The Foreword - Vanishing Civil Jury

Albert W. Alschuler
Albert.Alschuler@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation

This Comment is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
The Vanishing Civil Jury

Albert W. Alschuler†

I. WHEN LAWYERS TRIED CASES

In 1928, Raymond Moley published "The Vanishing Jury." This pioneer work of legal realism focused on criminal cases and documented a remarkable decline in the frequency of trials. In 1839—151 years before this symposium—85 percent of all felony convictions in Manhattan and Brooklyn were by trial rather than by guilty plea. Moley charted a steady decline in this figure over the course of the next 88 years. By the time of his article, only ten percent of all felony convictions in Manhattan and Brooklyn were obtained by trial rather than negotiated plea.²

In the years following Moley's article, the criminal trial faded further. By 1971, only three percent of New York City's felony convictions followed trials.³ Perhaps as a result of the increased severity of criminal sentences in the 1980s, recent years have seen

---

† Wilson-Dickinson Professor of Law, the University of Chicago. I am grateful to Stephanie Dest, Larry Kramer, Judith Resnick and Penelope Saxon Ingber for valuable suggestions; to Abigail Abraham, Thomas Collier, and William Van Lonkhuyzen for research assistance; and to the Kirkland and Ellis Faculty Research Fund and the Jerome F. Kutak Faculty Fund for research support.

¹ 2 S Cal L Rev 97 (1928).
² Id at 107-09.
³ Vera Institute of Justice, Felony Arrests, Their Prosecution and Disposition in New York's Courts 7 (1977).
a turnabout. Jury trials now account for almost seven percent of the felony convictions in New York City.

The story on the civil side has been less dramatic. Nevertheless, the twentieth century has witnessed a decline in civil trials that parallels to some extent the decline in criminal trials that Raymond Moley described.

Wayne McIntosh studied the St. Louis, Missouri, Circuit Court and reported that, from 1820 through 1920, 25 to 30 percent of all civil cases ended in contested hearings or trials. This percentage varied little throughout the 100-year period. After 1925, "the average skirted downward into the 15 percent range." At the same time, voluntary dismissals increased, and these dismissals typically reflected negotiated settlements. In the nineteenth century, the number of voluntary dismissals about equalled the number of trials. In the twentieth century, voluntary dismissals outnumbered trials by a three-to-one ratio.

The last year of McIntosh’s study was 1970. In the ensuing decades, the percentage of civil cases in St. Louis ending in contested hearings or trials has declined further. In 1989, only 5.5 percent of all dispositions in St. Louis were by contested hearing or trial.

A study of two California Counties by Lawrence Friedman and Robert Percival reported, “In 1890, more than one out of every three cases filed in Alameda County was brought to trial. Today

---

* Guilty plea rates in criminal cases tend to decline as sentences grow more severe. Like other people, defendants discount the future; they are less interested in remote than in immediate consequences. When a defendant is likely to be imprisoned for a long period even after a plea of guilty, he or she may not be notably impressed by a judge's or prosecutor's offer of a discount in sentence that will materialize only after years of incarceration. This defendant may take whatever chance of acquittal a trial may offer. At the same time, when a defendant knows that a short sentence will follow conviction, he or she may plead guilty in the absence of significant concessions simply to "get things over with." The severity of criminal sentences is likely to affect guilty plea rates independently of plea negotiation practices.

* New York State Division of Criminal Justice Services, 1986 Crime and Justice Annual Report 171.


* McIntosh noted that “the shift from adjudication to bargaining” was “wholesale” and was not restricted to one or a few categories of litigation. Id. Similarly, in the rural Illinois counties studied by Stephen Daniels, the percentage of civil cases ending in contested trials was twice as great in the years 1872-1885 as it was 70 years later. Stephen Daniels, Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties, 19 L & Soc'y Rev 381, 400, Figure 3 (1985).

* Telephone conversation with Laverne Akers of the Clerk's Office of the Circuit Court of St. Louis County, May 23, 1990. Exclusive of small-claims cases, there were 4248 civil dispositions in the Circuit Court of St. Louis County in 1989, and 235 civil trials.
less than one in six has such a life cycle." By "today," Friedman and Percival meant 1970. Trials have become rarer in the years following their study. In 1988-89 in Alameda County, only one civil case in nineteen ended in a contested hearing or trial.10

The decline of the civil trial was even more striking in the second county studied by Friedman and Percival. They wrote that "[in San Benito County,] trial incidence fell from one in four in 1890 to only one of nine today [1970]."11 More recently, in 1988-89, the Superior Court of San Benito County conducted no contested hearings or trials while disposing of 250 civil cases.12 In that county, the vanishing civil jury had vanished altogether, at least for a time. Statewide, about three percent of all civil dispositions in California were the product of contested hearings or trials in 1988-89.13

Twentieth century federal statistics document a similar decline in the proportion of cases resolved by trial. In 1930, 31 percent of all federal civil cases were terminated during or after trial.14 This figure fell to 19.8 percent in 1940,15 10.3 percent in 1960,16 6.5 percent in 1980,17 and 4.4 percent in 1986.18 In an article published a few years ago, I noted that placing these figures on a graph and projecting the line into the future would suggest the disappearance

---


10 Judicial Council of California, Annual Data Reference: 1988-89 Caseload Data by Individual Courts 15-24, Tables 4-8. I am grateful to David J. Halperin for supplying this material and for explaining it to me. The one-in-nineteen figure reported in the text includes civil matters commenced by petition as well as cases commenced by complaint—such matters as petitions for writs of review or prohibition, petitions under the Reciprocal Enforcement of Support Act, petitions for adoption, and petitions for change of name. Surprisingly, the exclusion of these "petition matters" would have reduced the proportion of cases resolved by contested hearing or trial. In lawsuits commenced by complaint in Alameda County, only one civil disposition in 28 was by contested hearing or trial in 1988-89.

11 Friedman & Percival, 10 L & Soc’y Rev at 287 (cited in note 9).

12 Judicial Council of California, Annual Data Reference at 15-24, tables 4-8 (cited in note 10).

13 Id.

14 American Law Institute, A Study of the Business of the Federal Courts, Part II: Civil Cases 65 (1934) (percentage calculated from a table on this page reporting the results of a survey of 13 federal districts).


of the trial from the federal courts by the year 2000. I observed, however, that the line was likely to curve before it hit bottom, and it has. Last year, the percentage of federal civil cases terminated during or after trial was 4.8 percent.

As Judith Resnik has commented, these figures may reflect the changing subject-matter of the cases in the federal courts as well as changing litigation practices. Social security disability cases, for example, may be more frequently dismissed than most of the cases filed in the federal courts 25 or 50 years ago. The addition of new groups of infrequently tried cases to the federal caseload cannot entirely account for the declining proportion of cases resolved by trial, however. The absolute number of civil trials in the federal courts has declined as well. The limited evidence available from places like San Francisco, Chicago and the State of Florida suggests that the absolute number of civil trials has also declined in the state courts.

An absolute decline in the number of trials does not sound like a litigation explosion. Consider the paradoxes: The civil trial has approached the vanishing point as our population has grown, as


22 The number of federal civil cases terminated during or after trial in 1989—11,162—was lower than in any of the preceding seven years. The largest number of terminations during or after trial in this period—12,570—came in 1985. See the 1984-89 issues of the Administrative Office of the United States Courts, Annual Reports Table C4.

Table C8 of the Administrative Office's Annual Reports appears to document a more dramatic decline. It shows a total of 14,400 civil trials in 1982—then a drop in every succeeding year through 1989 to 12,085 civil trials. Nevertheless, the “civil trials” reported in Table C8 include all contested proceedings at which courts received evidence, even hearings on pretrial motions. For present purposes, the number of cases “terminated during or after trial”—the lower number reported in Table C4—is more significant. The data reported in Table C8 do reveal that as the civil trial has vanished, it has not reappeared under a new name, disguised as a pretrial hearing.


the resources devoted to our courts have expanded greatly,\textsuperscript{25} as the number of lawyers per capita has doubled,\textsuperscript{26} as judicial decisions have expanded rights against the government and the manufacturers of injury-producing products,\textsuperscript{27} as courts have implied private causes of action from regulatory provisions,\textsuperscript{28} as dozens of statutes have authorized the award of attorneys' fees to victorious plaintiffs,\textsuperscript{29} as public and private agencies have been established to provide legal services to the poor,\textsuperscript{30} and as lawyers have been forbidden to establish minimum fee schedules and allowed to advertise.\textsuperscript{31} As the rights of Americans have burgeoned,\textsuperscript{32} access to these rights through judicial proceedings has grown more difficult.\textsuperscript{33}

The vanishing jury and the vanishing trial might not be cause for concern if increased settlements reflected a more cooperative attitude on the part of civil litigants. Nevertheless, current settlement rates probably do not reflect a kinder, gentler and less litigious America. Instead, the near disappearance of the trial is the product of government's failure to supply a basic social service, the impartial resolution of disputes. We have not witnessed an increase in voluntary settlements against a background of adequate judicial services.\textsuperscript{34} Rather, the civil trial is on its deathbed, or close to it,
because our trial system has become unworkable. The American trial has been bludgeoned by lengthy delays, high attorneys' fees, discovery wars, satellite hearings, judicial settlement conferences and the world's most extensive collection of cumbersome procedures. Few litigants can afford the cost of either the pretrial journey or the trial itself.

The unworkability of our trial system is most clearly manifested in the length of the litigation process. The average civil case tried during 1988 in the Circuit Court of Cook County had been filed more than six years before.\(^3\) At the end of 1989, 1680 cases had been pending in the Circuit Court for more than seven years, and 116 of these cases had been pending for more than ten years.\(^3\) Long delays and other pressures to settle pervade our system, and settlements are often determined by which side runs out of money first.

The promise of a "just, speedy, and inexpensive determination of every action" offered by Rule 1 of the Federal Rules of Civil Procedure is difficult to take seriously, and the term "trial judge" has become a misnomer. We might better speak of a "satellite hearing judge" or a "settlement judge." Indeed, Wayne Brazil's article for this symposium compliments one judge of the Northern District of California by saying that even before his appointment to the federal bench he had developed a formidable reputation as a settlement judge.\(^3\) Brazil's praise may be deserved, but his use of the term "settlement judge" as a compliment reveals how much times have changed.

The term "trial lawyer" is also an anomaly. Law firms now use the word "litigator," and some 40 and 50-year-old "litigators" can count the cases they have tried on the fingers of one hand. The term "discovery lawyer" might fit better, at least in large civil cases.\(^3\)

---


\(^3\) Id.


\(^3\) Several commentators have noted how paradoxical our references to trial judges and trial lawyers have become. See Marc Galanter, "... A Settlement Judge, Not a Trial Judge": Judicial Mediation in the United States, 12 J L & Soc'y 1 (1985); John F. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 Litigation 5 (1978); Judith Resnik, *Failing...
The impartial resolution of disputes, a basic social service, is not a service that our society provides very well. The papers in this symposium are largely, though not entirely, agreed on this proposition, and they also exhibit a surprising degree of consensus on how to provide this service better.

II. Through the Symposium

A. Views of the Litigation Battlefield

1. Paul D. Carrington: *The Seventh Amendment: Some Bicentennial Reflections.* Carrington's reflections on the Seventh Amendment declare that the civil jury is in disarray—an especially arresting remark when it comes from the Reporter to the Advisory Committee on the Federal Civil Rules. Carrington attributes this disarray to some inherent features of jury trials, to the failure of Congress to address the scope of the right to jury trial as it creates new substantive rights and remedies, and to haphazard reforms that often pull in opposite directions. Carrington notes, for example, that as the Jury Selection and Service Act created more democratic jury-selection procedures, local rules cut the size of federal juries in half and made these bodies less representative of the community.

Carrington observes that our use of juries exerts substantial pressure to conduct the civil trial as a single continuous event. Because jurors cannot readily be excused and reassembled, surprise at trial ordinarily cannot be remedied through midtrial adjournments. We therefore employ less effective and more wasteful mechanisms to address this danger in advance. These mechanisms include what Carrington mildly calls "perhaps excessively ample" pretrial discovery and other costly efforts to prepare for virtually every trial contingency. Lawyers now prepare witnesses even for


**1990 U Chi Legal F 33.

pretrial depositions, and "testimony presented at trial has been carefully rehearsed both informally and under battle conditions."\textsuperscript{41}

In 1968, only 75 civil trials in the federal courts extended ten days or more; in 1988, the number was 359. Carrington suggests that the growing length of the trial\textsuperscript{42} is attributable less to the growing "complexity of the world" than to the fact that more lawyers are billing by the hour. Other causes include more liberal joinder, the natural tendency to present most of the abundant information discovered before trial, and the greatly increased use of adversarial expert witnesses.

In lengthy trials, "the volume of information that the jury is asked to assimilate can be the equivalent of one or several college courses," and the outcome all too frequently is juror "dropout."\textsuperscript{43} Carrington reports the admission of one federal judge that he lies in court about the probable length of the trial to discourage jurors from calling in sick. (In oral comments at the \textit{Legal Forum} symposium, Susan Getzendanner added that, as a federal judge, she had found it useful to require jurors to do calisthenics; she had, however, resisted the temptation to admonish lawyers, "You picked 'em; you keep 'em awake.")

Carrington observes that the jury system builds a constituency for laws administered by juries, thus "divert[ing] funds otherwise available for the compensation of victims [perhaps through no-fault insurance] to the asocial purpose of providing nice incomes for the professionals who staff the system."\textsuperscript{44} Moreover, the risk of aberrant verdicts and damage awards by juries (a risk aggravated by reduction of the jury's size to six) may deter investment in activities that are exposed to tort liability. The abandonment of efforts by pharmaceutical companies to develop more effective means of birth control, for example, may be attributable largely to a risk of liability made less predictable and less controllable by the jury system.

Carrington discusses a broad range of jury trial issues, including the use of juries in bankruptcy proceedings, the conduct of jury trials by magistrates, the sevèrance of some issues for separate tri-

\textsuperscript{41} Carrington, 1990 U Chi Legal F at 68. Even apart from the economic cost of this pretrial gamesmanship, the resulting loss of spontaneity may diminish the jury's ability to judge credibility and discover the truth.

\textsuperscript{42} The number of trials lasting ten days or more does not adequately indicate the substantial extent to which the length of the federal trial has increased. For a more complete picture, see Resnik, 53 U Chi L Rev at 559-60, App B, Table 2 (cited in note 38).

\textsuperscript{43} Carrington, 1990 U Chi Legal F at 65.

\textsuperscript{44} Id at 40.
als before separate juries, the use of videotaped evidence, and the limitation of attorney participation in the examination of prospective jurors. On virtually every issue, he offers rich historical perspective and trenchant insight.

2. Stephen C. Yeazell: The New Jury and the Ancient Jury Conflict. Reviewing the 800-year history of the civil jury, Stephen Yeazell notes that this institution came into being as an administrative device designed to conserve judicial and other resources. The jury originally was simply a means of coercing citizens to perform investigative and reporting functions. Today, by contrast, jurors are selected on the basis of their ignorance rather than their knowledge, and trials are "attempted empirical demonstrations rather than soundings of . . . feelings and beliefs." Any juror who attempted to perform the juror's original investigative role today might be held in contempt. Yeazell traces many other transformations of the jury, including some in the jury's size, composition and procedure, that he argues have made the post-1970 jury essentially a new institution.

Yeazell reports that, despite important changes over the centuries in the jury's function, debates concerning the jury have exhibited substantial continuity. The central theme of defenders of the jury has been the mistrust of official power, and the central theme of jury critics has been the importance of the rule of law. America's suspicion of officialdom may in fact account for its retention of the civil jury following the near abandonment of this institution in England where, in Yeazell's view, Parliament has "provided a far more effective voice of popular will." The anti-authoritarianism of Americans may also account for their willingness to accept actions by juries that they would not tolerate if taken by judges or other officials.

3. George L. Priest: The Role of the Civil Jury in a System of Private Litigation. George Priest's article presents a time chart of the jury system, based on his calculation of the time from the beginning of trial through the conclusion of jury deliberations in every case tried to a jury in the Circuit Court of Cook County over the course of twenty years. Echoing Yeazell, Priest notes that we romanticize the jury as a bulwark against official oppression and as a means of obtaining the judgment of the community. In practice,

---

*1990 U Chi Legal F 87.*
*Id at 95.*
*Id at 111.*
*1990 U Chi Legal F 161.*
however, civil juries devote only a small portion of their time to
cases in which the control of government is potentially at issue or
in which the expression of community sentiment seems likely to be
important—cases, for example, in which damages must be awarded
for loss of life, injury to reputation, or pain and suffering following
disfigurement or other catastrophic injury.

According to Priest, Cook County juries have devoted vastly
more time to cases involving bruises, sprains and strains, and sim-
ple fractures than to cases involving catastrophic injury, death, loss
of limb or injury to reputation. Moreover, juries have devoted only
a tiny portion of their time to allegations of malicious prosecution,
false arrest and imprisonment, assault by police officers and pri-
ivate security guards, and other wrongs by governmental and quasi-
governmental agencies. The allocation of resources in our jury sys-
tem turns on which cases fail to settle rather than on which cases
might best utilize the jury's distinctive virtues. Priest's study un-
derscores Paul Carrington's observation that important political
constituencies (notably trial lawyers) keep cases within the jury
system although the litigants' claims could be resolved more
quickly and less expensively through other compensatory
mechanisms.

Priest maintains that the uncertainty generated by jury trials
discourages settlement and causes unnecessary pretrial delay. Us-
ing forums other than the jury to resolve some disputes would re-
duce this delay—not so much because nonjury proceedings would
be less cumbersome, time-consuming and expensive as because
they would reduce unpredictability and thereby encourage
settlement.49

Once upon a time, the use of juries to resolve even minor dis-
putes did not cause extensive pretrial delay. During this era,
Tocqueville praised the educative effect of America's use of juries.
The participation of citizens in the resolution of their neighbors' 
disputes instructed them in democracy and civic virtue. Priest sug-
gests that today's jury system does not educate as much. When
Tocqueville wrote, an eligible citizen was likely to serve on a jury
about once every three years. Today in Cook County, an eligible
citizen is likely to serve on a jury only once every 260 years.

---

49 Priest's analysis of the role of uncertainty in settlement negotiations seems to me
incomplete. See Alschuler, 99 Harv L Rev at 1828 n 85 (cited in note 19). Moreover, to say,
as Priest does, that each of the principal institutional characteristics of the jury renders
outcomes more uncertain may be misleading. See id at 1827 n 80.
The smaller likelihood that a person eligible to serve on a jury will do so during his or her lifetime, let alone serve more than once, is partly the product of a liberalization of the qualifications for jury service; the distinctive education in civic virtue and democracy that jury service may provide is no longer limited to a select group of white men. At the same time, the near disappearance of the trial has contributed to the greatly diminished frequency of jury service. Perhaps, if Tocqueville was correct, the vanishing civil jury has reduced Americans’ sense of participation in civic affairs.\footnote{Contrary to Priest’s suggestion, the appropriate response to pretrial delay may not be to “settle more” (something that today’s settlement rates make almost impossible) but instead to seek restoration of a workable trial system like the one America once had.}

4. Peter Huber: *Junk Science and the Jury.*\footnote{1990 U Chi Legal F 273.} Priest questions the use of juries to resolve sprain-and-strain traffic accident cases, but Peter Huber’s article might prompt one to wonder whether juries are qualified to hear more difficult cases. Partly because of changes in products liability and other substantive law, juries regularly resolve difficult issues of causation on the basis of scientific and, frequently, pseudo-scientific evidence. Survey data concerning the scientific literacy of Americans suggest, however, that a representative twelve-person jury is likely to include four people who believe that UFOs occupied by extraterrestrials have visited the earth and one who claims actually to have seen a UFO. Although our rhetoric treats jurors as hearty yeomen ever alert to incursions on their liberty, some jurors might better be viewed as hearty yahoos.

Huber observes, however, that most juries manage to separate real science from junk science. The education that the jurors receive at trial, their collective deliberation, and other positive features of the jury system enable most juries to reach appropriate verdicts. The difficulty is that sound verdicts by “most juries” are not enough. Huber contends that “one hundred wise verdicts can be utterly dwarfed [in economic impact] by one extremely foolish one.”\footnote{Id at 291.}

Huber’s most dramatic illustration of this thesis is the litigation concerning Bendectin, an anti-nausea drug used during pregnancy. According to Huber, Bendectin does not cause birth defects, and most juries have recognized that it does not. Jury awards at the median and well above the median in Bendectin cases re-
main zero. Nevertheless, a few outlying verdicts against Bendec-
tin’s manufacturer—in one case for $95 million—have made the
average Bendectin award $100,000. Huber notes, “Whichever side
you believe on the toxicity of Bendectin, a median jury verdict of
$0, a mean of $100,000, and a high verdict of $95 million cannot be
just.” Moreover, a manufacturer can rarely purchase insurance
against a wild-and-crazy $95 million skew.

The message to plaintiffs’ lawyers may be to push more dollars
into the slot machine; with enormous jackpots, the odds may favor
them even when they lose most bets. And the message to the
manufacturers of pharmaceuticals and other products may be:
Don’t market anything unless you’re willing to pay the lawyers and
still “bet the company” with every sale.

Huber proposes greater use of special verdicts and bifurcated
trials, more rigorous application of the Frye test governing the
admissibility of expert testimony to exclude charlatans from the
courtroom, and the submission of some scientific issues to tribu-
nals more qualified than the jury. He notes that lawyers and judges
no longer submit questions of law to the jury and suggests that, in
matters of codes, the genetic may be no more suited to jury deter-
mination than the Uniform Commercial.

5. Marc Galanter: The Civil Jury as Regulator of the Litiga-
tion Process. Marc Galanter rejects critical views of the jury “as a
hostile, menacing presence bent on savaging deep pocket defend-
ants.” He contends, moreover, that “a formidable body of empiri-
cal research . . . undermines the premises of the jury’s critics.” At
the same time, Galanter’s article offers reason for serious con-
cern about the vanishing civil jury.

Galanter reports that jury trials account for less than one per-
cent of the cases terminated in the state courts and for only about
two percent of the cases terminated in the federal courts.

---

53 Id at 285. Huber adds that the few cases in which juries approved jolting damage
awards were essentially indistinguishable from the many cases in which juries found no
liability.

54 The jackpot may be long in coming, however, and neither the plaintiffs nor their
lawyers may have enough dollars to keep betting. As Huber observes, huge delays and ex-
enses work mostly against plaintiffs, while wild-card verdicts work mostly against
defendants.

55 See Frye v United States, 293 F 1013 (DC Cir 1923).

56 1990 U Chi Legal F 201.

57 Id at 206.

58 As noted above, 4.8 percent of the civil cases filed in the federal courts are currently
terminated during or after trial. See text accompanying note 20. But only about half of all
federal trials are jury trials (less than half in 1984, 1985 and 1986; more than half in 1987,
guine portrayals of our legal system speak of “bargaining in the shadow of the law” and emphasize that jury trials have an impact beyond their incidence. Scholars speak of “litigotiation” (the unitary process of litigation and negotiation), depict the contested trial as the tip of an iceberg, note the importance of juries as transmitters of signals, and liken settlement decisions to investment decisions.

Bargaining in the shadow of a shadow would be a more appropriate metaphor. Trials are rare events, and the “visible cap” of the iceberg does not “control” any “symmetrical and comprehensible crystalline structure” underneath. With thorough mastery of the literature and deep social insight, Galanter reviews the various mechanisms by which lawyers develop an understanding of the jury and a sense of the worth of their cases. He demonstrates that these mechanisms are full of noise and distortion.

Unlike the investment decisions to which law-and-economics scholars compare them, settlement decisions generate highly skewed, one-sided feedback. Lawyers who settle too cheaply can always believe that they performed well. Moreover, the jury verdicts described in appellate reports are a biased sample; the press reports horror stories more often than ordinary cases; jury verdict reporters, which most lawyers do not study, also emphasize unusual cases and high awards; courthouse rumors and folklore are misleading and exaggerated; lawyers remain essentially unaware of academic studies of the jury; and trial judges and other settlement brokers have interests of their own and are likely to be less knowledgeable than they appear. Lawyers rely mostly on their own experience and on that of close associates, but as the trial vanishes, few have had much experience.

Supposedly experienced litigators differ greatly in judging the worth of the same cases, and pairs of litigators given identical pairs of case files and asked to negotiate settlements (and even to publicize the results with their names attached) enter very different bargains. Although lawyers believe that they “know what a case is worth,” there appear to be no “going rates” in even the most commonplace litigation.

1988 and 1989). See Table C4 of the Annual Reports of the Director of the Administrative Office of the United States Courts for these years.

The term is Galanter’s, but his article reveals that he is more concerned about the “litigotiation” process than many other scholars.

Galanter, 1990 U Chi Legal F at 251.

Outcomes in our "litigotiation" system are shaped not only by the distortion, misinformation and ignorance that Galanter emphasizes, but also by high litigation expenses, long delays, and financial conflicts of interest on the part of negotiating attorneys. The continuous jury trial itself bears much responsibility for the features of our legal system that have made jury trials unattainable—extensive pretrial maneuvering, scheduling and other management problems, cumbersome rules of evidence, burdensome jury selection procedures, and complex and frequently incomprehensible jury instructions. When trials hardly ever happen, most of the difficulties that Galanter notes seem likely to persist. Even if the jury performs as well as he contends in the few cases that reach trial, one might dissent from his generally optimistic view of the jury and from his conclusion that "[t]he jury can keep the litigation process anchored in the emergent moral sense of the society." 

6 HANS ZEISEL: The Debate over the Civil Jury in Historical Perspective. Hans Zeisel has fewer reservations about the civil jury than most other contributors to this symposium. Although Paul Carrington claims that "the civil jury is in disarray," Zeisel describes the jury as "a robust institution." Zeisel, however, is not entirely content with the jury's current functioning. He urges significant reform in the way that judges instruct jurors, in the rules of evidence, in the length of trials, and, especially, in the size of federal civil juries, which he would restore to the historic num-

---

62 And Galanter does not address either the dangers of outlying verdicts noted by Peter Huber or other evidence of disturbing jury performance—evidence indicating, for example, that jurors award smaller damages to black plaintiffs than to white plaintiffs in comparable cases. See Audrey Chin and Mark A. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials viii-ix, 37-41 (RAND Institute for Civil Justice, 1985).

63 Indeed, Galanter himself describes one troubling form of juror misconduct. He notes that we should not equate jury verdicts with the ultimate outcome of lawsuits and reports that apparently excessive jury awards may reflect the efforts of jurors to compensate for limitations on their power. For example, one member of a Texas jury that awarded $64 million to an injured worker explained, "We knew the case would be appealed, so we wanted to give him a lot to start with before it was reduced." Another added, "I went along with it . . . because I figured it would be reduced by a judge or on appeal." When jurors act as dealiers in a "litigotiation" process, everyone appears to be bargaining in the shadow of a shadow. No one may be left to decide the case on its merits. Compare Jon O. Newman, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L J 810, 812 (1975) (in the case of Private Eddie Slovik, the only American executed for desertion during World War II, the members of the court-martial panel that imposed the death penalty did not expect it to be carried out).

64 Galanter, 1990 U Chi Legal F at 257.
65 1990 U Chi Legal F 25.
66 Id at 31.
ber twelve. In addition, Zeisel’s remarks offer wonderful reminiscences of noteworthy moments in the study of the jury and in the debate concerning it.

B. Toward a Workable Adjudicative System

Although the papers in this symposium are not entirely in accord, they seem unlikely to inspire a view of the Seventh as one of the Constitution’s greatest Amendments. Proposed remedies for the defects of our current regime of civil adjudication fall into two broad categories. Some contributors to the symposium focus primarily on the management of jury trials. Others emphasize dispute resolution outside the courts or through mechanisms other than trial.

**Trial Management**


The symposium’s principal proposals for improved trial management come from two experienced federal district judges, William Schwarzer and Prentice Marshall. Schwarzer argues that traditional jury trial procedures have left “jurors floundering in a mass of disconnected and obscure evidence and legal mumbo jumbo.” He emphasizes that trial judges must take an active role in controlling the litigation process. During the pretrial period, judges should work with the parties to identify and define issues, and they should eliminate unnecessary issues through partial summary judgment. Judges also should require the pretrial submission of exhibits and should rule before trial on significant evidentiary questions. At trial, Schwarzer proposes limiting the number of expert and character witnesses, forbidding cumulative testimony, imposing time limits on each side, and limiting the examination of each witness to one lawyer per side.

Schwarzer also advocates a number of reforms designed to treat jurors with greater dignity and ensure that they are equipped to decide the matters before them. Noting that the Constitution does not require random jury selection, he suggests a variety of devices for selecting those jurors who, by education and experience, are best qualified to decide particular cases. Schwarzer urges giving preliminary jury instructions at the start of the trial, repeating one commentator’s remark that not giving preinstructions is

---

66 1990 U Chi Legal F 119.

67 Id at 120.
like "telling jurors to watch a baseball game and decide who won without telling them the rules until the end of the game." He also favors giving the jury a written copy of the court's instructions.

Schwarzer proposes "levelling with jurors" by informing them of such matters as the parties' insurance coverage, the trebling of damages in antitrust cases, and earlier dismissals and settlements that account for the absence of parties whose presence might have been expected. He favors permitting jurors to take notes, to question witnesses, and to discuss the case among themselves as the trial progresses.

Judges must also protect jurors from an overflow of information. For example, the deadly practice of reading lengthy depositions to the jury can be eliminated by requiring each side to submit summaries of the deposition testimony that it proposes to use, permitting opposing parties to object to these summaries, and resolving before trial differences that the parties cannot resolve for themselves. Schwarzer favors the use of special verdicts, the bifurcation of liability and damage questions, and the structuring of the trial to address one issue at a time. Moreover, the court should require critical witnesses on an issue, particularly expert witnesses, to remain available throughout the trial of that issue. An effective confrontation of experts is likely to reveal their differing assumptions and differing risk assessments.

Schwarzer discusses other trial management issues from the selection of the jury foreperson to the use of jury selection questionnaires—questionnaires that he believes can overcome most objections to judge-conducted voir dire. He supports his wealth of sensible suggestions with equally sensible arguments. One wonders, however, whether our wobbly trial mechanism does not require more thorough repair than any form of judicial trial management can provide.

8. Prentice H. Marshall: A View from the Bench: Practical Perspectives on Juries. Prentice Marshall offers a similar checklist of recurring issues in the management of jury trials. Unlike Schwarzer, Marshall favors the participation of attorneys in the examination of prospective jurors; and although he, like Schwarzer, permits jurors to take notes, Marshall expresses substantial reservations about this practice and does not encourage it. These differences aside, Marshall's and Schwarzer's proposals generally track one another.

** Id at 130.
** 1990 U Chi Legal F 147.
Drawing on 38 years’ experience as a lawyer and judge, Marshall also endorses some customary arguments for preferring juries to judges as decisionmakers in most cases. Juries, he argues, are more independent and less corruptible; their collective recollection, comprehension and evaluation of the evidence is superior to that of a single judge; they bring a higher level of interest to each case; and they decide things faster than most judges—including, Marshall confesses, himself.

Alternative Dispute Resolution

The alternative dispute resolution movement has its own American Bar Association Standing Committee, its own American Association of Law Schools Section, and its own professional journals. ADR encompasses so many techniques that only ADR cognoscente can keep them straight—mediation, med-arb, early neutral evaluation, rent-a-judge, panel evaluation, court-annexed arbitration, mini-jury trials, summary jury trials and more.

As Deborah Hensler indicates, the ADR movement has had three phases. In the initial phase, the proponents of ADR were mostly critics of the courts and the adversary system—champions of informal justice. In the second phase, the movement was embraced by distinguished judges, including the Chief Justice of the United States, whose primary goals appeared to be cost and docket reduction. Today, in the ADR movement’s third phase, some proponents seem mildly embarrassed by the goals of their predecessors. Although reducing costs and excessive formality may remain among their objectives, they defend ADR primarily as a means of providing greater access to justice.

Hensler focuses on court-annexed or court-ordered arbitration. At least 20 states and ten federal districts have programs in which judges refer cases to arbitration by a practicing lawyer, a retired judge or a panel of three lawyers. The arbitration is mandatory but non-binding; either party may reject the arbitrator’s award and insist on trial before a judge or jury. A party who rejects the arbitrator’s award may, but usually does not, incur financial sanctions if he or she fails to improve his or her position at trial. Although most programs are restricted to smaller-stakes cases, a few extend

---

76 See McMunigal, 37 UCLA L Rev at 843-44 (cited in note 61).
71 1990 U Chi Legal F 399.
to all civil damage actions. Moreover, there has been a tendency to increase monetary limits over time.

In courts in which litigants would wait years for a trial, arbitration programs commonly offer a hearing within months of filing. Litigants may wait for this hearing although they otherwise would settle more rapidly. For this reason, arbitration cannot be shown to reduce overall disposition time. Similarly, because arbitration provides a forum for cases that otherwise would not be heard, this practice cannot be shown to reduce court expenditures.

Finally, to the disappointment of some cost-conscious, production-oriented champions of ADR, most court-ordered arbitration programs have not significantly reduced the rate of trials. They couldn’t; trial rates were too low to go much lower. Hensler reports that, for the relevant cases, trial rates were in the two-to-three percent range both before and after the inception of arbitration. As she notes, to infer that small reductions in an already low trial rate were statistically significant would require large samples beyond the resource constraints of most researchers.\(^7\)

Court-ordered arbitration programs have delivered something more valuable than lower court costs, processing time and trial rates: “In every jurisdiction studied to date, both plaintiffs and defendants and their attorneys, whether winners or losers, said they were highly satisfied with the arbitration process and its outcome.”\(^7\) Both individual and institutional litigants are more likely to believe they have been treated fairly when they receive a hearing, and they are “more likely to express satisfaction with the litigation process when they believe they have been treated fairly, regardless of whether they won or lost.”\(^7\) Litigants whose cases have been arbitrated seem neither more nor less satisfied than those whose cases have been tried, but both groups are “significantly more positive . . . than litigants whose cases [have been] settled in court-mediated conferences.”\(^7\) Moreover, attorneys’ fees and other private litigation expenses appear no higher when cases are arbitrated than when they are settled without arbitration.

\(^7\) Wayne Brazil’s article in this symposium offers evidence suggesting a reduction in trial rates, but he, like Hensler, regards this evidence as inconclusive. Brazil, 1990 U Chi Legal F at 376-77.

\(^7\) Hensler, 1990 U Chi Legal F at 415.

\(^7\) Id at 416.

\(^7\) Id at 417. Contrary to the assumptions of some early ADR proponents, neither lay nor institutional litigants prefer informal to formal dispute resolution. Litigants, however, see both trial and arbitration as appropriately formal, impartial and dignified.
Hensler suggests that most evaluations of court-ordered arbitration have compared this practice unrealistically to trial. For most litigants, the real choice is not between arbitration and trial but between arbitration and settlement. Perhaps the clearest indicator of the success of court-ordered arbitration is that “two to ten times as many civil cases receive some form of adjudicative process in courts that have mandatory arbitration programs, as compared to courts that do not.”78

10. Wayne D. Brazil: A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values.79 Wayne Brazil notes and discusses nine potential objections to ADR programs, including all the objections voiced in Diane Wood’s contribution to this symposium. Brazil considers the extent to which each of these objections applies to the three ADR programs instituted by the Federal District Court for the Northern District of California, a court in which Brazil serves as a magistrate. He makes a convincing case that each of these innovative programs has improved the quality of justice.

Brazil first describes the Northern District’s program of settlement negotiations hosted by magistrates. This program was shaped by a lawyers’ symposium and an extensive formal survey of members of the bar. The symposium and survey revealed that an overwhelming majority of lawyers value settlement conferences hosted by judges or magistrates. The lawyers also believe that, absent unusual circumstances, these conferences should be mandatory. Moreover, they agree that judicial officers should not only facilitate communication between the parties but also offer suggestions and observations. The attorneys strongly prefer that judges or magistrates who are not scheduled to preside at trial host settlement conferences, and they believe that the parties as well as their lawyers ordinarily should be present.

Because the magistrates who host settlement conferences in the Northern District have no power over the conduct of later proceedings and because they do not reveal what transpired to the judges who do, they cannot exert significant pressure to settle. Their function is to aid the parties’ evaluations of their positions. Whether judicially hosted settlement conferences have increased the number of settlements is not known, but these conferences ap-

78 Id at 407-08.
79 1990 U Chi Legal F 303.
pear to have enhanced the efficiency and quality of the negotiating process.

Brazil observes that "litigators bring deeply suspicious and self-protective instincts" to two-party negotiations. Fear, mistrust and posturing inspire "oblique, circuitous and time-consuming exchanges of information."76 The assistance of a neutral third party can provide "direct, forthright, dialectical feedback," and most lawyers value this service.79

A second ADR program in the Northern District of California is "early neutral evaluation." In this program, volunteer, uncompensated lawyers with substantial experience in particular areas of litigation, acting as evaluators, conduct conferences to aid both lawyers and their clients in determining the settlement value of cases in the evaluators' areas of expertise. The goals of the conferences include identifying areas of agreement, obtaining stipulations of undisputed facts, suggesting plans for sharing information informally and for discovering information from third parties, and exploring the possibility of resolving legal issues through stipulation or through an expedited motion plan. In addition, an evaluator prepares a document that assesses the strengths and weaknesses of each side's case, suggests which side is likely to prevail on liability, and assesses the likely range of damages. With the parties' agreement, the evaluator may mediate negotiations (with or without revealing his or her written evaluation) and may conduct a series of "follow up" conferences. ENE conferences, however, occur in only a small proportion of the Northern District's cases, and "docket reduction . . . never has been a primary purpose" of the program.80

Brazil notes the findings of David Levine's two careful evaluations of the program. The clearest indication of the program's success is that "almost 90 percent of the lawyers . . . compelled to participate in ENE expressed the view that the program should be expanded to more cases."81 An overwhelming majority of lawyers thought ENE superior to judicial status conferences in clarifying

---

76 Id at 329.
79 Id at 323. Recall, however, the evidence noted by Deborah Hensler that litigants whose cases have been heard in court-ordered arbitration programs are more satisfied that they have been treated fairly than litigants whose cases have been settled through judicially hosted settlement conferences. Hensler, 1990 U Chi Legal F at 417. Although neutral third-party participation in any of several forms may improve the dispute resolution process, some forms are more welcome and more successful than others.
80 Brazil, 1990 U Chi Legal F at 340.
81 Id at 341.
issues, promoting party communication, facilitating settlement, and facilitating cost-effective discovery.

The Northern District of California also has a program of court-ordered arbitration of the sort described by Deborah Hensler. Following adversary proceedings at which sworn testimony is heard, an arbitrator determines, not the "settlement value" of the case, but the legal entitlements of the parties. Either party is free to reject the arbitrator's award and to proceed to trial without sanctions.

Again, an overwhelming majority of both lawyers and litigants have expressed favorable views of the program. One Federal Judicial Center study, however, offers an intriguing caveat to this pattern of endorsement. This study asked lawyers to consider separately the quality and the cost-effectiveness of arbitration. Ignoring cost-effectiveness, a substantial majority of lawyers reported that they preferred judges as decisionmakers to either arbitrators or juries (whom the lawyers ranked equally). When, however, the lawyers were asked, whether "[c]onsidering costs, time, and fairness, [they would] prefer to have [their] case decided by a judge, jury, arbitration, or makes no difference," 48 percent of the lawyers preferred arbitration, 29 percent a nonjury trial, and only 12 percent a jury trial.

11. Diane P. Wood: Court-Annexed Arbitration: The Wrong Cure. Swimming against the tide of favorable evaluations of court-ordered arbitration, Diane Wood argues that court-ordered arbitration is "the wrong cure" for what she calls a "crisis" in civil litigation in the federal courts. Wood usefully reviews the history of ADR programs in the federal courts, the statutes authorizing and limiting these programs, and some litigation that has challenged their legality.

Most of Wood's criticisms of court-ordered arbitration follow the path that Hensler and Brazil condemn as unrealistic. These criticisms compare arbitration to trial rather than to the negotiations that undoubtedly would resolve most arbitrated cases were arbitration abandoned. Wood maintains in fact that, although court-ordered arbitration programs are constitutional, they unfairly burden a litigant's exercise of the right to jury trial. One wonders whether she has noticed the extent to which American civil procedure already has accomplished this objective; existing procedures appear to have chilled exercise of the right to jury trial.

---

21 1990 U Chi Legal F 421.
almost to the freezing point. Moreover, Wood's condemnation of court-ordered arbitration as "second-class justice" rings hollow when an overwhelming majority of participants in the process proclaim that it isn't.

Still, many of Wood's criticisms are forceful. Arbitration proceedings are often conducted behind closed doors by people who are selected haphazardly. The current procedures for selecting arbitrators, the inadequacy of training programs (when they exist at all), and the lack of effective judicial or public scrutiny of arbitration awards raise issues of quality control. (The response that any hearing is better than none may be appropriate but does not seem entirely satisfying.) Moreover, the problems that court-ordered arbitration addresses—among them delay and docket congestion, lengthy and formalistic proceedings and discovery abuse—do not occur exclusively or even primarily in the smaller-stakes cases in which arbitration is currently available.

III. CONSOLIDATION

A thorough transformation of official dispute-resolution procedures occurred in thirteenth-century England as the collapse of earlier forms of adjudication led to the development of jury trial. In the fifteenth century, the excessive formalism of the common law courts prompted the development of courts of equity. In the approaching twenty-first century, the collapse of unworkable trial procedures may once again lead to the creation of new ones. This development will not require great inventiveness, merely a return to the basics of justice.

As Diane Wood argues, adjudication is public business, and the provision of an impartial forum for resolving disputes is one of society's core responsibilities. Efforts to remedy the failures of our adjudicative system "on the cheap" through pro bono volunteers and casually selected arbitrators may be useful stop-gaps, but they cannot be more. The appropriate long-term solution lies in providing effective dispute resolution services through our courts. As Wood suggests, these services must be provided in all cases, not just some; and they must be provided by judges who are accountable to higher courts and ultimately to the public.83

83 In addition, as noted above, evidence developed by the Federal Judicial Center and described by Wayne Brazil reveals that most federal court litigators consider judges sounder decisionmakers than either arbitrators or juries.
The ADR movement, however, has marked the way. For the most part, the empirical evaluation of social reforms in the twentieth century has been discouraging. The bottom line has seemed to be that nothing works. Scholars have concluded, though never without dissent, that Great Society programs have not reduced poverty, that the death penalty has not been shown to deter crime, that efforts to reform criminals have not lessened recidivism, that school integration has not improved the lot of minority children, that judicial settlement conferences have not increased the number of settlements, and so on. With alternative dispute resolution programs that permit disputants to tell their stories to impartial third parties, however, this dark conclusion has been reversed: Almost everything seems to work (though the principal measure of success has been participant satisfaction rather than changes in more tangible social indicators).

As Marc Galanter has noted, ADR mechanisms can be arrayed along a spectrum from “warm” to “cool.” Mediation by a professional psychologist in a room with pastel walls and soft New Age music playing in the background is “warm.” Arbitration resembling traditional adjudication is “cool.” Mechanisms toward the “cool” end of the ADR spectrum appear to offer the most promising model for restoring effective adjudication to our courts.

In discussions of ADR, we have spoken too much of tracking—of using different forms of dispute resolution for different sorts of cases. “Tracking talk” is a remnant of the informal-justice (or, if you prefer, the “touchy-feely”) era of the ADR movement. Although tracking is unobjectionable in principle, its proponents have neither demonstrated the need for it in practice nor offered worthwhile tracking proposals. The time to “let a hundred flowers bloom” has passed.

We should focus instead on consolidation and synthesis—on using the knowledge and experience that we have gained through

---

*See, for example, Steven Flanders, *Case Management and Court Management in United States District Courts* 37-39 (Federal Judicial Center, 1977).
*Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 Judicial 257 (1986).*
ADR experimentation to devise a workable dispute resolution procedure for the entire range of civil cases.\textsuperscript{90} We should move "court-annexed arbitration" from the annex to the courtroom, and we should address today's problems of quality control by regularizing arbitration services and by using judicial officers to provide them.

Perhaps, for example, a judicial officer other than the judge who will hear the case if it goes to trial should supervise pleading and discovery, consider the evidence that the parties have gathered, and then offer a nonbinding judgment concerning this evidence. In effect, this judicial arbitrator or evaluator would decide the case, although any party could reject the judge's determination and exercise his or her right to jury trial.

Court-ordered arbitration programs have been confined mostly to lower-stakes cases. But plaintiffs' lawyers, defendants' lawyers, and insurance company representatives have reported that they would welcome nonbinding judicial arbitration in complex and higher-stakes cases as well. Moreover, a judicial evaluator might employ "warm" techniques to facilitate settlement when preferred by the parties. The cost of adding a regularized arbitration procedure to our already extensive system of judicial pretrial management might not be great, and despite budget deficits, our nation plainly could afford to provide civil litigants the rudiments of due process. A systematized form of nonbinding judicial arbitration should become a standard part of American civil procedure.

I have elsewhere discussed at greater length how this arbitration might operate,\textsuperscript{91} but the specifics of the procedure are less important than its one essential characteristic. All of the favorably evaluated ADR techniques have shared this characteristic, and evaluations of ADR have concluded that "everything works" because of it: Somebody listens. That is what people want and what they often cannot get from our legal system. As the civil jury and the civil trial approach the vanishing point, we must again find impartial decisionmakers who will listen.

\textsuperscript{90} Or at least for almost the entire range of cases. "Warm" ADR mechanisms may remain appropriate when the parties have continuing relationships so that litigation is not a "zero-sum game," and already established "separate tracks" such as small claims courts have obvious virtues.

\textsuperscript{91} Alschuler, 99 Harv L Rev 1808 (cited in note 19).