JUDICIAL MANAGEMENT INSIDE THE COURTS

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INTRODUCTION

At its best, scholarship does more than simply add to our collective body of knowledge; it causes us to see the world in a new and different way. And its evidence is so convincing, its account so resonant, that it becomes difficult to remember a time when we saw the world otherwise.

Forty years on, Professor Judith Resnik's *Managerial Judges*[1] lives up to that ideal. It began with an ideal of a different sort—that of the dispassionate and removed trial judge.[2] Under the so-called "Traditional Model" of judging, district judges were passive; they would rule on the merits of issues presented to them by the parties. *Managerial Judges* took that idealized version of a judge and replaced it with a realistic one from modern times. It showed judges actively managing cases in an effort to move the business of the court, at a time when caseloads were rising considerably.[3] Such management entailed meeting with the parties to encourage settlement and to supervise case preparation.[4] In painting a new portrait of the federal courts, *Managerial Judges* not only provided key descriptive analysis for academics and judges alike, but also focused collective attention on potential shortcomings of the new mode of judging, and with it potential reforms. It further helped to solidify the field of judicial administration and invited more scholarship to follow.

This symposium essay, in honor of Professor Resnik's work, has a far more modest goal. It is not attempting to blaze a new trail but to mark a side path that I hope others will continue down, all still squarely within the boundary lines of judicial administration.

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1. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

2. As Professor Resnik herself noted in *Managerial Judges*, this ideal is often reinforced by courthouse iconography, including the blindfolded Lady Justice. *See id.* at 382–83. Professor Resnik would go on to explore these themes in subsequent work. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011).

3. *See* Resnik, *supra* note 1, at 379; *see also* JUD. CONF. OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 9–10 (1995).

4. *See* Resnik, *supra* note 1, at 377.

Specifically, this essay seeks to draw our attention to what I believe is another overlooked aspect of the role of the judge today: the ways in which a judge not only manages her caseload, but potentially also the others on her bench.

Drawing in part on co-authored work with Judge Jon O. Newman of the Second Circuit Court of Appeals (based in part on a series of interviews with judges),[5] this essay traces some examples of management that will no doubt be familiar to those in the judiciary, though less so to those outside of it. These include the ways in which appellate judges manage their colleagues to move the business of the court—to get opinions out in a timely fashion, what some have called the most challenging and least pleasant part of their work. Still on the topic of difficult tasks, this essay next takes up the ways in which judges sometimes "nudge" each other to take senior status or leave the bench entirely. While these may not be top-of-mind items the way that managing a caseload is, they are nevertheless important aspects of the job—particularly the job of the Chief Judge—that are deserving of our present attention.

This essay ends by considering a pressing type of internal management that judges undertake today—ensuring that others, particularly recently-appointed judges, are instilled with, and then maintain, collegial and judicial norms. Just as the rising caseload was an important backdrop to *Managerial Judges*, the sheer volume in turnover at the courts, particularly the courts of appeals, is an important backdrop to current work. (As one example, out of its thirteen seats, the Second Circuit has only two that are presently occupied by judges whose appointments predate 2018.[6]) In the midst of this rapid sea-change in court composition, seasoned judges have had to find ways to ensure that those who are newer to the bench appreciate the practices and customs of their court. This management

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5. *See* Marin K. Levy & Jon O. Newman, *The Office of the Chief Circuit Judge*, 169 U. PA. L. REV. 2423 (2021) [hereinafter *The Office of the Chief Circuit Judge*]); JON O. NEWMAN & MARIN K. LEVY, THE RULES, INTERNAL PRACTICES, AND UNWRITTEN CUSTOMS OF THE UNITED STATES COURTS OF APPEALS (forthcoming 2024) [hereinafter THE RULES].

6. Specifically, Chief Judge Debra Ann Livingston and Judge Raymond J. Lohier, Jr. were appointed to the Second Circuit in 2007 and 2010, respectively. The remaining eleven judges—Judge Richard J. Sullivan, Judge Joseph F. Bianco, Judge Michael H. Park, Judge William J. Nardini, Judge Steven J. Menashi, Judge Eunice C. Lee, Judge Beth Robinson, Judge Myrna Pérez, Judge Alison J. Nathan, Judge Sarah A. L. Merriam, and Judge Maria Araújo Kahn—received their commission in 2018 or after. *See Second Circuit Judges*, U.S. CT. OF APPEALS FOR THE SECOND CIR., https://www.ca2.uscourts.gov/judges/judges.html.

has become particularly challenging as some more recent appointees have acted in nontraditional (and certainly non-dispassionate) ways of late, making management inside the courts more important still.

In short, at this critical time in our country and for the judiciary, the way in which judges interact, not just with their cases but with each other, is worth examining. This essay hopes to offer a few observations on this score and, in the tradition of Professor Resnik's scholarship, to prompt further thought and future scholarship.

I. MANAGING OTHERS TO MOVE THE BUSINESS OF THE COURT

The changes in the nature of judging explored by Professor Resnik in *Managerial Judges* were driven, in turn, by other changes—including an expanding caseload.[7] As has been well documented, the 1960s and '70s saw a sharp rise in the workload of the courts.[8] It is unsurprising that an increase in the number of cases assigned to each judge ultimately corresponded with judges being more proactive in the management of those cases.

This same dynamic led to the adoption of various case management techniques at the courts of appeals as well—a phenomenon discussed in earlier work inspired by Professor Resnik.[9] To paint the picture with broad strokes, three main shifts occurred in this era. Specifically, on the heels of a 1964 decision by the Judicial Conference stating that only opinions of "general precedential value" need be published,[10] the courts of appeals each created plans for deciding cases via less time-consuming unpublished opinions or

7. *See* Resnik, *supra* note 1, at 379 (stating that "[p]artly because of their new oversight role [vis-à-vis discovery] and partly because of increasing case loads, many judges have become concerned with the volume of their work.").

8. *See, e.g.*, JUD. CONF. OF THE U.S., *supra* note 3, at 9–10.

9. *See, e.g.*, Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L. J. 315, 320–25 (2011); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 413–20 (2013); Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2395–98 (2014) (reviewing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS (2012)).

10. *See* ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 16–17, 1964, at 11 (1964).

orders.[11] Today, the majority of cases terminated on the merits are disposed of this way.[12] Then, starting in 1973, Congress began to provide the courts funding for staff law clerks to assist with certain types of cases,[13] and in 1982, Congress authorized the creation of staff attorney offices within the courts to defray the workload further.[14] Today, staff attorneys in many of the circuit courts play a critical role in working up those appeals that are not put on the regular argument calendar.[15] Finally, starting in 1968 with the Fifth Circuit, courts began to change the default expectation that oral argument would be offered in most appeals.[16] A 1979 amendment to Federal Rule of Appellate Procedure 34 formalized this change,[17] and today the circuit courts forgo argument in the majority of appeals.[18]

Despite the advent of case management practices at the courts of appeals, the workload today, particularly among some courts, is sizeable.[19] This, in turn, makes moving the business of the court of

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11. *See* ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, MARCH 7–8, 1974, at 12–13 (1974).

12. *See Stats. & Reps.*, *Data Tables*, *Table B-12–U.S. Cts. of Appeals Jud. Bus.* (September 30, 2021), U.S. CTS. (2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_b12_0930.2021.pdf (noting that of the cases terminated on the merits by the U.S. Courts of Appeals during the twelve-month period ending September 30, 2021, 86.3% were by unpublished opinion or order).

13. *Staff Attorney Offices Help Manage Rising Caseloads*, FED. CT. MGMT. REP. (Admin. Office of the U.S. Courts, Wash., D.C.), Feb. 2004, at 1, 3.

14. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, sec. 120(c)(1), § 715, 96 Stat. 25, 34 (codified at 28 U.S.C. § 715).

15. *See Staff Attorney Offices*, *supra* note 13, at 3 (noting that "[o]ver time, the scope of the office's substantive legal work expanded"); RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY 49–61 (2017).

16. JOE S. CECIL & DONNA STIENSTRA, DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS 2 (1985).

17. FED. R. APP. P. 34. Specifically, Rule 34 was amended to authorize the resolution of an appeal without oral argument when the panel agreed that argument was unnecessary because (1) the appeal was "frivolous," (2) the dispositive issue in the case had already been "authoritatively decided," or (3) the legal arguments and relevant facts were "adequately presented" in the submitted materials and "the decisional process would not be significantly aided by oral argument."

18. *See Judicial Business of the United States Courts: 2021 Annual Report of the Director*, ADMIN. OFF. U.S. CTS. tbl.b-1 (2021), https://www.uscourts.gov/sites/default/files/data_tables/jb_b1_0930.2021.pdf (noting that of the cases terminated on the merits by the U.S. Courts of Appeals during the twelve-month period ending September 30, 2021, 6,152 were terminated after oral argument and 22,333 were terminated after submission on the briefs).

19. In the twelve-month period ending September 30, 2021, there were 44,546 appeals commenced in the geographic circuit courts (all courts of appeals but the

special import. And yet, there exists a perennial problem: judges who do not circulate their opinions in a timely fashion. As one judge put it: "You hear oral argument on a given date, Judge X is assigned to write the opinion, and then there is just the sound of silence for months and months . . . and what does one do to get that judge moving to circulate an opinion?"[20]

This particular problem was described to Judge Newman and me by current and former Chief Circuit Judges as one of the most frustrating and difficult challenges they meet.[21] The business of the court must be moved, but there are few tools to ensure its movement. Unlike at the District Court, there is no "Six-Month List" at the Court of Appeals that publicly identifies judges who are behind on their work.[22] Certainly no judge will be "let go" for falling behind on the job. Just as there are few sticks on offer, there are few carrots. As we know, there are no year-end bonuses to distribute and no corner offices to give out. The solutions come from, in effect, judges managing their colleagues.

The first strategy that many courts have undertaken is the creation of a report of opinions that have yet to be circulated after some time period—essentially, a non-public equivalent of the Six-Month List. There is variation across the circuits when it comes to the report—for example, whether the report tracks opinions that have not been circulated sixty days after oral argument or ninety, if it is

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Federal Circuit). This means that the average caseload per active judgeship in this time period was approximately 267. Of course, this figure is an average across those courts; in some, it is substantially higher. (For example, in the Ninth Circuit, there were 9,487 appeals commenced in this time period, or 327 per active judgeship.) *See Judicial Business of the United States Courts: 2021 Annual Report of the Director*, *supra* note 18, at tbl.b-1.

20. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2456 (quoting Interview with a Judge (May 20, 2020)).

21. *See id.*

22. Specifically, Congress enacted the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5093, which requires the Director of the Administrative Office of the U.S. Courts to prepare a semiannual report disclosing for each District Judge and Magistrate Judge the number of (a) motions pending for more than six months, (b) bench trials submitted for more than six months, and (c) cases that have not been terminated within three years after filing, and the names of the cases. *Id.* § 103(a), codified at 28 U.S.C. § 476. Again, there is no comparable requirement concerning Court of Appeals Judges. For scholarship on the effectiveness of the Six-Month List, *see* Jonathan Petkun, *Nudges for Judges: An Empirical Analysis of the "Six-Month List"* (in progress); Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363 (2020).

distributed on a monthly basis or quarterly, and so forth.[23] But the key commonality, across most circuits, is that the report is distributed to all of the judges and then, in many circuits, discussed at a court meeting.[24] (Notably in one circuit, the Tenth, only the Chief Judge sees the full report; it was said that distributing the report could be considered uncollegial.[25])

The underlying mechanism at work in the circuits that do circulate such a report is plain: one judge described it as "social pressure" and another said simply, "shaming."[26] As it happens, knowing that such pressure is about to be exerted can be motivation enough. One Chief Judge noted that in his court, the list is circulated two weeks in advance of their court meeting and many cases come off of the list in that time; as he put it, the circulation of the list prior to the meeting itself can serve a "disciplining function."[27]

While this sort of internal management may be sufficient to ensure that most judges circulate opinions promptly, it is not sufficient for all of them. All of the current and former Chief Judges that Judge Newman and I interviewed had a second set of strategies for responding to judges in those rare instances. Once again, there was variation across practices, but of a more significant kind. In some circuits, help in the form of additional staff is offered to the delinquent judge. For example, in the Second Circuit, a judge who was behind on his work received an additional law clerk; in the Third Circuit, a judge in the same position received the assistance of a staff attorney.[28] In other circuits, judges do not receive additional staff support but are assigned fewer opinions or have some opinions reassigned to other panel members. For example, in the Eleventh Circuit, one judge noted that he would not assign opinions coming out of a sitting to others who were behind on their work so that they could focus on their backlog; in the Fifth Circuit, the Chief Judge can appoint a panel to review pending cases for appropriate assignment and individual judges may offer to take over a judge's writing assignment.[29] And at the more extreme end, judges can be relieved of motions work or even sitting

23. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2457; THE RULES, *supra* note 5.

24. THE RULES, *supra* note 5.

25. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2459.

26. *Id.* at 2458.

27. *Id.*

28. *Id.* at 2460; THE RULES, *supra* note 5.

29. *See The Office of the Chief Circuit Judge*, *supra* note 5, at 2459–60; THE RULES, *supra* note 5.

days. While in several circuits these were discussed as remedies to be offered quietly by the Chief Judge to a delinquent judge, in the D.C. Circuit this is done by court rule—specifically, if a judge has more than two opinions not circulated by August 15th, that judge will not be permitted to sit when the new term begins in September.[30]

Stepping back, it becomes clear that judicial administration extends beyond the management of one's cases to the management of others on the court. And while this type of management is predominantly the responsibility of the Chief Judge, it is one in which other judges share. Casting these practices in such terms should help us see that they should not be dismissed as mere "housekeeping" matters.[31] Rather, like other practices within the federal courts, they deserve our collective consideration.

At the micro level, it may be worth asking more questions about the policies and practices identified here. To be sure, no two courts of appeals are identical; they have different caseloads, different cultures, and different needs. But even accepting such differences, some variation in practice is puzzling. For example, it is striking that judges of one circuit apparently thought that circulating a list of outstanding opinions (with the judges assigned to draft them) would pose a threat to collegiality where such a concern did not create a bar in any other court.[32] Just as with case management, there can be value in learning how others approach the same task and whether one's own practice constitutes an outlier. It may well be that there is an affirmatively good reason for taking a different approach, or a few different approaches might all be considered reasonable. But it is worth at least comparing the different practices for moving the business of the court to see if one's own can be improved.

Still focused on individual practices, some variation is not simply puzzling but perhaps affirmatively worth revisiting. In examining the responses to judges who have difficulty keeping pace with their workload, to put it plainly, providing additional staff or even assigning fewer opinions is a remedy of a different kind, with different effects, than relieving one of sitting days. In the final option, the delinquent judge will not have a say in potentially dozens of cases.

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30. *See The Office of the Chief Circuit Judge*, *supra* note 5, at 2457, 2459–60; THE RULES, *supra* note 5.

31. Judith Resnik, herself, has written about the problematic usage of the word "housekeeping" as applied to work within the federal courts. *See* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

32. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2459.

Particularly in a closely divided court, having one judge hear a smaller percentage of cases in a given year could be of consequence. The larger point is that judges, and here particularly Chief Judges, are faced with complex management decisions that can have various spillover effects, and it is worth judges and scholars alike thinking more about best practices.

Finally, at the macro level, it is worth considering how some courts have institutionalized their practices. Again, in the D.C. Circuit, if a judge is not more-or-less current by the time the new term is set to begin, she will not be put on the oral argument schedule in September.[33] This rule has the virtue of being clear and known to all; it takes the Chief Judge out of the position of deciding when someone is sufficiently behind that some action must be taken, and then determining what that action should be. (Indeed, upon learning of the D.C. Circuit's rule, the former Chief Judge of another circuit said he thought his court should adopt a similar approach for precisely these reasons.[34]) By discussing the matter and making the decision as a whole (say, through an internal operating procedure), courts might come to a better practice that reduces the need for more micro-level management on the part of a few.

II. MANAGING OTHERS AT THE END OF THEIR JUDICIAL CAREERS

There was widespread agreement among the judges we interviewed that managing one's colleagues in order to move the business of the court was one of the most challenging aspects of the job. Trying to coax older judges off the bench was another.

To wit, one Chief Judge spoke of the difficulties in handling judges who are "slipping."[35] Another discussed the need to address

33. *See supra* note 30 and accompanying text. A similar approach was noted by the judge of another circuit. Specifically, she mentioned that according to the informal policies of her court, if a judge has more than one opinion that is over a year old or four opinions over 180 days old, the judge cannot sit. Interview with a Judge (July 1, 2020).

34. Judge Robert A. Katzmann, United States Court of Appeals for the Second Circuit, Panel at the University of Pennsylvania Law Review Symposium: Civil Procedure, Judicial Administration, and the Future of the Field: A *Festschrift* in Honor of Professor Stephen B. Burbank (Feb. 12, 2021). Judge Katzmann served as Chief Judge of the Second Circuit from Sept. 1, 2013 through Aug. 31, 2020. *Robert A. Katzmann*, U.S. CT. OF APPEALS FOR THE SECOND CIR., https://www.ca2.uscourts.gov/judges/bios/rak.html.

35. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2463.

judges who are "over-the-hill."[36] The problem, and its import, were clear. As one former Chief Judge put it, "[W]e have judges—some senior, some active—who have lost their fastball. . . . Protecting litigants from judges who are losing their fastball was one of the most important things we had done."[37]

To be sure, the problem of an older colleague who is "slipping" is not unique to the federal judiciary, but there are features of the judiciary that make it particularly difficult to address. Plainly, federal judges have what are essentially lifetime appointments.[38] Unlike so many of their state counterparts,[39] they face no mandatory retirement age. And while eligible judges can take senior status, doing so is by choice; no one is required to enter this kind of semi-retirement.[40] And while senior judges typically sit less than active judges, they still sit. This means, echoing the earlier comment of one Chief Judge, that there can be senior and active judges alike who are in decline with no interest in leaving the bench. As Charles Evans Hughes famously put it, "[i]t is extraordinary how reluctant aged judges are to retire and to give up their accustomed work."[41] And so, it often falls to other members of the court to intervene.

Now, it is worth noting that as with handling judges who are behind on their work, handling judges who are declining is nothing new. There are numerous accounts of judges and Justices trying to manage their colleagues off the court.[42] But there is reason to think that the problem is becoming more acute. According to one recent

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36. *Id.*

37. Interview with a Judge (Nov. 21, 2020).

38. The Constitution provides that federal judges are entitled to their office for life, subject only to the requirement of "good Behaviour." U.S. CONST. art. III, § 1.

39. The majority of states have a retirement age for appellate or general jurisdiction court judges. *See* William E. Raftery, *Increasing or Repealing Mandatory Judicial Retirement Ages,* NAT'L CTR. FOR STATE CTS. (Feb. 2016), https://cdm16501.contentdm.oclc.org/digital/collection/judicial/id/440https://cdm16501.contentdm.oclc.org/digital/collection/judicial/id/440.

40. Federal Judges who have "retire[d] from regular active service" at an eligible age and continue to serve either full- or part-time, as they choose, are known as "senior judges." 28 U.S.C. § 371(b); 28 U.S.C. § 294(b). Federal Judges are eligible to become senior judges after reaching age sixty-five with fifteen years of service or age seventy with ten years of service; between ages sixty-five and seventy, the "rule of eighty" permits an active judge to take senior status when the judge's age and years of service total eighty. 28 U.S.C. § 371 (a), (c).

41. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS, AND ACHIEVEMENTS: AN INTERPRETATION 75 (1928).

42. *See* David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000).

study, the median age for active members of the federal judiciary is currently 60.[43] The median age for senior judges is 68—the highest it has ever been.[44] This, in turn, puts more pressure back onto the Chief Judge and certain other members of the court.

How do they address the problem? The answer can depend, in part, on whether the judge in question is still active or has taken senior status. Due to the statutory requirements associated with senior status, Chief Judges have more leverage when treating senior judges than they do with active judges. As one former Chief Judge explained, "Because senior judges rely on certification by the Chief Judge . . . if I thought someone wasn't up to snuff, I would tell them to get a mental exam . . . if it came back that they were impaired, I would not certify or grant a limited certification."[45] The judge went on to say: "The biggest problem was judges who refused to take senior status."[46]

In the absence of this type of intervention (either because the Chief Judge does not wish to withhold certification or because the judge in question is active), others are taken—usually in the form of conversations. One former Chief Judge spoke of responding to those who are rumored to be slipping: "It's a little subtle; you check on them."[47] Another described a particular instance in which he spoke with an aging judge in person, and asked a well-respected judge on his court to go with him.[48] He concluded afterwards that "we had protected his litigants to the extent we could."[49]

Other solutions are prophylactic in nature and come in the form of pacts or agreements between judges, whereby each judge promises to inform the other if it is time to leave the bench. Such pacts are generally private, but some judges have spoken about them. Shira Scheindlin, a retired Judge of the United States District Court for the Southern District of New York, said publicly that in her early 50s, she made a pact with two of her colleagues to tell one another if they

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43. Annie Fu, Walk Hickey, and Shayanne Gal, *The Oldest Government in History*, BUS. INSIDER (Sept. 13, 2022), https://www.businessinsider.com/gerontocracy-united-states-congress-red-white-and-gray-data-charts-2022-9.

44. *Id.*

45. *See The Office of the Chief Circuit Judge*, *supra* note 5, at 2463; Interview with a Judge, *supra* note 37.

46. Interview with a Judge, *supra* note 37.

47. Interview with a Judge (May 13, 2020).

48. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2463; Interview with a Judge, *supra* note 37.

49. Interview with a Judge, *supra* note 37.

thought it was time for one of the others to retire.[50] Judge Scheindlin explained the rationale: "I had seen too many judges stay too long."[51] The one difficulty with this solution is that judges are not always receptive to the message when the time comes. As one former Chief Judge said, "you always encourage everybody to have a buddy judge . . . [but] we had a circumstance where someone said, 'I don't remember saying that to you.'"[52]

Stepping back, as in the preceding section, it is worth asking if there are ways in which these management measures can be improved. The first possibility picks up on the observation that the problem of the "over-the-hill judge" can be easier to address if the judge in question has taken senior status. One potential improvement, then, can be found by focusing on making senior status more attractive to those judges who are eligible to take it. As I have written about elsewhere, there are a considerable number of judges who are old enough and have been on the bench long enough to take senior status, but have not yet elected to do so.[53] Furthermore, there is widespread variation across the circuits when it comes to the treatment of senior judges.[54] Some circuits go out of their way to treat their senior judges well—for example, by permitting them to select when they will sit during the year, and by permitting them to select which opinion they will write coming out of a sitting.[55] In other circuits, senior judges stand to lose—they may have to give up their chambers and be relegated to the edges of the bench during ceremonial events.[56] If more courts adopted practices that incentivize taking senior status (or did away with practices that disincentivize taking senior status), more judges might be inclined to give up active status. This, in turn, could help reduce the management burden on the court toward the end of one's judicial career.

Next, appreciating that some conversations will still need to take place, it would be helpful if more support could be given to the

50. *See* C. Ryan Barber & Camila DeChalus, *Alzheimer's Disease, Retirement "Pacts," and Serving Until You're 104 Years Old: Inside the Federal Judiciary's Reckoning with Age*, BUS. INSIDER (Sept. 27, 2022), https://www.businessinsider.com/gerontocracy-federal-judges-red-white-and-gray-courts-supreme-2022-8.

51. *Id.*

52. Interview with a Judge, *supra* note 47.

53. *See* Marin K. Levy, *The Promise of Senior Judges*, 115 NW. U. L. REV. 1227, 1233 (2021).

54. *See id.* at 1245–51.

55. *See id.*

56. *See id.*

judges who have to initiate them. One former Chief Judge noted that judges are lawyers by training, not administrators or managers,[57] and yet they are required to manage. Given that judges are being put in a difficult position, more consideration should be given to providing them with the necessary training. One recent report stated that the Federal Judicial Center had just put on a leadership session of this sort. The judges in attendance were apparently assigned roles to play—the Chief Judge or "an elderly colleague who was beginning to slow down."[58] The judge playing the part of the Chief Judge then "was tasked with approaching the aging colleague for a difficult discussion."[59] Recognizing that management of this sort is a component of the job can lead to improvement through training and support like this—something that will hopefully continue into the future.

Finally, the best cure may come directly from the courts themselves. In some circuits, there have been strong norms around taking senior status when one first becomes eligible—regardless of the party of the President (who would nominate the judge's successor).[60] In an ideal world, such norms would be reestablished, though that may be asking too much in the current moment. Even so, it should be possible to create norms around undergoing mental fitness tests at a certain age or at least forming pacts with other members of the court (and ensuring that these pacts include instructions for what to do if the judge in question becomes, shall we say, recalcitrant). Again, the key is to recognize that management of this sort is now part of the judge's role and can be quite challenging. It is therefore worth finding ways to relieve the pressures on individual actors, including the Chief Judge, and trying to create shared responsibility by the court as a whole.

III. MANAGING NEWER JUDGES TO INSTILL JUDICIAL NORMS

Just as there can be particular management responsibilities concerning judges toward the end of their time on the bench, there can

57. *The Office of the Chief Circuit Judge*, *supra* note 5, at 2445.

58. Barber & DeChalus, *supra* note 50.

59. *Id.*

60. *See, e.g.*, Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 46 (2012) (noting the Second Circuit's "reputation," among judges interviewed for the article, as "having a culture of taking senior status upon eligibility or shortly thereafter"—a reputation that was supported by survey work).

be some responsibilities concerning judges at the very beginning. The third, and final, type of internal management that this essay takes up is the need to instill, and then maintain, certain collegial and even judicial norms.

The courts of appeals all have their own customs and practices—their own norms.[61] As newly-appointed judges join the bench, they receive training for their job by the Federal Judicial Center (through the delightfully named "Baby Judges School");[62] but this sort of training is meant to be about the "fundamentals" of doing the job—the nuts and bolts, as it were.[63] New judges are then also guided by more senior members of their own court, including the Chief Judge, who may impress upon them not only how their court operates but also the way in which the judges are expected to relate to each other.

In speaking with several current and former Chief Judges, the attention paid to instilling norms of collegiality among the newer members of the court was clear.[64] Quite a few noted having met with recently appointed judges to stress collegiality and, as one Chief Judge put it, the "family-sense" of the court.[65] Another noted that all of the judges on his court were planning to meet together in a relaxed setting with the newer judges to help support them during their transition and to help preserve their court's norms.[66]

Not surprisingly, the challenge of acclimating new judges becomes more significant the more new judges there are. One former Chief Judge of the Second Circuit recounted years ago now how he and another senior member of their court decided to organize a formal retreat when they had four judges join the bench in short order during the Clinton Administration.[67] That is, four new judges out of thirteen

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61. *See* THE RULES, *supra* note 5; Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 VA. L. REV. 1315 (2022).

62. *See, e.g.*, *"Baby Judges School" is Underway for New Federal Judicial Appointees*, CBS NEWS (Feb. 7, 2018, 8:01 AM) https://www.cbsnews.com/news/baby-judges-school-is-underway-for-new-federal-judicial-appointees (quoting then-Director of the Federal Judicial Center, Judge Jeremy Fogel, as saying, "The goal of the baby judge program is to make sure that people have the fundamentals that they need to be able to do the job.").

63. *Id.*

64. *See The Office of the Chief Circuit Judge*, *supra* note 5, at 2470.

65. *Id.*

66. *See id.*

67. Interview with a Judge (Oct. 19, 2012). Those judges were Judge Rosemary S. Pooler (who received her commission on June 3, 1998), Judge Chester J. Straub (who received his commission on June 3, 1998), Judge Robert D. Sack (who received his commission on June 16, 1998), and Judge Robert A. Katzmann (who received his commission on July 16, 1999).

active seats was viewed as something of a highwater mark in changeover, prompting an official retreat.

But with a particularly high number of judicial appointments by the Trump and Biden administrations (to date),[68] courts have recently faced a staggeringly large set of colleagues to bring into the fold. As noted at the outset, though four new judges out of the Second Circuit's thirteen active seats was once considered substantial, that figure is today dwarfed by eleven new judges in the past five years.[69] This phenomenon is not unique to one court alone. The Ninth Circuit has seventeen judges—or just over half of the court as a whole—who have been appointed since 2018.[70]

One response among the courts, as noted earlier, has been to hold retreats for all of their judges. Such retreats may take place outside of the court setting and allow the judges to talk and spend time together socially (say, even with spouses). This dedicated time together then provides an opportunity for the more senior members of the court to try to convey the (shared) values of the court to the new members. To be sure, this is important work that is done on top of the primary work of hearing and deciding appeals.

Such work is of particular importance today given the recent actions taken by judges, in and outside of opinions, that seem "untraditional" and certainly run up against standard collegial and judicial norms. These include the actions of one Court of Appeals judge, who, after authoring the majority opinion in a particular case,

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68. *See, e.g.*, John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ (noting that President Trump nominated fifty-four judges to the courts of appeals—nearly as many as President Obama, in half the time); Russell Wheeler, *Biden's Record-Setting Judicial Confirmation Efforts Face Three Challenges in 2023-2024*, BROOKINGS (Dec. 6, 2022), https://www.brookings.edu/blog/fixgov/2022/12/06/bidens-record-setting-judicial-confirmation-efforts-face-three-challenges-in-2023-2024/ (noting that President Biden nominated twenty-six judges to the courts of appeals in the first two years of his term).

69. *See Second Circuit Judges, supra* note 6 and accompanying text.

70. Those judges are Judge Mark J. Bennett, Judge Ryan D. Nelson, Judge Eric D. Miller, Judge Bridget S. Bade, Judge Daniel P. Collins, Judge Kenneth Kiyul Lee, Judge Daniel A. Bress, Judge Danielle J. Forrest, Judge Patrick J. Bumatay, Judge Lawrence VanDyke, Judge Lucy H. Koh, Judge Jennifer Sung, Judge Gabriel P. Sanchez, Judge Holly A. Thomas, Judge Salvador Mendoza, Jr., Judge Roopali H. Desai, and Judge Anthony D. Johnstone. *See The Judges of this Court in Order of Seniority*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/judicial-council/judges-seniority-list/.

took it upon himself to also author a concurrence that he said (sarcastically) could serve as a draft opinion for a future en banc court to reverse his panel's decision.[71] They also include the recent (and now well-publicized) commitment of another Court of Appeals judge to refuse to hire law clerks from particular law schools, following episodes in which certain conservative speakers were protested during their scheduled events.[72]

It is worth noting that in addition to whatever management was happening within the courts in response to these actions by judges, some could be seen outside of the courts as well. In response to "intemperate" opinion writing, retired United States District Judge Nancy Gertner was quoted in an article on the subject as saying "[i]t really undermines the relationships on the court."[73] In response to the clerkship boycott, several former Chief Judges spoke publicly against members of the judiciary taking such stances. J. Harvie Wilkinson, former Chief Judge of the Fourth Circuit, said in a statement that he would "not be joining a boycott" as he did "not think it right or fair to penalize individual students for an ill-advised institutional policy."[74] Diane Wood, former Chief Judge of the Seventh Circuit, stated that she "would never delete students from a particular law school from the pool of people [she] consider[s] for clerkships. . . . Nothing but case-by-case consideration suffices."[75]

In short, one aspect of a judge's job may be not simply to follow her court's norms of collegiality and judicial behavior, but to help ensure that newly appointed members are taught and maintain those same norms. Doing so can involve participating in retreats, in which all of the more senior members of the court try to convey to the more junior members how the court is meant to run and how judges are meant to relate to one another. And when it appears such norms

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71. *See* Madison Adler, *Judicial Opinion Barbs Reflect Political Divisions, Twitter Era*, BLOOMBERG L. (Feb. 1, 2022, 3:45 AM), https://news.bloomberglaw.com/us-law-week/judicial-opinion-barbs-reflect-political-divisions-twitter-era.

72. *See, e.g.*, Andrew Goudsward, *Conservative Judges Extend Clerk Boycott to Stanford After Disrupted Speech*, REUTERS (Apr. 3, 2023, 2:20 PM), https://www.reuters.com/legal/government/conservative-judges-extend-clerk-boycott-stanford-after-disrupted-speech-2023-04-03/.

73. *See* Adler, *supra* note 71.

74. Avalon Zoppo, *Judges Push Back Against James Ho's Call to Boycott Yale Law Clerks*, ALM LAW.COM (Oct. 11, 2022, 2:29 PM), https://www.law.com/nationallawjournal/2022/10/11/judges-push-back-against-james-hos-call-to-boycott-yale-law-clerks/.

75. *Id.*

are being breached, it can also involve public statements made by particularly respected judges to reinforce expectations of judicial behavior.

CONCLUSION

Professor Resnik's *Managerial Judges* underscored that those who are committed to the study of law need to have a grasp of what is happening inside our courts. It is not the imagined ideal of yore that counts, but what is happening in real time, and based upon real pressures, that defines adjudication today. With her foundational work, Professor Resnik began a new conversation in the legal academy and inspired countless scholars to follow down her path.

On that ground, this essay seeks to focus our attention not just on how judges have had to manage their caseloads over time, but also how they have had to manage the other judges on their court. From needing to "nudge" colleagues to circulate opinions in a timely fashion to needing to "nudge" colleagues to leave the bench when it is time, the job of a judge—particularly a Chief Judge—can have complex human components to it. Those complexities may be felt particularly now, in the face of significant turnover at the courts of appeals when the need to instill and maintain judicial norms feels particularly acute.

Managerial Judges concludes with a series of statements by Professor Resnik concerning her hopes for our justice system. To continue down her path a few steps further, one can hope that the field of judicial administration, to which she has contributed so much, will only continue to flourish and that more and more scholars will be drawn to the study of courts to help understand and improve how they function.