

ADR'S BIGGEST COMPROMISE

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I. INTRODUCTION

Alternative Dispute Resolution (ADR) has become an increasingly popular alternative to litigation in America.¹ ADR has been championed

1. See Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System*, 108 PENN ST. L. REV. 165, 165 (2003) (“Today, interest in dispute resolution is high.”); Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 463 (1984) (noting that even in the early 1980s “[t]he use of alternative dispute resolution techniques ha[d] received considerable attention”); ADR Report, *The Director as Futurist: Jack Hanna Previews ‘Coming Attractions’ in ADR*, ADR REPORT, Feb. 16, 2000, at 4 (discussing the impact of the “huge trend” toward increasing legalization and institutionalization of mediation); James Cahoy & Kathryn Ericson, *Torts and Personal Injury: Alternative Dispute Resolution*, WEST’S LEGAL NEWS, June 24, 1996, at 1–2, available at 1996 WL 343267 (discussing the

as a primary solution² to crowded dockets and expensive litigation,³ and every year the ADR animal gets bigger and bigger.⁴ Meanwhile, the number of civil cases going to trial and the use of the civil jury has steadily declined since 1938.⁵

This Note addresses the largely unrecognized and unforeseen costs associated with the lionization of ADR. In doing so, it offers a critique of ADR that few are willing to give. But more than just a critique, this Note is a refreshing reminder of the importance of litigation and the jury trial to American democracy.

Judith Resnik wrote in 1995 that “judges and lawyers debate less about whether ADR is good and more about who should initiate ADR, who may attend, and whether it should be mandatory.”⁶ The same is true today. ADR has become an accepted and legalized practice in America without much discussion of whether it is “good.”⁷ The debate has centered

evolution of ADR by the decade, since the 1970s, and concluding that “the trend toward ADR has become even more pronounced since 1990”).

2. See Gerald F. Phillips, *The Obligation of Attorneys to Inform Clients About ADR*, 31 W. ST. U. L. REV. 239, 239 (2004) (“The emergence of ADR was one of the most significant developments in the resolution of disputes in the latter half of the 20th century.”).

3. See Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275–76 (1982) (advocating the increased use of ADR to relieve the pressures on courts); Phillips, *supra* note 2, at 256 (noting that “[o]vercrowded court calendars and the length of time it takes to prepare and try a case make litigation appear endless”); Andrea Kupfer Schneider, *Building a Pedagogy of Problem-Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113, 114 (2000) (“Hailed as a way to provide better service to clients, save money and time, and unplug the court system, the promise of ADR has meant many things to many people.”).

4. See, e.g., JACQUELINE M. NOLAN-HALEY, *ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL V* (2d ed. 2001) (“In the eight years since the publication of the first edition of this book, the field of alternative dispute resolution (ADR) has undergone extraordinary growth.”).

5. E.g., ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 12 (2001).

6. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 235 (1995) (footnote omitted); see also Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1960 (1996) (“ADR redefines the role of law in society and the public mission of the lawyer, but advocates never put content to that redefinition *nor do they address the larger implications of the change they espouse*. ‘Just try the new elixir,’ they seem to say, ‘and it will make you feel better.’” (emphasis added)).

7. See James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLIN J. PUB. L. & POL’Y 235, 252–53 (2004) (discussing the acceptance of mediation as a form of ADR despite

not on whether ADR is beneficial to the legal community as a whole, but on how to utilize it more effectively in certain areas of law.

For example, ADR is often welcomed in divorce proceedings because the emotionally charged backdrop of litigation can aggravate an already stressful situation.⁸ Legal scholars, however, have also critiqued the use of ADR in this situation because it “takes two to settle,” and if one party to the divorce is too angry and unwilling to come to the negotiation table, litigation might be the better option.⁹ Thus, ADR presents the advantage of a less confrontational proceeding for divorces, but may prove futile if one party is unwilling to compromise. This is a typical discussion of ADR. Commentators analyze the benefits and detriments of ADR within certain boundaries, like the family law context, but fail to analyze ADR’s effect on the entire legal system.¹⁰

This is unfortunate tunnel vision—like a horse in blinders, aware of only the path directly ahead. The tunnel vision dictating the discussion of ADR leaves the most important and fundamental questions unanswered. A new vantage point is needed: a step backward to see the effect of ADR on the legal system *as a whole*, not just ADR’s effect on a certain area of law. This Note takes that step backward to take the discussion of ADR a step forward.

“a paucity of empirical evidence,” and noting that while harshly critiqued in the 1980s by Owen Fiss and others, “[b]y the mid-1990’s, at least one scholar felt compelled to ask the obvious question: ‘Where have the critics gone?’” (citing Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996)).

8. See Kim Denise Morton, *Alternative Dispute Resolution in Family Law: Families in Crisis Explore Turning to the ‘Civil’ Alternative*, PA. L. WKLY., Mar. 22, 1999, at S13, available at 03/22/1999 PLW S13 (Westlaw) (“The anxiety related to the divorce process and litigation is often overwhelming to the participants.”).

9. See Samuel J. Goodman, *Know When to Settle and Take Control of Your Future*, FAM. ADVOC., Summer 2004, at 29 (“Keep in mind, however, that no matter how much you want to settle, it takes two to settle—and only one to initiate World War III.”).

10. See Resnik, *supra* note 6, at 240. Resnik argues the following:

The current legal issues are not whether ADR is a desirable mode for courts and agencies to adopt or whether courts should play a role in encouraging parties to settle and to explore a variety of procedures to help them achieve an agreement. Rather, today’s issues are what forms of ADR should be adopted, what kinds of settlement programs are acceptable, what kinds of disputes are appropriate to which forms of ADR, whether ADR providers are (like judges) immune from suits and the reach of their jurisdiction, and how to increase use of ADR procedures.

Id. (footnotes omitted).

Part II provides a definition of ADR for the purposes of this Note. This Note focuses on ADR as a generic form, rather than its various types, to compare ADR with adjudication. Part III discusses the increasing caseloads affecting the augmented federal judiciary and the declining numbers of federal civil trials and juries. Part IV discusses the incredible growth ADR has achieved in the last quarter-century. Part V explains that ADR is a response to the “litigation explosion” and is a significant reason for the decline in civil trials and the use of juries. Part VI juxtaposes ADR’s private nature with the public nature of adjudication, and Part VII discusses the importance of litigation and the jury trial and argues that the unfettered growth of ADR compromises the very foundations of democratic governance. ADR’s biggest compromise is not in the final resolution of a dispute (although the resolution is often just that—a compromise), but in the divide it creates between Americans and our democratic institutions, like public adjudication and the jury trial, that provide our constitutional freedoms. Finally, Part VIII offers some concluding remarks and advises us not to embrace ADR at the expense of adjudication. We must use restraint in our approach to ADR, understand what is at stake, and reflect on whether we want the trends to continue.

II. ADR GENERALLY

ADR is defined as “[a] procedure for settling a dispute by means other than litigation, such as arbitration or mediation.”¹¹ ADR attempts to avoid trial,¹² and may encompass any extrajudicial procedure that private parties use to resolve legal disputes.¹³ In many ways, ADR is essentially a compromise.¹⁴

11. BLACK’S LAW DICTIONARY 86 (8th ed. 2004).

12. See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 892–94 (1991) (noting that common to all types of ADR is an attempt to resolve disputes without a full trial on the merits). Sometimes, however, ADR may be unsuccessful in avoiding trial. For example, parties may have to litigate the terms of contractual arbitration, which presents a comedic irony: parties contractually choose to arbitrate, but because of disagreement on the terms of arbitration, they have to go to court to sort the terms out.

13. See *id.* at 897.

14. See Virginia Brown, *Revisiting the Public Policy Exception to the Employment-at-Will Doctrine Following Thibodeau v. Design Group One Architects: Applying an Ethic of Care Analysis*, 3 CONN. PUB. INT. L.J. 295, 311 n.53 (2004) (“The principles behind Alternative Dispute Resolution (ADR), such as value creating as opposed to value claiming, are illustrative of a humanistic approach to legal problems. The principles of ADR [involve] cooperation, compromise, and continuance.”); Larry Weinberg & Geoffrey B. Shaw, *A Practical Road Map to Entering the Canadian*

Nevertheless, ADR has been championed as a better way to attain justice. In divorces, for example, a more peaceful proceeding benefits the already aggravated parties.¹⁵ As noted in the introduction, some consider this a better way of achieving justice because justice involves not only the outcome of a decision, but the process used to achieve that result.¹⁶ The pursuit of justice in both procedure and outcome requires ADR to enlist many different forms. Indeed, "ADR is an umbrella term that refers generally to alternatives to the court adjudication of disputes."¹⁷ Negotiation,¹⁸ arbitration,¹⁹ and mediation²⁰ are among the most common types of ADR,²¹ but others such as early neutral evaluation (ENE)²² and summary jury trials (SJT),²³ are commonly used as well.²⁴ In practice,

Market, 24 FRANCHISE L.J. 63, 70 (2004) ("ADR is designed to encourage parties to compromise."); Sanford F. Young, *Conventional Wisdoms or Mistakes: The Complaint and the Response*, N.Y. ST. B.A. J., June 2004, at 28, 29 ("[T]he conventional wisdom is that ADRs are more likely to result in compromise awards than court actions.").

15. See *supra* note 8 and accompanying text.

16. See Brian L. Josias, Note, *Burying the Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141, 1173 (2004) ("Fundamentally, the goal is to arrive at a more just result than adjudication would permit. This concept of justice encompasses more than simply the outcome of the decision, but also the process required to arrive at that decision.").

17. NOLAN-HALEY, *supra* note 4, at 1–2; see Harvey C. Fisher, *Trial Rate's Down? Not on Your Life*, N.J. LAW., Nov. 8, 2004, at 1 (noting that Chief U.S. District Judge John W. Bissell commented that the alternatives to the resolution of disputes provide a "buffet of opportunities").

18. Negotiation is "[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter." BLACK'S LAW DICTIONARY 1064 (8th ed. 2004).

19. Arbitration is "[a] method of dispute resolution involving one or more neutral third parties who are [usually] agreed to by the disputing parties and whose decision is binding." *Id.* at 112.

20. Mediation is "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." *Id.* at 1003.

21. See NOLAN-HALEY, *supra* note 4, at 2 (noting that "negotiation, mediation, and arbitration, have been practiced for hundreds of years"); Josias, *supra* note 16, at 1171 (considering arbitration and mediation as "two primary methods of dispute resolution").

22. ENE is a form of court-annexed ADR and, like the name suggests, involves an early case evaluation by a neutral private attorney. NOLAN-HALEY, *supra* note 4, at 208.

23. See *id.* at 199 (noting that the summary jury trial (SJT) provides "lawyers and their clients an advance[d] assessment of" a likely jury verdict). See generally Lambros, *supra* note 1, at 463 (noting that Judge Lambros describes the importance of

however, the different types of ADR take on an amorphous character making them difficult to define.²⁵ Thus, perfect definitions encompassing all types of ADR are difficult to achieve.²⁶

For the purposes of this Note, however, understanding the nuances between the different forms of ADR is not necessary.²⁷ This Note is particularly concerned with the characteristics of ADR as a whole in order to differentiate those characteristics from adjudication.²⁸

Most importantly, ADR as a generic form introduces the disputants to a third party who is asked to do something.²⁹ The third party essentially performs one of three different types of work.³⁰ These different categories, or types of work, are useful in understanding the different forms of ADR. One type of work performed by the third party is “quasi-adjudicatory.”³¹ ADR forms falling into this category offer an outcome decided by the third party from a truncated fact-finding procedure.³² Often the result is binding,

finding alternatives to litigation and how he created the SJT).

24. See generally Dayton, *supra* note 12, at 897–914 (discussing the use of “[c]ourt-annexed arbitration, summary jury trials, mediation, and early-neutral evaluation” in the federal court system).

25. See Josias, *supra* note 16, at 1172–73 (discussing how arbitration takes on “chameleon-like” qualities because “arbitration is ‘designed by the parties to serve their particular needs,’ and, therefore, ‘it cannot be defined or described in a manner that will encompass all arbitration elements’” (quoting STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 233 (3d ed. 1999))).

26. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004) (“The first obstacle to an understanding of the role of ADR is the sheer breadth and diversity of activities to be taken into account, a breathtaking range of approaches and strategies that we lump under the heading of ‘ADR’ (an outmoded acronym that survives as a matter of convenience).”).

27. For a quick, accurate, and interesting read on the variations of ADR, see NOLAN-HALEY, *supra* note 4. The book discusses negotiation, mediation, arbitration, SJT, ENE, and hybrid dispute resolution procedures; although, the author notes that “[i]t is certainly not possible in this book to catalogue, let alone describe, every ADR procedure.” *Id.* at 2. See also OWEN M. FISS & JUDITH RESNIK, *ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE* (2003) (including over one hundred pages of material on ADR, the bulk of which are in chapter 4, entitled “Resolution Without Adjudication”).

28. Cf. NOLAN-HALEY, *supra* note 4, at 2 (noting that “[f]or purposes of analysis and client counseling, ADR processes should not be lumped together”).

29. Resnik, *supra* note 6, at 218.

30. *Id.* at 218–20.

31. *Id.* at 218.

32. *Id.*

but sometimes parties can decline the judgment as part of a nonbinding procedure.³³ Private contractual arbitration³⁴ and court-annexed arbitration³⁵ are both forms of quasi-adjudicatory procedures.³⁶ Importantly, these forms are not adjudicatory because “the proceeding is not conducted by a state-employed individual who bears the title ‘judge,’ formal evidentiary rules do not apply, and opinions are often not written.”³⁷

A second type of work performed by the third party is “to inform the disputants of how outsiders view the dispute and how these outsiders would decide, were they asked to do so.”³⁸ The information provided by the third party assists the parties in fairly settling their dispute.³⁹ Like some types of quasi-adjudicatory ADR, this form is not binding and does not affect the parties’ rights to litigate.⁴⁰ It is simply a predictive process for ascertaining the probability of results to aid in settlement.⁴¹ The SJT is one type of ADR that employs this practice.⁴²

The final type of work performed by third parties involves eliciting the agreement of the parties through conversation.⁴³ The third party does not render a judgment or reveal its views to the parties.⁴⁴ The third party is there to facilitate the conversation between the parties so they may arrive at a settlement themselves, or at least narrow the issues should adjudication be needed.⁴⁵ ENE, judge-run settlement procedures, and mediation⁴⁶ encompass this form of ADR.⁴⁷

33. *Id.* at 218–19.

34. Private contractual arbitration is a voluntary process where the parties, prior to the dispute, agree to arbitrate. *Id.* at 218.

35. Court-annexed arbitration is often mandatory arbitration and differs from private contractual arbitration in that it operates with the court’s supervision and the right to a de novo trial is reserved if the parties are not satisfied with the outcome. NOLAN-HALEY, *supra* note 4, at 147–48.

36. Resnik, *supra* note 6, at 218.

37. *Id.* at 219.

38. *Id.*

39. *Id.*

40. Lambros, *supra* note 1, at 469.

41. *Id.*

42. Resnik, *supra* note 6, at 219–20.

43. *Id.* at 220.

44. *Id.*

45. *Id.*

46. KIMBERLEE K. KOVACH, *MEDIATION PRINCIPLES AND PRACTICE* 26 (3d ed. 2004) (noting that the definition of mediation is subject to debate, but most agree it is a way “to assist people in reaching a voluntary resolution of a dispute or conflict”).

Thus, ADR spans a great deal of procedures aimed at resolving disputes without having to go to trial. Even though ADR enlists many forms, however, this Note is only concerned with ADR as an alternative regime to litigation. Professor Resnik captures the perspective of this Note well:

Were this . . . an inquiry into the quality of outcomes or processes of ADR, it would be necessary to consider each form individually and not to speak of ADR as a 'generic.' However, my interest here is in the relationship between ADR in its generic form, as an idea of an alternative regime . . . to state-based adjudication.⁴⁸

III. THE VANISHING TRIAL

In 2003, the ABA's Section of Litigation funded a project called "The Vanishing Trial" to "document, and then to analyze, what many of us knew anecdotally from our own practices—that old-fashioned trials are an increasingly rare beast."⁴⁹ The project commissioned Marc Galanter of the University of Wisconsin Law School to collect data on trials, with a particular emphasis on federal courts.⁵⁰ His research, as well as others', shows a steep decline in trials since 1962.⁵¹

A. Federal Civil Trials

Federal civil trials are fast becoming extinct.⁵² The percentage of federal civil cases reaching trial has dropped from 8.5% in fiscal year (FY)

47. Resnik, *supra* note 6, at 220.

48. *Id.* at 222.

49. Patricia Lee Refo, *Opening Statement: The Vanishing Trial*, LITIGATION, Winter 2004, at 1, 1. In fact, the "project is the largest single initiative the Section has ever funded." *Id.*

50. *Id.*

51. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004); *see also* Refo, *supra* note 49, at 1 ("Thus, *our federal courts actually tried fewer cases in 2002 than they did in 1962*, despite a fivefold increase in the number of civil filings.").

52. *See* Galanter, *supra* note 51, at 523 ("Trials are not exactly an endangered species—at least for now. But their presence has diminished."); *see also* Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141 (2000) ("Our American birthright, the proverbial 'day in court,' eludes more parties in federal court every year.") (footnote omitted).

1973⁵³ to 1.4% in FY 2005.⁵⁴ The years between these two bookends tell the story of the descent: in FY 1980, 6.5% of civil cases reached trial;⁵⁵ in FY 1985, 4.7%;⁵⁶ in FY 1990, 4.3%;⁵⁷ in FY 1995, 3.2%;⁵⁸ and in FY 2000, only 2.2% reached trial.⁵⁹ These statistics reveal an astounding truth: fewer civil cases are tried each year.⁶⁰ Moreover, the federal judiciary⁶¹ has grown in size from 245 authorized district court judgeships in 1960⁶² to 678 in 2005,⁶³ and yet tries significantly fewer civil cases.⁶⁴ Thus, a trend that

53. See Mollica, *supra* note 52, at 144–45 (displaying a table of federal civil and criminal cases proceeding to trial from 1973 to 1999).

54. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 182 tbl. C-4 (2005), available at <http://www.uscourts.gov/judbus2005/appendices/c4.pdf> [hereinafter 2005 ANNUAL REPORT].

55. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 388 tbl. C-4 (1980) [hereinafter 1980 ANNUAL REPORT].

56. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 308 tbl. C-4 (1985).

57. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 153 tbl. C-4 (1990) [hereinafter 1990 ANNUAL REPORT].

58. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 162 tbl. C-4 (1995).

59. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 159 tbl. C-4 (2000), available at <http://www.uscourts.gov/judbus2000/appendices/c04sep00.pdf>.

60. This Note focuses on civil trials, but it should be observed that the rarity of civil trials is accompanied by a similar trend in criminal trials. “On both the civil and criminal sides, federal courts see significantly fewer trials now than a generation ago.” Mollica, *supra* note 52, at 142. Mollica’s research, presented in tabular form, shows that 17% of criminal cases went to trial in 1973, while only 5.7% did so in 1999. *Id.* at 144–45. In 2005, approximately 4.5% of criminal cases went to trial. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 245 tbl. D-4 (2005), <http://www.uscourts.gov/judbus2005/appendices/d4.pdf> (calculated by dividing the sum of acquittals and convictions tried by both judge and jury (3,835) by the “total defendants” (86,000)).

61. This Note is concerned with federal district courts, and thus the numbers reflect federal district court statistics. But the district courts are not out of step with the rest of the federal judiciary—since 1960 the circuit courts of appeals have seen an increase of 68 authorized judgeships. ADMIN. OFFICE OF THE U.S. COURTS, TABLE C, U.S. COURTS OF APPEALS, ADDITIONAL JUDGESHIPS AUTHORIZED BY JUDGESHIP ACTS (2005), <http://www.uscourts.gov/history/tablec.pdf>. Of course, the Supreme Court has remained at nine justices since 1948, as mandated by Congress. See 28 U.S.C. § 1 (2000).

62. ADMIN. OFFICE OF THE U.S. COURTS, TABLE 2.11, U.S. DISTRICT COURTS, CIVIL CASES FILED, TERMINATED, PENDING (2004), <http://www.uscourts.gov/judicialfactsfigures/table2.11.pdf> [hereinafter TABLE 2.11].

63. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL VACANCIES, AUTHORIZED JUDGESHIPS, <http://www.uscourts.gov/cfapps/webnovada>

has continued since at least the 1970s demonstrates that fewer cases are tried by a larger federal judiciary.

This is not to say, however, that federal district court *caseloads* are decreasing. In fact, the larger federal judiciary was in response to increased caseloads.⁶⁵ For example, in FY 1960, there were 245 authorized judgeships and 61,829 civil cases terminated.⁶⁶ Thus, there was an average caseload of just over 250 cases per authorized judgeship.⁶⁷ In FY 1980 there were 516 authorized judgeships and 163,869 cases terminated, resulting in a caseload of more than 315 cases per authorized judgeship.⁶⁸

/CF_FB_301/index.cfm?fuseaction=Reports.ViewJudgeships (last visited Apr. 4, 2006) [hereinafter FEDERAL JUDICIAL VACANCIES].

64. See Mollica, *supra* note 52, at 141 (noting that from 1973 to 1999 federal civil trials had decreased even though there was “a judicial branch nearly doubled in size, augmented with a rising corps of magistrates, clerks and other ancillary personnel”).

65. See Moore v. City of East Cleveland, 431 U.S. 494, 522 (1977) (Burger, C.J., dissenting) (“That burden has now become a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function as it should.” (internal quotation marks omitted)). As a result of that overload “[c]ourts are forced to add more clerks, more administrative personnel, to move cases faster and faster.” *Id.* at 523 (citation omitted).

66. TABLE 2.11, *supra* note 62.

67. See *id.* (calculated by dividing the number of cases terminated in 1960 (61,829) by the number of authorized judgeships in 1960 (245)). The actual result is 252.36 cases per authorized judgeship, but I have averaged the result to show that these calculations are not precise. This is true for two reasons. First, I used the cases “terminated” figure when either the cases “filed” (59,284) or “pending” (61,251) figures could have been used. The numbers, however, are not significantly different from the “terminated” figure (61,829), and the terminated figure better represents the actual number of cases the court decided that year. Cases filed simply means how many cases were filed that year, and cases pending means how many cases were pending at the end of the year. Thus, while 59,284 cases were filed in 1960, the 245 authorized judgeships terminated slightly over that amount—61,829. This is because they also terminated some of the cases that were still pending from the previous year. Second, the denominator in my calculation, or the 245 authorized judgeships, does not accurately represent the actual number of judges, just the number authorized. There are often vacancies making the number less. See Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1405 n.1 (2002) (utilizing the number of authorized judgeships for calculating the number of trials per judgeship, and noting that “[a]lthough a number of vacancies reduced the lot of active judges well below 665, 665 is not too high an estimate of the number of total judges trying cases, as almost three hundred senior judges were still on the bench in 2001.”).

68. See TABLE 2.11, *supra* note 62; see also *supra* note 67 (discussing how this calculation and others were made).

In FY 2005, there were 678 authorized judgeships and 270,973 cases terminated, thereby resulting in 400 cases per authorized judgeship.⁶⁹ According to this data, the last fifty years reveal significant trends: Federal caseloads are increasing, the federal judiciary is growing, and yet the number of cases reaching trial is decreasing. Therefore, despite the “litigation explosion,”⁷⁰ lawyers are spending less time litigating. The dramatic increase in caseload indicates that more lawsuits are being filed, but it has not resulted in more cases being tried.

B. Federal Civil Jury Trials

The corollary to the decline in federal civil trials indicates another trend: the federal civil *jury's* moribund decline.⁷¹ The statistics speak for themselves. In 1970, there were 79,466 civil cases terminated, of which 7,975 were a result of court action (jury and nonjury) during or after trial.⁷² Of these 7,975 cases, 3,409 were terminated by juries.⁷³ Thus, 43% of the cases that went to trial in 1970 were decided by a jury.⁷⁴ But of all case terminations (including those terminated with and without court action—79,466 cases) that year, only 4.3% were decided by a jury.⁷⁵ While this does not seem like a large percentage, it is four times as large as recent figures.

In 1980, only 39% of cases terminated by court action during or after trial were the result of jury trials.⁷⁶ More significantly, however, is that only

69. FEDERAL JUDICIAL VACANCIES, *supra* note 63 (authorized judgeships); 2005 ANNUAL REPORT, *supra* note 54 (cases terminated); *see also supra* note 67 (discussing how this calculation and others were made).

70. *See Josias, supra* note 16, at 1155 (“Academics and jurists alike, researching for over thirty years, have extensively documented and debated the phenomenon in America of increasing numbers of lawsuits known as the ‘litigation explosion.’”).

71. *National Program to Increase Citizen Participation in Jury Service*, CIV. ACTION, Spring 2005, at 6 (“A corollary to the vanishing trial is the vanishing juror. The willingness of citizens to serve as jurors has been steadily declining for years. The response rate to jury summons is about 20% in many large urban court systems.”).

72. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 245a tbl. C-4 (1970).

73. *Id.*

74. *See id.* (calculated by dividing the number of cases terminated by juries (3,409) by the number of cases terminated by court action during or after trial (7,975)). *See id.*

75. *See id.* (calculated by dividing the cases terminated by juries (3,409) by the total terminations (79,466)).

76. *See* 1980 ANNUAL REPORT, *supra* note 55 (calculated by dividing (3,920) the number of cases terminated by jury trials during or after trial by the total number

2.5% of total terminations that year were decided by a jury.⁷⁷ Out of the cases that went to trial in 1990, 52% were decided by a jury,⁷⁸ which accounted for only 2.2% of total terminations.⁷⁹ In 1995, the decline in cases terminated by a jury fell to only 1.8%,⁸⁰ while the percentage of cases that went to trial and were decided by a jury rose again to 55%.⁸¹ By 2000, these percentages became 1.5% and 65%, respectively.⁸² 2005 statistics indicate that less than 1% of total cases terminated were decided by a jury, and out of cases that went to trial, about 67% were decided by a jury.⁸³

C. Summary of the Vanishing Trial and Jury

The trends indicating the decline in the number of civil trials, civil jury trials, and related matter are indicated in Table 1 below.

of cases terminated during or after trial in 1980 (10,091)).

77. *See id.* (calculated by dividing the total number of civil terminations in 1980 (154,985) by the number of cases terminated by juries (3,920)).

78. *See* 1990 ANNUAL REPORT, *supra* note 57 (calculated by dividing the number of cases decided by jury (4,783) by the total number of civil cases terminated during or after trial (9,263)).

79. *See id.* (calculated by dividing the total number of civil cases terminated in 1990 (213,429) by the number of cases terminated by jury during or after trial (4,783)).

80. ADMIN. OFFICE OF THE U.S. COURTS, TABLE 2.13, U.S. DISTRICT COURTS, CIVIL CASES TERMINATED BY ACTION TAKEN (2004), <http://www.uscourts.gov/judicialfactsfigures/table2.13.pdf> [hereinafter TABLE 2.13]. For these and other percentages, I relied on the data from Table 2.13 because it provides accumulated figures for 1991 through 2004 from Statistical Table C-4 of those years. The 1.8% figure I arrived at was deduced from the table by taking the number of cases decided by jury in 1995 (4,126) and dividing it by the total number of cases terminated that year (229,325); this figure includes all cases filed, even cases resolved with no court action.

81. *See id.* (calculated by dividing the number of cases decided by jury in 1995 (4,126) by the total number of cases that went to trial (jury and nonjury) that year (7,443)).

82. *See id.* (calculated by dividing the number of civil jury cases in 2000 (3,779) by the total cases terminated in 2000 (259,234), and by dividing the number of civil jury cases in 2000 (3,779) by the total civil cases in 2000 (5,780)); *see also* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 143 (2002) (“For example, in 1979 there was one jury trial for every two judge trials, and by 2000 there were more than two jury trials for every judge trial.”).

83. 2005 ANNUAL REPORT, *supra* note 54 (calculated by dividing the number of civil jury cases in 2005 (2,610) by the total cases terminated in 2005 (270,973), and by dividing the number of civil jury cases in 2005 (2,610) by the total civil cases in 2005 (3,899)).

Table 1
Federal District Court Data Indicating Trends of Larger Caseloads, a
Larger Judiciary, Fewer Trials, and Fewer Jury Trials⁸⁴

Fiscal Year	Cases Terminated	Number of Authorized Judgeships	Average Workload per Judgeship	Percentage of Cases Reaching Trial	Percentage of Cases Decided by a Jury
1960	61,829	245	252	10.5	4.9
1970	80,435	401	201	10.0	4.3
1980	163,869	516	318	6.5	2.5
1990	214,435	575	373	4.3	2.2
2000	259,637	655	396	2.2	1.5
2005	270,973	678	400	1.4	1.0

Substantial evidence supports my research and deductions confirming the decline in trials, and more specifically, the decline in jury trials. The most recent research performed by Professor Galanter is an authoritative source proving the vanishing trial phenomenon.⁸⁵ Others have reported on and expanded his research, arriving at the same conclusions.⁸⁶

84. These statistics derive from multiple sources. The numbers in columns two (Cases Terminated) and three (Number of Authorized Judgeships) were taken from TABLE 2.11, *supra* note 62, except for the 2005 numbers. The Cases Terminated figure for 2005 comes from 2005 ANNUAL REPORT, *supra* note 54. The Authorized Judgeships figure for 2005 comes from FEDERAL JUDICIAL VACANCIES, *supra* note 63. The average in column four (Average Workload per Judgeship) is simply the quotient of the numbers in column two divided by the numbers in column three. The percentages in column five (Percentage of Cases Reaching Trial) were taken from Table C-4 of the given fiscal year, except for the 1960 percentage. The 1960 percentage was derived by using Table C-7. The percentages in column six (Percentage of Cases Decided by a Jury) were derived from Table C-4 of the given year in the method defined in footnote 75, *supra*, (except for the 1960 percentage, which again utilized Table C-7).

85. See generally Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005) (providing substantial statistical evidence and a number of graphical figures to illustrate this phenomenon).

86. E.g., Clermont & Eisenberg, *supra* note 82, at 142 (noting that “the civil trial has all but disappeared” and that “[m]any have noted this trend”); Mollica, *supra* note 52, at 144–45 (displaying a table indicating decline in both civil and criminal trials); Scott Atlas & Nancy Atlas, *Potential ADR Backlash: Where Have All the Trials*

Regarding the decline of civil *jury* trials, Ellen E. Sward wrote a book dedicated to the subject, appropriately titled *The Decline of the Civil Jury*.⁸⁷ Galanter's research revealed the same decline,⁸⁸ as have the conclusions of many others.⁸⁹

The decline in both the number of cases going to trial and of cases decided by juries is well documented. All the data tell the same story: suits are being filed with increasing regularity, but fewer persons are seeing their proverbial "day in court,"⁹⁰ *whether as a party or a juror*. Meanwhile, ADR becomes ever more ubiquitous.

IV. THE LIONIZATION OF THE ADR ANIMAL

The ADR movement started gathering steam in the 1970s.⁹¹ Key to this development was the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which examined ADR as a possible solution to Roscoe E. Pound's earlier concerns regarding dispute resolution in the judicial system (the Pound Conference).⁹² The

Gone? To Mediation or Arbitration, DISP. RESOL. MAG., Summer 2004, at 14, 14 ("Moreover, while the number of civil lawsuits being filed annually has increased, the number of cases tried has steadily declined."); Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at A1 (writing that "even though there are five times as many lawsuits today, the raw number of civil trials has dropped").

87. SWARD, *supra* note 5, at 3 ("[T]he civil jury now hangs by a thin, albeit strong, thread—the Seventh Amendment to the United States Constitution. But the civil jury is under attack." (internal citation and footnote omitted)).

88. Galanter, *supra* note 51, at 459 (noting the startling sixty percent decline in the number of trials from the mid-1980s to today); accord Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 133 (2004) ("[A] study recently conducted by Professor Marc Galanter reveals a marked decline in jury trials.").

89. See, e.g., Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 17 (2003) ("The Civil Jury trial is fast disappearing from our legal landscape" (footnote omitted)); N. Patrick Flanagan III, *Are Lawyers an Endangered Species?*, NEV. LAW., September 2003, at 6, 6 ("I believe that the American civil jury system is withering away.").

90. Mollica, *supra* note 52, at 141.

91. Cahoy & Ericson, *supra* note 1, at 2. See generally Hensler, *supra* note 1, at 165 (providing a comprehensive history of the dispute resolution movement in the United States).

92. *In re Sargeant Farms, Inc.*, 224 B.R. 842, 844 (Bankr. M.D. Fla. 1998); Schneider, *supra* note 3, at 115 ("The current concept of ADR in the United States emerged from the 1976 Pound Conference focusing on the weaknesses of the adversarial system.").

Pound Conference was convened to gather “leading jurists and lawyers [who] expressed concern about increased expense and delay for parties in a crowded justice system.”⁹³ Chief Justice Warren Burger specifically wanted to know “if there was a better way of doing things than taking someone to court.”⁹⁴

Professor Frank Sander had an answer for the former Chief Justice. Sander’s essay, *Varieties of Dispute Processing*,⁹⁵ was among the conference materials and called for turning the courthouse into a “Dispute Resolution Center.”⁹⁶ Subsequently, Sander’s idea became known as the “multi-doored courthouse.”⁹⁷ Sander meant that the courthouse had to be flexible to conduct trials *and* settle disputes through various forms of ADR.⁹⁸ For Sander, ADR mechanisms enabled the “forum to fit the fuss,”⁹⁹ and provided “promising avenues to explore.”¹⁰⁰

Exploration immediately began. It has yet to look back. One scholar noted that over the last twenty-five years “[n]o field of law has experienced more growth or had a greater impact on the law . . . than alternative dispute resolution.”¹⁰¹ One reason ADR has grown is because judges and lawyers have advocated its use.¹⁰² Another reason, even more significant, is the complete 180 degree doctrinal shift in the Supreme Court’s attitude toward arbitration in the last half-century.¹⁰³

93. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 7 (3d ed. 1999).

94. Cahoy & Ericson, *supra* note 1, at 2.

95. *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 111 (1976) [hereinafter *Justice Address*].

96. *Id.* at 131.

97. Resnik, *supra* note 6, at 216 n.19.

98. *See id.* at 217.

99. Hensler, *supra* note 1, at 175.

100. *Justice Address*, *supra* note 95, at 133.

101. Richard Chernick, *Alternative Dispute Resolution: The Growth and Maturation of Mediation*, L.A. LAW., Mar. 2002, at 8.

102. *See* Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 193 (2003) (“Many judges, working in close proximity with lawyers (and to a much lesser extent [sic] with litigants) do not like the very processes of adjudication with which they work on a daily basis. Judges have become a major part of the ADR lobby.”); Resnik, *supra* note 6, at 234; Fisher, *supra* note 17 (describing the feelings of one attorney who believes “that some judges actually feel they have ‘failed’ if they’re unable to short-circuit a case from trial”).

103. *See* James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic*

A. *The Supreme Court's Affinity for Arbitration*

In the 1953 *Wilko v. Swan*¹⁰⁴ decision, the Court held that an individual's signature on an agreement to arbitrate did not preclude him from litigating his claim.¹⁰⁵ While the Court based its decision on congressional intent (that the Securities Act precluded such contractual agreements to arbitrate),¹⁰⁶ Judith Resnik points to three assumptions the Court made in allowing the customer to litigate his claim.¹⁰⁷ Two of these assumptions were that "arbitration was assumed to be something *different* from and less loyal to law than adjudication,"¹⁰⁸ and that "the judiciary viewed with skepticism the agreements of parties."¹⁰⁹ The Court, however, quickly revised these assumptions in the 1980s.¹¹⁰

The opposition to arbitration based upon public policy reasons is known as the *Wilko* doctrine, and it has met its demise in several Supreme Court decisions.¹¹¹ The assumptions the Court made in *Wilko* dramatically changed after these decisions.¹¹² The result was that the Court held that congressional intent supported, rather than disfavored, arbitration.¹¹³

Rumination on Mediator Values Beyond Self-Determination and Neutrality, 5 CARDOZO J. CONFLICT RESOL. 65, 66 (2004) (noting that the Supreme Court has recently provided "unbridled support for freedom to contract in disputing"); Resnik, *supra* note 6, at 224 ("For almost thirty years, these assumptions formed something called a 'public policy' objection to arbitration During the 1980s, however, the Supreme Court changed its mind.").

104. *Wilko v. Swan*, 346 U.S. 427 (1953).

105. *Id.* at 430, 438.

106. *Id.* at 438.

107. Resnik, *supra* note 6, at 224.

108. *Id.* Resnik also argues that the Court made a final assumption that "public judgments rendered by federal trial courts on factual questions, such as the claim of fraudulent inducement of a client by a firm to purchase stock, in individual cases, were viewed as desirable *mechanisms* of social regulation." *Id.*

109. *Id.*

110. *See id.* at 224–25.

111. *Id.* at 225 n. 53 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)).

112. *See id.* at 225–26.

113. *See* Peter M. Panken & Jeffery D. Williams, *Drafting Executive Employment Agreements That Work for Employers: An Annotated Model Agreement*, in *EMPLOYMENT AND LABOR RELATIONS LAW FOR THE CORPORATE COUNSEL AND THE GENERAL PRACTITIONER* 439, 458 (ALI-ABA Course of Study, June 3–5, 2004), available at SJ079 ALI-ABA 439 (Westlaw) ("Since the U.S. Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the overwhelming

Under these decisions, the assumption that arbitration was pejoratively different from adjudication turned out to be dead wrong.¹¹⁴ The Court believed earlier courts were too distrustful and suspicious when focusing on the differences between arbitration and adjudication.¹¹⁵ Instead, the Court adopted “a healthy regard for the federal policy favoring arbitration.”¹¹⁶ In addition, the Court reversed its assumption that contractual agreements to arbitrate should be closely scrutinized.¹¹⁷ The Court no longer cared that parties lost their place in the litigation queue by agreeing to arbitrate.¹¹⁸ As a result, the parties in an agreement to arbitrate “will be held to their bargain.”¹¹⁹ The Supreme Court’s change in attitude indicated that “[p]ublic policy no longer prohibits arbitration; rather, public policy welcomes arbitration of federal statutory claims.”¹²⁰

B. *The Procedural Shift Favoring ADR*

The Supreme Court’s affinity towards arbitration¹²¹ has been followed by a parallel shift in statutes, rules, and procedures.¹²² The history of Rule 16 of the Federal Rules of Civil Procedure highlights the

majority of courts have upheld the enforceability of written arbitration agreements”); Resnik, *supra* note 6, at 224–25; Jean R. Sternlight & Judith Resnik, *Competing and Complementary Rule Systems: Civil Procedure and ADR*, 80 NOTRE DAME L. REV. 481, 483 (2005) (“[T]he market for ADR has flourished in the wake of United States Supreme Court decisions supporting the enforcement of dispute resolution clauses in a wide array of cases.”).

114. See Resnik, *supra* note 6, at 225.

115. *Id.*

116. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

117. Resnik, *supra* note 6, at 226.

118. See *id.*

119. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

120. Resnik, *supra* note 6, at 225.

121. Notably, a recent decision by the Supreme Court may have changed its attitude toward arbitration clauses vis-à-vis class actions. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453–54 (2003) (holding that the scope of an arbitration agreement is within the control of the arbitrator, thus allowing the arbitrator to decide whether the arbitration could proceed on behalf of a class). Prior to this decision “federal courts routinely held that, unless an arbitration clause *specifically* provided for classwide arbitration, a judge has no authority to certify class arbitration, thereby leaving the potential class representative to litigate his or her action individually in arbitration.” Aashish Y. Desai, *Class Action Arbitration Agreements After Bazzle*, FED. LAW., July 2004, at 22, 22 (citations omitted).

122. See Resnik, *supra* note 6, at 230–31 (discussing how changes to federal rules and local rules have impacted procedure).

institutionalization of ADR within the court system.¹²³ Written in the 1930s, Rule 16 allowed parties the opportunity to convene for a pretrial conference at the trial court's discretion.¹²⁴ As amended in 1983, Rule 16 *required* judges to hold pretrial conferences and to discuss, among other things, "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."¹²⁵ Moreover, the stated purpose of the amended rule 16(a)(5) was to "facilitat[e] the settlement of the case."¹²⁶

Then, in 1990, Congress granted the judiciary even more authority to manage litigation by enacting the Civil Justice Reform Act (CJRA).¹²⁷ The CJRA mandated that each district court develop a plan for reducing expense and delay.¹²⁸ The CJRA included "giving considerable management authority to judges and authorizing referrals to alternative dispute resolution."¹²⁹

Some of the mandates authorized in the CJRA were then incorporated into the 1993 amendment to Rule 16.¹³⁰ The reason for the amendment was to "detail further the judicial role in managing the pretrial process, controlling discovery, structuring trials, and helping parties to settle cases."¹³¹ Amended Rule 16 specifically allowed judges to require

123. See *id.* at 230–32; SWARD, *supra* note 5, at 121 ("Authority for judicial management of litigation has several sources, but the door was opened with the promulgation of Rule 16 in the 1938 Federal Rules of Civil Procedure."). The institutionalization of ADR is also occurring in state courts. See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 *HAMLIN L. REV.* 403, 405 (2002) (concluding that ADR, especially mediation, has been institutionalized in civil cases); Stipanowich, *supra* note 26, at 874 (noting that McAdoo's study of Minnesota courts demonstrates that ADR has been "institutionalized").

124. Resnik, *supra* note 6, at 230.

125. FED. R. CIV. P. 16(c)(7) (1983) (amended 1993, renumbered 16(c)(9)); see SWARD, *supra* note 5, at 121 ("In 1983, Rule 16 was greatly expanded to allow for more active judicial management.").

126. FED. R. CIV. P. 16(a)(5).

127. 28 U.S.C. §§ 471–482 (2000); see SWARD, *supra* note 5, at 121 ("Congress then jumped into the fray, enacting the Civil Justice Reform Act (CJRA) in 1990. The CJRA is a Congressional mandate to judges and judicial districts to institute management procedures.").

128. 28 U.S.C. § 471.

129. SWARD, *supra* note 5, at 121; see 28 U.S.C. § 473(a)(2)–(3), (6) (describing a civil justice expense and delay reduction plan); Stipanowich, *supra* note 26, at 849 ("In 1990, Congress passed the . . . (CJRA), which encouraged federal district courts to develop programs utilizing [ADR] approaches.").

130. SWARD, *supra* note 5, at 121–22.

131. Resnik, *supra* note 6, at 230.

parties to be at pretrial conferences or available by phone “to consider possible settlement of the dispute.”¹³² Thus, from the 1930s to the present, the evolution of Rule 16 welcomed ADR inside the courtroom.¹³³

In addition to the evolution of Rule 16 and the CJRA, Congress passed the Alternative Dispute Resolution Act of 1998,¹³⁴ which required all “94 districts to ‘authorize’ use of ADR in civil actions.”¹³⁵ The law empowered each district to develop its own ADR program, and in 2004 “[s]ixty-three districts . . . authorize[d] mediation; 28 authorize[d] some form of nonbinding arbitration; and 23 authorize[d] early neutral evaluation.”¹³⁶

C. Summarizing the Rise of ADR

Various forms of ADR have been around since time immemorial.¹³⁷ The last quarter-century, however, has been witness to an unprecedented rise in the use of ADR.¹³⁸ Steven Shavell sums up the recent charge of ADR well:

Interest in ADR has grown over the years, and today utilization of ADR is widespread. Moreover, ADR is increasingly encouraged by courts and legislation; in various areas of dispute, plaintiffs and defendants are required to use ADR before they are given recourse to trial. Alternative dispute resolution is now part of the law school curriculum; casebooks on ADR have been published; and journals devoted to it have been established. Indeed, the group of lawyers, arbitrators, academics, and jurists fostering ADR has taken on some of

132. *Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 430–31 (1993).

133. *See* Resnik, *supra* note 6, at 230.

134. 28 U.S.C. §§ 651–658.

135. Stipanowich, *supra* note 26, at 849.

136. *Id.*

137. *See* Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1235 (2000) (“Arbitration as we know it was developed by the merchant class in medieval western Europe.”); *see also* Hensler, *supra* note 1, at 175 (discussing the vast amount of civil cases resolved outside of the courtroom).

138. Stipanowich, *supra* note 26, at 843 (“In the past quarter-century, significant changes have occurred in the ways lawyers approach conflict. There have been unprecedented efforts to develop strategies aimed at more efficient, less costly, and more satisfying resolution of conflict, including more extensive and appropriate use of mediation and other ‘alternative dispute resolution’ (ADR) approaches.”).

the aspects of a social movement.¹³⁹

V. THE CAUSE

That the rise of ADR coincided with the vanishing trial is not happenstance.¹⁴⁰ ADR was a direct response to the litigation explosion¹⁴¹ and the need for remedying the large expenditures of time and money associated with litigation.¹⁴² But, of course, ADR is not the only reason for the vanishing civil trial and the corresponding decline of the civil jury.¹⁴³ In fact, most scholars attribute the decline to several factors¹⁴⁴ including: (1) the significant increase in new case filings;¹⁴⁵ (2) the unpredictability of the

139. Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 1–2 (1995) (footnotes omitted). Commenting on this phenomenon, Chief Judge William G. Young of the Federal District Court in Boston said, “what’s documented here . . . is nothing less than the passing of the common law adversarial system that is uniquely American.” Liptak, *supra* note 86. Harvard Law professor Arthur Miller also commented that “[t]his is a cultural shift of enormous significance.” *Id.* (internal quotation marks omitted).

140. *See supra* Parts III–IV (discussing the decline of civil trials that started in the 1970s and the rise of ADR). Of course, it is also of no coincidence that the 1970s was the time of the litigation explosion and when scholars began to recommend reform. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985 (2003) (“Civil litigation has long been criticized as costly and inefficient. The contemporary perception of a crisis in the judicial system first became prominent in the 1970s.” (footnote omitted)).

141. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 366 (1986) (“The great interest in such alternatives reflects the widespread sense, which I share, that our courts are dangerously overloaded.”).

142. *See* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 1 J. INST. STUDY LEGAL ETHICS 49, 76 (1996) (noting ADR has grown because of dissatisfaction with the adversarial system).

143. The ABA noted that “[o]n the criminal side, there was near unanimity that the federal sentencing guidelines are responsible for the decline in the criminal trial. . . . On the civil side, the causes are more complicated and perhaps more difficult to separate.” Refo, *supra* note 49, at 2; *see also* Clermont & Eisenberg, *supra* note 82, at 142–43 (“As settlement and like dispositions have blossomed, the civil trial has all but disappeared. Many have noted this trend, although there is less agreement on cause.” (footnote omitted)).

144. Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 691 (2005) (“The demise of bench and jury trials is certainly attributable to many factors besides ADR.”).

145. Refo, *supra* note 49, at 2.

jury trial;¹⁴⁶ (3) the inherent costs of litigation;¹⁴⁷ (4) the aggressive settlement efforts by federal judges;¹⁴⁸ and (5) the rise in summary judgment dispositions.¹⁴⁹

These are all legitimate reasons why fewer cases go to trial each year.¹⁵⁰ To better understand the causes of the vanishing trial and jury, many scholars have divided them into different categories.¹⁵¹ Similarly, this

146. *Id.* at 58; SWARD, *supra* note 5, at 319 (noting that uncertainty is an inherent incentive to settle).

147. These include the large amounts of time and cost associated with litigation, as well as the uncertainty of an outcome if the case goes to trial. SWARD, *supra* note 5, at 319–23. Some have pointed out that civil cases are becoming increasingly complex, too, so that the expenditures of time and cost associated with litigation are more present today than ever. See Tony Anderson, *Decline of Civil Jury Trial*, WIS. L.J., Dec. 15, 2004, at 1A (recounting the remarks of Wisconsin Supreme Court Justice Ann Walsh Bradley); Atlas & Atlas, *supra* note 86, at 14 (“The most significant reason for the decline in trials is the cost of litigation.”).

148. Mollica, *supra* note 52, at 141; see also, e.g., Annesley H. DeGaris, *The Role of United States District Court Judges in the Settlement of Disputes*, 176 F.R.D. 601, 601–14 (1998) (reporting the results of a questionnaire filled out by Eleventh Circuit federal district court judges and noting their attitudes and practices in the settlement of cases).

149. Mollica, *supra* note 52, at 141 (noting that “[a]nother factor in the decline . . . is the emergence of summary judgment as the new fulcrum of federal civil dispute resolution”); see also SWARD, *supra* note 5, at 319 (noting that summary judgment is a large reason why many cases do not go to trial).

150. Other factors have been noted. For example, John Lande suggests Galanter attributes the reduction in trial rates to many factors,

includ[ing] (a) increased complexity and cost of litigation and trial, (b) changes in the definition and nature of a case as a unit of measurement, (c) growing tendency of defendants to settle for fear of large judgments, (d) enhanced role of judges as case managers and promoters of settlement, (e) expanded discretion of judges, (f) ‘failing faith’ in trial by the public as well as by judges and lawyers, and (g) greater use of ADR.

John Lande, *The Vanishing Trial Report: An Alternative View of the Data*, DISP. RESOL. MAG., Summer 2004, at 19, 20.

151. See, e.g., Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637, 638–39 (2004) (dividing the causes into demand factors and supply factors); Galanter, *supra* note 51, at 516–19 (dividing the causes into a “diminished-supply argument,” “diversion argument,” “economic argument,” and “institutional factors” argument); 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, 945 (2004) (dividing the causes of the decline into “what we asked for,” meaning “procedural reform and changes in the legal profession” and “what we paid for,” meaning an “evolution in the economic organization of the bar”).

Note divides them into two: “reasons for reform” and “methods of reform.”¹⁵² The reasons for reform include the first three reasons listed previously. Increased case filings have motivated the judiciary and the legal system to provide alternative means to resolve disputes.¹⁵³ Likewise, the inherent costs of litigation and the uncertainty of jury verdicts are additional reasons for adopting reform.¹⁵⁴ Without the burdens and excesses of litigation,¹⁵⁵ there would be no push for alternative means such as settlement, summary judgment, and ADR. Thus, the exigencies of litigation, whether real or perceived, are the direct causes of the vanishing trial and jury.¹⁵⁶

The last two reasons—more aggressive efforts to settle and increased use of summary judgment—are additional causes of the vanishing trial. But they are a response to the litigation explosion and the burdens of litigation. These are different methods to end disputes without submitting the parties or the judiciary to the exigencies of litigation. The increased use of these methods has similarly resulted in less litigation.

ADR, of course, belongs in this second category. As a method of reform it has come a long way since the 1970s.¹⁵⁷ It is undeniable that

152. I could have given these categories “tortious” labels, and identified them as “proximate” and “concurring” causes. For example, the burdens of litigation—like the time and cost involved—are the proximate causes of reform. But for the detriments of litigation, there would be no need for change. Meanwhile, the methods of reform—like the aggressive efforts at settlement, utilization of summary judgment, and ADR—are the concurrent causes displacing litigation. They join simultaneously with the reasons for reform to create an alternative. Indeed, these “tortious” labels better express my feelings toward the causes of the vanishing trial and jury.

153. See, e.g., Dayton, *supra* note 12, at 891 (“Over the last decade, many federal district judges have sought to address the problem of increased caseloads by using a variety of dispute resolution procedures.”).

154. Stipanowich, *supra* note 26, at 847–48 (noting that “the rising costs and perceived risks of going through the court system also largely explain why in the last quarter-century there has been an emphasis on developing approaches that help reach quicker or better or more lasting results through something other than trial”).

155. Galanter calls these the “exigencies of litigation.” Galanter, *supra* note 51, at 515.

156. See Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1935 (1997) (arguing “that alternative dispute resolution, broadly defined, is a cause of the decline of the American civil jury, but not the proximate cause,” and that “it is ultimately the defects of the civil jury trial itself . . . that is the proximate cause of the civil jury’s decline”); see also Lande, *supra* note 150, at 19 (suggesting the data shows “that the growth of ADR is probably as much a result of [the disappearance of trials] as a cause of them”).

157. See *supra* Part IV. In fact, today’s technological world has introduced

ADR has changed the nature of dispute resolution.¹⁵⁸ It is also undeniable that ADR is a significant cause of the vanishing trial and jury.¹⁵⁹

Judges agree. The American Judicature Society (AJS) recently requested the opinions of three experienced trial judges concerning the importance of the vanishing trial, whether the judges noticed the phenomenon, and if so, whether they knew the causes of it.¹⁶⁰ All three judges acknowledged the drop in trials, and similarly acknowledged that ADR was a significant reason for the decline.¹⁶¹ Two of the judges were state court judges—Judge Downie of the Maricopa County Superior Court in Arizona and Judge Zervos of the Superior Court of Alaska.¹⁶² Judge Zervos noticed that for almost the last twenty years, “only a small percentage of the civil cases filed actually ended up before a jury.”¹⁶³ Judge Zervos continued by saying the reasons for the decline were obvious, and that one of the reasons was Alaska’s procedure of using a “talented group

online ADR, or “ODR.” See, e.g., ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION* 3 (2001) (“[T]he overall field of dispute resolution cannot avoid being affected by the new information technologies because communication is central to this process.”). The Internet has also made at least one person question whether ADR’s “potential exposure to every Internet user in the world [will] have an impact on the choice of dispute resolution venue, driving disputes away from the courts and towards [ADR] proceedings that are not required to be open to public scrutiny.” Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 819 (2004).

158. See Stipanowich, *supra* note 26, at 844 (“Did a quarter-century of proliferating and widely disparate efforts to change the culture of conflict resolution—encompassing . . . mediation, arbitration, or other strategies . . . —transform the litigation experience of disputants, attorneys, and judges? The answer is undoubtedly a resounding ‘yes’ . . .” (footnotes omitted)).

159. See Mollica, *supra* note 52, at 141 (“This decline can be attributed to a number of factors, including . . . the rise of alternative dispute resolution (both court-sponsored and private).”); Refo, *supra* note 49, at 58 (“[ADR], in all of its permutations, also contributes to the declining trial rates.”); Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 25, 26–27 (emphasizing push towards ADR); Paul Sandler, *Raising the Bar—Reforming and Revitalizing the Jury Trial*, DAILY REC., Feb. 7, 2005, available at 2005 WLNR 1786708 (“The great institution of trial by jury continues to suffer from the litigation explosion and many litigants’ need for fast, inexpensive and risk-averse approaches to dispute resolution.”).

160. Mark W. Bennett, Margaret H. Downie & Larry C. Zervos, *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 306 (2005).

161. *Id.* at 306–09.

162. *Id.* at 309, 312.

163. *Id.* at 309.

of retired judges” to “successfully mediate the most difficult cases.”¹⁶⁴ Judge Downie used statistical data to demonstrate that the civil trial vanished long ago in her state of Arizona.¹⁶⁵ She, too, recognized that “ADR is no doubt a significant factor” in the vanishing trial equation.¹⁶⁶ Judge Downie, however, was reluctant to conclude—at least right now—that this trend was one to regret.¹⁶⁷

Chief Judge Mark W. Bennett, however, was not so unwilling. Judge Bennett was the only federal judge solicited by the AJS and serves as the Chief Judge for the United States District Court for the Northern District of Iowa.¹⁶⁸ Judge Bennett concluded that the “precipitous and shocking drop in civil jury trials” should “be a matter of grave and urgent concern for lawyers, litigants, federal judges, and citizens.”¹⁶⁹ Judge Bennett also noted that a recent poll indicated that increased use of ADR was the most frequently mentioned reason for the declining trial rates.¹⁷⁰ Judge Bennett himself has concluded that “[w]hile ADR has made some important contributions to our civil justice system, it has also had an insidious effect—it is the major contributing factor to the rapid decline of civil jury trials—especially in our federal courts.”¹⁷¹ In sum, Judge Bennett believes that “ADR . . . has become the civil jury trial’s number one enemy.”¹⁷²

These three judges are not alone. Wisconsin Supreme Court Justice Ann Walsh Bradley believes that “[a]mong the factors leading to the decline in civil jury trials is the development and proliferation of ADR.”¹⁷³ Dickinson Debevoise, Senior United States District Court Judge for the District of New Jersey, commented that the decline in trials “reflects the success of our mediation and arbitration programs.”¹⁷⁴ Former federal judge from the District of New Jersey, Nicholas Politan, proudly remarked that his preference for resolving disputes rather than adjudicating was the

164. *Id.*

165. *Id.* at 308.

166. *Id.*

167. *Id.* at 309.

168. *Id.* at 308.

169. *Id.* at 306.

170. *Id.* at 307.

171. Email from Mark W. Bennett, Chief Judge of the Northern District of Iowa, to Kirk Schuler (Mar. 8, 2005, 02:44 CST) (on file with author) [hereinafter Bennett Email].

172. Bennett, *supra* note 160, at 307.

173. Anderson, *supra* note 147, at 5A (internal quotation marks omitted).

174. Mary P. Gallagher, *U.S. Civil Trials Vanishing, Says ABA Report*, LEGAL INTELLIGENCER, Jan. 5, 2004, at 4.

cause of fewer trials in his district.¹⁷⁵ Judge William G. Young¹⁷⁶ took it upon himself to write *An Open Letter to U.S. District Court Judges*¹⁷⁷ and remarked that while judges should embrace all forms of voluntary ADR, they must not do so at the expense of the civil jury.¹⁷⁸

Finally, Judge Patrick E. Higginbotham¹⁷⁹ also noticed that ADR was fast replacing litigation:

Over the past several years it became clear to me that the daily work of our judges in the United States District Courts in the Fifth Circuit, and perhaps in other places, was changing. Judges seemed to be spending more time on matters other than trials. I watched as a whole new segment of legal business was born—mediation and Alternative Dispute Resolution (“ADR”).¹⁸⁰

Judges are not the only ones who believe the practice of ADR has resulted in fewer trials. The American College of Trial Lawyers¹⁸¹ published a report on the vanishing trial that concluded “ADR is a factor, to some extent, in the drop in the civil trial rate.”¹⁸² Their conclusion, however, is less dramatic than the results of the poll they conducted on the College’s leadership. The College circulated a questionnaire in March of 2004 “to the leadership of the College to solicit their input on the Vanishing Trial phenomenon.”¹⁸³ The College was quick to point out that the poll was “non-scientific” and “not designed to survive a *Daubert*

175. *Id.* Interestingly, Judge Politan left the bench two years ago to become a private mediator. *Id.* He remarked that at the end of his tenure he tried fewer than ten trials a year. *Id.* More and more judges are doing the same, as the market for mediators becomes larger and larger.

176. William G. Young is a United States District Court judge for the District of Massachusetts.

177. William G. Young, *An Open Letter to U.S. District Court Judges*, FED. LAW., July 2003, at 30.

178. *Id.* at 33.

179. Judge Higginbotham was appointed to the United States District Court for the Northern District of Texas in 1975 and to the United States Courts of Appeals, Fifth Circuit, in 1982.

180. Higginbotham, *supra* note 67, at 1405.

181. The American College of Trial Lawyers “is composed of the best of the trial bar from the United States and Canada,” admission is by invitation only, and “[l]awyers must have a minimum of 15 years’ experience before they can be considered for Fellowship.” AM. COLL. OF TRIAL LAWYERS, THE “VANISHING TRIAL:” THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM i (2004).

182. *Id.* at 22.

183. *Id.* at 7.

challenge as to scientific validity.”¹⁸⁴ The poll, however, certainly survives any common sense challenge: It asked a simple question— “[w]hat factors contribute to the decrease in trials?”—and received a simple answer—ADR.¹⁸⁵ In fact, increased use of ADR was by far the number one response among the College leadership polled.¹⁸⁶ Moreover, these responses were the “perceptions of prominent, in-the-trenches trial lawyers” who would be as knowledgeable as anyone on the causes of the vanishing trial.¹⁸⁷

Although many judges and lawyers around the country seem sure that ADR is a significant cause of the vanishing trial and jury, the most recent research¹⁸⁸ on the subject is very skeptical about the conclusions to be drawn from the available statistics.¹⁸⁹ Marc Galanter wrote that “[o]ne of the most prominent explanations of the decline of trials is the migration of cases to other forums [such as ADR],”¹⁹⁰ but he also expressed doubt about the available data.¹⁹¹ This is because of the large number of activities that fall under the ADR umbrella and the lack of reliable data on the subject.¹⁹² ADR suffers from a “paucity of useful, reliable information” because “public and private dispute resolution programs seldom report statistics

184. *Id.*

185. *Id.* at 10.

186. *See id.* (showing the results graphically, and that ADR significantly led all responses).

187. *Id.*

188. The Journal of Empirical Legal Studies provides fantastic empirical research on the vanishing trial and the use of ADR in its November 2004 issue, an issue dedicated to the ABA’s report on the “Vanishing Trial.” Cornell University Law School published the journal’s first issue in March of 2004. Currently it is unavailable on Westlaw or Lexis (as of January 2006) and is difficult to locate. All the articles, however, are available through subscription in PDF form at <http://www.blackwell-synergy.com/servlet/useragent?func=synergy&synergyAction=showTOC&journalCode=jels&volume=1&issue=3&year=2004&part=null> (last visited Apr. 3, 2006).

189. *See* Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 571–72 (2004) (noting that care should be taken in interpreting data and that conclusions reached about the causes and consequences of the vanishing trial are premature).

190. Galanter, *supra* note 51, at 514.

191. *Id.* at 514–15.

192. Stipanowich, *supra* note 26, at 845–46. In addition, there are complaints about the limitations of the data provided by the Administrative Office of the U.S. Courts. *See* Burbank, *supra* note 189, at 571. Burbank is optimistic, however, because under the new Case Management/Electronic Case Files (CM/ECF) system “almost all federal district courts will be reporting data directly from docket entries by some point in 2005.” *Id.* at 581.

beyond the volume of matters filed or resolved.”¹⁹³ Moreover, “ADR institutions and businesses often maintain valuable information, but treat it as proprietary.”¹⁹⁴ Thus, some scholars advocate caution when drawing conclusions about the causes of the vanishing trial and advise that “[w]e must go much further with our quantitative and qualitative investigations of ADR in these realms.”¹⁹⁵

This is nonsense. It is undeniable that ADR is a significant cause of the vanishing trial and jury. Those closest to the phenomenon—judges and trial lawyers—are sure of it. We can analyze statistics all we want, but doing so only delays what we already know (or what we do not want to admit). Moreover, the statistics are not all that fuzzy because while “[i]t is impossible to know how many matters are diverted from the courts to arbitration [and other forms of ADR], it is surely safe to say that the rise in arbitrations [and other forms of ADR] reduces the number of courtroom trials.”¹⁹⁶ This is common sense, and the data supporting this realization is commonplace. For example, an easy inference supporting causation can be made by comparing the caseload data of arbitrations from the American Arbitration Association to the declining rates of trials.¹⁹⁷

193. Stipanowich, *supra* note 26, at 846.

194. *Id.*

195. *Id.* at 912.

196. Refo, *supra* note 49, at 58.

197. I am not the only one to note that the rise in arbitrations has coincided with the decline in trials. See Atkinson-Baker Court Reporters, *The Tribulations of Trials*, http://www.depo.com/DU_8-1_tribulations.htm (last visited Apr. 3, 2006) [hereinafter Atkinson-Baker Court Reporters] (noting that a major factor of cases moving out of the courtroom is due to ADR, and that “the American Arbitration Association receives about a quarter million filings” on an annual basis).

Table 2
American Arbitration Association (AAA) Total Caseloads Juxtaposed
with the Percentage of Cases Going to Trial, 1993–2002¹⁹⁸

Fiscal Year	AAA Total Caseload ¹⁹⁹	Percentage of Cases Going to Trial
2002	230,258	1.8
2001	218,032	2.2
2000	198,491	2.2
1999	140,188	2.3
1998	95,143	2.6
1997	78,769	3.0
1996	72,200	3.0
1995	62,423	3.2
1994	59,424	3.5
1993	63,171	3.4

These statistics²⁰⁰—despite the cautionary attitude about statistics in this area—coupled with the first hand observations of those closest to the phenomenon, like the judges’ and trial lawyers’ observations noted previously, certainly indicate a causal relationship between ADR and the vanishing trial and jury. They are a very strong signal that ADR is the significant cause of the vanishing trial. Moreover, it is a cause, which for the reasons stated later, we had better start appreciating.

198. The statistics from the second column were derived from Table 13, in Stipanowich, *supra* note 26, at 872. The statistics from the third column were taken from TABLE 2.13, *supra* note 80.

199. The numbers in this column represent the number of filings, and not the number of arbitrations actually heard or decided. AM. COLL. OF TRIAL LAWYERS, *supra* note 181, at 22.

200. Additional and similar statistics may be forthcoming. The American Bar Association recently sent me an email, as an ABA member, requesting me to fill out a survey “[i]n order to better understand the use that General Practice, Solo & Small Firm Division practitioners are making of ADR” Email from GP|Solo division of the American Bar Association to Kirk Schuler (Nov. 23, 2005, 09:07:51 CST) (on file with author). The email further stated that “[f]rom [the] responses . . . we expect to obtain a great deal of useful information concerning the use of ADR. We will prepare a report that will be available at the ABA website and present the results of the survey at the Spring Meeting in May.” *Id.* As of March 7, 2006, I was not able to find the report on the ABA website.

VI. THE COMPROMISE

ADR, as a whole, is overwhelmingly private in nature: “The essence of the ADR process is that people and entities can set up *private* rules, procedures and conditions for the purpose of resolving any existing or future dispute between them without having to file a lawsuit and go to a *public* court.”²⁰¹ Arbitration, for example, “was not conceived of as a judicial trial. It is privatized justice. . . . Moreover, the determination is not intended to serve the public interest, but only that of the parties who have paid for the arbitration.”²⁰²

At least court-annexed arbitration yields results that are open to the public, unless they are sealed.²⁰³ Mediation, on the other hand, is much less public than court-annexed arbitration.²⁰⁴ The fruits of mediation are the result of private meetings, and in many jurisdictions, the law requires that what transpired during the mediation be kept confidential.²⁰⁵ Furthermore, since mediation today dominates the “multi-door courthouse,”²⁰⁶ ADR, as a whole, is a convincingly privatized pursuit of justice.

This, of course, is exactly what ADR was meant to be. A proponent of ADR noted that “[t]he whole movement of ADR is really the effort of the client making the decision to stay out of the court system.”²⁰⁷ By staying out of the court system, “the press is not there, the public is not there.”²⁰⁸

Adjudication, on the other hand, is quintessentially public. Owen M. Fiss stated the difference between ADR and adjudication by saying:

Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and

201. Arthur Mazirow, *Alternative Dispute Resolution in Real Estate Transactions*, in 460 UNDERSTANDING THE SOPHISTICATED REAL ESTATE PRACTICE 857, 865 (2000) (emphasis added).

202. Carbonneau, *supra* note 6, at 1958.

203. Hensler, *supra* note 1, at 187.

204. *Id.*

205. *Id.* (“Mediation programs yield outcomes that are private settlements, reached in private meetings. In many jurisdictions, the parties, lawyers, and mediators are bound by law to keep whatever transpired during the mediation confidential.”).

206. *Id.*

207. Fisher, *supra* note 17 (internal quotation marks omitted).

208. *Id.* (internal quotation marks omitted).

conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.²⁰⁹

Adjudication is not a private endeavor. It is public,²¹⁰ and this “should be a source of pride rather than shame.”²¹¹ As a public enterprise, adjudication makes sure that judgment does not just “maximize the ends of private parties, nor simply . . . secure the peace,” but upholds the freedoms and rights established in the Constitution.²¹²

Nevertheless, people support ADR, and they do so because they “see[] adjudication in essentially private terms.”²¹³ According to them, the purpose of adjudication is to solve disputes, and ADR serves this purpose well.²¹⁴ The overcrowded dockets of America’s courts are simply evidence of “the needlessly combative and quarrelsome character of Americans,”²¹⁵ to which ADR provides the welcomed elixir.²¹⁶

Despite the support for ADR,²¹⁷ the differences between the private nature of ADR and the public nature of adjudication cannot be ignored,²¹⁸ and neither can the consequences. Commenting on the consequences of the privatization of justice, Professor Carrie Menkel-Meadow wrote the following:

As we move to private systems of informal and private decision-making some have questioned whether settlements are entered into coercively and secretly without the protections of the rule of law, public accountability for decision-making and equalization of

209. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

210. *Id.*

211. *Id.* at 1089.

212. *Id.* at 1085.

213. *Id.* at 1089.

214. *Id.* at 1085.

215. *Id.* at 1089.

216. See Carbonneau, *supra* note 6, at 1960.

217. See, e.g., Todd B. Carver, *ADR—A Competitive Imperative for Business*, DISP. RESOL. J., Aug.–Oct. 2004, at 67, 68 (beseeching businesses to use ADR and commenting that “[n]o business can afford *not* to implement . . . a structured ADR program. ADR is truly a *competitive imperative!*”).

218. Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 497 (2004).

economic and psychological or social power imbalances. . . . [S]ome worry that there will be no way to monitor competence or quality and our legal system will not only fail to produce publicly declared precedents, but will produce “bad” private justice.²¹⁹

Thus, while some believe that ADR “achieve[s] exactly the same purpose as judgment—peace between the parties—but at considerably less expense to society,”²²⁰ it is clear that ADR’s less expense to society approach entails much more than just time and cost calculations.²²¹

VII. THE EFFECT ON THE JURY TRIAL

ADR’s private nature disengages Americans from the public process of litigation. This inevitably entails the removal of citizens from the “back bone of democracy”:²²² the jury trial.²²³ The right to trial by jury has been fought for since America’s founding, and has always remained a cornerstone of American justice.²²⁴ The Constitution was not ratified until proponents agreed to add a Bill of Rights to secure additional freedoms, of which the Seventh Amendment’s right to trial by jury was one.²²⁵

219. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 418–19 (1997) (footnote omitted).

220. Fiss, *supra* note 209, at 1085.

221. In fact, it is not clear whether ADR actually lowers the cost of settling disputes. *See, e.g.*, Dayton, *supra* note 12, at 896 (“These comparisons conclusively show that ADR has not resulted in speedier resolution of federal civil cases [and] has not reduced backlogs.”). *But see* Cole, *supra* note 137, at 1200 (“[S]tudies of mediation and arbitration continue to demonstrate that these ADR tools provide efficient, low cost dispute resolution, while at the same time providing a high degree of party satisfaction.”).

222. *See* Anderson, *supra* note 147 (“What is the backbone of democracy, but our system of justice . . . [a]nd core to our system of justice, of course, has been our civil jury trial.” (internal quotation marks omitted)); Atkinson-Baker Court Reporters, *supra* note 197 (noting that “America needs to understand that the backbone of our society is trial by jury,” and that “[i]t is part of democracy” (quotation omitted)).

223. *See* Jeffrey Robert White, *Mandatory Arbitration: A Growing Threat*, TRIAL, July 1999, at 32, 32 (discussing the growing threat to jury trials in civil disputes through the privatization of personal injury claim resolution by the imposition of mandatory arbitration); Young, *supra* note 177, at 31 (“The American jury ‘is the purest example of democracy in action that I have ever experienced.’”).

224. *See* White, *supra* note 223, at 32.

225. *See id.* (“Americans were outraged when their new Constitution did not guarantee the right to trial by jury in civil actions. . . . The Constitution won ratification only after proponents agreed to add a Bill of Rights that included the right to trial by jury.” (footnote omitted)).

The right to trial by jury has played a significant role in America's history.²²⁶ Alexis de Tocqueville wrote: "the practical intelligence and good political sense of the Americans must principally be attributed to the long use that they have made of the jury in civil matters."²²⁷ Unfortunately, the rise of ADR and the resultant decline in civil jury trials has the potential to ruin America's practical intelligence and political good sense.

It is not to be taken lightly that civil jury trials in America are drastically decreasing in number.²²⁸ We are reminded that "[t]he civil jury is not invincible,"²²⁹ and if we do not do something soon, "we are likely to lose one of the most flexible and democratic of our governing devices."²³⁰ De Tocqueville's advice nearly two centuries ago is still salient today:

The institution of the jury, limited to criminal affairs, is therefore always in peril; once introduced into civil matters, it defies time and the efforts of men. If one had been able to take away the jury from the mores of English as easily as from their laws, it would have succumbed entirely under the Tudors. It is therefore the civil jury that really saved the freedoms of England.

....

The jury, and above all the civil jury, serves to give the minds of all citizens a part of the habits of mind of the judge; and these habits are precisely those that best prepare the people to be free.

It spreads to all classes respect for the thing judged and the idea of right. Remove these two things, and love of independence will be no more than a destructive passion.

226. See William G. Young, *An Unspoken Consequence*, CIV. ACTION, Spring 2005, at 4 (noting that the "[American jury] has served the republic well over two hundred years," and that "[i]t is as American as rock 'n' roll"). See generally Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001) (providing a historical sketch of the importance of the American jury).

227. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 262 (Harvey C. Mansfield & Debra Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

228. See Atkinson-Baker Court Reporters, *supra* note 197 ("We lose all kinds of things when we no longer have as many juries coming together in our courthouses to help their fellow citizens resolve disputes." (quotation omitted)).

229. Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 619 (1993).

230. *Id.*

It teaches men the practice of equity. Each, in judging his neighbor, thinks that he could be judged in his turn. That is above all true of the jury in a civil matter; there is almost no one who fears being the object of a criminal prosecution one day; but everyone can have a lawsuit.

....

It vests each citizen with a sort of magistracy; it makes all feel that they have duties toward society to fulfill and that they enter into its government. In forcing men to occupy themselves with something other than their own affairs, it combats individual selfishness, which is like the blight of societies.²³¹

ADR—as a secretive and private dispute resolution form—embodies the type of private selfishness that de Tocqueville called the “blight of societies.”²³² Unfortunately, this burgeoning blight of society, and the resultant decrease in jury trials, has the potential to change American democracy: “[W]hen juries are the rare occurrence, and when only state supreme courts and the Supreme Court of the United States are interpreting the organic law, we will still have democracy, but it will not be American democracy.”²³³ In fact, the change is already occurring.

VIII. CONCLUSION

It is unmistakable that America’s adversarial system is under attack. Trials are vanishing and fewer cases are decided by juries.²³⁴ Meanwhile, a juggernaut of “reform”—ADR—is constantly growing.²³⁵ Of course, adjudication is not the only way to pursue justice. After all, the American adversarial form of litigation is problematic²³⁶ due to its inherent exigencies and the litigation explosion. But this does not mean we should abandon our “tried and true” system for something completely different—at least not on the wholesale basis that we are fast approaching.

231. 1 DE TOCQUEVILLE, *supra* note 227, at 262.

232. *Id.*

233. Young, *supra* note 226, at 4.

234. See *supra* Part III (discussing the vanishing trial and jury); see also Galanter, *supra* note 85, at 1255 (describing the declining rates).

235. See *supra* Part IV (discussing the rise in ADR); see also Galanter, *supra* note 85, at 1268 (noting that “ADR institutions and programs have proliferated” (citation omitted)).

236. Carbonneau, *supra* note 6, at 1962 (“There is little doubt that the American form of adversarial litigation is problematic.”).

Stephen Landsman identifies three potential futures for our system of justice.²³⁷ One is an America in which our system of justice disappears into a world of privatized adjudication, another is the “ghettoization of trials,” and in a last future he sees the replacement of the adversarial system by the inquisitorial system.²³⁸ No matter what future materializes, however, all would “suggest a world where trial confrontations have been rendered unnecessary, where ADR dominates, where lawyering and judging skills have disappeared, and where adversarial methodology has been displaced.”²³⁹

The good news is that the potential future that Landsman sees is “[b]ased on current trends” and “the things that might transpire if trends remain unchanged.”²⁴⁰ The bad news is that the trends are unlikely to reverse,²⁴¹ and the lionization of ADR is roaring louder every day and affecting generations of lawyers to come.

The current generation of lawyers is affected because they are not receiving adequate litigation experience.²⁴² Because of the vanishing trial, young lawyers are receiving less litigation experience.²⁴³ With less

237. Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 979–82 (2004).

238. *Id.*

239. *Id.* at 982.

240. *Id.* at 979.

241. Atlas & Atlas, *supra* note 86, at 15; Galanter, *supra* note 85, at 1273 (stating that “the recent decline of trials is not likely to be reversed without reversal of the larger turn away from the law”). Galanter believes that ADR’s proliferation is due in part to a larger “turn against the law.” *Id.* at 1268–69. This turn against the law is the result of a “jaundiced view” of the legal system—that the litigation explosion is “unraveling the nation’s social fabric and undermining the economy.” *Id.* at 1266. As a result, litigation is avoided. *Id.* at 1267.

242. *See* AM. COLL. OF TRIAL LAWYERS, *supra* note 181, at 22 (noting the lack of trial experience for young lawyers, but recognizing that “[t]here is no empirical data on this topic”); Bennett, *supra* note 160, at 308 (noting that if we do not stop the current trends, “the trial bar as we know it” will “wither[] away”); Flanagan, *supra* note 89, at 6 (“Senior lawyers in my firm were discussing the problem of getting the young litigators trial experience.”); Landsman, *supra* note 236, at 973 (“Young lawyers, in particular, find it increasingly difficult to get any sort of trial experience save, perhaps, in state criminal courts where practice is likely to be unpolished”); *The Vanishing Trial: Implications for the Bench and Bar*, CIV. ACTION, Spring 2005, at 1, 3 [hereinafter *The Vanishing Trial*] (“Attorneys and firms may have diminished trial experience and a shortage of experienced advocates may result.”).

243. One report noted that the litigation field is growing ever more competitive because out-of-court ADR is taking away potential court cases, resulting in less work for litigators. *See* Ann Davis, *Market for Litigators Is Growing Tighter*,

experience, they are “[l]acking in background and confidence”²⁴⁴ and thus more willing to settle a case when the opportunity arises.²⁴⁵ This new generation of settlement-motivated lawyers aptly “describe themselves as ‘litigators’ rather than ‘trial lawyers.’”²⁴⁶ An ABA study confirmed that those who call themselves “litigators have scant, if any, actual trial experience.”²⁴⁷ The unfortunate reality is that “[a]s trials dwindle, the overall quality of advocacy . . . inevitably suffers.”²⁴⁸

It should come as no surprise that the lack of litigator experience in young lawyers is matched by law schools providing more courses on ADR.²⁴⁹ Litigation may still be central to law school curriculums,²⁵⁰ but law schools around the country are teaching ADR with incredible eagerness.²⁵¹ Thirty years ago, “the only curricular offerings related to any dispute resolution process other than litigation tended to deal solely with arbitration, and those were often limited to labor arbitration.”²⁵² Today the picture is much different, with schools all over the country offering classes on negotiation, arbitration, and mediation.²⁵³ Of course, this is not a

NAT’L L.J., Feb. 27, 1995, at A5. As a result, only the very best law students are able to find jobs as litigators. *See id.* (noting this phenomenon is very apparent in New York, where only associates with clerkships, law review experience, and who have graduated from the highest ranked law schools are able to secure litigation jobs).

244. Landsman, *supra* note 237, at 973.

245. In fact, a distaste for trial creates a situation where the bar will “devote more time and effort on pre-trial motions than preparing for an actual trial.” *The Vanishing Trial*, *supra* note 242, at 3. “By necessity, attorneys will be cultivated for their negotiation skills and experience with ADR rather than trial advocacy.” *Id.*

246. Bennett, *supra* note 160, at 307.

247. Stephanie Francis Ward, . . . *No Place Like Court: Shrinking Trial Dockets Reduce Learning Opportunities for Young Litigators*, A.B.A. J., Sept. 2003, at 62, 62.

248. Atlas & Atlas, *supra* note 86, at 15.

249. *See* Frank E.A. Sander, Stephen B. Goldberg & Nancy Rogers, *The Teaching of ADR in the 21st Century Law School*, 19 ALTERNATIVES TO THE HIGH COST OF LITIG. 29, 29 (2001) (discussing the importance of offering ADR classes in law schools).

250. Drake University Law School does an incredible job in this regard. It is the only law school in the country that suspends class for one week during students’ first year to witness a week-long jury trial. In addition, Drake has nationally recognized clinical, moot court, and mock trial programs.

251. *See* Sander, *supra* note 249, at 29 (stating ADR classes, especially negotiation courses, are extremely popular law school classes).

252. *Id.*

253. *Id.* My law school is no different. Drake offers negotiation and mediation, although not arbitration. *See also* Lee A. Rosengard, *Learning From Law Firms: Using Co-Mediation to Train New Mediators*, DISP. RESOL. J., May–July 2004,

bad thing.²⁵⁴ ADR has many beneficial uses, and law students need to be trained in how to take advantage of it. The problem is, however, that many law students are unable to receive opportunities to litigate upon graduation, and thus gain a heightened appreciation for ADR. Thus, a generation of lawyers feels ever more comfortable staying out of court.

This lack of experience among young lawyers creates a problem for the next generation of judges as well. Lawyers elevated to the bench arrive with less trial experience, and “[w]hen this is coupled with judicial rhetoric portraying trial as a failure, a cycle is fostered in which judges strive to avoid trying cases.”²⁵⁵ Thus, we are left with judges unwilling to try cases.

The trend affects the public as well. In fact, “[t]he public may be most affected by the trend of vanishing jury trials.”²⁵⁶ Fewer trials mean fewer opportunities for jury decision-making.²⁵⁷ This is unfortunate because juries serve to educate the public about the law.²⁵⁸ Less jury service corresponds to a significant decline in public education about America’s justice system.²⁵⁹ Galanter has even suggested that fewer jury trials “cut[] laymen . . . out of the picture and adds to a public perception that lawyers control everything.”²⁶⁰ This, in turn, results in public backlash

at 16, 16 (“The 2003 *Directory of Law School Dispute Resolution Courses and Programs*, published by the American Bar Association’s Section of Dispute Resolution, lists just under 900 courses at nearly 200 law schools. Over 40 of these had an ADR clinic of one kind or another.” (footnote omitted)). Those numbers have likely increased, as Drake Law School added a mediation clinic in 2006, and I am sure many other schools have followed suit.

254. Although, some argue that academia needs to improve the way it teaches dispute resolution. See Sternlight, *supra* note 144, at 700–16 (asserting law students must be taught how litigation and ADR complement each other).

255. Landsman, *supra* note 237, at 973–74 (internal citations omitted).

256. *The Vanishing Trial*, *supra* note 242, at 3.

257. Landsman, *supra* note 237, at 974; see also Atlas & Atlas, *supra* note 86, at 15 (“Citizen jurors have fewer opportunities to speak on the issues of the day and to sit in judgment of their peers, their government, businesses and other entities.”).

258. See AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 54 (1998) (showing that the jury functions to educate the public about the justice system by making the public part of its operation); *The Vanishing Trial*, *supra* note 242, at 3 (“A minority of the public has the opportunity to actually serve as jurors, limiting public education through jury service.”).

259. See Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT’L L. 79, 93 (2003) (“Citizen participation in the disposition of civil cases . . . has served many purposes, but its enduring purpose has been to secure a greater measure of trust in judicial institutions.”).

260. Peter Shinkle, *Get Used to Jokes, Author Tells Law Students*, ST. LOUIS

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ADR's Biggest Compromise

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against lawyers.²⁶¹ Moreover, fewer jury trials forfeit the opportunity for thousands to serve their country.²⁶²

This is all unfortunate because the great majority of jurors enjoy their service.²⁶³ Chief Judge Mark W. Bennett understands this first-hand and had this to say concerning the situation:

This dramatic decline in civil jury trials results in a substantial loss of many important civic values not the least of which is depriving hundreds of thousands of this country's citizens the opportunity to serve their nation as jurors. My experience is that jurors come to the courthouse anxious, not wanting to serve, and, generally, quite uninformed and skeptical about our federal justice system. However,

POST-DISPATCH, Sept. 15, 2005, at C4.

261. *Id.* Galanter says that an indicator of this backlash against lawyers is the recent increase in lawyer jokes and how they have "evolved over the decades from gentle mockery to harsh jabs." *Id.*; see also MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 16 (2005) (listing nine negative qualities of lawyers that the public perceives that reoccur in lawyer jokes).

262. See Bennett, *supra* note 160, at 308 (stating that the "opportunities for hundreds of thousands of potential civil trial jurors to serve their nation" will be lost if current trends are not reversed).

263. The ABA released a study conducted by HarrisInteractive in July of 2004 and released the executive summary with findings about attitudes toward jury service:

- Americans view jury service as an important civic duty, and maintain a positive attitude about the responsibility.
- Given their positive outlook, Americans have little concerns about jury duty.
- If they themselves were on trial, the majority of Americans (75%) would want their case to be decided by a jury, rather than a judge.

AM. BAR ASS'N, JURY SERVICE: IS FULFILLING YOUR CIVIC DUTY A TRIAL? 5 (2004), <http://www.abanews.org/releases/juryreport.pdf>. In addition, the executive summary found the following regarding experience with jury service:

- The majority of Americans have been called for jury service, of which about half have actually served as a juror.
- Those who have served on a jury feel the experience met their expectations and the majority would even serve again if requested.
- *Those who have been called to service view the experience even more positively than those who have not.*

Id. at 6 (emphasis added).

after debriefing more than a thousand jurors who have served in my courtroom, I find that an extremely high percentage—well over 90%—leave the courthouse with a newly found respect and heightened appreciation for our judicial system and jury service. They find jury service extremely informative, and feel unsurpassed pride in having served their country. They leave the federal courthouse and go back to their communities as unparalleled emissaries for the right to trial by jury and our system of justice in federal courts.²⁶⁴

It should not be surprising that with these “increasing barriers to litigating, fewer citizens will find their own way into court.”²⁶⁵ “With little experience of public adjudication and little information available about the process or outcomes of dispute resolution, citizens’ abilities to use the justice system effectively to achieve social change will diminish markedly.”²⁶⁶

So, I urge restraint, because the problem today is that ADR defies its namesake. It is no longer an “alternative” but often the preferred choice among lawyers, judges, and the public.²⁶⁷ The preference for ADR, however, has one principal downfall: ADR’s public acceptance has been at the cost of public disengagement.

Therefore, I also urge understanding. We must understand the “quiet revolution” taking place and what it is replacing, and we must know what we are getting in return. America’s legal landscape is changing, and it is a zero-sum game: More ADR means less adjudication.²⁶⁸ It also means

264. Bennett Email, *supra* note 171. It is important to note that the Northern District of Iowa, where Chief Judge Mark W. Bennett presides, led all districts in trials per judge in 2001 and 2002 and was second in the nation in 2003. Bennett, *supra* note 160, at 308. During this time, the Northern District of Iowa had more than twice the national average of trials per judge. *Id.*

265. Hensler, *supra* note 1, at 196.

266. *Id.*

267. Even in 1994 it was written that “some commentators have cautioned that ADR is becoming not merely a supplement to adjudication, but a replacement for it.” Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 STAN. L. REV. 1487, 1488 (1994); see also Carver, *supra* note 217, at 79 (implying that adjudication, not ADR, is the alternative, and noting that “ADR beats the ‘alternative’”).

268. Recognizing that this is a zero-sum game, Galanter suggests that the “vanishing trial” label may not be the correct one to use, a better label might be “displaced” or “relocated” trials. *The Vanishing Trial*, *supra* note 242, at 3. That is because, “[i]nstead of saying that trials are declining, it may be more accurate to say that trials are occurring somewhere other than the courts. . . . In other words, what we may be really observing is a displacement of trial activity from the core legal

more privatization. That is a cost that I am unwilling to accept. Moreover, it is a cost much greater than all the exigencies of adjudication.

Finally, I urge reflection.²⁶⁹ America's warm embrace of ADR and its unfettered growth compromise the very foundations of our legal system. ADR has been championed as a solution to the litigation explosion and a panacea to the costs, time, and emotional drain of adjudication. But jumping on the ADR bandwagon²⁷⁰ is detrimental because the law promises more than simple dispute resolution. The law is public and the law is principled.²⁷¹ The law affords a check on clandestine evils, bringing them to light through a public process. The public nature of adjudication—with citizens participating as parties and jurors—constantly reminds America of what it is to be free²⁷² and serves to protect our democracy. ADR, essentially a private pursuit, fails to champion democracy and the law's promise to the public that truth will be exposed. That is ADR's biggest compromise.

Kirk W. Schuler*

institutions into ADR" *Id.*

269. Refo, *supra* note 49, at 4 ("The vanishing trial may be the most important issue facing our civil justice system today. It deserves our continued attention.").

270. Unfortunately, the business world has already jumped onto the ADR bandwagon. Coben & Harley, *supra* note 7, at 256 ("Employers and corporate interests have latched onto the ADR bandwagon with zeal.").

271. I agree with Professor Carbonneau that "[a]dvocates of ADR appear to mistake style and structure for content." Carbonneau, *supra* note 6, at 1961.

272. See Richard A. Rossman & John R. Runyan, *Are Some Civil Trials Too Complex to Be Heard and Decided by a Jury?*, FED. LAW., Aug. 1998, at 42, 43 (noting that Alexis de Tocqueville believed that juries "instill some of the habits of the judicial mind into every citizen and that these habits best prepare people to be free").

* B.A., Drake University, 2003; J.D. Candidate, Drake University Law School, 2006. I would like to thank Chief Judge Mark W. Bennett for suggesting this topic to me while interning with him and offering help on it whenever needed. I also take great pride in his friendship and scholarship, and knowing that he cares a great deal about the topic of this Note. Judge Bennett knows that "district judges . . . ought [to] be in the forefront of a national debate concerning this matter. We are not. In fact, we operate as though we don't much care." Young, *supra* note 177, at 30. I feel fortunate that my experience working with the Judge has been quite different.