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How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice

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How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice

John Lande*

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I. INTRODUCTION

One of my favorite cartoons shows a lawyer saying to his client, "You have a pretty good case, Mr. Pitkin. How much justice can you afford?" Professor Marc Galanter, in his tour de force analysis of lawyer jokes, analyzes this cartoon as well as jokes using the same punch line.¹ These jokes lend themselves to several interpretations. Galanter focuses on the message that the legal system is biased in favor of the wealthy.² A complementary (but not complimentary) interpretation portrays lawyers as economic predators, concerned more about their own financial interests than their clients' interests.³ Although that interpretation certainly represents an element of the reality of lawyer-client relations, this scenario could, in fact, reflect lawyers' genuine concern for clients' interests and, indeed, possible subordination of the lawyers' own financial interests to benefit the clients. Presumably, few clients actually demand to "take their case all the way to the Su-

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1. See MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 244-46 (2005).

2. *Id.*

3. See *id.* at ch. 2.

preme Court” as reflected in popular legend, but some clients undoubtedly do start off by insisting that they are ready to engage the full panoply of legal procedures needed to achieve their goals. Lawyers provide a valuable service to such clients by discussing whether the advantages of extensive litigation are likely to outweigh the disadvantages, whether the clients can realistically afford the likely costs, and whether this would be the best strategy for achieving their goals.⁴ Thus, when lawyers ask, in effect, “how much justice can you afford?,” this question can be a useful tactic for helping clients satisfy their most important interests.

Similarly, the courts have to consider how much justice *they* can afford, though the question for the courts is how much they can afford to *provide* rather than how much they can buy. Ideally, courts would provide all litigants their “day in court” cheaply and easily if they want it.⁵ In the real world, however, courts have limited resources, and they need to manage their resources wisely to accomplish their goals.

This article discusses how the court system can function optimally given declining trial rates and the limited resources available. It does not provide a detailed analysis of court financing but rather discusses broad issues relating to the role of trials in the legal system.⁶

This article grows out of a conversation with clerks of court in the ten federal district courts of the Eighth Circuit.⁷ I was invited to lead a discussion with the clerks at the Eighth Circuit Judicial Conference in October 2005.⁸ These clerks

4. See John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1332-36 (2003).

5. Even under ideal circumstances, however, trials may not be the optimal process for resolving disputes because trials can harm relationships and reputations and produce other adverse consequences. While indulging in fantasies about ideal situations, we could add the hope that all disputants would seriously attempt to resolve their differences before invoking the legal system. Moreover, they would settle only if they believe that a settlement is appropriate and not because of excessive concern about the cost, time, or risk of going to trial.

6. This article focuses primarily on the federal courts, which have experienced more dramatic declines in trial rates than the state courts. See John Lande, *Shifting the Focus From the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 196 (2005). The state courts handle many more cases than the federal courts. There is great variation in structure and process in the state courts and less data, so it is harder to generalize about the state courts. See Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 755-58 (2004). Thus, the dynamics described in this article may or may not apply to particular state courts. There is also considerable variation between the federal district courts, so one should be cautious about generalizations in the federal courts as well. See *infra* note 30.

7. The Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. Arkansas, Iowa, and Missouri each have two districts. The experiences and views of the Eighth Circuit clerks may not be a good representation of clerks in other parts of the country, especially clerks who administer courts in very large metropolitan areas. Although there may be such geographic differences, the views of the Eighth Circuit district court clerks may generally reflect a perspective of professional court managers in many parts of the country.

8. Before the conference, I emailed a survey to the clerks which included questions about their goals, responsibilities, and problems; efforts to achieve their goals and overcome problems; perceptions about changes in trial rates in their courts and reasons for any changes in trial rates; perceived problems and benefits caused by any changes in trial rates; perceptions about the views of judges and lawyers in their courts about changes in trial rates; and perceived effects of the Civil Justice Reform Act, including a separate question about the effects of advisory groups established under that Act. Clerks Initial Survey (on file with author). The email included several articles providing differing perspectives about the “vanishing trial” phenomenon. *Id.* Before the conference, I prepared a sum-

are experienced, knowledgeable, and professional. Most have law degrees or masters degrees.⁹ The median length of service as court administrators is 23 years and the median period in their current positions is about 14 years.¹⁰ Court organizations have grown in size and complexity, and the district court clerks, as the principal court administrators, play a critical management role.¹¹ The clerks described their greatest challenge as satisfying and reconciling differing interests of multiple stakeholders—with limited and uncertain resources.¹² Courts rely on the clerks to take initiative in addition to managing the court operations.¹³ Some modern courts use “strategic plans,” and the clerks provide leadership in developing and implementing strategic goals for their courts.¹⁴

For modern court administrators, the question of how much justice we can afford is no joke. It is a challenge that becomes more difficult as budgets fall behind the increasing demand for and cost of court services.¹⁵ Presumably most

mary of the clerks’ responses and emailed it to them. At the conference, I reviewed the summary and led a wide-ranging conversation covering, among other things, the work of the courts generally, the clerks’ roles, and the place of trials in the courts. The discussion included several court-related employees in addition to the clerks. Following the conference, I emailed a follow-up survey asking for information about their work experiences and further thoughts on the discussion. Clerks Follow-up Survey (on file with author). Eight clerks provided responses to the follow-up survey. This article does not include any responses from two of the clerks. *Id.* The clerks were promised that information from the surveys and conference discussion would not identify any individual or court except to indicate that the court is in the Eighth Circuit. *Id.*

This article does not necessarily reflect the views of any of the clerks who provided information for this article except as specifically noted. Rather, it reflects my views, informed by input from the clerks, among other things.

9. Six of the seven clerks who provided information about their educational background have law degrees or masters degrees. Clerks Follow-up Survey, *supra* note 8.

10. *Id.* (Clerks 1, 2, 5-9). Their experience as court administrators ranged from 22 to 28 years. *Id.*

11. One clerk’s resume describes his duties as follows:

managing activities that support the judges of the United States District Court including: processing paper and electronic documents and other information related to pending cases, courtroom support, customer service to the bar and the public, processing appellate records, personnel administration, accounting and financial operations, budget preparation and execution, jury selection and management, space and facilities management, procurement of furniture and office equipment, automated case processing, personal computer acquisition, support and maintenance, electronic internet access to court records, telecommunications, liaison between the court and other agencies, service as a member of the Court Security Committee.

Resume, *supra* note 8 (clerk 8). Presumably the other clerks would have virtually the same responsibilities.

12. Clerks Initial Survey, *supra* note 8 (clerks 1, 4-8).

13. Clerks Discussion, *supra* note 8.

14. *Id.* See, e.g., U.S. District Court, Western District of Missouri, Strategic Plan (2005) [hereinafter Western District, Strategic Plan] (on file with author).

15. See *infra* Part II. Society presumably could provide more justice with increased court budgets. It seems plausible that the number of trials is affected by the amount of public support for the courts. Niemeijer & Klein Haarhuis report that the number of trials is increasing in the Netherlands, where the total of judges and court personnel members grew more than a factor of four between 1951 and 2003 (from 2,420 to 13,221 in full time equivalents). See Bert Niemeijer & Carolien Klein Haarhuis, *Vanishing or Increasing Trials in the Netherlands?*, 2006 J. DISP. RESOL. 71. In England and Wales, Dingwall & Cloatre relate a decline in the number of claims and trials to declining public support for the courts. See Robert Dingwall & Emilie Cloatre, *Vanishing Trials? An English Perspective*, 2006 J. DISP. RESOL. 51. In the U.S., it would be appropriate to increase financial support for the courts, but given the current political environment, it seems unlikely that federal courts will get sufficiently increased resources to make a significant difference in their ability to provide trials. See *infra* notes 46-48 and accompanying text.

analysts would agree, in principle, that courts should try cases when appropriate—and help litigants¹⁶ find just resolutions without trial when trial is not needed. It seems obvious that the courts' ability to provide trials in some cases is possible only if the vast majority of other cases are not tried. No one proposes a trial rate above 50 percent or even anything close to that. The real controversy is about when trial is appropriate and how that decision should be made.¹⁷

This article is part of the growing literature on the "vanishing trial."¹⁸ Much of that literature analyzes various phenomena related to trial courts with relatively little discussion of consequences of reduced trial rates or recommendations for dealing with those consequences. This article provides a more systematic analysis of potential problems related to changing trial patterns and possible strategies to address those problems. This article could not provide a comprehensive inventory of problems given its limited empirical base. Nor could it provide definitive or universal prescriptions for dealing with such problems considering that the phenomena involved are so complex and vary greatly. It contributes to the discussion by cataloging and analyzing potential problems and prescriptions for dealing with the problems.

Part II briefly describes some background about the federal district courts' workload and financial situation. Part III identifies courts' goals for satisfying litigants and society's interests in the courts. Part IV discusses benefits and problems caused by declining trial rates. Part V analyzes possible strategies for dealing with problems caused by declining trial rates. These potential strategies include ensuring that litigants have a real choice of disputing procedures including trial, routinely collecting and disseminating data on negotiation and settlement, designing court facilities to fit realities of litigation, reforming legal education to reflect the realities of legal practice, making judging more attractive to judges, and expanding courts' roles in promoting local dispute resolution systems. Part VI offers a brief conclusion.

II. THE FEDERAL DISTRICT COURTS' WORKLOAD AND FINANCIAL SITUATION

Galanter presents a compelling compilation of data to show a general pattern of decline in the proportion and number of cases terminated by trial in recent decades. For example, the number of civil trials in the federal district courts fell from

16. For simplicity, references to litigants in this article include their lawyers.

17. For classic critiques of ADR, reflecting preferences for trial, see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). These views are not limited to scholars from the 1980s. At the Eighth Circuit Conference, District Court Judge William Wilson, Jr. passionately defended the constitutional right to a jury trial and criticized court promotion of ADR. Hon. William R. Wilson, Jr., Remarks at Program on Alternative Dispute Resolution, Eighth Circuit Judicial Conference (Oct. 20, 2005).

18. See, e.g., Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. v (2004); Symposium, *The Vanishing Trial*, DISP. RESOL. MAG., Summer 2004, at 3; Symposium, *The Civil Trial: Adaptation and Alternatives*, 57 STAN. L. REV. 1251 (2005). I have referred to "the phenomenon known as the vanishing trial" to suggest that the term "the vanishing trial" may give misleading impressions about the nature of trials and whether trials really are on the verge of vanishing. See Lande, *supra* note 6, at 191-99.

5,802 to 3,951 between 1962 and 2004, despite the fact that there were five times as many cases filed in 2004 as in 1962.¹⁹ Thus, civil trials comprised only 1.7% of terminations in 2004, compared with 11.5 percent in 1962.²⁰ Galanter finds a particularly “precipitous decline” in the last two decades,²¹ which he relates to a combination of factors, including what he describes as a “jaundiced view” of the law promoted by major elements of business, political, and legal elites. This jaundiced view depicts a litigation explosion caused by opportunistic plaintiffs, greedy lawyers, activist judges, and biased juries who combine to produce outrageous verdicts that “unravel[] the social fabric and undermin[e] the economy.”²²

To account for the declining trial rates, Galanter offers five possible explanations that are not mutually exclusive. First, American legal procedure is “converging” with that in other court systems, where courts embrace a more managerial judicial role, relying on procedures such as multiple hearings in trials over extended periods of time.²³ Second, court trials are “displaced” by “trial-like events” in non-court forums such as administrative tribunals, arbitration proceedings, and hearings in various organizations.²⁴ Third, and related to the second, non-court organizations are “assimilating” law into their regular governance processes, which mimic legal procedures.²⁵ Fourth, the law is being “transformed” to embody “a new process rationality that supplants rule-centered, top-down, formal rationality with a decisional process that is negotiative, informal, participative and interactive.”²⁶ Fifth, and presumably related to the fourth, the Anglo-American legal system is “evolving” because parties are seeking more tailored, complex, and future-oriented solutions to problems and thus look to non-court dispute resolution procedures in many cases.²⁷ All these explanations seem quite plausible; with combinations of causal forces varying in different contexts.²⁸ Although the

19. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7 [hereinafter Galanter, *World Without Trials*].

20. *Id.* These data should be interpreted cautiously. Galanter presents data indicating that trials have generally become longer and more complex in recent decades. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 477-78 (2004) [hereinafter Galanter, *Vanishing Trial*]. Apparently there is no data tracking the aggregate number of trial *days* over time; the increased length of trials would presumably mitigate the apparent reduction in federal trials to some extent.

21. Galanter, writes:

The steady decline in the portion of cases tried has been in progress for more than a century, marking a long historic movement away from trial as the mode of disposing of civil cases. . . . In the past twenty years, the pattern has changed: the long-term decline in the portion of trials has intensified and accelerated, producing a dramatic drop in the absolute number of trials.

Galanter, *World Without Trials*, *supra* note 19, at 13.

22. *Id.* Galanter relates this recent precipitous decline to a combination of factors:

The decline of trials is not an isolated meteor flashing across the legal skies. Its current phase is intimately connected to a set of other changes in American law over the past thirty years, changes in elite ideology, institutional practice and legal culture that have transformed the legal environment.

Id.

23. *Id.* at 23-24.

24. *Id.* at 24-27.

25. *Id.* at 27-30.

26. *Id.* at 30-31.

27. *Id.* at 31-33.

28. In certain settings, some of these explanations may fit and others do not. See, e.g., Christopher Honeyman, *Worlds in a Small Room*, 2006 J. DISP. RESOL. 107 (suggesting that evolution is the only

precise mechanisms causing the vanishing trial phenomena are unclear, it appears that the causes are complex and deeply rooted in larger social changes.²⁹ It follows that substantial changes in the patterns of court trials in the future are likely to require more than simple changes in policy or procedure.

Analyzing the district courts' combined civil and criminal caseload between 2000 and 2004 shows that the number of trials declined as the number of filed and pending cases generally increased, consistent with the pattern Galanter identifies. Table 1³⁰ indicates that the number of cases filed grew about 30,000 cases (from about 322,000 to about 352,000).³¹ The number of pending cases grew by about 50,000 cases (from about 301,000 to about 351,000 cases) and the number of cases pending per authorized judgeship increased from 459 to 518 cases.³² If the number of trials had not declined in this period (from 14,679 to 12,938),³³ the number of pending cases would presumably have increased even more because the additional tried cases almost certainly would have consumed more court time than if they were terminated by non-trial procedures.

one of Galanter's explanations that would explain the pattern of adjudication rates in the Wisconsin Employment Relations Commission).

29. For detailed collections of hypotheses explaining reduced trial rates, see Ad Hoc Committee on the Future of the Civil Trial of the American College of Trial Lawyers, *The "Vanishing Trial:" The College, the Profession, the Civil Justice System*, 226 F.R.D. 414, 414-15 (2005), available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=57 (last visited Mar. 5, 2006); Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 193-219 (2005); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1262-68 (2005); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 170-81 (2005); Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RESOL. 35.

30. See Administrative Office of the U.S. Courts, *Judicial Facts and Figures*, Tables 4.1, 4.3, at <http://www.uscourts.gov/judicialfactsfigures/contents.html> (last visited Jan. 5, 2006) [hereinafter AO, *Judicial Facts and Figures*]. The years in the table are the fiscal years, which end on September 30. These data should be interpreted with great care. As Table 1 shows, there are substantial fluctuations from year to year. Moreover, these figures provide an overall picture but do not reflect factors such as the number of judges actually on the bench at a given time (including magistrate and senior status judges). In addition, there is great variation between courts. For example, in 2004, 1.6 percent of civil cases reached trial for all of the U.S. district courts. In various district courts, however, this percentage ranged from 0.6 percent to 4.9 percent, with rates of 1.0 percent or less in twelve districts and at least 4.0 percent in eight districts. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Table C-4A, available at <http://www.uscourts.gov/judbus2004/appendices/c4a.pdf> (last visited Mar. 10, 2006) [hereinafter AO, *Judicial Business*]. For more detailed analysis of court workload, see Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637 (2004).

31. See tbl.1.

32. *Id.*

33. *Id.*

Authorized Judgeships, Civil & Criminal Cases Filed, Tried, Terminated, and Pending in U.S. District Courts, 2000-2004

Fiscal Year	Authorized judgeships	Cases filed	Cases tried	Cases terminated	Cases pending	Percent terminated by trial	Filings per authorized judgeship	Trials per authorized judgeship	Terminations per authorized judgeship	Cases pending per authorized judgeship
2000	655	322,225	14,679	318,355	300,928	4.6	492	22.4	486	459
2001	665	317,907	13,558	309,165	308,640	4.4	478	20.4	465	464
2002	665	345,483	12,817	325,165	326,458	3.9	520	19.3	489	491
2003	680	323,604	12,948	318,643	321,597	4.1	476	19.0	469	473
2004	679	352,360	12,938	317,382	351,672	4.1	519	19.1	467	518

Table 1

Historically, a major increase in the number of pending cases coincides with the beginning of the period of precipitous decline in the number and rate of trials that Galanter identified.³⁴ The number of pending cases has grown steadily since the 1960s, with a period of particularly sharp growth between 1980 and 1983 when the pending caseload increased about 28 percent (from about 207,000 to about 264,000 cases).³⁵ During that period, the number of cases pending per judgeship increased more than 21 percent, from 421 to 512 cases per authorized judgeship.³⁶

Although trials capture people's imagination, they represent only a small proportion of the courts' work. Federal "trial" courts³⁷ must do many things in addition to conducting trials, including assisting litigants, providing overall case management, managing case documents, conducting pretrial hearings, deciding contested motions, arranging for special services such as translation, administering jury pools, supervising public defender and probation systems, operating ADR³⁸

34. See Galanter, *World Without Trials*, *supra* note 21 and accompanying text.

35. See AO, *Judicial Facts and Figures*, *supra* note 30, tbl.4.1.

36. *Id.*

37. See Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. Rev. 1405 (2002)

38. The term "alternative dispute resolution" is generally used to refer to a set of dispute resolution procedures including mediation and arbitration as well as a wide range of other procedures such as early neutral evaluation, summary jury trials, and ombuds work. The term is conceptually problematic but it is embedded in the vernacular and hard to avoid. It raises empirical issues about which procedures are most common and philosophical issues about which procedures do or should have greater value. These discussions often seem unproductive and it is often preferable to use the term "dispute resolution," referring to all dispute resolution procedures, including litigation. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 140 n.5 (2000) [hereinafter Lande, *Getting the Faith*]; John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 324-25 [hereinafter Lande, *More Sophisticated Theory*]. This article uses "ADR" in its conventional meaning of mediation, arbitration, etc. to distinguish from court adjudication procedures. Although there is some controversy about whether judicially-hosted settlement conferences should be considered as a form of ADR, this article considers such settlement conferences as ADR because they are alternatives to adjudication. Moreover, many federal courts consider settlement conferences to be a form of ADR. See ELIZABETH PLAPINGER & DONNA

programs, publicizing court decisions, and promulgating rules, policies, and procedures.³⁹

As caseloads have grown, courts have shifted some of their efforts from trials to pretrial work.⁴⁰ Galanter notes that “[c]learly, courts are more involved in the early resolution of cases than they used to be.”⁴¹ A major study found that federal judges are actively involved in holding pretrial conferences, setting pretrial schedules and trial dates, setting limits on discovery, and ruling on motions.⁴² Judges described their level of pretrial management as moderate or intensive in more than half the cases.⁴³ Moreover, the decrease in the trial rate has been accompanied by an aggregate increase in the rate of summary judgments in federal civil cases from about 1.8 percent to 7.7 percent from 1960 to 2000, according to Professor Stephen Burbank.⁴⁴

Modern trials—especially jury trials—are expensive and burdensome for the courts. Trials require numerous personnel in addition to judges, including law clerks, courtroom clerks, court security officers, court reporters, and sometimes interpreters. Obviously, jury trials require a pool of potential jurors, including a substantial number more than actually will be needed.⁴⁵ Modern courtrooms re-

STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS 20-28, 65 (1996); Donna Stienstra, Summary of Selected Features of ADR Procedures in U.S. District Courts (Nov. 17-18, 2005) (unpublished document prepared for the Conference on Court ADR Research, on file with author).

39. See generally ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 2004, available at http://www.uscourts.gov/library/dir rpt04/2004AnnualReport_Full.pdf (last visited Mar. 10, 2006) [hereinafter ADMINISTRATIVE OFFICE REPORT]. In addition to functions specifically related to the law, trial courts have become complex organizations requiring management of physical facilities, technological capabilities, human resources, information systems, finances, and security (including, but not limited to, security related to prisoners), as well as coordination with numerous public and private organizations and individuals. *Id.*

40. Shari Seidman Diamond and Jessica Bina analyze federal court data and find that the civil trial rate is negatively correlated with the caseload, i.e., districts with higher caseloads generally have lower trial rates. See Diamond & Bina, *supra* note 30, at 654-56. Although this does not prove that higher caseloads cause courts to increase the number of non-trial dispositions, that is a plausible interpretation.

41. Galanter, *Vanishing Trial*, *supra* note 20, at 482. The Administrative Office of the U.S. Courts states:

In addition to conducting trials, judges perform many other case-related functions, including those related to courtroom activity, research and opinion drafting for motions for summary judgment and other dispositive motions; hearings on sentencing issues; *Daubert* hearings on expert witnesses; evidentiary hearings in pro se prisoner and other cases; supervised release and probation revocation hearings; alternative dispute resolution activities; and settlements. In 2004, a total of 44 districts operated mediation and arbitration programs that involved more than 14,000 civil cases.

AO, Judicial Business, *supra* note 30, at 22.

42. JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 258-61 (1996). For further discussion of changes in pretrial processing, including use of ADR, see John Lande, “*The Vanishing Trial*” Report: *An Alternative View of the Data*, DISP. RESOL. MAG., Summer 2004, at 19.

43. KAKALIK, *supra* note 42, at 258-61.

44. See Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 590, 592 (2004).

45. During the period 2000-2004, 36.8 percent to 40.0 percent of jurors who went to court to serve as jurors were not selected or challenged. See Administrative Office of the U.S. Courts, U.S. District Court - Judicial Caseload Profile, available at <http://www.uscourts.gov/cgi-bin/cmsd2004.pl> (last visited Mar. 10, 2006).

quire equipment, including increasingly sophisticated computers and audio-visual equipment. Trials also require expensive courtroom space.

Despite the increasing caseloads, the federal courts are cutting expenditures rather than increasing them.⁴⁶ It seems unlikely that funding for the courts will increase substantially in the foreseeable future, considering the federal budget generally, as well as the tense relationship between the federal judiciary and Congress.⁴⁷ The director of the Administrative Office of the United States Courts predicts major budget shortfalls despite an extensive cost-containment strategy.⁴⁸ Thus the federal courts must do more work with fewer resources. To provide a framework for analyzing problems related to declining trial rates the next part describes goals for the courts.

III. GOALS OF THE COURTS

The clerks are very concerned about the challenges of providing justice.⁴⁹ They focus on the overall operation of the courts and, rather than concentrating particularly on trials, they generally see their goal as the optimal administration of justice.⁵⁰ From this perspective, trial is a means to an end—an especially impor-

46. The Chief Justice's 2004 Year-end Report on the Federal Judiciary describes the judiciary's "funding crisis" as follows:

The continuing uncertainties and delays in the funding process, along with rising fixed costs that outpace any increased funding from Congress, have required many courts to impose hiring freezes, furloughs, and reductions in force. In some cases they have had to cut back services available to the public. During Fiscal Year 2004, this resulted in a 6 percent reduction—1,350 positions—in employees other than judges and the staff who work in their chambers.

William Rehnquist, Chief Justice of the United States, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 2-3, available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf> (last visited Mar. 10, 2006).

To deal with the crisis, the Judicial Conference developed "a comprehensive cost-containment strategy" which

entails a moratorium on some courthouse construction projects; improving workforce efficiency; a study of basic changes in the Judicial Branch's approach to compensation for non-judges; promoting more effective use of technology; a study of possible program changes to reduce costs in defender services, court security, probation and pretrial services, and bankruptcy case processing, among others; and regular examination of court fees to reflect economic changes.

Id. at 2-3. The report states that "[i]mplementing this cost containment strategy will ameliorate but not end the Judiciary's funding crisis." *Id.* at 3. See generally, PATRICIA A. GARCIA, FUNDING THE JUSTICE SYSTEM: HOW ARE THE COURTS FUNDED? (1998), available at <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=3460003> (last visited Mar. 10, 2006).

47. See Chief Justice of the United States, *supra* note 46, at 4-8 (discussing "the strained relationship between the Congress and the federal Judiciary").

48. According to the director of the Administrative Office of the United States Courts:

Unprecedented funding challenges face the Judiciary in FY [fiscal year] 2004 and over the next several years due to overall budget constraints. For the past two years, the Judiciary has received funding that was inadequate to meet its needs, and estimates of probable future funding when compared to estimated needs show a growing gap approaching \$848 million by FY 2009.

Administrative Office of the United States Courts, *supra* note 39, at 4. Government officials sometimes use dire warnings as part of a strategy to advocate for increased funding. Even if this statement is somewhat exaggerated, it suggests that there is a substantial gap between the cost of normal court activities and expected appropriations.

49. Clerks Discussion, *supra* note 8.

50. *Id.* Similarly, Magistrate Judge Wayne Brazil focuses on the administration of justice when considering effects of integration of ADR into the litigation process. See Wayne D. Brazil, *Court ADR*

tant one—but it is not an end in itself. One clerk said, “Trials are not our main business,”⁵¹ reflecting the fact that courts do many other important tasks in the administration of justice. Few of the clerks think that the trial rates are too low.⁵² For example, one clerk wrote:

Courts should strive to be full service dispute resolvers. Trials have a place in the array of services, but not to the exclusion of other devices for justly ending disputes. If there is or was a methodological hierarchy, it needs to be ditched. If courts intend to retain relevance and public support, they must do a better job of responding to needs.⁵³

Obviously there are widely differing definitions of justice, a huge subject well beyond the scope of this article.⁵⁴ In this article, the administration of justice focuses on court operations that provide: (1) processes and outcomes for litigants consistent with procedural and substantive legal norms,⁵⁵ and (2) proper guidance to the public about those norms and what people can expect from the courts in future cases.

25 Years After Pound: Have We Found a Better Way?, 18 OHIO ST. J. ON DISP. RESOL. 93, 98-108 (2002).

51. Clerks Discussion, *supra* note 8 (clerk 5).

52. *Id.* Clerks Discussion, *supra* note 8.

53. *Id.* Clerks Follow-up Survey (clerk 1).

54. For a helpful discussion of how different theories of justice can be applied in analyzing dispute resolution processes, see Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157 (2002). Professors Hyman and Love describe theories of reparative justice, retribution and revenge, distributive justice, justice as a function of effects on relationships, and procedural justice. *Id.* at 162-74. For a very thoughtful analysis of how settlements can produce justice, see Carrie Menkel-Meadow, *Whose Dispute Is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2687-94 (1995). See also Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213 (2005) (identifying six elements needed for justice in mediation); Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL. 247 (2005) (distinguishing theories of justice based on self-determination and social norms).

55. Litigants in court-connected dispute resolution processes can settle cases under terms that differ from what courts would order if the cases were tried. In some cases, such as class actions, the courts must approve the settlements. See FED. R. CIV. P. 23(e). If the law does not require court approval of settlements, the results may be considered “just” and consistent with legal rules if the process complies with appropriate norms such as informed consent and avoidance of coercion. See Timothy Hedeon, *Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary Than Others*, 26 JUST. SYS. J. 273 (2005); Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 527-35 (2004) (analyzing duress and undue influence in mediation); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 59-78 (2001). In recent years, scholars and practitioners have been paying greater attention to compliance with process norms. See, e.g., John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 857 (1997) (recommending a goal of “high-quality consent” defined as where principals make decisions by “considering the situation sufficiently and without excessive pressure”); John Lande, *More Sophisticated Theory*, *supra* note 38, at 325 n.25 (suggesting the term “quality of decision making” because “the same considerations generally apply regardless of whether the mediations result in agreement”); Welsh, *supra*, at 79-93 (offering recommendations to protect party self-determination and prevent coercion). For further discussion, see *infra* notes 113-14 and accompanying text.

A. Satisfying Litigants' Interests in the Courts

Although trials represent the symbolic and sometimes glamorous pinnacle of litigation, litigants often have a greater interest in courts' non-trial activities. Indeed, for many litigants, a trial judgment is not their ultimate goal and a trial is not their preferred process to achieve their goals. Rather, most litigants presumably value trial as a "doomsday machine"⁵⁶ with which they can threaten opponents to gain a settlement on favorable terms, in a process that Galanter calls "litigotiation."⁵⁷ For litigants, trial courts provide many services with more immediate practical value than trials. The vast majority of litigants value courts as legitimate institutions to assume jurisdiction, administer paperwork, adjudicate pretrial disputes, manage the dispute resolution process in an orderly way, and enforce decisions.⁵⁸ This is very concrete administration of justice.

Courts now provide dispute resolution services in a competitive market. The courts used to be the "only game in town" for people who needed a formal dispute resolution process that would produce a legitimate and enforceable resolution. Courts were like the monopolistic pre-1980s telephone company parodied by Lily Tomlin's character Ernestine the operator, who said, "We're the phone company. We don't have to care." After AT&T was dismantled, the phone market became very competitive and phone companies "had to care" to get and retain customers. Similarly, the courts cannot assume that disputants will choose their services to handle their disputes—or to handle the entirety of the disputes. Parties can choose binding arbitration or private judging and largely keep their cases out of the court system. They may sometimes choose between federal and state courts based on

56. See Howard Bedlin & Paul Nejelski, *Unsettling Issues About Settling Civil Litigation: Examining "Doomsday Machines," "Quick Looks" and Other Modest Proposals*, 68 JUDICATURE 9, 26-28 (1984). Professor Samuel Gross described it this way:

[A]voiding trial is a central goal of courts and litigators alike. Some marginal figures—academics, and that quaint old-fashioned breed, the trial lawyer—may see a down side to this quest, but this is a minority position. . . . [A]bove [a] functional minimal level (whatever that is) the dominant—the nearly exclusive—view is that trials are an unnecessary cost, a deadweight loss to be avoided.

Samuel R. Gross, *Vanishing Trials, Civil and Criminal: Global Cost Cutting, and Local Politics* 3 (Dec. 12-14, 2003) (unpublished manuscript, on file with the author) (footnote omitted).

57. Though litigants and lawyers probably wouldn't recognize the term "litigotiation"—which Galanter coined to mean "the strategic pursuit of a settlement through mobilizing the court process"—that is what they usually expect and want. See Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984). People who feel aggrieved generally would prefer to avoid invoking a third party such as a court and typically go to court only if avoiding the problem or talking it out is unsatisfactory. See Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 171-76 (1984). Although some disputants undoubtedly begin litigation with fantasies of spectacular public vindication in a "Perry Mason moment" at trial, these fantasies often subside as trial looms, when they increasingly appreciate the costs and risks of trial.

58. Galanter, *Vanishing Trial*, *supra* note 20, at 533-34. Galanter compiled data about the stages of disposition of federal civil cases between 1962 and 2002, showing increasing pretrial engagement of the courts in cases filed in the court. *Id.* By 2002, 83.9 percent of cases terminated with some court action. *Id.* This included 74.1 percent of cases terminated with some court action before pretrial, 8.0 percent with court action during or after pretrial, and 1.8 percent during or after trial. *Id.* One may assume that these court actions had some value to many, perhaps most, litigants.

which is likely to provide process advantages such as the ability to manage the cases, informality, convenience of procedural rules, and cost.⁵⁹

Understandably, some courts view litigants as “customers”⁶⁰ and have a strong interest in providing a range of services to satisfy consumer demand.⁶¹ Some litigants now file suits in court in a more sophisticated version of litigation than when Galanter coined the term in 1984. Twenty years ago, settlement typically resulted from unassisted negotiation between lawyers or sometimes from court settlement conferences. Today, litigants regularly choose from a broader range of assisted dispute resolution processes, especially mediation and judicial settlement conferences.⁶² Many courts regularly provide or broker ADR services in addition to administering pretrial procedures and trials.⁶³ From a market perspective, courts would not necessarily define these cases as a loss of “business” due to reduction of trial rates and might, instead, consider these as an increase in business satisfying litigants’ needs.

59. See Melissa Burkland et al., *2004-2005 Assessment of the Services of the United States District Court for the District of North Dakota*, 81 N.D. L. REV. 233, 256 (2005) (survey of attorneys identifying various advantages of state courts causing attorneys not to file case in federal court).

60. See Western District, Strategic Plan, *supra* note 14, at 16 (setting goal of “maintain[ing] high level of service to public with diminishing budget limitations,” including initiative to “provide timely and knowledgeable customer service”). The U.S. District Court for the District of North Dakota arranged for a survey of lawyers to assess the Court’s services. The survey included numerous aspects of interaction with the court, including many involving the clerk’s office and pretrial activities in addition to trial. Many more attorneys responded “not applicable” to questions about trial than they did about dealing with the clerks or the pretrial process. See Burkland, *supra* note 59, at 258-62. A market orientation is reflected by the characterization that the court provided “pretrial services” and “trial services.” *Id.* at 238-40.

61. Texas Supreme Court Justice Nathan Hecht described the situation this way. “The civil jury trial, as a dispute-resolution product, is losing its market. To recover, it needs more than a better advertising campaign. Its costs must be slashed and its taste improved.” Hecht, *supra* note 29, at 182. Some people focus on the courts’ role in performing valuable public functions. See, e.g., Fiss, *supra* note 17. These people would disapprove of courts competing for customers as if courts’ produce services just like any other goods or services in the market. One can appreciate the essential and unique nature of courts’ functions in our society and also recognize the reality that courts act in a market where they do not have a monopoly on dispute resolution services. *Id.* For a description of the private dispute resolution market in a large metropolitan area, see ELIZABETH ROLPH ET AL., *ESCAPING THE COURTHOUSE: PRIVATE ALTERNATIVE DISPUTE RESOLUTION IN LOS ANGELES* (1994).

62. Under the Alternative Dispute Resolution Act of 1998, each federal district court must adopt local rules implementing its own ADR program. 28 U.S.C. § 651(b) (2001). According to a preliminary review of local court rules, general orders, and plans promulgated by the district courts, sixty-two courts authorize mediation, thirty-two courts authorize settlement conferences, twenty-one courts authorize arbitration, eighteen courts authorize early neutral evaluation, and nine courts provide only a general authorization to use ADR. Stienstra, *supra* note 38, at 2-3 (unpublished document prepared for the Conference on Court ADR Research, on file with author). The federal courts do not regularly collect data on referrals to ADR processes. Forty-nine of the ninety-four district courts applied for ADR funding for fiscal year 2005 and the applications include statistics about the numbers of cases referred to ADR. Of the 24,835 cases included in these applications, 15,555 (63 percent) were referred to mediation, 3,317 (13 percent) were referred to the multi-option program for selecting ADR processes in the Northern District of California, 2,588 (10 percent) were referred to arbitration, 1,608 (6 percent) were referred to settlement conferences, 1,332 (5 percent) were referred to early neutral evaluation, and the rest were referred to other processes. *Id.* at 8 (based on information compiled and provided by the Administrative Office of the U.S. Courts). The accuracy of these statistics is not clear and they may significantly understate the number of settlement conferences, especially in courts not applying for funds, as some people do not consider settlement conferences as ADR. See *supra* note 38.

63. For a recent symposium on court-connected ADR, see Symposium, *Making Dispute Resolution Work*, 26 JUST. SYS. J. 253 (2005).

This market perspective is consistent with individualistic cultural and political values underlying the U.S. legal system, in which courts generally react to litigant initiative rather than taking the initiative themselves.⁶⁴ These same values affect lawyer-client relationships, in which lawyers advance clients' interests by using the most advantageous procedures available.⁶⁵ These market and cultural values support the perceived mission of many court administrators of satisfying litigants' interests consistent with the courts' responsibilities under the law. One clerk illustrated this by saying, "the parties do what they decide to do, which is fine as long as the courts don't create barriers."⁶⁶ The way that courts manage litigation does, in fact, create some barriers for litigants. Federal courts use pretrial conferences to address various procedural matters such as defining and narrowing issues for trial, setting deadlines for discovery and motions, exploring settlement and ADR options, and setting the groundrules for trial.⁶⁷ To wisely manage their resources, courts must balance their interest in satisfying litigants' needs with the courts' institutional needs. Although courts might like, in theory, to give all litigants their proverbial "day in court"—perhaps even with a jury guaranteed by federal and state constitutions—this is obviously impractical and no one seriously suggests that. One judge put it this way, "Litigants are entitled to their day in court, but they are not entitled to somebody else's day in court."⁶⁸

B. Satisfying Society's Interests in the Courts

Professor David Luban catalogues a variety of public goods produced through the court system including opportunities for intervention by persons not party to lawsuits, discovery and publication of important facts, facilitation and enforcement of private settlements, development of legal rules and precedents, and structural transformation of large public and private institutions.⁶⁹ Though trials—and sometimes the threat of trial—can promote these goals, the legal system can accomplish them without trials in many situations. In particular, trials are not needed to gain benefits of non-parties' intervention in cases, pretrial discovery of information, or facilitation and enforcement of private settlements.

64. See Robert Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 7-11 (1994).

65. Ethical rules require lawyers to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2) (2002). A comment to Rule 2.1 states that when a matter is likely to involve litigation, "it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." *Id.* R. 2.1 cmt. 5.

66. Clerks Initial Survey, *supra* note 8 (clerk 1). The clerk made this statement in conversation and presumably would have qualified it to say that courts should not create *inappropriate* barriers.

67. See generally WILLIAM W. SCHWARZER & ALAN HIRSCH, *THE ELEMENTS OF CASE MANAGEMENT: A POCKET GUIDE FOR JUDGES* (2d ed. 2006). Case management is intended to help courts use limited resources efficiently and to help litigants make appropriate litigation decisions. For a seminal critique, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

68. Celeste F. Bremer, Magistrate Judge, S.D. Iowa, Remarks at the Program on Alternative Dispute Resolution for the Eighth Circuit Judicial Conference (Oct. 20, 2005).

69. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-26 (1995). See also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247-51 (1996) (describing benefits of public dispute resolution).

Trials certainly can perform important social functions of publicizing facts, developing common law rules and precedents, and producing judgments that promote institutional transformation. Galanter writes, “[t]he trial is a site of ‘deep accountability’ where facts are exposed and responsibility assessed, a place where the ordinary politics of personal interaction are suspended, the fictions that shield us from embarrassment and moral judgment are stripped away.”⁷⁰ Trials also can satisfy the public interest in providing opportunities for checks on government power, catharsis in dealing with events of public significance, and demonstration that the system of justice works.⁷¹ These outcomes are also possible to a considerable extent through other means. For example, although trials provide dramatic means of publicizing facts, information gathered during discovery can be publicized through other processes, including filings in public court records, non-trial adjudications, press conferences, legislative hearings, and publications by government agencies and private entities. Many cases do not involve newsworthy facts and trials may not be a particularly effective means of publicizing them. News media have limited “news holes” to fill and merely increasing the number of trials might not significantly increase the amount of publicity about truly newsworthy facts. Certainly, many non-trial processes are less dramatic and may not be widely publicized. However, some settlements and non-trial adjudications do provide opportunities for public accountability and vindication of public values. Although many settlements are kept private, a substantial number are publicized including some settlements of major public interest.⁷²

Certainly some trials lead to development of new case law. Appellate courts also develop new law based on cases decided on summary judgment motions, which may actually be more efficient in generating new law. The issues on appeal

70. Galanter, *World Without Trials*, *supra* note 19, at 22. This assumes that trials work as intended. Sometimes they do not. Trials promote what Professor Jonathan Cohen calls “the culture of legal denial,” in which lawyers seek partisan victory rather than truth or justice. See Jonathan R. Cohen, *The Culture of Legal Denial*, 84 NEB. L. REV. 247 (2005). Although this culture also affects pretrial processes including negotiation, there is much greater incentive for adversarial approaches and denial at trial. Our adversary system is premised on the assumption that justice will result from partisan procedures adjudicated by impartial judges. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 65-66 (1990) (advocating the premise “Let justice be done—that is, for my client let justice be done— though the heavens fall,” positing the existence of an opposing counsel and impartial judge to make sure that the heavens do not fall unless justice requires it). Experience shows that this is no guarantee of justice as trial procedures can be used to create misleading impressions and the ultimate results may depend on the litigants’ resources and their lawyers’ capabilities. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

71. See Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America’s Social Capital*, 2006 J. Disp. Resol. 165; Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 629-30 (2004); Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 974-79 (2004).

72. News media often publish stories about settlements. See, e.g., Kyle Whitmire, *HealthSouth Will Settle Investor Suits Over Fraud*, N.Y. TIMES, Feb. 24, 2006, at C6 (describing \$445 million settlement for accounting fraud). Many legal newspapers routinely publish information about cases that settle as well as those that are tried. See, e.g., *Verdicts and Settlements*, RECORDER (San Francisco), Dec. 20, 2005, at 5 (including reports of settlements of \$22.6 million in a toxic tort case and \$150,000 in a motor vehicle case). For a listing of about sixty sources providing information about settlements, see Blanca Fromm, *Bringing Settlement out of the Shadows: Information about Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 708-41 (2001).

of summary judgment motions are purely legal issues, as the appellate courts base their decisions on a clear set of facts⁷³ whereas some trial judgments turn on disputed factual disputes. Professor Stephen Burbank identifies potential problems with case law based on summary judgment, which may be “arid, divorced from the full factual account that has in the past given our law life and the capacity to grow.”⁷⁴ Assuming, for the sake of argument, that case law derived from trials often is superior to that based on summary judgment motions, it is not clear how much value would be added to the common law by having a larger percentage of precedential appellate decisions based on trial judgments. It is also worth noting that appellate decisions are not vanishing, considering that the total number of federal trials appealed to conclusion has been increasing⁷⁵ and the number of pages of federal opinions published each year has more than doubled since 1962.⁷⁶

Trials can lead to significant transformations of social institutions, but the same results sometimes can be achieved through settlement. Indeed, settlement offers the potential for even greater transformation as litigants have the power to agree to arrangements beyond the courts’ remedial authority.⁷⁷

There should be no doubt that having trials produces considerable social benefit. As a policy matter, however, the question is not whether to have trials. Rather, policy issues focus on such matters as whether to have more or fewer trials, what kinds of cases and litigants should get to trial, who should make those decisions, how to design litigation and trial procedures to maximize the benefits and minimize the problems, etc. Concern about loss of social benefits due to declining trial rates requires close analysis of whether the costs of conducting more trials would be worth any additional net benefit.⁷⁸ Such a detailed analysis is beyond the scope of this article. The points here are that: (1) we should not simply assume that trials are the only means of producing certain benefits, and (2) when limitations of resources require careful decisionmaking, it is important to

73. See *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992) (appellate courts review appeals of summary judgments based on facts presented by the nonmoving party).

74. Burbank, *supra* note 44, at 624-26.

75. See Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 669 (2004) (finding that the total number of federal trials appealed to conclusion rose from about 7,100 in 1987 to about 8,300 in 1995). It is not clear how many of these appeals resulted in published opinions. Judge Boyce Martin cites several studies showing that approximately 60 to 90 percent of appellate decisions are unpublished. See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 188-89 (1999). Given these rates of non-publication, increasing the number of trials would be an inefficient way to generate additional appellate case law.

76. See Galanter, *Vanishing Trial*, *supra* note 20, at 506.

77. See Menkel-Meadow, *supra* note 54, at 2672-78 (contrasting limited “remedial imagination” and authority of courts with settlement, which “offers the opportunity to craft solutions that do not compromise, but offer greater expression of the variety of remedial possibilities”); Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004) (arguing that use of deliberative dispute resolution processes in significant cases of deep moral disagreement can benefit litigants and society in ways that litigation cannot).

78. The additional net benefit of trials is the additional benefit achieved by trials compared with other methods of accomplishing the goals, taking into account the costs and problems resulting from the various dispute processes. The accounting terminology is not meant to imply that this could be readily calculated quantitatively. Rather, it is used to suggest an analytical approach of comparing benefits of different procedural regimes.

analyze various means of accomplishing the courts' goals. The following parts provide a framework for such an analysis in the context of reduced trial rates.

IV. CONSEQUENCES OF REDUCED TRIAL RATES

A. *Perceived Benefits of Reduced Trial Rates*

The Eighth Circuit clerks were asked about their perceptions of the benefits of recent changes in trial patterns in their courts. The trial rates in their courts generally seemed to be declining, at least for civil cases.⁷⁹ The most common set of responses regarding perceived benefits referred to the ability to invest more time in other cases and court business. For example, one of the clerks said, "My judges believe that the decline affords them more time to devote to substantive issues of the law, improved decision-making, and an overall improvement in the work of the law clerks."⁸⁰ Another clerk suggested that the reduced civil trial calendar helps relieve pressure to handle the criminal cases.⁸¹ A related set of comments referred to the ability to handle cases more quickly, routinely, and efficiently. One clerk said that it was easier to train his staff because the "cases tend to look pretty much alike and do not raise many unusual twists and turns."⁸² Some also see a change in the attitudes of attorneys, reflecting greater interest in settlement.⁸³

Many litigants terminating litigation before trial are also likely to benefit by avoiding some risk, saving litigation costs, and resolving the cases sooner than if the cases were tried.⁸⁴ It seems likely that in some, perhaps many, of these non-tried cases, litigants achieved such other benefits as greater satisfaction with the process and results, greater privacy, and reduced damage to relationships. This article focuses primarily on possible problems caused by reduced trial rates and thus does not provide a detailed analysis of the benefits.

79. Most of the clerks reported that the trial rates in their courts had declined in civil cases in the prior ten years or so and none reported that the civil trial rate increased. Clerks Initial Survey, *supra* note 8 (clerks 1, 2, 4, 7, 8, 9). Three clerks reported that the criminal trial rate had been stable or increased. *Id.* One should interpret these reports cautiously. Although many of the clerks provided some statistics, there was no effort to make uniform and valid assessments of the trial rates in these courts.

80. *Id.* (clerk 9).

81. *Id.* (clerk 8). The pressures from the criminal docket may inhibit civil litigants from trying cases if they find that it takes too long to get a trial date or if they risk getting "bumped" off the trial calendar if a criminal case takes priority. If these events occur, the reduced civil trial rate reflects a problem of insufficient judicial capacity.

82. *Id.*

83. *Id.* (clerks 2, 5, 9). It is hard to separate how much lawyers' increased interest in settlement is a cause or an effect of changing trial rates. Moreover, some may not see this change as positive.

84. The substantive results might or might not be better for various litigants than if the cases were tried. In assessing the substantive results of trial, one should adjust for extra litigation costs that would be needed to try the case and other considerations affecting litigants' assessments.

B. Perceived Problems Caused by Reduced Trial Rates

I also asked the clerks about problems caused by the pattern of trial rates in their courts.⁸⁵ The largest response—from about half of the clerks—was that it had not caused any problems in their courts.⁸⁶ Some of the responses may be based on clerks' philosophies about the courts' mission. For example, one clerk said:

I have a hard time viewing the overall decline in the number of trials as a bad thing for the public or the justice system. . . . No one would bemoan a decline in the number of surgeries required to cure cancer if less invasive alternatives were effectively treating those patients. In that same vein, the decline in trials should generally be viewed as a positive development rather than as a sign of a failing justice system.⁸⁷

Several clerks raised questions whether the reduced civil trial rate has left lawyers with reduced trial practice skills.⁸⁸ In addition, some lawyers reportedly are over-preparing for trials that will not take place. One clerk said, "lawyers and

85. The clerks had not analyzed this question systematically, so their responses reflected their general impressions. Confident assessments of the problems would require careful study and the clerks' responses are useful in identifying issues for further research. Given the variations between courts, particular courts interested in identifying and addressing problems related to reduced trial rates may want to conduct their own inquiries about the circumstances in their areas. See *infra* notes 30, at 110-11 and accompanying text.

86. Clerks Initial Survey, *supra* note 8 (clerks 4, 5, 6, 8).

87. *Id.* (clerk 1). This view is similar to the general perspective that Gross and Syverud describe as follows:

A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial. Much of our civil procedure is justified by the desire to promote settlement and avoid trial. More important, the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate. These are powerful forces, and they produce settlement in a very high proportion of litigated disputes. Once in a while, however, the process fails and a case goes to trial.

Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (footnotes omitted).

88. Clerks Initial Survey, *supra* note 8 (clerks 1, 6, 7). This is consistent with reports of others' concerns about lawyers' diminished trial skills due to limited trial experience. Professor Kevin McMunigal writes that

if trials are infrequent, costly, and subject to great delays, we should expect to incur a number of costs relating to lawyers: decreased advocacy skills, distorted settlements, frivolous claims, discovery abuse, and increased psychological strain on lawyers. Scarcity of trial experience threatens to exact these costs by undermining the abilities of lawyers and by creating incentives that make lawyers more likely to disserve both clients and the legal system. In other words, trials and their associated processes generate a number of benefits in terms of the competence of lawyers as well as the incentive structure under which they operate.

Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigation*, 37 UCLA L. Rev. 833, 838 (1990). See also Daniel D. Blink, *Ethics, Evidence, and the Modern Adversary Trial*, 19 GEO. J. LEGAL ETHICS 1, 56 (2006) (suggesting that inexperienced trial lawyers may be both a cause and effect of declining number of jury trials); Galanter, *Vanishing Trial*, *supra* note 20, at 521-22; Landsman, *supra* note 71, at 973 (arguing that young lawyers find it increasingly difficult to get trial experience).

litigants behave as if there really will be a trial when all is said and done. So instead of managing a dispute for settlement, they conduct the litigation as if the chances of a trial are quite high.”⁸⁹

A possible related problem is that some judges may not have enough trial experience, due to limited trial experience in legal practice and on the bench.⁹⁰ Moreover, the number and types of cases on the trial docket which, combined with other factors,⁹¹ may make it harder to attract and retain good judges as some judges enjoy trying cases and would like to try more cases.⁹²

Two clerks speculated that reduced trial rates may create inappropriate messages for litigants and the public about the courts’ willingness to try cases. One said, “a problem may exist if litigants . . . do not perceive the trial option as a viable choice available to them.”⁹³ Another said, “[m]aybe [there is] a perception problem given that the public often clamors for ‘getting their day in Court’ and our systems are designed to keep Court hours to a minimum.”⁹⁴ One clerk expressed concern that court-connected mediation conveys the message that litigants should settle their cases because juries are so unpredictable and trial is a bad and expensive process.⁹⁵

Another problem is a surplus of courtroom space in some courts, as the facilities were designed assuming that there would be more trials and that every judge needs a courtroom. Empty courtrooms can create public misperceptions that the

89. Professor Julie Macfarlane makes a similar observation: “Lawyers generally conduct litigation as if they are going to trial but they almost never do.” Julie Macfarlane, *Will Changing the Process Change the Outcome? The Relationship Between Procedural and Systemic Change*, 65 LA. L. REV. 1487, 1489 (2005). One possible explanation for such behavior is that some lawyers are insecure about their trial skills and feel a need to over-prepare in case a particular matter happens to go to trial. Another possible explanation is that some lawyers are taking advantage of their clients by providing as much justice as they can afford even if it is more than they need.

90. See Ad Hoc Committee on the Future of the Civil Trial of the American College of Trial Lawyers, *supra* note 29, at 415; Landsman, *supra* note 71, at 973-74 (arguing that judges’ lack of trial experience undermines their confidence in the trials, leading them to try to avoid trying cases).

91. Judges’ salaries have been the source of long-standing concern. Chief Justice John Roberts writes that, “Chief Justice Rehnquist wrote often about the need to raise judicial pay—going so far as to say in his 2002 Year-End Report that he felt at risk of ‘beating a dead horse.’ . . . If Congress gave judges a raise of 30 percent tomorrow, judges would—after adjusting for inflation—be making about what judges made in 1969.” John Roberts, Chief Justice of the United States, 2005 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf> (last visited Mar. 10, 2006). In addition, Senate confirmation processes can be grueling and drawn-out, leaving judicial nominees “twisting in the wind” for a long time with their legal practices in limbo. See John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1 (2003).

92. Clerks Initial Survey, *supra* note 8 (clerks 1, 2, 7, 9). Given reduced trial rates and increased pretrial activity, one clerk speculated that lawyers who want to become judges these days may have a greater desire and/or willingness to perform the managerial aspects of the job. *Id.* Clerks Discussion (clerk 1). Although some judges love trying cases, other judges prefer different judicial tasks. Professor Paul Butler describes a judge he clerked for as “happiest in her business suit, at her desk in chambers, in conference with trial attorneys, cajoling and imploring and yelling. She was never thrilled to find herself draped in a robe, in a courtroom, sitting on high.” Butler, *supra* note 71, at 627.

93. Clerks Initial Survey, *supra* note 8 (clerk 6).

94. *Id.* (clerk 5).

95. *Id.* (clerk 7).

courts are not busy doing important work.⁹⁶ When courtrooms are used only intermittently, courtroom equipment may require extra testing and service.⁹⁷

I asked clerks whether the reduction in number of trial verdicts seemed to make it harder for lawyers to settle cases because they have a harder time predicting how local judges and juries would decide cases.⁹⁸ The clerks generally did not have an opinion about this.⁹⁹ One clerk doubted that this has been a problem and noted that the few cases that do go to trial are, by definition, very unusual and thus not necessarily indicative of likely outcomes of other cases.¹⁰⁰ Even though tried cases are not representative of cases filed,¹⁰¹ many litigants nonetheless use trial verdicts in setting their settlement strategies.¹⁰² The limited amount of information on prior trial verdicts would not necessarily decrease the litigants' ability to settle—indeed increased uncertainty may stimulate some litigants to settle so that they can limit the risks of unfavorable trial judgments. The resulting settlements may be considered as less just or of poorer quality, however, to the extent that one

96. *Id.* (clerk 5).

97. Many courthouses are designed so that each judge has his or her own courtroom. Although courtrooms are used for pretrial hearings, in some courts the courtrooms are under-utilized because the focus of judges' work has shifted to various pretrial activities that do not require courtrooms. Ironically, the under-utilization itself can increase costs as it takes more effort to stage non-routine events. For example, courts may need technicians to test equipment before each trial. One clerk made the analogy that it is a lot harder on average to throw a party once in a while than to do it every day. *Id.*; Clerks Discussion (clerk 8).

98. Galanter writes that the “signals and markers that provide guidance for settlements derive increasingly from pronouncements that are not connected with an authoritative determination of facts. What does this do to the clarity of signals?” Galanter, *Vanishing Trial*, *supra* note 20, at 526. Diamond and Bina argue that “it is hard to challenge the value of trial verdicts as benchmarks against which would-be litigants and their attorneys can evaluate claims and consider how to resolve them short of trial.” Diamond & Bina, *supra* note 30, at 658.

99. Clerks Discussion, *supra* note 8.

100. *Id.* (clerk 1).

101. Gross and Syverud state that “[s]cholars are unanimous in recognizing that trials are not representative of the mass of litigated disputes.” Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996). Gross and Syverud conducted a detailed analysis of California civil cases that went to jury trial and found that

the few cases that do go to jury trial—perhaps 2 percent of civil filings, and less than 1 percent of all civil claims—are very different from the mass of cases that settle. They are typically high-risk, all-or-nothing cases, cases with unusual facts or intransigent parties, cases that defy compromise. Their outcomes, by comparison with ordinary work-a-day settlement cases, are costly, unpredictable, and sometimes bizarre. Because jury trials and jury verdicts are the most visible products of litigation, these extreme and unrepresentative cases distort public perception of the administration of civil justice. In the process, they perpetuate the image of litigation as terror, which helps drive all but the most hopeless disputes out of court, which means that any general policy based on what happens in those cases that are tried will be misconceived.

Id. at 63. See also Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1944 (1997) (referring to litigants taking cases to trial as “freaks”); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. (forthcoming 2006) (describing why published opinions and settlement and verdict reporters are incomplete and unrepresentative data sources regarding trial outcomes).

102. Gross and Syverud write:

for practitioners, trials are important primarily because they influence the terms of settlement for the mass of cases that are not tried; trials cast a major part of the legal shadow within which private bargaining takes place. Trials have this standard-setting effect despite the fact that they are not typical of the cases in which their results are used as guides for settlement.

Gross & Syverud, *supra* note 101, at 4 (footnotes omitted).

believes that settlement should approximate trial outcomes as opposed to satisfying litigants needs or achieving other goals.¹⁰³

Although this catalog of potential benefits and problems is based on the impressions and speculations of a small number of court administrators, their views are quite plausible and worth considering when analyzing what the courts might realistically do to advance the cause of justice. The next part analyzes some possible strategies to address problems that the clerks discussed.

V. POSSIBLE STRATEGIES FOR PROVIDING JUSTICE IN A COURT SYSTEM WITH REDUCED TRIAL RATES

Trial courts' functions have expanded in various ways during recent decades. Traditionally, trial courts' main role was to adjudicate at trials.¹⁰⁴ Although courts have conducted pretrial activities for quite some time, in recent decades the courts have been doing so more self-consciously, extensively, and systematically.¹⁰⁵ In recent decades, trial courts have increasingly adopted local rules.¹⁰⁶ As case referral managers, courts encourage and sometimes order litigants to use ADR processes.¹⁰⁷ Courts are also involved in various court and justice planning activities, typically involving the bar and lay communities.¹⁰⁸ Presumably many courts' initiatives began sporadically and on an ad hoc basis in various localities and became more widely adopted and institutionalized over time.

The combination of declining trial rates and tightening budgets provides courts with an opportunity to refine their role in the world of dispute resolution. In this refined role, courts could add a function as self-conscious promoters of local dispute resolution systems extending beyond the immediate reach of the courts. This expanded role provides an opportunity for courts to enhance the public service they provide. It also carries real risks described in this part; thus, courts should exercise caution.¹⁰⁹

Although it can be tempting to make strong universal recommendations for all courts, analysts should resist that temptation for several reasons. First, courts'

103. See generally Fiss, *supra* note 17.

104. See Resnik, *supra* note 67, at 380-86.

105. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1986); Resnik, *supra* note 67.

106. See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020-26 (1989) (discussing report of Local Rules Project of the Judicial Conference of the United States which found a "proliferation" of local rules, including "approximately 5,000 local rules, not including many 'subrules,' standing orders and standard operating procedures").

107. See Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 63 (2004).

108. See Coalition for Justice, ABA, Summary of State and Local Justice Improvement Activities (2003), available at <http://www.abanet.org/justice/03summary/execsummary.html> (Last visited Mar. 10, 2006) [hereinafter Coalition for Justice]. For illustrations of these initiatives, see *infra* notes 184-86 and accompanying text.

109. Courts vary in the extent to which they currently undertake these activities as well as in the level of court leaders' motivation to do so in the future. Thus, courts may range from the most traditional roles with little interest in changing to highly innovative courts with great interest in continuing innovation. Most courts are probably somewhere in between. Although the term "innovation" has a positive connotation, this article does not advocate innovation as an end in itself, but only to advance legitimate public goals through well-designed policies.

trial patterns vary widely¹¹⁰ and some courts' trial rates may not be considered as too low or as declining seriously. Second, the identification of problems and analysis of policy options in this article rest on a very thin empirical base, primarily brief surveys and conversations with a small number of court clerks. Much more detailed analysis would be needed to make definite recommendations with legitimate confidence. Most importantly, courts are not like interchangeable mechanical systems in which technicians can install fungible parts. Much depends on local culture, including perceptions, beliefs, and values of key stakeholders, especially judges and the lawyers who regularly practice in those courts. Obviously a court whose stakeholders support a given policy is more likely to succeed in implementing it than a court whose stakeholders oppose the same policy. Moreover, the process of considering, designing, and implementing a policy may affect its success. Thus a court that carefully consults its stakeholders and crafts a policy addressing the stakeholders' interests is more likely to be successful than a court imposing that same policy without such consultation. Courts concerned about problems related to changing trial patterns should use system design processes to develop policies tailored to the needs of their local court communities.¹¹¹

A. Give Litigants a Real Choice of Disputing Procedures Including Trial

Courts could respond to changing trial patterns by doing nothing, i.e., nothing different than the status quo. Many of the clerks perceived no problems with the current pattern of trial rates in their courts, suggesting the wisdom of the "if it ain't broke, don't fix it" philosophy. Indeed, some would say that the system not only ain't broke, but it is doing precisely what court leaders have been advocating in recent decades, namely helping litigants resolve cases efficiently without going to trial and arguably producing practical outcomes as good as or better than trial verdicts. Reducing the number of trials not only provides savings to litigants in cases resolved without trial; it also frees court resources to invest in other cases and court business. From this perspective, abandoning policies that promote pre-trial resolution would be tantamount to surrendering after achieving victory.

The appropriateness of this strategy would depend on making sure that the courts do not create inappropriate barriers to going to trial. One clerk said, "So long as the decision about foregoing trial in favor of a voluntary disposition is freely made by the parties, it represents a healthier and more rational approach to disputing."¹¹² Some pressure in negotiation is inevitable and often desirable. Litigants may not make reasonable decisions—or any decision—without some pressure. Excessive pressure to settle, however, undermines litigants' choice of going to trial. There are persistent reports of excessive pressure by judges and

110. See *supra* note 30.

111. For description of methods of court system design, see John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 108-18, 149 n.364 (2002). The Federal Judicial Center and the American Bar Association Section of Dispute Resolution offer technical assistance to help federal and state courts design and modify their dispute resolution programs. See also Gina Viola Brown, *A Community of Court ADR Programs: How Court-Based ADR Programs Help Each Other Survive and Thrive*, 26 JUST. SYS. J. 327 (2005).

112. Clerks Initial Survey, *supra* note 8 (clerk 1).

court-appointed mediators in some cases that undermine litigants' perceptions of the justice of the process.¹¹³ The courts are responsible for monitoring and minimizing these problems.¹¹⁴

B. Routinely Collect and Disseminate Data on Negotiation and Settlement

Courts could provide more systematic information to guide litigants in settling cases. Historically, much of the courts' impact has been through "radiating" signals that influence private negotiation, according to Galanter:

Courts contribute to the settlement of disputes less by imposing authoritative resolutions and more by pattern setting, by distribution of bargaining counters, and by mediation. Courts produce effects that radiate widely: rulings on motions, imposition of sanctions and damage awards

113. See *supra* note 55. This is not to suggest that litigants are coerced in most cases. See Wissler, *supra* note 107, at 65 (citing studies indicating that parties in mediation generally do not feel that the mediators pressured them to settle). For example, in a study of mediation in nine Ohio courts, Wissler found that "[m]ost of the parties said they were not pressured by the mediator (80 percent) or by people other than the mediator (85 percent) to accept a settlement." Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 661 (2002). In a non-trivial minority of cases, however, the parties did feel pressured. Up to 8 percent of parties said that they felt pressured by mediators and up to 5 percent said that they felt pressured by others. E-mails from Roselle Wissler to author (Mar. 18, 2006 5:04 PM, Mar. 20, 2006 9:36 AM) (on file with author) (noting that percentages varied in different courts). Wissler found that parties were more likely to feel pressured to settle when mediators expressed their views of the case and especially when they recommended a particular settlement. Wissler, *supra*, at 684-85. These findings do not show, however, that expression of opinions or recommendations necessarily lead to perceptions of being pressured. *Id.* If litigants request mediators to provide recommendations, presumably the litigants would not feel inappropriately or excessively pressured. See generally Marjorie Corman Aaron, *Evaluation in Mediation*, in *MEDIATING LEGAL DISPUTES* 267-305 (Dwight Golann ed., 1996).

114. A proposed new rule in the Model Code of Judicial Conduct states "A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute, but shall not act in a manner that coerces any party into settlement." MODEL CODE OF JUDICIAL CONDUCT Canon 2, Rule 2.09(B) (Final Draft Report Dec. 14, 2005), available at <http://www.abanet.org/judicialethics/finaldraftreport.html> (last visited Mar. 10, 2006). A comment to that rule emphasizes the importance of protecting the right to trial. "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are respected." *Id.* Cmt. 1. Similarly, Standard I of the Model Standards of Conduct for Mediators states, "A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductForMediatorsfinal-05.pdf> (last visited Mar. 10, 2006).

The provisions in the Model Rule and Model standards are appropriate statements of principle but are unlikely in themselves to reduce coercion because it is hard to define coercion (which is not defined in these provisions) and many people believe that some degree of pressure is acceptable and even desirable. See Welsh, *supra* note 55, at 59-78. In addition to adopting such rules, courts should consider designing litigation and settlement processes to minimize such abuses. Rules prohibiting coercion or bad faith are more likely to be effective in that context. See Lande, *supra* note 111.

become signals and sources of counters used for bargaining and regulation in many settings.¹¹⁵

The courts' trial decisions, which radiate most publicly, are unrepresentative of the general population of legal cases and thus are problematic as the primary basis for decisionmaking in later negotiations.¹¹⁶ Courts that regularly conduct settlement conferences produce signals that involve a larger number of more representative cases.¹¹⁷ However, the results of settlement conferences normally are not published, so these signals are relatively weak and fuzzy. Because litigants do not have clear and reliable signals about prior settlements, they typically rely, instead, on personal experience, folklore-like information, and occasional published reports of settlements.¹¹⁸

With a relatively modest investment, courts could create substantial public value by systematically collecting and disseminating information about settlements. Although people have suggested this for quite some time,¹¹⁹ few researchers or courts have been willing and able to collect such data. One exception is the U.S. District Court for the Northern District of Illinois.¹²⁰ Magistrate judges in that court complete a simple one-page form after settlement conferences where the litigants reach agreement. The form calls for data about case type; type of allegation and length of employment (in employment cases); settlement terms (including general information about non-monetary terms); itemization of damages sought and plaintiff's initial demand; defendant's initial offer; stage of litigation; and date of settlement.¹²¹ The data is kept confidential.¹²² The court collected data on 645 cases in three and a half years, which was entered into off-the-shelf database software to generate monthly reports for the magistrate judges.¹²³ Presiding Magistrate Judge Morton Denlow said that he uses the database in settlement conferences to assist litigants break impasses. In these situations, he identifies similar

115. Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 44 (1983).

116. See *supra* note 101 and accompanying text.

117. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1349 (1994) (describing the process of creating "benchmarks" in judicially-hosted settlement conferences).

118. See Fromm, *supra* note 72.

119. See, e.g., Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 970-71 (2004); Marc Galanter et al., *How to Improve Civil Justice Policy*, 77 JUDICATURE 185, 230 (1994).

120. See Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES J., Winter 2004, at 19.

121. *Id.* at 20.

122. "To preserve the confidentiality of the parties, no party names or case numbers are included on the form, and the date of the settlement conference is entered only by month and year." *Id.* at 21.

123. *Id.* at 22. The Center for Analysis of Alternative Dispute Resolution Systems designed and operates the database, producing monthly reports for the court. *Id.* Denlow and Shack report that "[b]ecause the project's format was kept simple, the time spent to develop the database was not significant, nor is the amount of time necessary to update it each month. . . . one person spends approximately one hour a month entering data and preparing the monthly summary report." *Id.*

cases to help them develop realistic cases valuations.¹²⁴ The database also can help educate new judges who are not familiar with particular types of cases.¹²⁵

Additional courts might experiment by developing similar databases, recognizing some potential problems described below.¹²⁶ Courts using magistrate judges to host settlement conferences might require these judges to provide this data, though this system would probably work well only if a substantial proportion of the judges participate voluntarily. Similarly, courts that maintain a roster of mediators could require mediators to provide such data as a condition for inclusion on the roster. Again, courts might choose to collect data only from mediators who are willing to provide the information voluntarily. Some courts already require mediators to file brief reports about cases,¹²⁷ so providing basic information about the settlements would be an extension of such requirements. Courts could use paper forms and/or design systems on their websites to enable neutrals¹²⁸ to enter the data through secure connections to the internet. Each court could design a database to collect information that is particularly useful given its caseload and interests. It would be desirable to develop some standardized data elements and definitions to permit comparisons between courts.¹²⁹ Judge Denlow emphasizes that for database systems to work well in practice, they should be simple and easy to use.¹³⁰ It would also be helpful if neutrals would provide data on all cases, not merely those that settle, to help analyze which cases settle and which do not.¹³¹

Courts would need to ensure the confidentiality of the data as many litigants would not participate seriously in court-connected settlement processes unless they have real confidence that sensitive information will not be disclosed.¹³² This

124. Telephone interview with Morton Denlow, Presiding Magistrate Judge, U.S. District Court for the Northern District of Illinois, in Chicago (Mar. 6, 2006).

125. *Id.*

126. *See infra* notes 139-42 and accompanying text.

127. *See, e.g.*, E.D. Mo. Loc. R. 16-6.05(B) (requiring neutrals to file compliance reports with the courts following each ADR referral).

128. "Neutrals" include settlement conference hosts and mediators.

129. *Cf.* Brown, *supra* note 111, at 337 (describing list of ten most important data elements about ADR that courts should collect, based on survey of court administrators).

130. Interview with Morton Denlow, *supra* note 124.

131. For example, in the U.S. District Court for the Northern District of Illinois, Magistrate Judge Geraldine Soat Brown kept track of all cases in which she hosted settlement conferences and found that in cases that did not settle within six months of her settlement conference, the plaintiffs generally had poor results. She hypothesizes that plaintiffs may have fared poorly at trial because they did not value cases as well as defendants. *See* Geraldine Soat Brown, *What Happens to Cases That Don't Settle?*, DISP. RESOL. MAG., Spring, 2005, at 25. For a detailed study of cases that did not settle, see Gross & Syverud, *supra* note 87.

132. Some commentators have criticized the lack of access to data about settlements that affect public health and safety or other public interests. *See, e.g.*, David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217; Luban, *supra* note 69, at 2648-58. Thus, it might be tempting to use settlement databases to provide public access to such settlements. Attempting to use settlement databases for this purpose, however, would be self-defeating. Mandating disclosure of sensitive information in these processes would certainly cause some litigants to spurn those processes and, instead, use truly private negotiation or mediation. Efforts to require neutrals to disclose settlements would also stimulate intense opposition by the neutrals because protection of the confidentiality of settlement processes is a fundamental ethical principle. *See, e.g.*, A.B.A. ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS STANDARD V (2005) ("A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."),

would involve designing the systems so that they would collect little or no information that would identify litigants or cases. If such databases would include any identifying information, the courts would need to assure that it would not be disclosed. Courts should consider giving notice to litigants in each case or requesting their consent to include data from their case in the database.¹³³ Many litigants probably would be willing to permit such data collection if they know that it contributes to a system that would benefit them and others. Perhaps the biggest barrier would be a reticent legal culture wary of embracing a new process. Although such resistance would preclude development of database systems in some courts, experience shows that this is not necessarily an insurmountable barrier.¹³⁴

Litigants, lawyers, courts, and society would presumably benefit from routinely collected and disseminated data about settlements. In producing such data, courts would presumably radiate clearer, stronger, and more valid settlement signals about representative cases than provided by trial verdicts. This would facilitate well-informed settlements and could avoid unnecessary trials. By relying on the courts' settlement data, litigants and their constituents¹³⁵ would have greater confidence about the settlement value of disputed cases. This may provide particular value to "have-not" litigants, who otherwise are likely to have less infor-

available at <http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf> (last visited Mar. 10, 2006).

Full discussion of this issue is beyond the scope of this article. For thoughtful analyses of the problems of publicizing settlement negotiations and results, see ROSCOE POUND INSTITUTE, OPEN COURTS WITH SEALED FILE: SECRECY'S IMPACT ON AMERICAN JUSTICE (2000) (report of the 2000 Forum for State Appellate Court Judges); Fromm, *supra* note 72; Menkel-Meadow, *supra* note 54, at 2682-87, 2694-96.

133. In the Northern District of Illinois, the court does not request litigants' consent to include the data in the database because the data does not identify the case number, the parties, or the judges. Interview with Morton Denlow, *supra* note 124. Some courts might establish database systems through local rules or orders and effectively give notice through this generalized process. To gain greater legitimacy for the system, other courts might provide notice to or obtain consent of the litigants in each case. Courts might create benefits for giving consent, such as providing greater use of the database in cases where the litigants have given consent.

134. Many lawyers and judges have initially resisted use of ADR, only to become evangelical converts—or at least pragmatic users. See Lande, *Getting the Faith*, *supra* note 38, at 171-76; Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 254-56.

Some personal experiences illustrate changing legal culture about confidentiality in mediation. When I began mediating in California in the mid-1980s, it was difficult for outsiders (such as novice practitioners) to get permission to observe mediations. When I lived in Florida a decade later, professionals and litigants routinely accepted attendance by observers. I observed a number of mediations and almost no one appeared to give it much thought. One possible reason for the difference in attitudes was that a state court rule required mediators to observe mediations to become certified. See FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.010 (2005), available at http://www.flcourts.org/gen_public/adrc/certify.shtml (last visited Mar. 10, 2006). This imprimatur of the state supreme court provided great legitimacy and presumably had a significant effect on the legal culture. I had a similar experience with a mediation program I directed at the University of Arkansas-Little Rock Law School in the late 1990s where the courts directed parties to attend the mediation and law students routinely observed without much apparent concern by the parties.

135. See AARON, *supra* note 113, at 302 (describing need for litigants to provide assurances to their superiors that settlement concessions were necessary and appropriate); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 343-47 (3d ed. 2003) (describing need for litigants to develop agreements acceptable to their constituents).

mation about settlement values than opponents who are “haves.”¹³⁶ It would also add some public accountability in a process shrouded in secrecy. Publishing settlement data could also contribute to greater understanding of the settlement process for court personnel in managing their systems and for scholars in developing more sophisticated knowledge about the legal process. The courts are in a unique position to undertake such a project and create such benefits. In a market for dispute resolution services, courts could gain some competitive advantage by highlighting the quality of their settlement services, enhanced by their data on settlements.¹³⁷

Maintaining a system of settlement data would create some manageable risks. Neutrals and lawyers could use these data to exert excessive pressure to settle,¹³⁸ which would be a serious abuse. Even without such pressure, litigants could rely too much on the data, which cannot be completely comparable because databases could not include all relevant factors.¹³⁹ Moreover, although litigants can reasonably use results in other cases as the sole or primary basis for their settlement decisions, these are not the only—or necessarily the most appropriate—standards that they might choose. Indeed, the dispute resolution field has highlighted the value of focusing on litigants’ interests as well as other possible standards of fairness.¹⁴⁰ For neutrals and litigants to use such databases properly, they would need to be carefully informed about potential misinterpretations and misuses of the data. Courts might conduct educational programs when introducing such databases and provide concise and understandable information sheets to assist in interpretation whenever the data are used.

Another potential problem is that settlement databases could easily track information about neutrals that could distort the process. For example, if neutrals are required to provide reports about cases where litigants do not settle, the system

136. See Brown, *supra* note 131, at 26-27; Fromm, *supra* note 72, at 700-02; see generally Galanter, *supra* note 19.

137. Some people may bristle at the notion that courts operate in a market and that courts compete for dispute resolution “business.” Courts whose leaders hold these views obviously would be unlikely to adopt market-oriented strategies to attract litigants. On the other hand, some courts do define their roles, at least in part, as providers of services in a market. See *supra* notes 59-63 and accompanying text. Courts might publicize the fact that settlement services are available to litigants. Any increased costs are likely to be minimal and might be included in general fee increases as part of the “examination of court fees to reflect economic changes” contemplated in the courts’ cost-containment strategy. See *supra* note 46.

138. Cf. Lavinia Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 279, 299 (Deborah M. Kolb ed., 1994) (describing a case where mediator pressured parties to settle on value generated through decision tree analysis). See also *supra* notes 55, 113-14 and accompanying text (discussing coercion in court-connected mediation).

139. Judge Denlow said that a settlement database is appropriate for types of cases that are fairly comparable and handled in sufficient number to provide appropriate comparisons. For example, he finds the database useful in employment discrimination cases, civil rights cases, and personal injury cases but not contract cases. Interview with Morton Denlow, *supra* note 124.

140. See ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-55, 81-94 (2d ed. 1991). Some people may think that litigants should focus only on the issues and interests in their case and should not care about settlement decisions by litigants in other cases. Many litigants do care very much, however, about other cases as they “bargain in the shadow of the law.” See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 980 (1979). Given the greater number of settlements than trial verdicts, patterns of settlements negotiated in the shadow of the law themselves become an important part of “the law.” Interview with Morton Denlow, *supra* note 124.

could generate data on neutrals' settlement rates. If this would be publicly disseminated, it could create pressure on neutrals to get "another notch on their belts" by pressuring litigants to settle.¹⁴¹ Similarly, courts could generate and distribute data comparing the outcomes for various neutrals. It would be inappropriate, however, for courts to publicize data identifying particular neutrals because this would enable litigants to "shop" for neutrals who would seem to produce certain patterns of results, such as higher or lower average settlements. Although this may (or may not) be an appropriate basis for selecting arbitrators, it clearly is inappropriate for selecting mediators because they should not be responsible for producing the outcomes, unlike arbitrators. This is probably not an exhaustive list of potential abuses of settlement databases. Court administrators who develop such systems should be attentive to the potential for abuse and take action to prevent it. There is no guarantee that developing settlement databases would produce benefits offsetting any problems, but the potential benefits should prompt some courts to experiment carefully with such systems.

C. Design Court Facilities to Fit Realities of Litigation

Some courthouses have been designed for an earlier era when courtrooms were used more frequently. Having a separate courtroom for each judge provides real convenience for judges and their staffs. Given the current patterns of litigation and financial support for the courts, it may also be a luxury that society will not be able to afford as much as in the past.¹⁴² Indeed, the Administrative Office of the United States Courts recognizes this situation and, as part of its cost containment strategy, has decided to "impose tighter restraints on future space and facilities costs."¹⁴³ There may be ways to design facilities that better serve court personnel, lawyers, litigants, and the public without excessive dislocation. This might involve court facilities with more variety in courtrooms and spaces for conferences in chambers, mediations, and other activities as reflected in projected patterns of court use.

D. Reform Legal Education to Reflect the Realities of Legal Practice

Changing patterns of litigation reflect a need for legal education to train lawyers to work as trial advocates and to perform other legal functions.¹⁴⁴ Declining trial rates reflect the reality that a large and growing portion of litigators' work involves pretrial rather than trial activity. Although some pretrial activity is direct preparation for impending trials, much legal work involves a range of other tasks

141. See Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOT. J. 329, 329-31 (1995).

142. See Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 835-39 (2004) (describing Congressional skepticism about the need for courtrooms for each judge).

143. See *supra* notes 46-48 and accompanying text.

144. This article provides a brief discussion of implications of declining trial rates for legal education. For a more extensive analysis of the kinds of tasks that lawyers actually perform and the implications for law schools and continuing legal education, see Julie Macfarlane & John Manwaring, *Reconciling Professional Legal Education with the Evolving (Trial-less) Reality of Legal Practice*, 2006 J. DISP. RESOL. 253. See also Hecht, *supra* note 29, at 181 (making recommendations for changes in legal education).

including client interviewing and counseling, drafting pleadings and discovery documents, motion practice, negotiation, and advocacy in ADR processes as well as tasks in transactional matters.¹⁴⁵ In 2005, the A.B.A. revised its standards for legal education to “require that each student receive substantial instruction in . . . problem solving, and oral communication . . . and other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.”¹⁴⁶ Although there have been significant changes in legal education in recent decades to reflect the realities of legal practice,¹⁴⁷ more is needed.¹⁴⁸

145. The ABA’s influential “MacCrate Report” identified ten “fundamental lawyering skills” including problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 135-221 (1992) (commonly known as the “MacCrate Report”) [hereinafter, MACCRATE REPORT].

Researchers Marjorie Shultz and Sheldon Zedeck are conducting a study to identify factors predicting the effectiveness of lawyers. The first phase of the study involved individual interviews, focus group interviews, and a large sample survey to collect data from more than 2,000 judges, clients, students, faculty, and lawyers in many practice fields, at various career stages, and in various career settings. See Linley Erin Hall, *What Makes for Good Lawyering?*, TRANSCRIPT, Summer 2005, at 22, available at http://www.law.berkeley.edu/alumni/transcript/summer_05/22-27_feat_23_lsat_final.pdf (last visited Mar. 10, 2006); Marjorie M. Shultz, *Expanding the Definition of Merit*, TRANSCRIPT, Summer 2005, at 25, available at http://www.law.berkeley.edu/alumni/transcript/summer_05/22-27_feat_23_lsat_final.pdf (last visited Mar. 10, 2006). Shultz and Zedeck generated a list of twenty-six factors, including elements relating to analytical, research, communication, planning, organizational, problem solving, and conflict resolution skills as well as certain personal qualities. See Hall, *supra*, at 24.

146. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A.B.A., STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 3.02(a)(2), (4), available at <http://www.abanet.org/legaled/standards/standards.html> (last visited Mar. 10, 2006). Interpretation 302-2 states:

Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302 (a)(4).

Id.

147. A recent survey of law school curricula found that between 1992 and 2002, ABA-approved law schools substantially increased the number of six pretrial skills courses, including alternative dispute resolution, arbitration, interviewing and counseling, mediation, negotiation, and pretrial advocacy. See SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A.B.A., A SURVEY OF LAW SCHOOL CURRICULA: 1992-2002 34 (2004). ADR was the most frequently offered skills course in 2002. Of 151 schools in this comparison, almost 140 offered an ADR course, about 120 schools offered mediation and negotiation courses, about 100 offered pretrial advocacy, about 80 offered arbitration courses and about 80 offered interviewing and counseling courses. *Id.* Law schools also increased the number of planning and drafting, live clinical, and externship courses in the 1992-2002 period. *Id.* at 34-36. Law schools increased graduation requirements for skills courses, primarily by increasing the number of credits required for first-year legal research and writing courses, typically from two to four credits. According to the survey, “many schools have added interviewing, counseling and negotiation components into this course,” though it does not provide specific numbers. See *id.* at 44.

148. In 2002, only 45 (29.6 percent) of ABA-approved law schools required specific skills courses, simulation courses, clinical experience, and/or externships for graduation. See *id.* at 20. This is not to suggest that merely including a skills requirement would prepare law students sufficiently or that it would be easy for law schools to change their curricula to make desirable changes. This is a challenging problem and it is beyond the scope of this article to offer a comprehensive analysis or prescription.

Trials are essential in our legal system and lawyers generally need to know how to perform trial advocacy skills even though trial rates are generally declining. This presents a dilemma of needing to invest additional resources to train lawyers for a shrinking portion of lawyers' work, as paradoxical as that may seem.¹⁴⁹ Legal educators, bar leaders, judges, and court administrators should consult with each other to consider how to deal with this problem effectively.¹⁵⁰ As the MacCrate Report recognized, the system of professional development for lawyers must extend beyond law school¹⁵¹ and thus training in trial advocacy will need to continue during lawyers' life in practice. Courts have a special knowledge of and interest in needs for training in trial advocacy and thus should take an active role in developing and implementing strategies to address deficiencies in trial advocacy skills. For example, courts may collaborate with bar associations to promote pro bono programs that help needy clients and also provide useful trial practice experience for lawyers.¹⁵²

149. Looking only at statistics about declining federal court trial rates would not fully recognize the need for trial advocacy skills, as many of the same skills would be valuable for advocacy in pretrial, arbitration, administrative law, and private organizational hearings. See *supra* notes 24-25 and accompanying text (describing possible transformations of an overall system of handling disputes in which advocacy takes place outside trial courts).

150. Interpretation 302-6 of the A.B.A. Standards for law schools states, "A law school should involve members of the bench and bar in the instruction required by Standard 302(a)(5) [relating to 'the history, goals, structure, values, rules, and responsibilities of the legal profession']." SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *supra* note 146. All of the district courts in the Eighth Circuit have federal practice committees, which are charged with "work[ing] with bar associations and law schools to develop continuing legal education programs," among other things. OFFICE OF THE CIRCUIT EXECUTIVE, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT, 2004 ANNUAL REPORT 145 (2004).

Part of the solution could entail educating law students and lawyers about specialization in trial advocacy and encouraging lawyers who are not trial specialists to engage trial specialists when needed. Although this may help a bit, it would not address some fundamental realities of practice. In smaller communities where the bar is not highly specialized, there simply may not be any trial specialists or a large enough pool to try most cases. Even in larger communities, it seems impractical for litigators to hand off relatively short trials to trial specialists, as the additional costs would often be disproportionate to the benefit. For many longer trials, it is unrealistic to expect that litigators would give up control of the case, as this would require them to sacrifice income and status. Even in large law firms, where the income would stay within the firm, many lawyers would be reluctant to lose personal income and status by turning cases over to firm members who specialize in trials. Thus, although creating a specialized trial bar might help address a problem of poor trial skills, it would be an inadequate solution.

151. MACCRATE REPORT, *supra* note 145, at 305-17.

152. Nathan Koppel, *Trial-less Lawyers—As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates' Courtroom Skills*, WALL ST. J., Dec. 1, 2005, at B1. To give lawyers trial experience, some law firms are assigning their lawyers to take pro bono cases that might go to trial. *Id.* These include cases involving prisoners' complaints, domestic abuse, traffic altercations, and routine slip-and-fall cases. *Id.*

On the other hand, some lawyers want to provide some pro bono assistance but do not want to accept the responsibility of litigating and trying cases. One of my LL.M. students, Larry McLellan, has been working with the Polk County Bar Association Volunteer Lawyers Project (centered in Des Moines, Iowa) to develop a collaborative law project in which lawyers represent clients in negotiation but are disqualified from representing them in litigation. Larry McLellan, *Expanding the Use of Collaborative Law: Consideration of its Use in a Legal Aid Program for Resolving Family Law Disputes* (May 9, 2006) (unpublished manuscript, on file with author). Such cases that do go to trial would provide good opportunities for lawyers who seek trial experience.

The Family Law Education Reform Project is a good example of an effort to revise law school instruction to address practical needs of lawyers and clients.¹⁵³ The Project was conducted by the Hofstra Law School Center for Children, Families and the Law and the Association of Family and Conciliation Courts. The Project engaged legal academics, practitioners, and judges to consider the skills needed by family law practitioners and how law schools might best prepare future lawyers to work in the world of practice that they will encounter.¹⁵⁴ The Project's report provides detailed recommendations for law schools in reevaluating their family law curricula to include such subjects as the goals of family dispute resolution, the appropriate role of family courts and judges, multiple roles and responsibilities of family lawyers, roles of allied professionals, needs of unrepresented litigants, function of dispute resolution processes, and family violence.¹⁵⁵ Although family law matters generally are not handled in federal courts, this project is a good model of how academics, practitioners, and courts can collaborate in preparing lawyers to function well in practice.

E. Make Judging More Attractive to Judges

It is important to attract good judges to serve in our courts. The reduction in opportunity to try cases may be a factor making judicial service less attractive for some people to accept judicial appointments or to continue sitting on the bench.¹⁵⁶ Some judges enjoy non-trial duties as much as or more than conducting trials.¹⁵⁷ In particular, some judges undoubtedly derive satisfaction from managing litigation and others relish hosting settlement conferences. Indeed, it is likely that judges' skills at these tasks vary and are presumably correlated to their enjoyment of the tasks.¹⁵⁸ Courts could take advantage of these differences by varying the distribution of tasks assigned to different judges, so that some judges can devote more of their time to trials, others to settlement conferences, etc. Federal courts can take advantage of the senior status and magistrate judges to handle different parts of the workload. Some courts, for example, rely extensively on magistrate

153. See Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform, Final Report*, 44 FAM. CT. REV. (forthcoming 2006), available at http://www.afcnet.org/about/fam_law_tf.asp (last visited Mar. 10, 2006).

154. In connection with this project, Hedeon and Salem conducted a survey of practitioners and students to determine what knowledge and skills are most important for family lawyers. See Timothy Hedeon & Peter Salem, *What Should Family Lawyers Know? Results of a Survey of Practitioners and Students*, 44 FAM. CT. REV. (forthcoming 2006).

155. See O'Connell & DiFonzo, *supra* note 153, at vi.

156. As noted above, such other factors as politicized confirmation processes, relatively low salary compared with private practice, and the composition of the caseload may affect sitting and prospective judges' feelings about judicial service. See *supra* text accompanying notes 91-92. In general, it is hard to know how reduced opportunities to try cases fits into their overall assessments given the other factors.

157. Although some judges love trying cases, other judges prefer different judicial tasks. For example, Butler describes a judge he clerked for as "happiest in her business suit, at her desk in chambers, in conference with trial attorneys, cajoling and imploring and yelling. She was never thrilled to find herself draped in a robe, in a courtroom, sitting on high." See Butler, *supra* note 71, at 627.

158. Cf. Honeyman, *supra* note 28, at 112 (noting that, for a time, some administrative law judges of the Wisconsin Employment Relations Commission preferred to mediate and others preferred to hold hearings and that judges' assignments were based, in part, on their skills and interests in doing different tasks).

judges¹⁵⁹ or senior status judges¹⁶⁰ to host settlement conferences. Such a system could free full-time Article III judges to spend more time on other tasks, such as conducting trials, if desired.

F. Promote Local Conflict Resolution Systems

Using Galanter's concept of the "ecology" of conflict, we can see that the court trial is an important but relatively small feature in a highly diverse environment featuring various species of conflict processing.¹⁶¹ Perhaps the courts previously functioned like a dominating king of the jungle. As Galanter suggests, the conflict environment in the U.S. has changed in many complex ways,¹⁶² making it so there can not be a single master. In a pluralistic system of conflict resolution with great local variation, courts play a leading role, though not the highly centralized commanding role that they may have played in the past.

In this leading role, courts can take the initiative to analyze problems and develop court rules and programs based on those analyses. The federal courts have been particularly active in such planning and program development initiatives. By statute, each district court must appoint an advisory committee to study the court's rules and internal operating procedures and to make recommendations to the court.¹⁶³ The Civil Justice Reform Act of 1990¹⁶⁴ (CJRA) required each court to create a representative advisory group to make recommendations about local court management practices.¹⁶⁵ The CJRA required courts to consider the advisory group recommendations but courts were not required to follow them in adopting "civil justice expense and delay reduction plans."¹⁶⁶ The U.S. Judicial Conference,¹⁶⁷ the RAND Institute for Civil Justice,¹⁶⁸ and analysts Douglas K. Somerlot

159. See, e.g., ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 75-76 (2001); DAVID RAUMA & DONNA STIENSTRA, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DELAY REDUCTION PLANS: A SOURCEBOOK 227-39 (1995); Robert M. Levy, *ADR in Federal Court: The View from Brooklyn*, 26 JUST. SYS. J. 343, 344, 348 (2005). See generally D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986).

160. See, e.g., Geetha Ravindra, *Virginia's Judicial Settlement Conference Program*, 26 JUST. SYS. J. 293, 302-04 (2005) (describing state courts' use of retired judges to conduct settlement conferences).

161. See Lande, *supra* note 6, at 199-211.

162. See *supra* notes 22-27 and accompanying text.

163. 28 U.S.C. § 2077(b) (2005). In the Eighth Circuit, each district court is also required to establish a "federal practice committee," to (1) study the practice and procedures in the district and make recommendations regarding case processing, (2) give advice about maintaining a high level of competency of lawyers practicing in the courts, (3) work with bar associations and law schools to develop continuing legal education programs, and (4) assist in planning the annual Eighth Circuit conference. Office of the Circuit Executive, *supra* note 150, at 145.

164. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-479 (2000). The CJRA expired on December 1, 1997 under a sunset provision in the legislation. Pub. L. No. 101-650, 104 Stat. 5090 § 103(b)(2)(A) (1990).

165. See 28 U.S.C. § 472 (2000). The advisory groups were required to include attorneys and representatives of major categories of litigants. *Id.* § 478(b). Under the CJRA, the advisory groups were required to prepare reports including: (1) an assessment of the courts' dockets, (2) recommended measures, rules, and programs, and (3) the basis for their recommendations. *Id.* § 472(b).

166. *Id.* § 472(a).

167. The U.S. Judicial Conference found that the "advisory group process proved to be one of the most beneficial aspects of [the Act] by involving litigants and members of the bar in the administration of justice" and recommended that the courts, in consultation with the advisory groups, continue to perform regular assessments after the CJRA expired. JUDICIAL CONFERENCE OF THE UNITED STATES,

and Barry Mahoney¹⁶⁹ all endorsed or favorably evaluated the local advisory group process. The CJRA local advisory groups as well as the various bodies and activities described above are examples of “dispute systems design” processes or components of them.¹⁷⁰

Most of the clerks thought that the CJRA had a significant impact in speeding up the handling of cases in their courts.¹⁷¹ Several clerks said that requiring reports on pending cases had a definite impact, especially reports tracking the number of cases more than three years old.¹⁷² Many of the clerks found that collecting and publishing statistics was particularly effective. One clerk related:

THE CIVIL JUSTICE REFORM ACT OF 1990: FINAL REPORT 19 (1997), available at <http://www.uscourts.gov/cjra/cjrafin.pdf> (last visited Mar. 10, 2006).

168. The RAND Institute for Civil Justice conducted a major evaluation of the CJRA, including the operation of the court advisory groups. The RAND researchers found that the advisory group reports “generally reflected considerable independence from the court” and that the courts responded positively to the reports, adopting more than 75 percent of the advisory groups’ major recommendations. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 26 (1996). The researchers concluded that “the CJRA advisory group process was useful, and [that] the great majority of advisory group members thought so too.” *Id.*

Soon after the CJRA began to be implemented, Professor Lauren Robel surveyed members of local advisory groups. See Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 897-900, 905-06 (1993). She found mixed reactions, with many respondents believing that these groups improved understanding and cooperation between bench and bar, and some believing that the process was not worthwhile. *Id.* Some respondents were not satisfied in districts that did not have major problems to solve and where solutions required increases in resources or limitations in federal jurisdiction that were beyond the ability of local courts to implement. *Id.* The fact that Robel’s study was conducted so soon after enactment of the CJRA meant that advisory group members had little experience with those groups and may explain why her findings were somewhat less positive than in the other assessments cited in the text.

169. Douglas K. Somerlot and Barry Mahoney studied implementation of CJRA advisory groups as well as counterparts in the California state court system. See Douglas K. Somerlot & Barry Mahoney, *What Are the Lessons of Civil Justice Reform? Rethinking Brookings, the CJRA, RAND, and State Initiatives*, JUDGES’ J., Spring 1998. They concluded that the “emergence of collaborative approaches to solving court system problems, as demonstrated by the advisory committees established under the CJRA...provides a very hopeful model of cooperative effort toward solving significant judicial branch problems.” *Id.* at 4, 62.

170. For a brief overview of dispute system design, see Lande, *supra* note 111, at 112-18.

171. Clerks Initial Survey, *supra* note 8 (clerks 1, 2, 4, 5, 7, 8). Only one clerk said that the CJRA had little effect in his court—but that was because the court managed cases expeditiously even before CJRA was enacted. *Id.* (clerk 9). Another clerk described the impact in his court:

The effect in [my court] has been substantial and sustained. We changed our civil assignment system to include magistrate judges in the draw [for case assignment], we developed differentiated case management tracks to make sure that cases were being evaluated for their management needs based on the level of complexity, and we added an ADR component. In combination, these initiatives put the court distinctly in the case management business in ways that helped insure trial date certainty and accountability. Cases simply do not have the opportunity to linger unnoticed on the docket. They are moved persistently toward disposition, by whatever method is appropriate to each case.

Id. (clerk 1).

172. One clerk reported:

The semiannual report showing by U.S. district judge and magistrate judge all pending motions more than six months, all bench trials that have remained undecided more than six months, and all civil cases pending more than three years has positively impacted the court as a whole. Most of our judges strive to keep the number of reportable items to a minimum. Instead of working from a six-month motion report, many of our judges impose a 60-day limit on the ruling of dis-

I've worked in 3 different districts since the inception of CJRA and my observations are that it has made judges more conscious of and accountable for their civil caseload and particularly the age of motions. Like many things for all of us, once something's brought to our attention, we deal with it. Even remembering the work that went into setting the whole system up and the work it takes each time reports are due, my opinion is that it's been time and effort well spent and I don't know that it would've happened any other way.¹⁷³

Two clerks reported that CJRA also led to the development of vigorous ADR programs in their courts.¹⁷⁴

Although most of the clerks reported some significant effects from one or more components of the CJRA, they reported widely differing impacts of the advisory groups, ranging from almost no impact to very significant impact. One clerk said that in his court, the

advisory group was surprisingly aggressive and assertive in its recommendations to the court for reducing delay. I know this Congressional directive was merely winked at in many jurisdictions, producing very little of substance and almost no changes. Ours was a watershed experience. This court has been substantially reformed as a result of the work of the CJRA advisory group, and the follow up by the judges and staff that implemented the group's recommendations.¹⁷⁵

Several clerks said that the advisory groups in their courts made a difference while the CJRA was in effect but not any longer.¹⁷⁶ Most of the clerks said that their courts' federal practice committees—which could function, in effect, as successors to the CJRA advisory groups—are not very active.¹⁷⁷ Some clerks would like these committees to be more active but they report little interest by the lawyers or judges.¹⁷⁸ One suggested that these committees are likely to be most motivated and effective when given a specific task, such as developing CJRA reports, court rules, or electronic case filing systems.¹⁷⁹

If courts are concerned that declining trial rates are causing serious problems, there are ample precedents for them to convene local groups of stakeholders to analyze the problems and develop recommendations. For example, courts that are concerned about inadequacies of lawyers' trial skills could press their courts' advisory committees to develop plans to address this problem.

positive motions. The judges' efforts are paying off. In 1993, the percentage of civil cases over three years old was 4.3 percent. In 2003, the percentage dropped to 1 percent.

Id. (clerk 4).

173. *Id.* (clerk 7).

174. *Id.* (clerks 1, 5).

175. *Id.* (clerk 1).

176. *Id.* Clerks Discussion (clerks 2, 8, 9).

177. For example, one clerk described the practice committee in that clerk's court as being on "life support" and said that the court's committee "acts only when we push them." *Id.* (clerk 9). Another clerk said that the court "brought it back to life" to review the court's ADR program. *Id.* (clerk 5).

178. *Id.* (clerk 9).

179. *Id.* (clerk 1).

Courts can also take initiative in addition to responding to problems. It may seem paradoxical to suggest that courts expand their activities when facing increasing caseload and budget pressures. However, some initiatives can create significant value with relatively little cost. For example, many of the planning and policymaking activities require a limited amount of volunteer effort and often even less time from judges and court staff. Developing settlement databases is an example of an initiative that need not require a great expenditure of courts' staff time or money after initial development.¹⁸⁰

Courts have a valuable resource to contribute to justice initiatives, namely their legitimacy. Our society has invested great authority in the judiciary as an essential branch of government.¹⁸¹ When judges talk, people (especially lawyers) listen—and often take them quite seriously.¹⁸²

Courts that want to promote justice can work with entities outside the court system in activities beyond the immediate reach of the courts' dockets. For example, courts have worked with bar groups and others on committees and task forces to identify problems facing the justice system and to develop solutions.¹⁸³ Courts have collaborated in conducting citizens' conferences, town hall meetings, and community forums to promote two-way communication with the public about various justice issues.¹⁸⁴ More ambitiously, courts have participated in "futures commissions" to "examine long-term possible scenarios for the justice system and to make plans to meet those alternate futures."¹⁸⁵

Like the sorcerer's apprentice, courts should be careful in using their great power, as they venture beyond litigation. Judges naturally are most familiar with legal rules and procedures in an adversarial system and typically view conflicts using what Professor Leonard Riskin calls the lawyer's "standard philosophical map."¹⁸⁶ This map is based on two key assumptions: "(1) that disputants are adversaries—i.e., if one wins, the others must lose and (2) that disputes may be re-

180. See *supra* Part V.B.

181. See Kagan, *supra* note 64, at 7-19 (arguing that U.S. society relies heavily on courts as a result of strong political culture in which the public generally expects legal protection through courts as an alternative to centralized government regulation).

182. In a study in Arizona courts, researchers Roselle Wissler and Bob Dauber found that the frequency that judges suggested ADR was the factor most strongly related to how often lawyers discussed ADR with opposing counsel during litigation. Roselle L. Wissler & Bob Dauber, *Leading Horses to Water: The Impact of an ADR "Confer and Report" Rule*, 26 JUST. SYS. J. 253, 265 (2005). They found that rules merely requiring lawyers to meet and confer were not effective in promoting conversations about settlement and actual settlement whereas other research suggested that early court involvement may be more effective. *Id.* at 265-70. For example, in a survey of Arizona attorneys, Wissler found that attorneys "who reported that the court suggested ADR in fewer of their cases were less likely to discuss ADR with their clients and with opposing counsel." Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 OHIO ST. J. ON DISP. RESOL. 459, 488-89 (2004) (footnotes omitted).

183. See, e.g., Lucinda S. Brown, *Court and Community Partners in Massachusetts*, 81 JUDICATURE 200 (1998); Court and Community Collaboration Project, Judicial Council of California, available at <http://www.courtinfo.ca.gov/programs/community/> (last visited Mar. 23, 2006) ("project's two-part approach emphasizes the establishment of Community-Focused Court Planning in California's trial courts and the design and implementation of Court Community Outreach programs at the local level"). See generally Coalition for Justice, *supra* note 108.

184. See Coalition for Justice, *supra* note 108.

185. *Id.*

186. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982).

solved through application, by a third party, of some general rule of law.”¹⁸⁷ This map clearly is helpful and appropriate in some cases. It is problematic, however, when people assume that it is the only or necessarily best “map” for handling conflicts. One of the great achievements of the modern dispute resolution movement has been to offer a choice from a range of other “maps” to disputants and dispute resolution professionals.¹⁸⁸ The choice of conceptual maps applies not only to disputes between litigants, but also in making decisions about case management systems generally and about ADR programs in particular.¹⁸⁹ The point is not to abolish the lawyers’ standard map but rather to encourage appreciation of the value of choosing from multiple maps to best satisfy the interests of the courts’ stakeholders.¹⁹⁰

G. Consider Changes in Judicial Policies to Increase Trial Rates if Appropriate

I asked the Eighth Circuit district court clerks what actions the courts might take to increase the number of trials and whether they would recommend such actions. This part describes and analyzes ideas that the clerks brainstormed. Neither the clerks nor this article necessarily recommend any of these ideas, as indi-

187. *Id.* at 43-44.

188. See generally Lisa Blomgren Bingham, *When We Hold No Truths to be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131. Judges and lawyers should avoid unconscious “creeping legalism,” a dynamic in which ADR procedures that are intended to provide alternatives to the lawyer’s standard philosophical map gradually become formalized and resemble traditional litigation. See Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, DISP. RESOL. J., Feb.-April, 2003, at 37; Macfarlane, *supra* note 89, at 1493-96 (describing major impact of lawyers’ attitudes on mediation, including use of mediation as harsh adversarial tactic); Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 392-404 (2005) (arguing that the merger of Law and Equity is “cautionary tale” for the contemporary merger of litigation and ADR in which ADR is “ossified”); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or “The Law of ADR,”* 19 FLA. ST. U. L. REV. 1 (1991); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 1012-15 (2004).

189. Court planners and administrators should consider strategies designed to promote the interests of the courts’ stakeholders that are not limited to development of legal rules and use of lawyers and judges. A simple example is an assumption that lawyers are presumptively more appropriate to serve as neutrals than other dispute resolution professionals. Clearly, lawyers are more qualified and desired by parties in some cases. However, precisely because many lawyers do rely heavily on lawyers’ standard philosophical maps, some lawyers may be less helpful than other professionals in helping parties deal with underlying, non-legal issues in some cases. Another example deals with motivating litigants to behave appropriately in mediation. Program designers using a standard philosophical map might try to solve the problem by creating legalistic rules prohibiting bad faith and sanctioning violators. Although using such rules can be appropriate, doing so reinforces the adversarial mindset and can actually be counterproductive. See generally Lande, *supra* note 111; Charles Pou, Jr., *Scissors Cut Paper: A “Guildhall” Helps Maryland’s Mediators Sharpen Their Skills*, 26 JUST. SYS. J. 307 (2005).

190. For further discussion of potential problems with institutionalization of court-connected ADR, see Brazil, *supra* note 50, at 118-49; John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 61-65 (1998); Lande, *Getting the Faith*, *supra* note 38, at 222-27; Lande, *supra* note 55, at 896-99; Lande, *More Sophisticated Theory*, *supra* note 38, at 330-33. Courts, as organizations that routinely process a volume of cases under significant resource constraints, should be sensitive to potential loss of individual attention and a tendency to apply quick generalizations. See generally Symposium, *Dispute Resolution and Capitulation to the Routine*, 108 PENN ST. L. REV. 1 (2003).

cated below. This article includes this discussion to identify—and in some instances reject—options courts might consider to increase trial rates.

Several clerks said that they thought it would be inappropriate for the courts to take any action to increase the trial rates because this should be a function of lawyers' and litigants' decisions, would increase costs, violate Congressional mandates to promote ADR, or simply be ineffective.¹⁹¹ Moreover, in response to a question asking whether there are classes of cases that generally are not being tried but should be tried, the clerks could not identify any particular set of civil cases that they think should be tried more.¹⁹²

Two clerks suggested that the number of trials could be increased by increasing the number of judges. One wrote, "in my view, filling vacant judgeships and increasing the number of judgeships authorized would do more than any other single action to increase the capacity and efficiency of the justice system."¹⁹³ Another wrote, "I see an increased role of the magistrate judge in future years as Article III [judges] spend more and more time with criminal cases. I believe the magistrate judge will eventually morph into the 'civil case' judge."¹⁹⁴ Increasing the number of magistrate judges may be more palatable to Congress than increasing the number of Article III judges.

Another option for any courts or judges requiring litigants to use ADR would be to stop doing so.¹⁹⁵ Mandating ADR use has been controversial for several reasons, including philosophical objections to creating barriers to trial.¹⁹⁶ Professor Frank Sander argued that it was appropriate for courts to mandate ADR temporarily as a way to introduce it to litigants.¹⁹⁷ Under this justification, some might argue that this task has been completed and that it is time to undo ADR mandates. It is not clear, however, that trial rates would increase significantly if courts using ADR ceased those efforts. There is no data clearly showing the proportion of cases using court-ordered ADR but it is probably a relatively small percentage. Moreover, there is apparently no empirical evidence indicating that

191. Clerks Follow-up Survey, *supra* note 8 (clerks 5, 8).

192. *Id.* (clerks 1, 6, 8, 9). One clerk thinks that civil cases should generally be tried more often because settlements often result in unfairness and a "jury trial would result more often in 'justice' being done." *Id.* (clerk 2).

193. *Id.* (clerk 6).

194. *Id.* (clerk 2).

195. When asked what courts might do if they wanted to increase the number of trials, several clerks mentioned the possibility of reducing ADR use, though they generally did not recommend this strategy. *Id.* Clerks Followup Survey (clerks 5, 6, 8, 9). See Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) ("I believe [ADR] has become the civil jury trial's number one enemy. While ADR has many splendid qualities, it is, in my view, the single greatest cause of the addition of trial lawyers to the endangered species list."). But see Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 254-58 (2006) (arguing that termination of court ADR programs would cause numerous problems).

196. See *supra* note 17 and accompanying text.

197. See Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 8 (comparing rationale for mandatory mediation to affirmative action, as a "temporary expedient" to overcome resistance to using ADR). Summarizing empirical research, Macfarlane reports:

mandatory processes seem to be able to produce some of the same types of change [in lawyers' approach to practice], at least over the mid to long term. A number of studies of mandatory processes show similar reframing and reorientation among many lawyers, although these inevitably are more gradual and less widespread than among a self-selected group [of collaborative lawyers who actively seek to change their mode of practice].

Macfarlane, *supra* note 89, at 1504.

ADR has caused a reduction in trial rates.¹⁹⁸ Considering all the forces that prompt litigants to settle, it seems likely that many cases—perhaps the vast majority—that now go through court-connected ADR processes would settle anyway.¹⁹⁹ Having institutionalized ADR practice to a significant extent, some lawyers might well initiate ADR without pressure from the courts (including mandates to use ADR). The courts' pressure has been helpful for many lawyers, however, as it enables them to avoid the appearance of weakness caused by suggesting ADR. Without the legitimacy and structure of court ADR programs to initiate the process, some lawyers would procrastinate and/or play "chicken," resulting in negotiations in the sub-optimal environment of the courthouse steps on the day of trial.²⁰⁰ Scheduling settlement events at appropriate times in the litigation and offering the help of skilled neutrals seems more rational for litigants and courts. If the local culture in particular courts promotes excessive settlement pressure on litigants by judges or mediators, those courts should take action to avoid such pressure.²⁰¹ Depending on the circumstances, this may or may not increase the number of trials in those courts.

Another option would be to reduce or eliminate case management procedures, at least for shorter cases.²⁰² Although case management is intended to make the process more rational for litigants and the courts, the cumulative effect could inhibit litigants from proceeding to trial.

Some courts have experimented with reducing litigation procedures to make trials more attractive for simpler cases but few litigants have used these rules, however. For example, in 1995, the U.S. District Court for the Eastern District of Missouri adopted a rule providing for "differentiated case management," includ-

198. Galanter expresses some doubt that use of ADR has generally reduced trial rates, noting that "the decline in trials is very general, across the board, and is not confined to sectors or localities where ADR has flourished." Galanter, *Vanishing Trial*, *supra* note 20, at 517. To the extent, if any, that ADR does contribute to a reduction in trial rates, it seems likely that ADR use is not a major independent cause and may itself be the result of other factors prompting litigants to go to trial less often. See Hecht, *supra* note 29, at 182 (rejecting idea of restricting ADR use, as being "distinctly un-democratic" and unlikely to be effective); Syverud, *supra* note 101, at 1940-43 (arguing that there are three main causes for decline in civil jury trials—expense and delay of litigation, "commodification of civil claims" through insurance contingency fees, and distrust of juries by business and government litigants—which "operate incidentally to promote ADR").

199. It is not clear that use of mediation significantly increases the settlement rate. In summarizing research on this issue, Wissler found that "[o]f the eight studies that included a comparison group of nonmediation cases, half found that cases referred to mediation tended to have a somewhat higher rate of settlement, or a somewhat lower rate of trial or judgment on a dispositive motion, than did cases not referred to mediation . . . but half found no differences." Wissler, *supra* note 107, at 65 (citations omitted). See also Burbank, *supra* note 44, at 585 (arguing that there is no empirical evidence that ADR causes settlements that would not otherwise occur).

200. Macfarlane describes the problem this way:

Most settlement takes place either shortly before trial or "on the courtroom steps." Of particular concern are the delay in commencing serious negotiations until significant resources have been expended and the restrictive, depersonalized, and often inadequate character of negotiated solutions. A further concern should be the apparently minimal amount of time lawyers actually spend on negotiation, especially when compared with their efforts to pursue litigation.

Macfarlane, *supra* note 89, at 1489 (footnotes omitted).

201. See *supra* notes 55, 113-14 and accompanying text.

202. The clerks discussed whether courts might increase the number of trials by reducing case management procedures under the theory that this might give lawyers more control and reduce costs. Clerks Discussion, *supra* note 8. A guest in the discussion opposed that idea, saying that courts use case management for good reasons and that undoing it would "turn back the clock." *Id.*

ing an “expedited track.”²⁰³ In this track, “cases are expected to be concluded within 12 months of filing, with minimal judicial involvement. Motion and discovery deadlines are established by a standardized Case Management Order.”²⁰⁴ Prior to the initial scheduling conference, litigants indicate their preference about designation of the case management track for their cases, which judges generally honor.²⁰⁵ Only a tiny proportion of cases have gone through the expedited track.²⁰⁶ Similarly, in 2001, the District Court in Minnesota adopted rules for expedited litigation,²⁰⁷ but no one has yet used the procedure despite extensive efforts to engage judges and lawyers in developing and publicizing the rules.²⁰⁸

There are several possible explanations for the low usage of these rules.²⁰⁹ Despite lack of success to date, some courts might analyze the experience with such rules and develop variations—perhaps with more flexibility—in consultation with litigators and other stakeholders. Moreover, litigants could conceivably contract for streamlined litigation and trials in their own cases,²¹⁰ and courts or legislatures might encourage (and/or regulate) such efforts.

Another option would be for courts to deny more summary judgment motions. This idea is highly inappropriate, however, as summary judgment decisions are ultimate dispositions of cases. Cases where there is no material fact at issue

203. E.D.Mo., LOCAL RULES OF COURT, R. 16-5.01, available at <http://www.moed.uscourts.gov/documents/loclrule.pdf> (last visited Mar. 10, 2006).

204. *Id.*

205. *Id.* R. 3-5.02.

206. Telephone interview with Jim Woodward, Court Clerk, U.S. District Court for the Eastern District of Missouri (Feb. 7, 2006).

207. See D. Minn., RULES OF PROCEDURE FOR EXPEDITED TRIALS, available at <http://www.mnd.uscourts.gov/> (last visited Jan. 15, 2006). The rules provide that “[p]arties may agree to have existing or future disputes resolved under the Federal Rules of Civil Procedure, but with limited discovery and an expedited trial.” *Id.* The rules establish short time limits for the pretrial conference, discovery, and the trial date and strictly limit the amount of discovery and testimony. *Id.* Parties must request court permission to file motions and, if granted, the length of the parties’ memoranda is limited. *Id.* At trial, each side will have eight hours of trial time. *Id.* The judgment must be entered within thirty days after the matter is submitted. *Id.*

208. Telephone interview with James M. Rosenbaum, Chief Judge, U.S. District Court for the District of Minnesota, in Minneapolis (Feb. 6, 2006).

209. For example, some lawyers may be comfortable with the existing procedures and are reluctant to change. Some may be afraid to make a binding commitment to restrictive rules, fearing that they might lose control of their cases. Some may worry that they would be forced, in effect, to commit malpractice by making decisions without sufficient preparation. Such a reaction might be based on a concern that the rules may not provide enough flexibility to deal with issues they can not anticipate at the outset of a case. Some lawyers may not want to admit that their cases are simple and do not need the “normal” treatment. Some may choose the traditional process to generate more legal fees.

210. See generally Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. (forthcoming 2006) (arguing that procedural rules should be treated as default rules and that litigants should have the right to customize their litigation); Henry S. Noyes, *If You (Re)Build it They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image* (Litigation & Procedure Abstracts 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891301 (last visited June 1, 2006) (arguing that contracts to modify rules of litigation can accomplish procedural benefits of arbitration and such contracts have potential for creativity and efficiency as well as potential for abuse); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181 (describing potential for parties to negotiate pre-dispute agreements specifying many details of litigation and trial procedure). Some advocate a “chess clock” model in which litigants agree to a fixed and limited amount of time to present their cases at trial. See Patricia Lee Refo, *Opening Statement—The Vanishing Trial*, LITIG., Winter 2004, 2, at 3; see also Landsman, *supra* note 71, at 984 (endorsing Refo’s “chess clock” model of trial).

should not be tried merely to increase the trial rate. Inappropriately denying summary judgment motions increases costs to all litigants and creates unfairness by forcing the moving party to undergo the cost, delay, and risk of trial. Some such litigants would presumably settle to avoid these consequences, unfairly making them pay damages (or, in the case of plaintiffs, receive smaller settlements) than they should under the law. Courts do vary in the rates in which they grant summary judgment motions,²¹¹ suggesting that there may be some degree of arbitrariness in setting the *de facto* standard for deciding these motions. It may be appropriate for courts to take action to standardize their application of the standard and perhaps raise or lower it generally in the interests of justice.²¹² Courts should not lower the standard, however, merely to increase the trial rate.

Yet another option would be to set firm trial dates in civil cases. According to a participant in the clerks' discussion, parties sometimes file cases in state court because they cannot get a trial date in federal court that they can count on.²¹³ When a trial has to be rescheduled at the last minute, litigants are frustrated at the expense and inconvenience of having to prepare for trial more than once. Courts' ability to assure trial dates in civil cases may depend on having a sufficient number of judges to handle the overall caseload.

The options for increasing trial rates described in this sub-part generally seem inappropriate, unrealistic in the foreseeable future, and/or unlikely to make a significant difference. This suggests that there are not ready policy options for courts to change the trends in trial rates in the U.S., at least in the federal courts. To the extent that these trends create problems, responsible individuals and institutions should focus on addressing those problems as described above.

VI. CONCLUSION

From the observations of the Eighth Circuit clerks, it is not clear that declining trial rates have actually caused general or significant problems. Changing litigation and trial patterns do give courts an opportunity to reflect on their roles and missions in the administration of justice. Gross argues that some trials are necessary but it is not clear that we now have too few of them:

To be sure, our system of litigation does require *some* trials. Except in extraordinary situations, at least a few trials are necessary to set the terms of bargaining for the 98 percent to 99.5 percent of cases that settle, and to keep the threat of trial alive. But there's no reason to believe we've approached that irreducible minimum with 4,569 federal civil trials a year.²¹⁴

211. See Burbank, *supra* note 44, at 613.

212. See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91 (2002) (arguing that courts should have discretion whether to deny summary judgment motions).

213. Clerks Discussion, *supra* note 8.

214. Gross, *supra* note 56, at 3. This statement should refer to 98 percent to 99.5 percent of cases that are terminated without trial as some of these cases are terminated by procedures other than settlement. See Gillian K. Hadfield, *Where Have All the Settlements Gone? Settlements, Nontrial Adjudications*,

In general, there are other mechanisms for achieving the same goals as trials, and thus, it is appropriate to weigh carefully the benefits and problems associated with the various mechanisms.²¹⁵ In some cases, trials are the most appropriate mechanisms and the courts should ensure that litigants have the opportunity to try those cases. Contemporary courts in the U.S. operate in an environment with constrained public financing and heightened competition for delivery of dispute resolution services. Historically, a minority of cases were tried—especially if one counts proceedings that resemble modern trials—and it is not realistic to expect modern courts to provide trials in a large proportion of cases.²¹⁶ Although some courts may treat the declining use of trials as a crisis calling for defensive reactions, others will take advantage of this opportunity to develop innovative ways to improve their services. Innovation usually results in some benefits and new problems. Court planners and administrators should be alert to and deal with such problems as they arise.

Mark Twain reportedly said that “everybody talks about the weather, but nobody does anything about it.”²¹⁷ The “vanishing trial” may be similar. Given that the causes for the broad trend in reduction of trials are probably complex and deeply rooted, it seems unlikely that modest policy changes would significantly affect the trend. For those interested in doing something about any problems that are related to this trend, this article analyzes some options to consider. It would be inappropriate to make universal recommendations for all courts because of the variations between courts, limited knowledge about the causes and effects of changes in trial patterns, and the significant impact of local legal culture.²¹⁸ It would be appropriate for courts to assess their needs, experiment with policies that might address them within the resources available, and evaluate the impact of their policy experiments.²¹⁹ Innovative courts may be especially interested in developing settlement databases,²²⁰ which can not only help litigants and courts directly address some problems caused by reduced trial rates and but also contribute to greater understanding of the legal system.

and *Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004).

215. See *supra* Part III.B.

216. See Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 691-93 (2004).

217. Columbia World of Quotations, available at <http://www.bartleby.com/66/9/61909.html> (last visited Mar. 10, 2006).

218. See *supra* notes 110-11 and accompanying text.

219. See Lande, *supra* note 111, at 108-26.

220. See *supra* Part IV.B.