JUDGES' SELF-INTEREST AND PROCEDURAL RULES: COMMENT ON MACEY

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CONGRESSMAN John Dingell, a master of congressional procedure, spoke from experience when he said, "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time."[1] Because procedural rules are so important to substantive rights, and because nonspecialists usually pay little attention to procedural rules, I agree with Macey that it is important to be alert to the possibility that the people who "write the procedure" may be acting in their own self-interest rather than in the public interest.[2]

The enterprise is a subtle one, though. Federal judges cannot directly advance their personal financial interests by making procedural rules to govern the conduct of litigation in their courts. Their salaries are set by Congress at a uniform national level and cannot be decreased during their (lifetime) tenure. Even a minuscule financial interest in a case is ground for disqualification.[3] Unlike legislators—and most state judges—federal judges do not have to run for reelection and thus have no occasion to seek votes or accept campaign contributions.[4] And federal judges cannot engage in outside businesses.

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[1] Regulatory Reform Act, Hearings on H.R. 2327 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 98th Cong., 1st Sess. 312 (1983) (statement of Rep. Dingell).

[2] See Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Legal Stud. 627 (1993).

[3] 28 U.S.C. 455(b)(4). Other provisions of section 455 set out additional grounds for disqualification.

[4] Campaigning for nomination to a higher court or a job in the executive branch is not unknown, but these opportunities are probably too rare to furnish a satisfying explanation of procedural rule making.

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Thus, the judicial interests or "preferences" of Macey's theory are not the sorts of direct incentives (money, employment, votes) with which public choice theory is usually concerned. Rather, these interests are nonmonetary: judges' desire to improve their working environment (for example, by reducing the amount of their work, making it more interesting, making it easier or more pleasant, or increasing their control over what they do), to increase their prestige and influence, or to enhance their reputation. It seems reasonable to assume that such factors may play some part in judicial decision making.[5] The key question is whether they have a substantial effect and whether that effect is contrary to the public interest.

In my comments, I first discuss, in Parts I and II, two of Macey's applications of his judicial preference model, that is, settlement and discovery. In Part III, I conclude that the interests Macey identifies do not seem to generate a very powerful explanatory model of procedural rule making. If we are to apply public choice theory to judicial decision making, particularly in the procedural area, we need to identify interests or incentives that are likely to steer judges to act in a way that is not aligned with the public interest. One such interest may flow from an institutional characteristic of the federal judiciary that Macey does not mention. Federal judges are an extraordinarily homogeneous demographic group. They are predominantly white, male, middle-aged or older, and wealthy. It is quite possible that procedural rules may unconsciously reflect racial, gender, and class bias or a proclivity to favor established interests and entities—the haves over the have-nots, the status quo over change. In Part III I identify some procedural rules and practices that might be influenced by such bias. Empirical work on this subject could greatly advance our thinking about the administration of justice. Yet until such additional

[5] I am less persuaded by Macey's remaining two "hypotheses." Granting that judges possess both "specific" legal skills ("expertise in specialized areas of the law") and "generic" skills ("expertise in areas of the law that are equally applicable across a wide range of cases," such as research skills and knowledge of procedural rules), Macey, *supra* note 2, at 630–31, why should we assume that they seek to maximize their use of generic skills? Would they not prefer to use their specialized skills, at which they have a comparative advantage and from which they probably derive more personal satisfaction? The problem is that different judges may have different interests, and federal judges cannot specialize in a particular subject matter. Macey theorizes that judges will, collectively, prefer rules that permit the use of generic skills because otherwise they would frequently have to learn new specialized skills. The asserted preference for using generic skills is thus a means to the end of reducing workload.

Similarly, the hypothesis that judges seek to maximize the demand for lawyers' services because their preferences are aligned with those of "the legal community as a whole" seems too broad. To include this "preference" in modeling judicial "self-interest" seems to explode any potential the model might have for testability or predictiveness by blurring the distinction between lawyers' self-interest and judges' self-interest.

work is done in a rigorous and painstaking way, I remain agnostic on the value of the public choice approach to explaining, predicting, and critiquing procedural rules.

A preliminary note of caution is in order: Macey's model is based on federal procedure, specifically, the Federal Rules of Civil Procedure, and on the incidents of federal judicial service, specifically, life tenure and salary protection. The institutional characteristics of the federal judicial system differ from those of the state systems, which conduct the overwhelming bulk of the nation's judicial business.[6] For example, most state judges do not have life tenure but serve for a term of years. They may continue in office past that term only by winning an election. The average caseload of state judges is three times larger than that of federal judges.[7] In eleven states, including California and New York, procedural rules such as those governing pleading, discovery, and service of process are contained in statutes, rather than in judicially promulgated rules.[8] Conclusions drawn from the institutional characteristics of the federal system therefore will not necessarily apply to state procedural rules.

I. The Judicial Preference For Settlement Over Trial

As Macey suggests, most federal judges favor and actively promote settlement. As one federal judge put it, "a bad settlement is almost always better than a good trial."[9] Rule 16 was recently amended to reflect a policy of facilitating settlement, and the Advisory Committee notes to

[6] In 1990, there were 575 federal district judges and 9,325 state judges of courts of general jurisdiction. Total federal court civil filings for the year were 217,879, while 9,175,487 civil cases were filed in state courts of general jurisdiction. State Justice Institute, State Court Caseload Statistics: Annual Report 1990, at 43 (1990). In the same year, there were 240,929 civil cases pending in the United States District Courts. Administrative Office of the United States Courts, Federal Judicial Workload Statistics (December 31, 1991). See Marc Galanter, The Life and Times of the Big Six; or, the Federal Courts since the Good Old Days, 1988 Wis. L. Rev. 921, 923 ("federal courts are distinctive, rather than typical").

[7] See State Court Caseload Statistics, *supra* note 6, at 43. Without more information about case characteristics such as complexity, however, one cannot draw reliable inferences about the relative workload of state and federal judges.

[8] Many federal procedural rules are statutory as well. Title 28 of the U.S. Code consists entirely of procedural rules, and many other statutes contain procedural provisions. Even the "automatic disclosure" discovery rule, discussed in Section II, *infra*, although originally proposed by Judge William Schwarzer and Magistrate Judge Wayne D. Brazil, was first put into practice by Congress in the Civil Justice Reform Act of 1990, three years before being proposed as an amendment to the Federal Rules of Civil Procedure.

[9] In re Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986); see also Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 320 (1991) ("A trial is a failure.").

both the Federal Rules of Civil Procedure and the Federal Rules of Evidence state an express policy favoring settlement.[10]

This strong tilt in favor of settlement may not be entirely in the public interest. Settlement has many positive aspects, to be sure. For example, it may cost the parties less than trial; it avoids all-or-nothing results and allows parties to assure themselves an "average" outcome based on the expected value of the case; it permits consideration of interests that cannot be taken into account in adjudication; it allows innovative "pie-enlarging" solutions that are not possible through remedies available from adjudication; and it produces consensual, rather than coerced, outcomes. Adjudication, however, also serves important public and private interests. As Macey notes, adjudication produces precedents, which are a public good. Adjudication serves other public interests as well, such as enforcing the substantive law, providing a yardstick for evaluating settlements,[11] assuring public access to information about disputes affecting the public interest,[12] preserving public confidence in the administration of justice, and affording citizen participation in democratic government through jury service.[13] And adjudication advances private interests such as individual dignity and the interest in securing private rights.[14]

I do not believe, however, that the judicial preference for settlement can be explained as the result of judges' interest in reducing their workload or for using "generic," rather than "specific," legal skills.[15] The

[10] See F.R.C.P. 16(a)(5), (c)(7), and 1983 advisory committee's note to subdivision (c)(7) ("Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible"); F.R.E. 408 advisory committee's note ("public policy favor[s] compromises and settlement of disputes").

[11] See Kevin C. McMunigal, The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers, 37 UCLA L. Rev. 833 (1990).

[12] See, for example, Elsa Walsh & Benjamin Weiser, Public Courts, Private Justice, Washington Post, November 28, 1988, at 6 (national weekly ed.) (describing common practice of conditioning settlements of product liability cases on agreement to seal record of discovery); Arthur R. Miller, Private Lives or Public Access? ABA J. 65 (August 1991) (defending confidentiality orders in private civil litigation).

[13] See generally Stephen McG. Bundy, The Policy in Favor of Settlement in an Adversary System, 44 Hastings L. J. 1 (1992); Owen M. Fiss, Against Settlement, 93 Yale L. J. 1073 (1984); Marc Galanter, The Quality of Settlements, 1988 J. Disp. Resol. 55.

[14] See Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights, 1973 Duke L. J. 1153 (1973).

[15] In Macey's typology, "specific" legal skills "consist of expertise in specialized areas of the law," while "generic" skills consist of "expertise in areas of the law that are equally applicable across a wide range of cases," such as legal research skills and knowledge of procedural rules. Macey, *supra* note 2, at 630–31. Oddly, Macey classifies knowledge of the Federal Rules of Civil Procedure as "generic," but knowledge of the rules of criminal procedure as "specific." This characterization would more accurately reflect the state of affairs in law schools, which generally devote more attention to civil disputes, than in federal courtrooms.

preference-for-leisure explanation assumes that promoting settlement reduces judges' work or substitutes easier work for harder work. In fact, the opposite is probably true.

First, settling cases is generally at least as hard, if not harder, work for judges than trying cases. In a trial, the judge sits on the bench while the parties present the case. The judge maintains order, serves as the master of ceremonies, and periodically rules on objections, motions, jury instructions, and the like. A judge who is inclined to shirk (that is, the judge Macey hypothesizes) can sit back, let the parties present their case, and rule on whatever comes up, based on the parties' presentations and arguments.

By contrast, settlement often requires intense, energetic work by the judge. She[16] must schedule and run numerous meetings in which she cajoles, berates, reasons and remonstrates with and plain wears down lawyers, parties, and insurers.[17] She meets with both sides together, caucuses with them separately, and shuttles between them. These interactions are not always pleasant.

Contrary to Macey's assumption that settlement permits the judge to apply "generic" legal skills,[18] a settlement judge cannot serve as an effective evaluator or negotiator unless she is familiar with both the substantive law and the evidence in the case. This requires detailed preparation; indeed, settlement conference briefs can be as lengthy as pretrial memoranda. Moreover, the effective settlement judge applies her own creative legal thinking to the case. She must figure out how the issues fit together, which ones are proving an obstacle to a negotiated resolution, and how to break the logjam. Not only does settlement require a high level of

[16] In the original conference paper, all of Macey's judges were male; mine will all be female.

[17] Macey describes proposals to give settlement judges power to require parties and insurers to attend settlement conferences as attempts to increase judges' power to "coerce" settlements. He concludes that lawyers do not object to judges coercing settlements but "only . . . to having clients present to observe the discussions of the division of gains from settlement." Macey, *supra* note 2, at 635. Surely this account is incorrect. The objective of the proposal was not to bring clients in as spectators to watch the lawyers and judge settle the case. Rather, it was to make settlement conferences more effective by involving the actual decision makers, exposing them to the evidence and arguments that are presented in the settlement conference, and taking away the strategy of stonewalling settlement negotiations by withholding settlement authority from the attorney.

[18] Macey generally overestimates the extent to which procedural decisions can be based exclusively on "generic" legal skills. He appears to believe, for example, that a judge can dismiss a case for failure to state a claim "without reference to the underlying substantive legal issues." Macey, *supra* note 2, at 632, 635. The days when federal judges could dismiss cases for technical pleading errors unrelated to the substantive law essentially came to an end with the enactment of the Federal Rules in 1938. To dismiss a complaint for failure to state a claim, a judge must be familiar with the substantive law defining the claim.

"specific" legal skills, it also requires *different* "generic" skills from adjudication. In recognition of this fact, the training seminars held for newly appointed federal judges now include training in negotiation and settlement skills. Settlement is not, as Macey asserts, a "low-cost alternative" *for the judge*.[19]

Opportunities to delegate the work required to settle cases are limited. Very little can be assigned to law clerks, unlike the work of researching and drafting decisions and orders. Practicing lawyers are often used as mediators, in programs such as Early Neutral Evaluation and court-annexed arbitration, but considerable judicial effort is required to set up, assure staffing for, monitor, and evaluate such programs. Settlement discussions are also frequently conducted by magistrate judges, a trend that is likely to continue. Most cases, however, are still settled by Article III judges. In fact, a primary reason why settlement conferences are so effective is the authority and expertise of the judge who conducts them.

Second, Macey's argument implies that judges will concentrate their settlement efforts on cases that they find boring or that involve small stakes or unfamiliar subject matter and will encourage interesting cases in which they have expertise to go to trial.[20] Routine and small-stakes cases do not, however, consume the major part of federal judges' settlement time. To the contrary, judges seem to spend more time and work harder to settle large, complex cases.

Third, settlement judges do not have the power to "force" settlements, as Macey contends. A judge may use a variety of techniques to get the parties to agreement, but in the end, a settlement requires the consent of the settling parties. If the parties cannot agree, the case will go to trial.

As one technique for forcing settlement, Macey maintains, "judges can buy the cooperation of the legal community in their efforts to obtain settlements by conducting settlement negotiations in such a way that it is in the economic interests of lawyers to encourage their clients to settle."[21] Lawyers who are paid by the hour are paid whether they are attending a trial, a deposition, or a settlement conference or writing a brief; they cease being paid when the case settles. Lawyers with contingent fee arrangements that are based on a percentage of the recovery may have an economic incentive to settle, but this incentive is independent of the judge's actions in settlement conferences. How then can judges conduct settlement conferences so as to manipulate lawyers' economic interests in recommending settlement?

[19] *Id.* at 634.

[20] See *id.* at 632–33.

[21] *Id.* at 634.

Macey makes an even stronger claim for judges' power to force settlements on unwilling parties. He maintains that "procedural rules allow judges to obtain settlements in cases that would not otherwise be settled"—that is, by "coercing" settlements that are not economically justified ("without regard to efficiency norms").[22] This is a very strong statement. If this claim were true, it would demolish the entire body of law-and-economics work on the settlement process. Law-and-economics analyses of settlement have uniformly been premised on the assumption that the parties make settlement decisions voluntarily, by comparing the economic value of the settlement offer to the present expected value of going to trial.[23] If judges can—and do—"force" settlements on terms that are not economically rational for the parties, an entirely new economic analysis of the process would have to be developed.

Fourth, only a minority of federal judges participate in settlement negotiations for cases in which they would be the fact finder. Most federal judges follow a practice of designating another district judge or a magistrate judge as the settlement judge in such cases (and often in all cases assigned to them).[24] This practice avoids the possibility that the judge could retaliate against a party for not agreeing to a settlement or that confidential information a party reveals to the judge during settlement negotiations will be used to the party's detriment during the trial. In courts that follow this practice, a judge does not reduce her own caseload by settling cases. Indeed, the time she spends settling cases is time she cannot spend on her own docket.[25]

Fifth, even when a judge's own cases settle, her caseload is not reduced. In most courts, the docket control system aims to keep judges' caseloads roughly even. The judge who is successful at resolving cases just gets assigned more. So the intensive work required to settle cases does not bring a payoff of fewer cases on the judge's docket. The judge

[22] *Id.* at 642.

[23] See, for example, Richard A. Posner, Economic Analysis of Law, § 21.5 (4th ed. 1992); Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. Econ. Lit. 1067 (1989); William M. Landes, An Economic Analysis of the Courts, 14 J. Law & Econ. 61 (1971); Geoffrey P. Miller, Some Agency Problems in Settlement, 16, J. Legal Stud. 189 (1987); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984). The same is true of the "bargaining model" of settlement. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979).

[24] Telephone conversation with Fred Russillo, Administrative Office of the United States Courts, June 10, 1993.

[25] Obviously, there are opportunities for reciprocity, in which judges work to settle each other's cases.

will continue to have a caseload roughly equal in number to that of the other judges in her district. With an average caseload of 469 pending cases per federal judge[26] and 464 new filings per judge each year,[27] the effective settlement judge is not going to be heading out to the beach any time soon.

Thus, while a judge may gain reputational benefits or personal satisfaction from settling cases, she does not reduce her workload. Conversely, although a shirking federal judge may be subject to considerable pressure from the chief judge and other judges in the district and perhaps to unfavorable publicity in the legal press, she cannot be fired, she cannot be forced to work overtime, she cannot be transferred to another district, and her pay cannot be reduced.

In this respect, the effect of settlement on judges is quite different from its effect on litigants. The settlement of large numbers of cases does, in general, reduce costs and delay for litigants. Indeed, the high rate of settlement is all that keeps the entire federal judicial system from collapsing under its own weight.[28] But settlement does not reduce the workload of judges.

Sixth, if one looks at the judges who have reputations as effective settlement judges, they do not tend to be shirkers. To the contrary, effective settlement judges are typically among the most hardworking, energetic, and conscientious judges in their districts.

Thus, I do not believe that the self-interest explanation of the judicial preference for settlement is persuasive. I find it more likely that the extraordinary energy federal judges have devoted to promoting settlement is motivated primarily by the desire to do their jobs well. They believe settling cases is part of doing a good job because they are convinced (rightly or wrongly) that settlement is an inherently preferable method of resolving most disputes and because they believe that settling large numbers of cases is the only realistic way that litigants can obtain resolution of their disputes without unconscionable delay.

[26] See Administrative Office, Federal Judicial Workload Statistics, *supra* note 6 (229,624 civil and 39,812 criminal cases pending in the district courts in 1991); State Court Caseload Statistics, *supra* note 6, at 43 (575 federal district judges in 1990).

[27] State Court Caseload Statistics, *supra* note 6, at 43.

[28] Most federal courts have a substantial backlog of cases. In some courts, increases in the criminal docket (which, because of speedy trial requirements, takes precedence over the civil docket) have made civil trials essentially unavailable. Indeed, the difficulty of actually getting to trial may have much to do with the low trial rate in civil cases (currently about 4–5 percent).

II. Discovery

A. Discovery Rules and the Amount of Litigation

Macey argues that liberal discovery rules raise the cost of litigation. Indeed, he asserts that they "constitute fixed costs" because the amount of discovery available is not limited in small-stakes litigation.[29] The discovery rules thus benefit judges, he argues, by making small-stakes litigation economically infeasible and thereby eliminating cases that federal judges generally regard as less interesting.[30]

This argument ignores the evidence that massive discovery is largely confined to high-stakes cases.[31] Macey himself asserts that in most cases there are no formal discovery requests at all, and that in 95 percent of cases, fewer than five discovery requests are made.[32]

Moreover, contrary to Macey's contention that liberal discovery rules "reduce total litigation,"[33] a major purpose of the Federal Rules package of pleading and discovery rules was to *increase* the number of cases. The Federal Rules replaced a highly technical, arcane system in which many cases were summarily dismissed on the pleadings—through the use of "generic" judicial skills—with a simplified "notice pleading" rule and a comprehensive discovery procedure.

Notice pleading was intended to "reject the approach that pleading is a game of skill . . . and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[34] Under the Federal Rules, learning the opponent's specific theories and evidence is postponed until the discovery phase. The combination of notice pleading and expanded discovery thus permits a plaintiff to file a complaint in a state

[29] Macey, *supra* note 2, at 637–38.

[30] *Id.*

[31] See David M. Trubek *et al.*, The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 89–91 (1983) (in study of over 1,600 "ordinary" litigations, excluding very large and very small cases, the median amount of lawyer time spent was 30.4 hours, only 16.7 percent—or about 5 hours—of which was spent on discovery).

[32] Macey, *supra* note 2, at 638.

[33] *Id.* at 637. This empirical claim seems counterintuitive in light of the great increase in case filings since 1938. (I do not mean, by this statement, to endorse the "litigation explosion" myth, which has been convincingly refuted. See, for example, 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). No one, however, has suggested that the "real" rate of federal litigation has decreased since 1938, and certainly not that the adoption of the discovery rules led to a decline in the number of cases filed.)

[34] Conley v. Gibson, 355 U.S. 41 (1957).

of uncertainty over exactly what happened and to use the tools of discovery to discover the facts. Unlike the code pleading system that they replaced, the Federal Rules allow complaints to be filed when crucial information is held by the defendant and cannot be obtained without (compulsory) access to information held by the defendant or by third parties. This package of pleading and discovery rules was designed to *increase* "total litigation" by allowing cases to be filed at an earlier stage of factual investigation and by making it easier to get cases resolved on the merits by lowering the threshold for surviving a motion to dismiss. The rules thereby also substituted "specialized" judicial skills for "generic" skills.

B. The Automatic Disclosure Proposal

Macey also argues that the proposed revision of Rule 26 to require automatic disclosure of certain information[35] would further reduce judicial workloads by increasing litigation costs, again with a disproportionate effect on small cases. The automatic disclosure rule is highly controversial.[36] The most powerful argument against it, in my view, is that requiring lawyers to disclose materials without a request from the other side under pain of sanctions if a court later determines that the material should have been disclosed would force them to guess at what is responsive and would thereby induce breaches of lawyers' ethical obligations to their clients.[37] Critics also argue, as does Macey, that automatic disclosure would simply add another layer of discovery and thereby increase costs.[38] Often, however, this criticism comes from those who believe (unlike Macey) that present discovery practices are not, on the whole, abusive or excessive.[39]

[35] Proposed Rule 26(a), Amendments to the Federal Rules of Civil Procedure and Forms ("Amendments"), 146 F.R.D. 401.

[36] See, for example, *id.* at 501 (statement of Justice White), 507 (dissenting statement of Justice Scalia); Randall Samborn, Derailing the Rules, Nat'l L. J. 1 (May 24, 1993); Ann Pelham, Civil Defense Bar Ready to March on Capitol Hill, Recorder 1 (May 4, 1993).

[37] See Amendments, *supra* note 35, at 507, 511 (dissenting statement of Justice Scalia). This argument, however, does not seem to be any more applicable to the present version of the automatic disclosure proposal than to the discovery rules generally.

[38] See, for example, *id.* at 510; but see Ralph K. Winter, In Defense of Discovery Reform, 58 Brooklyn L. Rev. 263 (1992) (arguing that automatic disclosure would subtract, rather than add, an unnecessary layer of discovery).

[39] See, for example, Randall Samborn, Reports: Little Discovery Abuse, Fuel Reform Opposition, Nat'l L. J., May 31, 1993, at 3, col. 1 ("The [National Center for State Courts's] finding that no formal discovery is filed in 42 percent of the . . . cases that it examined . . . strikes at the heart of a judiciary proposal to amend Rule 26 to require opposing counsel to exchange basic information before beginning formal discovery.").

The announced purpose of the proposed rule is to *reduce* the expense of discovery.[40] The rule would require disclosure of documents that are "relevant to disputed facts alleged with particularity in the pleadings" without a formal discovery request. This information would clearly be discoverable under the present rules and should be requested by any competent lawyer. The proposed amendment is intended simply to eliminate a round of paperwork (drafting document requests, interpreting them, figuring out ways to wiggle out of them, objecting to them, and litigating over their scope and appropriateness) before such "core" documents are, inevitably, produced.

Whether the costs of unnecessary lawyer time and paperwork that would be eliminated by the rule would be greater than the costs it would impose, particularly in the short run while the scope of the rule is being defined through litigation, is an empirical question to which no one has a clear answer. The drafters believe that too much time is being spent haggling over "inevitable" disclosures. If such inefficiency, or actual abuse, is the norm, the amendment will likely improve matters. If discovery is not presently excessive, however, change may not really be needed. Even granting Macey's assumptions, however, it is not obvious that the rule would impose high costs on small-stakes litigation.

First, most cases, especially small cases, do not now involve extensive discovery requests even though there is presently no limit on such requests. The proposed amendment should not affect the informal handling of discovery in such cases. Rule 29, which permits the parties by stipulation to modify the discovery procedures set forth in the rules, would be unaffected. Moreover, the proposed amendment would explicitly permit district courts to exempt cases from the mandatory disclosure requirements, either by local rule or by order in a particular case.[41]

Second, Macey infers from the fact that in 50 percent of cases no formal document requests are filed with the court that "there was no document production at all" in those cases.[42] But Rule 5(d) permits the district courts to adopt local rules specifying that discovery requests are not to be filed with the court, and many—perhaps most—courts have

[40] "A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information . . ."; such information "is needed in most cases to prepare for trial or make an informed decision about settlement." Proposed Amendments to the Federal Rules of Civil Procedure and Forms, Advisory Committee Notes ("Advisory Committee Notes") 146 F.R.D. 535, 628. See also Winter, *supra* note 38.

[41] Proposed Rule 26(a)(1); Advisory Committee Notes, *supra* note 40, at 629.

[42] Macey, *supra* note 2, at 639.

done so.[43] Thus, the fact that no discovery requests were filed usually tells us nothing about whether documents were requested. Even when no formal discovery requests are made, documents and other information are often exchanged informally. It is difficult to imagine a case so small that the parties exchange no information at all.

Third, the scope of the required disclosure would be relatively limited because the rule would only apply to documents that are "relevant to disputed facts alleged with particularity in the pleadings." The Advisory Committee was at pains to make clear that the "broad, vague and conclusory allegations sometimes tolerated in notice pleading" would not trigger the obligation.[44]

Fourth, even within this relatively narrow range of material, the proposed amendment would not actually require the production of any documents. Rule 26(a)(1)(B) would give the producing party the option of either producing the documents or providing "a description by category and location." The parties then are expected to negotiate over the scope of the mandatory disclosures.[45]

We do not know whether more documents will actually be produced as a result of the proposed amendment, though automatic disclosure programs are already underway in many of the thirty-four pilot districts under the Civil Justice Reform Act of 1990.[46] It is not obvious that the rule would do more than accomplish its announced purpose of eliminating the need to request information that is already being produced.

Even if more documents are produced, however, the costs of litigation will not necessarily be increased. The costs of discovery include the costs of (1) drafting document requests and responses and negotiating and litigating over the proper scope of requests and the adequacy of responses, (2) finding the information, (3) putting the information into a form suitable for producing, and (4) reviewing the information. Under the proposed rule, the initial costs of drafting requests and responses would be eliminated, though they might be offset by subsequent litigation

[43] For example, all four U.S. district courts in California have adopted local rules providing that document requests and responses thereto are not to be filed with the court until there is a proceeding in which they are in issue (such as a motion for summary judgment or a motion to compel discovery), or by order of the court. See Local Rules of Practice for the United States District Court for the Northern District of California, Rule 229-1; Local Rules of Practice for the United States District Court, Eastern District of California, Rule 250(d); Local Rules of the United States District Court for the Central District of California, Rule 8.3; Local Rules of Practice for the United States District Court for the Southern District of California, Rule 33(c).

[44] Advisory Committee Notes, *supra* note 40.

[45] See Proposed Rule 26(f); Advisory Committee Notes, *supra* note 40, at 632, 643.

[46] Pub. L. No. 101-650, §§ 104, 105, 104 Stat 5097–98. See Pelham, *supra* note 36.

over whether the production was adequate. The added costs to the producing party of finding the required information should not be high since the party's lawyer would ordinarily review material "relevant to disputed facts alleged with particularity" in the course of preparing her own case. Indeed, not to do so would probably constitute malpractice. The costs of putting the information into a form suitable for production are not usually a large proportion of the total costs of discovery. The requesting party might incur greater costs of reviewing what is produced if more information is produced, but these costs would be optional, as the requesting party is not obligated to review the information at all. Thus, even if additional documents were produced under the new rule, the costs of litigation would not necessarily be higher.

In any event, where is the judicial self-interest in this rule even if it does require more discovery? Discovery is party-initiated and largely party-controlled. It requires no expenditure of judicial resources except when discovery disputes are brought to the court for resolution. Such discovery disputes are commonly referred to a magistrate judge, relieving the district judge of the necessity of hearing them. On the other hand, changing to an automatic disclosure rule will surely result in a great deal of satellite litigation over compliance with the rule. For at least several years, a significant expenditure of judicial time will be required at both the trial and appellate levels to delineate the scope and meaning of the rule and to adjudicate claims of noncompliance.

This is not just speculation; a similar change in lawyers' duties in the 1983 amendment to Rule 11 led to an explosion of time-consuming and expensive satellite litigation that is only now abating. The Rule 11 experience is fresh in federal judges' minds. They could not but realize that the automatic disclosure amendment will cause more work for judges for at least several years to come. If it is true that judges seek to reduce their workloads through procedural rule making, one would expect Macey to find the proposed rule to be contrary to judges' self-interest.

But the rule was in fact proposed, and Macey's model is sufficiently protean to "predict" it.[47] Avoiding a direct application of the "reducing workload" factor, Macey postulates instead that automatic disclosure will require more production than presently occurs in small-stakes cases, making such litigation economically nonviable and thereby reducing judicial workloads. I do not find this hypothesis persuasive. Even if the amendment led to more document production that in turn forced small-stakes litigation out of the federal courts, the conclusion that judicial

[47] See Macey, *supra* note 2, at 629. Of course, it is incorrect to say that a model can "predict" something that was already in existence when the model was created.

workloads would be reduced does not necessarily follow. Small-stakes cases do not require a large amount of judicial attention,[48] and in light of current caseloads, reducing the amount of such litigation is unlikely to reduce judges' work to a significant degree.[49]

In my opinion, public choice analysis would be more helpfully applied to the lobbying by interest groups, from the products liability defense bar to court reporters,[50] against the proposed discovery amendments after they were transmitted to Congress. "Hands-on" congressional involvement in rewriting the Federal Rules in response to organized lobbying campaigns seems more likely to be harmful to the public interest in impartial judicial administration than is the rather remote possibility that judges may have something to gain from a purely speculative decrease in the number of cases filed. By applying an off-the-rack version of public choice analysis to judicial decision making, which is not in fact very influenced by interest groups, we risk obscuring real differences between procedural rule making by judges and by legislatures.

III. Another Approach to the Judicial Self-Interest Model

On reflection, it should not be surprising if the judicial self-interest model sketched by Macey ultimately fails to provide a satisfactory explanation of procedural rule making. The model is based on interests and preferences that surely are relatively weak motivators for federal judges.

In Macey's model, judges' interests in reducing their workload, in-

[48] Compare Trubek, *supra* note 31, at 90–91 (median case required only 30.4 hours of *lawyer* time, less than 10 percent of which was spent in trials and hearings).

[49] Macey's other applications of his model also do not persuade me. Two examples involve not procedural rules, but changes in the substantive corporation law of Delaware (surely a court with ample "specialized skills" in that subject matter). See Macey, *supra* note 2, at 643–45. In these cases, one would suppose that simply continuing to apply the traditional business judgment rule would have involved even less work for judges. Another example is the standard of statutory interpretation set out in Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). See Macey, *supra* note 2, at 639–41. While the *Chevron* standard would permit judges to duck statutory interpretation issues to administrative agencies, it does not let them pick and choose as much as Macey suggests. Once an appellate court determines the meaning of a statute in particular circumstances, district judges cannot choose a different meaning at their pleasure. Moreover, some indeterminacy is a characteristic of any open-ended rule of statutory interpretation, even a "plain meaning" rule. Similarly, the proposal (now quietly interred) to create a new court between the Supreme Court and the Courts of Appeals, *id.* at 642–43, would only have reduced the caseload of one federal court, the Supreme Court. In recent years, that Court has demonstrated that it is quite able to reduce its own workload. For example, the Court decided only 107 cases in both the 1991 and 1992 terms; for the previous two decades the Court had decided between 125 and 150 cases each term.

[50] Court reporters objected to an amendment to Rule 30(b) that would facilitate the choice of nonstenographic means of recording depositions.

creasing their leisure, and increasing their use of generic skills bear the laboring oar.[51] These interests, however, are not likely to be significant factors in judicial decision making. As Macey points out, federal judges have made "considerable human capital investment in the legal system."[52] By the time they receive a presidential appointment to the federal bench, they have devoted many years to their profession and have achieved a high measure of professional distinction. The overwhelming majority continue to work hard as judges. Federal judges not only have life tenure; a great number of them serve out their term[53] or hear cases until they are well past normal retirement age.

These people did not become federal judges in order to get a soft job with a good pension. We are not going to explain their judicial decisions by postulating that they are lazy. Additionally, as Macey also notes, most have given up prestigious and much more lucrative positions to become judges.[54] They may have done so to enhance their prestige, to further their philosophical or ideological goals, to fulfill an obligation of public service, or to serve the cause of justice; but it is not credible to suppose that they do so to avoid work. Reducing their caseloads, getting easier work, and not having to learn new skills are, in my view, not significant motivations for federal judges.

Yet the idea that people's actions are often influenced, whether consciously or not, by their predispositions and biases is an important insight. Like the person who looked for his lost keys under the streetlight rather than in the bushes where he dropped them "because the light was better there," perhaps we have been analyzing the wrong judicial motivations.

Macey's article does not mention one of the most distinctive institutional characteristics of the federal judiciary: overwhelmingly, its members are white, male, middle-aged or older, and wealthy.[55] Like all of us,

[51] The hypothesis that judges try to maximize their discretion so they can hear cases they find interesting and get rid of cases they find uninteresting is discussed at text accompanying notes 58–73 *infra*. Macey also mentions judges' interests in increasing their influence and reputation but does not use these interests to analyze particular procedural rules.

[52] Macey, *supra* note 2, at 631.

[53] I allude here to Justice Thurgood Marshall's standard response to inquiries about whether he would resign because of ill health: "I was appointed for life, and I intend to serve out my term." He retired at the age of eighty-three, shortly before his death.

[54] Macey, *supra* note 2, at 630.

[55] During the Reagan and Bush administrations (1981–92) 85.2 percent of the federal appellate appointees and 80.8 percent of the federal district appointees were white males. Sheldon Goldman, Bush's Judicial Legacy: The Final Imprint, Judicature, April–May 1993, at 287, 293. On the wealth of federal judges, see Mark Ballard, Minority Judges Trail in Financial Reports; Federal Bench Not Immune to Economic Hard Times, Texas Lawyer

their perceptions and understanding of the world have been shaped by their experiences, and because they are quite a homogeneous group, certain kinds of experiences are very rare among federal judges. It is reasonable to ask, therefore, whether procedural rules may reflect unconscious gender, racial, or class bias, a disposition to favor the status quo, or a thumb on the scale for the haves rather than the have-nots.

We must look for the expression of such judicial biases in the case law and in judicial practices, where judges make procedure with relatively little interference or oversight, rather than in the Federal Rules.[56] There is evidence, for example, that women may be given less credibility in the courts than men as parties, witnesses, and lawyers; that in social security cases, women are less likely to prevail both initially and on appeal; and that judicial treatment of sex discrimination and sexual harassment cases reflects gender biases that conflict with the applicable statutes.[57] Procedural practices and judicial conduct may contribute to these results. In any event, procedure may offer the best hope of correcting the problem: procedural rules, and the law of evidence in particular, are centrally concerned with assuring fair and accurate results and with guiding fact finders in making reliable, accurate determinations.

Gender, racial, and class bias is usually unconscious. One would not expect it to be expressed explicitly in judicial opinions or formal rules. But we tend to be more sensitive to and interested in the problems of

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30 (July 29, 1992) (average assets of the fifty-two white federal judges in Texas were between $725,141 and $1,334,805; all of the eight Hispanic and one African American judges put together owned assets worth between $1,005,018 and $1,985,000); Alan Kohn, 12 Millionaires among Local Federal Judges; Required Disclosure Forms Detail Salary and Investment Income, Assets, Debts, N.Y. L. J. 1 (June 17, 1991) (summarizing financial information disclosed by district judges in New York and judges on the Second Circuit); Howard Mintz & Lisa Stansky, At Least 6 Millionaires on Local District Bench, Recorder (August 20, 1991) (average assets of judges in the Northern District of California were between $760,000 and $1.72 million; twelve of the thirty-five Ninth Circuit judges whose assets were reported were millionaires).

[56] The formal, layered process of amending the Federal Rules, and the opportunities for public comment at each stage, would make it rather difficult for judges to further their own interests through the rules. The Judicial Conference, the Supreme Court, and Congress have all rejected or rewritten amendments proposed by the Advisory Committee (over one-third of whose members are not judges). For example, the Supreme Court in 1970 made changes to the proposed discovery rules, and Congress in 1972 famously refused to enact the proposed Federal Rules of Evidence; instead, Congress took three years to consider the proposal rule by rule. Amendments to the service provisions of Rule 4 have been rejected by the Judicial Conference (in 1992), the Supreme Court (in 1991), and Congress (in 1983). It seems likely that Congress will change or reject the current proposals to amend Rules 11 and 26, and perhaps Rule 30. See Samborn, Derailing the Rules, *supra* note 35.

[57] See Preliminary Report of the Ninth Circuit Gender Bias Task Force (Discussion Draft, July 1992), at 97–103, 115–16, 175 and n.3 (citing findings from state court gender bias studies).

people like ourselves. Procedural distinctions between "important" and "trivial" cases, or "interesting" and "boring" cases, thus may signal areas in which such biases are operating.

Macey thus has an important insight when he describes the desire to hear "interesting" cases and avoid "uninteresting" ones as a judicial preference that may explain procedural rules.[58] Occasionally, judges admit to a desire to hear interesting cases.[59] Examples of procedural rules and practices that may be the result of a desire to avoid uninteresting cases might include the movement toward adopting a "percentage of the recovery" standard for awarding attorneys' fees in common-fund cases in place of the lodestar method,[60] judicial acceptance of confidentiality provisions in settlement agreements,[61] and the widespread practice of referring certain kinds of matters, such as discovery disputes, fee applications, government benefits cases, and certain factual determinations, to magistrate judges.

It is more acceptable for judges to express such a preference as a desire to hear "important," rather than "trivial," cases. Justice Scalia, for example, has spoken nostalgically about the past times when the federal docket supposedly consisted of "cases of major significance" rather than "minor," "routine" matters "of less import."[62] Judge Jon O. Newman of the Second Circuit, among other judges, has advocated limiting the size of the federal judiciary and "us[ing] Federal courts only for matters of special importance.[63]

Our notions of what is important, however, do not derive from the brooding omnipresence of reason.[64] Cognitive psychologists have demonstrated that the process of categorizing and stereotyping is fundamental to the way we humans know the world and that intergroup perceptions

[58] See, for example, Macey, *supra* note 2, at 632–33.

[59] A well-known example was former Judge Bork's statement during his confirmation hearings that serving as a Supreme Court justice would be "an intellectual feast."

[60] See, for example, Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989); Skelton v. General Motors Corp., 860 F.2d 250 (7th Cir. 1988). The lodestar method requires judges to undertake time-consuming and boring scrutiny of lawyers' time sheets in order to determine whether hours were actually and reasonably worked. Calculating a percentage of the recovery, by contrast, requires only an instant.

[61] See note 12 *supra*. Acceptance of such bargained agreements relieves the judge of the need to review documents individually and also removes a significant obstacle to settlements in product liability, intellectual property, and other types of cases.

[62] Justice Scalia's remarks are quoted (and controverted) in Marc Galanter, The Life and Times of the Big Six, *supra* note 6.

[63] Jon O. Newman, Are 1,000 Federal Judges Enough? Yes. More Would Dilute the Quality, N.Y. Times, May 17, 1993, at A13, col. 2.

[64] See Guaranty Trust Co. v. York, 326 U.S. 99, 102 (1945).

and biases, the stereotypes we use about people who are "like us" and "not like us," are inextricably intertwined with our understanding of the world.[65] Words like "important," "trivial," and "routine" may, quite unconsciously, mask gender, racial, and class bias.

For example, former Judge Bork, while serving as Solicitor General, proposed to limit the federal docket to "important" cases by creating a new set of non–Article III tribunals that would hear cases "where an Article III court is not required."[66] These tribunals would hear cases under the Social Security Act, environmental laws, consumer and worker safety laws, federal benefit laws, and many prisoners' suits.[67] Similarly, the Federal Courts Study Committee recently recommended the creation of federal disability courts and referring employment discrimination cases to arbitration.[68]

What is striking about these proposals is that the plaintiffs in the cases that would be diverted from the federal courts tend to be of a different race, gender, or class from most federal judges. The perception that such cases are "unimportant" may reflect judges' lack of sympathy for such plaintiffs.[69]

Another example of such stereotyping might be found in the recent expansion of gatekeeping doctrines that restrict the jurisdiction of the federal courts in areas such as habeas corpus, civil rights cases, abstention, and standing. This development may reflect a lack of judicial sympathy for types of claims that are not within judges' life experience or a tendency to favor established interests.[70] Other procedural practices may also tend to favor repeat litigants (who tend to be the "haves").[71] Examples might include the practice of granting vacatur on request of the parties,[72] of approving confidentiality agreements in settlements,[73] of per-

[65] I am grateful to my colleague Linda Krieger for bringing this work to my attention.

[66] Robert H. Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231 (1976).

[67] *Id.* at 238.

[68] See Federal Courts Study Committee, Report of the Federal Courts Study Committee (April 2, 1990).

[69] Revealingly, the Ninth Circuit Gender Bias Task Force noted that some employers routinely remove employment discrimination cases filed in state courts to federal court because it is easier to win summary judgment motions brought before federal judges. Ninth Circuit Gender Bias Task Force Report, *supra* note 57, at 116 n.11.

[70] In these cases, however, it may be difficult to distinguish whether the Justices are acting from the desire to avoid uninteresting cases or from hostility to the substantive laws being enforced in such cases. The distinction—between acting out of self-interest and acting on ideology—is subtle but worth making.

[71] See Galanter, Reading the Landscape, *supra* note 33.

[72] See U.S. Philips Corp. v. Windmere Corp., 971 F.2d 728 (Fed. Cir. 1992), cert. granted sub nom. Izumi Seimitsu Kogyo v. U.S. Philips Corp., 61 U.S.L.W. 3580, dismissed as improvidently granted, 62 U.S.L.W. 4007 (1993).

[73] See notes 12 & 61 *supra*.

mitting settlement offers in cases brought under fee-shifting statutes to be conditioned on waiver of the statutory attorneys fee,[74] of permitting limited fee shifting under Rule 68, but only by defendants, and the peculiar California Supreme Court practice of "depublishing" intermediate appellate court opinions to avoid granting discretionary review. These procedural devices are utilized primarily by repeat litigants. Many of them help repeat players to shape the law—the stock of precedent—in ways favorable to their interests. If such tactics were used primarily by public interest law firms, legal services groups, or pro se litigants against large corporations and governmental entities, one wonders whether they would appear so innocuous to judges.

IV. Conclusion

The idea that judges' "preferences" about the sort of work they like to do may affect their decisions may help to explain some procedural phenomena, such as the selection of matters to be referred to magistrate judges, and may therefore contribute to our thinking about institutional design. But the interests Macey examines not only are broad and vague but also seem relatively weak as possible motivations for procedural rule making. I find it difficult to believe that the cluster of "reducing workload" interests affect judicial decision making more than do judges' philosophical, ideological, or moral views—that is to say, their ideas about what is right or just.

If public choice analysis is to make a major contribution to our thinking about procedure, it must identify more robust interests—interests that could believably influence judicial decision making and that are likely to distort those decisions in ways contrary to the public interest. In view of the tiny percentage of the federal judiciary that is not white, male, and wealthy, I find more persuasive the possibility that procedural rules could be affected by unconscious gender, racial, or class stereotypes. Even here, however, I must say that the examples that have come to my mind do not yet demonstrate that the model provides a powerful tool of analysis or explanation. A more richly detailed institutional analysis of the judicial system and the operation of procedural rules might yield more persuasive results. Such empirical work would be an important contribution to our understanding of the administration of justice, regardless of what it shows about this particular issue. In the absence of such an analysis and the identification of a more persuasive set of judicial incentives; however, I am skeptical that public choice theory has so far furnished the tools to provide a better explanation or critique of procedure in the world.

[74] See Evans v. Jeff D., 475 U.S. 717 (1986).