

# The Honorable William W Schwarzer: Elevating Visions of What a Judge Should Be

*Wayne D. Brazil\**

## INTRODUCTION

It is altogether fitting and proper that William W Schwarzer was appointed a United States District Judge in 1976, the bicentennial of our country's birth and the year of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, known as the "Pound Conference."<sup>1</sup> In the almost twenty years since that watershed conference, no one has made more contributions toward addressing the many problems and achieving the lofty goals that were identified in those proceedings. As visibly and effectively as any judge of his generation, William W Schwarzer's career has been dominated by a compelling drive to improve the delivery of justice. As other contributors to this Tribute make clear, that drive, serviced by high ideals, demanding standards, and a vigorous, assertive intelligence, led Judge Schwarzer to make significant contributions in a staggering range of arenas: case management, discovery, mandatory disclosure, summary judgment, sanctions, incentives toward settlement, the organization and rationalization of trials, jury instructions, protecting against the consequences of incompetent lawyering, expert and scientific evidence, federal-state judicial relations, criminal sentencing, and several areas of substantive law. But it is not the breadth or abundance of his work on which I focus in this Essay; instead, I would like to describe the rich and inspiring vision of what a judge should be that

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\* Since 1984, United States Magistrate Judge in the District Court for the Northern District of California.

<sup>1</sup> The addresses delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which was held in St. Paul, Minnesota, on April 7-9, 1976, are reported at 70 F.R.D. 79 (1976).

emerges from and unifies so much of what Judge Schwarzer has written and done.<sup>2</sup> This is a vision not only about role but also about character.

## I. THEMES

At the center of this vision of what it means to be a judge are two tightly interdependent themes: discretion and responsibility. The centrality of discretion as a defining dimension of the trial judge's role emerges repeatedly in Judge Schwarzer's writings across a host of subject areas. As we will see below, Judge Schwarzer has insisted that a substantial (but by no means unlimited) range of discretion is often essential not only to effective delivery of judicial services at the trial court level, but also to give meaning and reality to the word "judge."

As important as discretion is to his vision of judging, however, responsibility looms even larger. For many people, perhaps even many judges, it is power (another word for discretion) that is the primary draw and the first object of professional pursuit. Many are first driven, out of naked psychological magnetism, toward power — and only belatedly, and begrudgingly, encounter and contend with its responsibility price tag. For Judge Schwarzer, however, this "normal" order was reversed. Remarkably, in Judge Schwarzer a passionate and courageous sense of responsibility came first. The pull of responsibility led him to the necessity of discretion.

That sense of responsibility is extraordinary not only because of its intensity, but also because its object is something as fragile, precious, subtle, and vulnerable as anything organized society can try to produce: justice. Judge Schwarzer has understood how sacred justice is. And he has understood that responsibility for protecting justice is what defines a judge.<sup>3</sup> From the begin-

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<sup>2</sup> While articulations of most of the thoughts that I attribute in this Essay to Judge Schwarzer can be found in the Judge's published writings, I have learned some of his ideas in much less publicly visible settings, most notably in the numerous conversations we have had over the decade and a half that we have known one another. Over those years, Judge Schwarzer and I have corresponded, spoken frequently, and worked in tandem on some projects. In addition, I have appeared with Judge Schwarzer on several educational programs and have heard him speak to other judges and lawyers many times. Thus the sources of the ideas that I describe go well beyond his published works.

<sup>3</sup> For an early and graphic example of the character of Judge Schwarzer's sense of

ning, he has understood that a principal reason judges must accept this responsibility is that in the adversary system we have inherited there are no other players who can be counted on to place the interests of justice above all others. That understanding may well explain why a man who many perceived to be politically conservative when he was appointed to the bench has so consistently rejected the social Darwinist approach to justice. We will explore these themes in some detail when we examine Judge Schwarzer's contributions to the field of case management in civil litigation.

When we consider his work in a very different arena, the process of sentencing persons convicted of crimes, we will see that Judge Schwarzer also has understood two additional reasons why judges must accept responsibility for justice. First, he has appreciated that the elements of justice cannot be fixed by reference only to current societal moods and limited visions of short term needs, but also must be informed by longer range considerations. This process requires us to reach back to principles that historically have defined us as a society and to look forward to assess the prospective implications of the decisions we make today for the vitality of our society over an enduring future.

Second, he has understood that sometimes social and psychological reality is too complicated and mobile for the law to capture reliably. There will always be places, some large, where law and its subjects don't match up. This is because reality is dynamic, intricate, subtle, and constantly in motion and metamorphose, while the law is rigid and slow, made up of words which have limited reach, play, and penetration. Moreover, these words are selected by people of limited understanding who are working with limited and politically cabined resources, working slowly and with a dated conception of the social fact. Thus, there will

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responsibility for justice, see William W Schwarzer, *Dealing with Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980), where he emphasizes the importance of direct intervention by the judge to compensate for shortfalls in the competency of counsel. Clearly rejecting the passivity model, and displaying considerable confidence that, with proper education, judges could exercise discretion reliably in this sensitive arena, he wrote: "The question confronting the trial judge, therefore, is not whether intervention can be reconciled with the adversary process, but how to exercise the discretion to intervene so as to accommodate the competing demands of that process." *Id.* at 639.

always be gaps between static legal prescriptions and the reality to which the prescriptions must be applied. The crucial role of judges is to help bridge those gaps in ways that achieve as much justice as possible. In doing so, they must be true to the spirit and principles that have driven the fashioning of the most relevant laws. At the same time, their efforts must respect the human spirit by insisting on an honest and searching understanding of the forces that are at work in that part of reality to which they must apply the law in a given case.

I hope that reflection on the pages that follow will yield an appreciation that Judge Schwarzer's embrace of responsibility is a reflection not of arrogance, but of courage. It is neither demanding nor risky to hide behind the conventional, the inherited, the status quo — to pretend that established rules provide clear and ready answers to every problem, no matter how new or unusual. It is neither demanding nor risky to leave to others, and to the interplay between the forces those others represent, responsibility both for the quality of the judicial process and the outcomes of individual cases. Judge Schwarzer eschewed that easier road, and actively pressed other judges to do the same.<sup>4</sup> He knowingly took the more stressful and riskier route of openly accepting responsibility, thereby exposing himself to criticism and controversy, and to the shame of publicly making errors and being "corrected" by higher courts, by other governmental institutions, and by colleagues and members of the bar.

This courage is reflected in Judge Schwarzer's decision, made before higher judicial authority began encouraging it, not only

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<sup>4</sup> One of Judge Schwarzer's significant contributions has been to help give other judges the courage to try new approaches. By personal example, and through his teaching and writing, he has emboldened many judges to take steps they believed would improve the administration of justice, but that they would not have initiated on their own, from lack of experience, confidence, or out of excessive deference to the tradition of judicial passivity. I watched this happen in seminars taught by Judge Schwarzer in which his explanation of an idea like time limits on the parties' presentations at trial has persuaded other judges to experiment with this method of containing cost and delay. For a circumspect early exploration of this idea, see WILLIAM W SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 93-94 (1982).

For another example of Judge Schwarzer teaching other judges to assume more active roles in the name of protecting justice, see his advocacy of the idea that judges should pose questions during criminal trials to alert apparently incompetent defense counsel to necessary steps to protect obvious client rights. Schwarzer, *supra* note 3, at 638-39.

voluntarily to poll lawyers (who would respond anonymously) about how he was handling the different aspects of his job as a judge,<sup>5</sup> but also to release the results of that poll to the press, even though in some respects the results were not flattering. He undertook that initiative, when virtually no other judge was willing to do so, because he wanted to learn not only how he was perceived, but how he could do his job better. He did this even though he was sufficiently self-aware to know beforehand that his ways were unpopular with some lawyers. And after studying the responses carefully, he took the criticism to heart and committed himself to making changes.

Before turning to specifics, one additional theme needs emphasis, a theme that is a significant unifying principle in many different arenas of Judge Schwarzer's work. Despite the fact that he is a very complicated man, and has a keen appreciation for the complexity of social and psychological dynamics, Judge Schwarzer has devoted a great deal of his professional life to trying to make things easier to understand and easier to manage by making them simpler. From his earliest book on case management through the most recent revision of the *Manual for Complex Litigation*, he has devoted much writing and teaching to helping other judges deal with complicated disputes, bring order to confusion, cut through verbal debris to isolate the key underlying events, demystify subjects whose vocabulary and reputations tend to intimidate nonspecialists, and organize masses of information into conceptually ordered and manageable subdivisions.

It is instructive that he introduced the chapter devoted to "Managing the Trial" in his first book-length work on civil case management with a quote from Henry David Thoreau: "Our life is frittered away by detail . . . simplify, simplify."<sup>6</sup> And as we will see when we review his approach to pretrial case development, he insisted that one core aspect of a judge's responsibility is to penetrate the artificial appearances of complexity sometimes created by lawyers, through calculation or incompetence, that mask the essential simplicity of some disputes.

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<sup>5</sup> The questions posed in Judge Schwarzer's poll, as well as commentary about the value of the responses, appear in William W Schwarzer, *Grading the Judge*, 10 LITIG., Winter 1984, at 5.

<sup>6</sup> SCHWARZER, *supra* note 4, at 125.

This same thrust toward clarification and simplification also marks his efforts at reform of the discovery process, along with his considerable work on improving how lawyers, judges, and witnesses communicate with jurors.<sup>7</sup> He devoted much energy to teaching judges and lawyers how to make the law more readily understandable to jurors,<sup>8</sup> and played a leading role in revising and extending the Ninth Circuit's standardized jury instructions. He also has written and taught extensively about effective direct and cross-examination.<sup>9</sup>

## II. APPROACHES TO CIVIL CASE MANAGEMENT

The arena of his work where Judge Schwarzer's sense of judicial responsibility is most obvious is civil case management. To understand how that sense of responsibility took shape it is necessary to understand how the world of adjudication appeared to Judge Schwarzer in the mid and late 1970s.

That understanding was not informed primarily by experience on the bench; he had served as a judge for little more than a year when he began preparing his first major article about civil case management.<sup>10</sup> Nor were his perceptions driven primarily by the demands of his new job. Rather, the primary source of his understanding of the adjudicatory system was his twenty-three years in civil practice at a large San Francisco law firm, where he litigated substantial cases in a sophisticated environment.<sup>11</sup> It

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<sup>7</sup> See, e.g., William W Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981).

<sup>8</sup> See, e.g., William W Schwarzer, *Jury Instructions: We Can Do Better*, 8 LITIG., Winter 1982, at 5.

<sup>9</sup> See, e.g., William W Schwarzer, *Guidelines for Discovery, Motion Practice and Trial*, 117 F.R.D. 273 (1987).

<sup>10</sup> William W Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400 (1978).

<sup>11</sup> It may be significant that the impressions of the system that were closest in time to Judge Schwarzer's taking the bench were developed in the latter years of his private practice, when his work was likely to involve larger and more complex cases. There is evidence that the problems in the civil justice system, especially the problems associated with procedural, informational, and tactical excesses, were appreciably more pronounced in larger cases than in their smaller counterparts. See, e.g., Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B.F. RES. J. 787.

The fact that Judge Schwarzer's impressions of the system were grounded primarily in larger case litigation may have led him to develop prescriptions for the roles judges should play that do not fit smaller cases quite as well. While he regularly emphasized that the

was as a lawyer, rather than as a judge, that he developed his most fundamental understandings of the system. His attitudes and ideas about the practice of civil litigation came from the bottom up, not the top down, from the vantage of a player in the private sector rather than that of a public servant. Appreciating where he formed his root understandings serves to dispel the notion that the ideas he began articulating as a judge were inspired either by an unworldly idealism or by vain infatuation with his new powers. Instead, his views about the state of the adversary system grew directly out of deep experience in it.

A. *The Problems Case Management Was Designed to Remedy*

What did the system of civil adjudication look like to Judge Schwarzer when he was appointed to the bench? Just as it did to many of the speakers at the Pound Conference, the system appeared to be afflicted with potentially serious problems.<sup>12</sup> Too often the system was not fulfilling its fundamental mission of delivering justice in a timely, cost-effective manner. And the trait most pervasively associated with its failures was excess — excess in paper,<sup>13</sup> excess in discovery, excess in motions, excess in trials, and excess in tactics. This led to concomitant excesses in cost and in delay. Because excesses in cost and delay sometimes were large, they threatened profoundly disturbing consequences. First, they could block access to justice by discouraging some parties from using the judicial process at all. Second, the excesses could drive other parties to compromise well short of trial on

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nature and extent of the judge's role had to be adjusted to fit the varying needs of individual cases, it can be argued that at least some of the kinds of activism in management that he endorsed generally were not necessary (would be excessive) in smaller cases, where the informational, conceptual, and economic room for inefficiencies and unfairness was smaller (though certainly not nonexistent, especially when there are large disparities in the economic or situational power of the parties).

<sup>12</sup> Core elements of Judge Schwarzer's perceptions are visible in Schwarzer, *supra* note 10. He presented more graphic and comprehensive articulations of his views in two articles that he published much later. See William W Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989)[hereafter *Discovery Reform*]; William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991)[hereafter *Slaying the Monsters*].

<sup>13</sup> See, e.g., William W Schwarzer, *Beating the Trial Court Paper Chase*, 5 LITIG., Spring 1979, at 5.

terms they never would have accepted had their decisions been dictated solely by their perceptions of the merits of their claims or defenses.

The role this disturbing vision played in the development of Judge Schwarzer's views about how judges should handle their responsibilities is evidenced graphically by his decision to open his first book on managing complex litigation with words from Charles Dickens' *Bleak House*.

This is the Court of Chancery . . . which gives to moneyed might the means abundantly of wearing out the right, which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart that there is not an honorable man among its practitioners who would not give, who does not often give, the warning — suffer any wrong that can be done you rather than come here!<sup>14</sup>

If excess was the system's dominant negative trait, what forces or factors, in Judge Schwarzer's view, were its sources? What was to blame? The fact that this crucial question could not be answered simply did not discourage Judge Schwarzer from attacking it. With characteristic appreciation of the complexity of sociological and psychological reality,<sup>15</sup> his analyses led him to several different but not wholly independent sources.<sup>16</sup> First, there were the imperatives of zealous advocacy on behalf of one's client. Those imperatives, noble in inspiration, moved many lawyers to feel less than fully professional if they failed to pursue every source of evidence, every line of inquiry, and every

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<sup>14</sup> The full quotation from *Bleak House* appears opposite page one of Judge Schwarzer's book, *Managing Antitrust and Other Complex Litigation*. See SCHWARZER, *supra* note 4. Juxtaposed to the Dickens quotation, on the lower portion of the same page, Judge Schwarzer reproduced most of the then-current version of Rule 1 of the Federal Rules of Civil Procedure, which commanded judges to construe the rules "to secure the just, speedy, and inexpensive determination of any action." *Id.*

<sup>15</sup> For an early example of Judge Schwarzer's appreciation of the complexity and density of major social phenomena, see his writings about the high-visibility effort of some well-placed members of the legal community to pursue world peace through "world law." See William W Schwarzer, *World Peace Through World Law: The Disarmament Problem*, 47 A.B.A. J. 1171 (1961); William W Schwarzer, *Toward World Law: A Reply*, 37 CAL. ST. B.J. 66 (1962).

<sup>16</sup> Judge Schwarzer presented thoughts on this topic in a speech at the National Conference on Discovery Reform at the University of Texas School of Law in Austin, Texas, November 18-20, 1982. Much of what Judge Schwarzer said on this occasion is reported beginning at page 118 of the report of that Conference's proceedings. The report appeared in the *Review of Litigation*. See 3 REV. LITIG., Winter 1982, at 118. Some of the other remarks he made are interspersed with other materials in this report.



procedural device that held any promise of improving the client's position. Less noble, but no less real, were natural competitive instincts and drives to win — forces that tended to produce a preoccupation with pursuit of tactical advantage that could generate, both directly and indirectly, considerable costs and delays. While not pervasive, other forces even less handsome, like greed (in lawyers and clients), deception, selfishness, and crude compulsions to capitalize unfairly on the weaknesses and mistakes of others, also played roles in the litigation drama.

Much less sinister and appreciably more pervasive were systematic shortfalls in communication across party lines.<sup>17</sup> Communication did not come through direct and forthright conversation among the parties. Rather, it was undertaken through the rituals of pleading, motions, and discovery. The utility of these costly and oblique devices for reliable communication was compromised by the perversions of adversarial pressures: pleadings too often over-stated and under-communicated, motions crafted not to maximize explication but rather the odds of prevailing, and in discovery counsel too often cast the broadest (and conceptually loosest) possible nets, anticipating that their opponents, in responding, would strain to interpret every probe so as to provide as little truly useful information as possible.

Another, related source of excess in the system could be expressed in shorthand as “incompetence” of counsel.<sup>18</sup> In Judge Schwarzer's view, this problem had at its heart two principal dimensions. The first dimension was analytical: lawyers too often failed to think clearly and carefully about their theories of the case, the elements of their claims and defenses, and the most effective ways to explore the evidence pertinent to those elements. The second dimension of the competence problem focused on timing: too often lawyers postponed the hard analytical thinking about their case until after considerable discovery and motion activity had occurred, well into the pretrial period. In combination, these analytical shortcomings helped account for much wasted litigation activity and needlessly delayed serious settlement negotiations.

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<sup>17</sup> See, e.g., SCHWARZER, *supra* note 4, at 9.

<sup>18</sup> See William W. Schwarzer, *Mistakes Lawyers Make in Discovery*, 15 *LITIG.*, Winter 1989, at 31.

The forces and factors described in the preceding paragraphs could combine to produce acute problems of proportionality: the time, energy, and money consumed by the pretrial process, as the sociology of at least big case practice had evolved, could be grossly disproportionate to the justice benefits delivered. It is in this sense that Voltaire's famous axiom, "the best is the enemy of the good," captured the spirit of Judge Schwarzer's concern about the state of civil litigation.<sup>19</sup> On closer consideration, of course, that axiom misstated the Judge's view, which really was that what many lawyers had assumed was "the best" really wasn't. A system that featured perfectly unrestrained pursuit of every possible informational and procedural lead was a clear failure, both in that it effectively blocked access to justice for many parties and in that there was no reason to believe it measurably increased the validity of outcomes.

### *B. The Basic Shape of the Judicial Response*

These perceptions of the character, seriousness, and sources of the problems besetting the civil justice system drove Judge Schwarzer to conclude that the best hope for significant improvement resided in changing the role of judges. Only the judges had justice as their only client. Only the judges could function unaffected by the understandable but often destructive forces by which lawyers and clients were so relentlessly buffeted. Concern that nothing less than the government's ability to provide justice was at stake drove Judge Schwarzer to pursue the necessary change in the judicial role with a remarkable and tenacious intensity.

In what direction did he believe the judicial role should change, given the character of the problems he perceived? The dominating theme of the answer Judge Schwarzer has articulated repeatedly since shortly after first taking the bench involves rejection of the traditional view that the appropriate judicial role is largely passive and insistence that the demands of justice can be met only if judges take intellectually and administratively active roles, especially in the pretrial period. As early as 1978,

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<sup>19</sup> See SCHWARZER, *supra* note 4, at 8.

Judge Schwarzer sounded the theme that would pervade much of his subsequent work:

[J]ustice is not better served by the passive judge who by inaction permits litigation to blunder along its costly way toward exhaustion of the litigants, when it might have long been settled or at least controlled to everyone's benefit. One may fairly ask whether the parties left to themselves can always be depended on to prosecute litigation diligently, economically and in good faith; to avoid wars of attrition and harassment, obstruction and delay; and to exclude extraneous personal considerations from the conduct of the litigation.<sup>20</sup>

Studied passivity by judges exacerbated the growing problems that excesses of information, money, and competitive zeal were causing, and that thinning social connections could not check. In response, Judge Schwarzer began moving toward a model of the judicial role that hinted of influences from continental Europe but maintained a distinctively American dependence on the work of counsel and parties. His vision was not of judicial domination, which he knew was both impossible and unwise, but of real judicial participation in regularized sets of dialectical processes.<sup>21</sup> The new judge would take steps to enhance the directness and productivity of the litigation "conversations" that the parties of necessity conducted in large measure between themselves. He also would insist that there be added to the pretrial process a new set of conversations altogether — conversations in which the judge himself would become a dynamic, pro-active participant. Moreover, to maximize the salutary effects on counsel and litigants, and to provide as much information as possible for the court, these new kinds of conversations had to occur, at least in substantial cases, at multiple and key intervals during the case development period. As we shall see, this approach evolved into a sophisticated, flexible, multi-pronged system that imposed new demands not only on the judge, but also on counsel and litigants.

Case management as Judge Schwarzer practiced it began by imposing new preparation demands on the judge. A judge could not make the contributions and assume the responsibilities Judge Schwarzer contemplated without acquiring — before the

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<sup>20</sup> See Schwarzer, *supra* note 10, at 404.

<sup>21</sup> See, e.g., SCHWARZER, *supra* note 4, at 9-12.

first conversations with counsel, and then on an ongoing basis — as much knowledge about matters pertinent to the case as possible. This included not only learning the pertinent law, but also learning as much as possible about the factual and evidentiary contentions, the parties' circumstances outside the lawsuit, and the lawyers handling the case. Some of this learning was, of course, evolutionary: it had to occur as the case matured over the pretrial period. But in Judge Schwarzer's scheme it was critical that the judge push as much of his learning as possible into the earliest pretrial stages. In particular, he insisted that the judge study the file and the pertinent substantive law carefully *before* the first pretrial conference, so that he could maximize what he could contribute at that important first meeting with counsel.

The next essential element in this system was to pressure the lawyers to develop higher standards of preparation, performance, and professionalism. Given the demands on a federal district judge's time (demands from 250 to 500 pending civil cases at a time, plus substantial numbers of criminal matters and administrative responsibilities), the administration of justice would implode if lawyers did not continue to bear the lion's share of responsibility for developing the pertinent evidence. But increased strain in the system also meant that lawyers would have to change some of their ways. They would be required to do their core investigative and legal homework earlier and more thoroughly, to put the key evidence on the table more directly and sooner, to be more forthright about the relative significance and viability of their various claims and defenses, and to commit less of their time and their clients' money to the pursuit of tactical advantage, obfuscation, and delay.

Judge Schwarzer's insistence on elevating professional standards surfaced most visibly in his work on sanctions, especially under Rule 11 of the Federal Rules of Civil Procedure.<sup>22</sup> As other articles in this Tribute demonstrate, he contributed actively to the campaign to encourage and pressure lawyers to act more responsibly in the ways they conducted pretrial investigations and made decisions about filing lawsuits and framing

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<sup>22</sup> See, e.g., William W Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985).

claims and defenses. He believed that the system could no longer tolerate the extensive gaming about the pertinent evidence and law<sup>23</sup> that some segments of the bar had come to accept as a natural feature of the adversary system. Since it was not clear that the bar would bring the necessary discipline to itself, he felt strongly that the rules and the judges had to fill the void. These strong feelings were driven not only by the Judge's high personal ethical standards, but also by his vision of the behavior lawyers need to exhibit for the legal community to have a fighting chance of reducing the strains that threatened the system of justice.<sup>24</sup> The approach to case development he was developing depended on better communication (both formally, in docketed papers, and informally, in case management conferences), and more reliable analysis earlier in the pretrial period — both of which would be endangered by ethical laxity in counsel.

When he first began writing about case development, most of Judge Schwarzer's emphasis was on handling the initial Rule 16 conference and what followed,<sup>25</sup> not on what lawyers and clients needed to accomplish *before* that first conference. Thus, in the late 1970s and early 1980s, he focused primarily on how the district judge could rationalize and streamline the pretrial process by pressing counsel at the first Rule 16 conference to identify the issues, factual and/or legal, about which they really disagreed and on which the outcome of the case was most likely to turn. The key, as Judge Schwarzer saw it, was conceptual and analytical: push the lawyers to think more carefully about their theories, and use these early analytical penetrations to shape a discovery and motion practice plan that concentrated on only those issues that were pivotal to disposition.

As he phrased it in his early writings about case management, the centerpiece of effective case management was a judicial activism whose principal goal was "to strip the case to its essentials, and focus the lawyers' attention and effort on the issues on

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<sup>23</sup> One of the most famous examples of Judge Schwarzer's insistence on elevated standards of candor from the bar is the subject of the opinion in *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531 (9th Cir. 1986).

<sup>24</sup> Dean Calbreath, *Schwarzer Says Rule 11 Cuts Down on Lawyer "Street Fights,"* S.F. RECORDER, Mar. 27, 1987, at 2.

<sup>25</sup> See, e.g., Schwarzer, *supra* note 10.

which the decision should turn . . . .”<sup>26</sup> During these earlier years he also saw considerable potential in requiring parties to exchange, dialectically, formal statements of contentions and proof, as Judge Harold Greene and his special masters had pressed the parties to do in the government’s mammoth anti-trust prosecution of AT&T.<sup>27</sup> These statements might serve, he thought, as substitutes for some formal discovery, and might lead to clearer isolation of the key issues. It is not surprising, given this focus on isolating potentially dispositive issues, that during this period Judge Schwarzer seems to have expected a great deal from motions for summary judgment.<sup>28</sup>

Judge Schwarzer’s intensely conceptual approach was capable of making significant contributions in cases where the underlying events and the relevant factual history were relatively well understood early in the pretrial period. In those circumstances sources of evidence could be identified easily and the range of viable legal theories could be identified reliably. But when counsel came to the first case management conference with only vague ideas about the events or conduct giving rise to the litigation, and about what the evidence might be, the judge’s capacity to contribute at that first meeting to reliable issue identification and to focused case development planning could be severely compromised. In this circumstance, the judge’s role might be limited to helping the parties devise a discovery plan to figure out what events gave rise to the litigation. Often the “plan” for developing that information was necessarily loose and broad, and the real focusing had to be postponed to a conference after the parties had completed a first round of discovery.

During the mid and late 1980s Judge Schwarzer began reaching out for means to address the problems that underpreparation by counsel had created for case management. He remained fully committed to early efforts to identify issues and clarify thinking about legal theories and defenses, but he seems to have realized that reliance on such efforts alone was not always sufficient. He seems to have realized that such efforts could be

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<sup>26</sup> SCHWARZER, *supra* note 4, at 12.

<sup>27</sup> *Id.* at 31-33.

<sup>28</sup> See William W Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984).

even more productive if they were undertaken in more reliable factual and evidentiary settings. His search for ways to build better factual and evidentiary foundations *earlier* in the pretrial period, and his continued frustration with the excesses of the adversary process, especially with regard to a discovery system that seemed unfazed by earlier reform efforts, led him by the late 1980s to support a new idea. This idea was that the law should require parties to disclose core evidence to one another automatically and early — before the first Rule 16 conference and before launching formal discovery.<sup>29</sup> Judge Schwarzer became one of the most visible and important proponents of this still very controversial idea as the Advisory Committee on Civil Rules developed it and pressed for its adoption between 1989 and 1993.<sup>30</sup>

While the long term fate of early mandatory disclosure remains unclear, this new concept could turn out to be one of the most constructive changes in civil procedure since the Federal Rules were adopted in the late 1930s. There is substantial evidence from the Northern District of California, which has experimented with its own version of early mandatory disclosures since mid-1992, that requiring counsel to exchange core evidence and to develop the essential elements of a case management plan early in the pretrial period — before the initial Rule 16 conference — is workable and productive in a wide range of cases.<sup>31</sup> While systematic analysis of the effects of this kind of system will not be completed until 1997, many of the judges in the Northern District believe that this new system is delivering, in many cases, exactly what Judge Schwarzer had hoped: a richer base of information for their early case management efforts.

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<sup>29</sup> See Schwarzer, *Discovery Reform*, *supra* note 12.

<sup>30</sup> See Schwarzer, *Slaying the Monsters*, *supra* note 12; William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery,"* 27 GA. L. REV. 655 (1993). For a more detailed examination of Judge Schwarzer's role in the development of the concept of early mandatory disclosure, see Professor Carl Tobias' article in this Tribute issue.

<sup>31</sup> See ANNUAL ASSESSMENT OF THE CIVIL AND CRIMINAL DOCKETS AND OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA app. a (1993) (on file with the Clerk of the Court, Northern District of California and with the Administrative Office of the United States Courts in Washington, D.C.).

### C. *The Evolved System of Case Management*

Thus, in its evolved form, Judge Schwarzer's system of pretrial management begins by pressing lawyers and clients to make crucial contributions *before* they have any direct contact with the judge. Driven by their early pretrial obligations, parties conduct core investigative homework early. Then counsel sit down at an informal conference to discuss the pleadings and the underlying events, trying to identify what they really are fighting about. Then they share key evidence. Finally, they write a report that they submit to the court several days in advance of the initial Rule 16 conference. This report identifies the key issues and reflects the agreements the parties have reached, or the proposals each side makes, for discovery and motion practice planning. This planning reflects their efforts to prepare the case as efficiently as possible for disposition by negotiation, some form of alternative dispute resolution (ADR), motion, or trial.

Armed with this report, and with his or her own study of the case file and the pertinent legal authorities, the trial judge hosts a meaningful initial case management conference. Judge Schwarzer's practice is to hold these conferences in chambers in an informal atmosphere. He wants the lawyers to talk, in English, directly and with as little posturing as possible. He wants to use such conversation to delve far into the central claims and defenses in the litigation and determine how they can be explored with as little friction and waste as possible. He explores whether more information can be shared across party lines without formal discovery. He also probes the parties' interest in ADR, and tries to help them identify obstacles to a negotiated disposition that might be removed before serious settlement negotiations are undertaken.

If the matter will require formal discovery, Judge Schwarzer's approach to case management contemplates working with counsel to devise a plan tailored to the specific circumstances of the case. Unlike the original *Manual for Complex Litigation*, which anticipated waves of discovery that began by casting wide nets and only gradually working to the center of the dispute,<sup>32</sup> Judge Schwarzer's approach focuses the first discovery efforts at

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<sup>32</sup> MANUAL FOR COMPLEX LITIGATION §§ .50 - 2.30 (5th ed. 1982).



the center. He hopes that evidence about the pivotal matters will either drive an efficiently timed settlement or position the case for disposition by motion. He also encourages the parties to consider ADR, and to plan discovery so that it yields the information that will maximize the odds that the ADR process will be productive.

The approach Judge Schwarzer has developed also emphasizes flexibility. If a particular course for case development that once looked promising turns unproductive, the judge must work with counsel to redirect the parties' efforts.<sup>33</sup> To work well, the system requires the judge to be available on relatively short notice, and to schedule regular, if not always elaborate, contact with the case. Notably, Judge Schwarzer was an early advocate of using the telephone to respond quickly to discovery problems, and thus avoid the delays and costs generated by formal discovery motions.<sup>34</sup> Judge Schwarzer also understood that scheduled and regular contact is essential to push the lawyers and parties to keep their case development commitments and maintain momentum toward disposition. By informing the court about the most recent developments in the case, that contact also allows the judge to make the prompt rulings without which litigation can stall.

An assertive approach to case management is by no means a panacea. It cannot, of course, fix every imperfection in the adversary system or in human nature. Moreover, like every approach to judicial administration, systems like Judge Schwarzer's carry risks.<sup>35</sup> But the risks that attended the earlier versions of the Judge's case management methods have been reduced by the evolution of his system in the late 1980s to include greater emphasis on developing the factual and evidentiary base on which the issue identification process operates.

The greatest risks created by the earliest iterations of Judge Schwarzer's approach can be captured in the word "prematurity." An aggressive judicial mind, searching for ways to reduce excesses and cut to the chase, but working in an early pretrial setting where little discovery and only embryonic investigative

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<sup>33</sup> See SCHWARZER, *supra* note 4, at 10-11.

<sup>34</sup> See *id.* at 83-84.

<sup>35</sup> See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

work had been completed, was vulnerable, in some kinds of cases, to premature judgments. Such judgments might result either in wasted motion activity,<sup>36</sup> or in unfairly blocking evidentiary development of a potentially viable claim. Even with a judge of great intelligence who is sensitive to such risks, as Judge Schwarzer clearly was,<sup>37</sup> a drive to use an analytical scalpel early in the pretrial period could threaten causes of action or defenses either that were truly novel and creative or whose substance could be fleshed out only through painstaking development of subtle evidence. This was especially true with evidence that was controlled by opposing parties or nonparties, or evidence that had to be developed by experts. Opportunities to elaborate and explain complex or subtle theories could be lost, and avenues of potentially productive but not obvious inquiry could be cut off too early.<sup>38</sup> A related risk was that the analytically assertive and pro-active judicial role would cabin the freedom of counsel or simply intimidate the thoughtful but timid —

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<sup>36</sup> An example of the "prematurity" problem would occur where a judge presses parties to file motions under Rule 12 or Rule 56, expecting to reduce the scope of the case considerably, or to dispose of it altogether, but later learns, as discovery and briefing on the motions proceeds, that the heart of the case will remain unchanged.

<sup>37</sup> See, e.g., SCHWARZER, *supra* note 4, at 10 (emphasizing need for flexibility and open-mindedness if evidence develops along unanticipated lines). See also the part of Judge Schwarzer's speech at the National Conference on Discovery Reform reported in the *Review of Litigation*:

It is one thing to acknowledge the existence of these kinds of abuses. It is quite another, however, to determine their presence in any particular case. How is the judge to say with assurance that in this particular instance a lawyer is engaged in a fishing expedition . . . . And knowing much less about the case than the lawyers, how is the judge to say that reasonable care in the discharge of his professional obligations does not require the lawyer to do what he is doing . . . .

Who is to say that some novel theory of claim or defense is so far beyond the pale that it cannot pass the tests of reasonableness and good faith . . . . Who can say with assurance that a far-fetched line of discovery may not promise pay dirt for a litigant? Who, after all, is running the case? Who has the responsibility for the client's welfare, and who must shoulder the blame for defeat?

3 REV. LIT., Winter 1982, at 120.

<sup>38</sup> There is always a risk that even a sensitive, principled, very intelligent judge will not accurately foresee how evidence might develop. See, e.g., *Poosh v. Flouroware, Inc.*, No. 93-1137, 1994 WL 374540 (N.D. Cal. July 11, 1994). In *Poosh*, Judge Patel acknowledged that she almost granted a motion for summary judgment against a party whose case had earlier been turned down by two lawyers but who ultimately earned a favorable and well-supported \$500,000 judgment at trial.

thus dulling lawyers' creativity and sense of responsibility for the fate of their clients. Dampers on lawyer creativity and initiative also could prevent development of remote sources of evidence and new legal theories.

One senses that in the first years after he moved from a big case practice to the bench, Judge Schwarzer was so responsive to the need to cut through the verbal and informational debris of litigation that these risks of prematurity did not loom overly large in his vision. How he was inclined to strike the balance is well illustrated in a passage from his first book-length work on case management. He insisted that the effective pretrial judge had to be prepared to make at least temporary decisions

when the information available . . . is incomplete. Some decisions affecting the course of the litigation, such as the permissible scope of discovery or the narrowing of certain issues, must be made early in the litigation even though all the facts are not known. It is essential that the judge be prepared to act on an incomplete record so long as it affords a reasonable basis for decision, recognizing that some of the interim management decisions may need to be changed before the case goes to trial.<sup>39</sup>

Judge Schwarzer may have struck the balance this way early in his career in part out of frustrated reaction to the institutional conservatism he saw in other judges — judges whose effectiveness he believed was needlessly hampered by the tradition of passivity. He wanted to lead his colleagues toward a more dynamic role, and to do so he may have felt that it was necessary to move decisively in new directions. But a more substantial source of how he struck the balance very likely was his belief that the risks that “prematurity” posed to subtle claims and subtle evidence were clearly outweighed by the obviously negative effects of the wholly artificial subtlety of much civil litigation. Appearances of subtlety, created sometimes by lack of preparation and analysis, sometimes by incompetence, and sometimes by tactical maneuvering, too often masked essentially simple disputes. Judge Schwarzer seems to have believed that in a great many civil cases, even “federal” cases, just outcomes would follow directly from forthright articulations of positions and straightfor-

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<sup>39</sup> SCHWARZER, *supra* note 4, at 11.

ward development of evidence. He was not prepared to sacrifice the capacity to manage the disposition of those cases, which made up the vast majority of the docket, out of fear that, in a much smaller universe of disputes, being analytically demanding at the outset might cut off access to a subtle theory or an obscure source of evidence.

During his tenure on the bench Judge Schwarzer has lost none of his commitment to the importance of vigorous intellectual activism throughout the pretrial period. He also, however, has embraced enthusiastically more recent procedural reforms, such as mandatory disclosure, whose purpose is to get as much evidence on the litigation table as early as possible. With more evidence on the table, and with counsel engaging in serious, specific communication about claims, defenses, and the parties' evidentiary needs *before* the initial Rule 16 conference, the risk has lessened that judges will prematurely cut off viable claims, defenses, or avenues of inquiry. Thus, in his more fully evolved approach, there is a healthier balance between insistence on early conceptual clarity (by both the court and counsel), and on prompt efforts to develop an evidentiary record that permits reliable exploration of the potential positions of litigants.

This is not to suggest that risks have been eliminated. Even in the hands of very bright, conscientious judges, some risks always will accompany an approach that calls for the court to play an intellectually active role. Nor would anyone argue that all federal judges are as bright and conscientious as Judge Schwarzer. For the judges who are not, the risks occasioned by active intervention are greater, and the need for restraint more obvious. The issue, however, is not whether Judge Schwarzer's approach can be made risk-free, but whether, on balance, it is likely to deliver, when employed by most judges, a net contribution to the interests of justice that is appreciably greater than the passive approach it is designed to replace. At this stage in our history, no one can answer this question with empirically based confidence. But, the harm that both fairness and efficiency have suffered in a system run by the judicially unrestrained self-interest of lawyers and parties seems to be so great that the burden of persuasion, at least, has shifted to those who would defend the old ways. No one has contributed more to the shifting of that burden than William W Schwarzer.

## III. CRIMINAL SENTENCING

We turn to a very different arena, sentencing people convicted of crimes, to explore further both Judge Schwarzer's vision of what it means to be a judge, and less visible but no less real dimensions of the human being behind the robes.

It is in this area where we can see most clearly past the image of seasoned intellectual toughness and into Judge Schwarzer's soul. What we see is an astonishing depth marked most clearly by a real, well-exercised capacity for compassion. That compassion informs much of the Judge's repeated public attacks on the severity of federal sentences for certain kinds of crimes,<sup>40</sup> especially on the length and rigidity of certain mandatory minimum prison terms. That compassion has been most dramatically visible when Judge Schwarzer has been required by the law to impose degrees of punishment which he has felt were grossly disproportionate to the culpability of a particular defendant.

The most famous example of the strain that the laws of sentencing imposed on his soul was in the case of Richard Anderson, a dock worker who drove a drug dealer to the scene of a transaction with an undercover agent. The amount of drugs involved in the transaction (in which Anderson played no role) forced the Judge to impose a mandatory minimum sentence of ten years in prison. On the bench, as he was explaining the law's sentence, Judge Schwarzer wept. On the record, he declared that "in this case the law does anything but justice." He went on to say, in words reported widely by the press: "It behooves us to think that it may profit us very little to win the war on drugs if in the process we lose our soul."<sup>41</sup>

In this arena, as in management of civil litigation, the theme of the need for vesting district judges with discretion unites much of Judge Schwarzer's views. Writing in the *Southern Califor-*

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<sup>40</sup> Judge Schwarzer has articulated several additional grounds for criticisms of guideline sentencing and mandatory minimums. For example, he has argued that the guidelines are rationalized on the ground that they deliver uniformity (consistency) in sentencing, but that in fact they deliver nothing of the kind. See William W Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 407 (1992). Thus he protests against the guidelines both as ineffective and as dishonest.

<sup>41</sup> See Harriet Chang, *New Drug Law is Backfiring, Judges Say*, S.F. CHRON., Sept. 5, 1989, at A1; see also Stuart Taylor, Jr., *Ten Years for Two Ounces*, THE AMERICAN LAWYER, Mar. 1990, at 65.

*nia Law Review* in 1992, Judge Schwarzer argued that one of the effects of guideline and mandatory minimum sentencing was to shift the locus of the key discretionary decisions about sentencing away from district judges and to assistant United States attorneys.<sup>42</sup> In his view, prosecutors now wield the key discretionary power through decisions about who and how to charge, and about negotiating pleas. By the time the case reaches the sentencing stage, there is precious little room left to exercise any judgment at all.

One senses that Judge Schwarzer objects to this relocation of the key discretionary power to the prosecutors not just because he has more confidence in the wisdom of the judges, and not just because judges are less vulnerable to passing political pressures. It appears that his insistence that discretion be returned to judges is a product of fundamental notions about what the sentencing process should consist of in a healthy society. Judge Schwarzer appears to reject, both on humanistic and utilitarian grounds, the notion that the outcome of sentencing should be dictated by objective criteria that are independent of the character and circumstances of the individual human being on whom judgment is being passed. The dynamic in sentencing should not take place only between a rigid formula and an abstracted incidence of conduct. Judge Schwarzer understands that a process in which the defendant is dehumanized by being objectified — reduced to a category defined by limited and largely impersonal considerations — cannot help people who have committed wrongs reconnect to society. Such a dehumanizing process further desensitizes defendants, alienates them from their community, and supports rather than attacks the forces that first lead to crime.

Instead of permitting sentencing to exacerbate alienation, a good judge looks at it as at least sometimes presenting an opportunity to begin repairing the relationship between the wrongdoer and society. For some defendants, the moment at which sentence is imposed can be a point of acute sensitivity. This is the moment in which the dynamic between them and organized society is most dramatic and most sharply focused. In this moment, the judge is the concrete embodiment of organized soci-

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<sup>42</sup> See Schwarzer, *supra* note 40, at 407.

ety. How the judge interacts with them, and what values and criteria he or she uses in determining what the sentence should be, can shape defendants' most basic feelings about the respect-worthiness of their government.

Thus, if handled well, sentencing can be the first important step toward reconstructing both the defendants' sense of self and their incentives to become meaningful members of the community. But this chance for construction can become an event of destruction if defendants sense that the person they are and want to become are literally of no consequence, and that the judge has no interest in trying to reach them as individual human beings. Thus, a good judge wants the sentencing dynamic to be as rich and multifaceted as reality itself — a dynamic between a multidimensional, enduring, and organic society, and a complex and unique individual human being. Judicial discretion, or “judging,” is necessarily at the center of such sentencing.

This brings us full circle — back to the heart of Judge Schwarzer's vision of what it means to be a judge. To “judge” is not simply to act as a conduit for decisions made by legislators, drafters of rules, and prosecutors. The prescriptions formulated by others, no matter how detailed, cannot anticipate the full range of circumstances in which they will need to be applied. No crafter of rules can foresee all the factors that can surface when general norms are applied to specific cases. Reality is too fluid, too complicated, too unpredictable, too poorly understood. Since a system that ignores inevitably unforeseen factors and the gaps between generalized prescriptions and specific cases cannot produce justice, it is necessary to vest judges with the discretion and the responsibility, in individual cases, to integrate into the formulas that others have predefined all the pertinent but unanticipated considerations. It is the exercise of that discretion and responsibility that is at the heart of judging. And it is this kind of judging — with heart — that William W Schwarzer has personified.

