of the Italian reform will become evident a decade or so from now when Italy's national data-gathering office publishes statistics showing an

332. See, e.g., MAHONEY, *supra* note 29, at 197-205 (describing ten main elements of successful caseload management programs).

333. See, e.g., *id.* at 199-200; HEWITT ET AL., *supra* note 194, at 18-19, 37-38, 73-74, 95-96, 121, 150-51 (describing management information collected in six successful trial courts).

334. See MAHONEY, *supra* note 29, at 192-93.

335. See, e.g., CONSOLO ET AL., *supra* note 26, at 90 (Italian judges have had little success in managing cases).

336. See *supra* text accompanying notes 38-46.

337. See, e.g., sources cited in *supra* note 34.

increase in backlogs and delays. In contrast, the U.S. reform includes built-in systems to measure its performance continuously.³³⁸

338. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105(c), 104 Stat. 5089 (1990) (uncodified). This Section calls for a comparison of pre-Act and post-Act results in ten pilot districts, as well as a comparison with ten non-pilot districts. This study is to be conducted by "an independent organization with expertise in the area of Federal court management." *Id.* The Institute of Civil Justice of the Rand Corporation is conducting the research with a report anticipated in the fall of 1995. Telephone Interview with Mark Shapiro, Administrative Office of the U.S. Courts (Aug. 23, 1993).

