

## Our Passive-Aggressive Model of Civil Adjudication

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It is a privilege to participate in a symposium that honors Professor Michael Vitiello. A symposium that interrogates questions about access to civil justice is an especially apt tribute. Professor Vitiello's recent book helps us appreciate the importance of these questions and reminds us of our obligation to pursue answers to these questions.<sup>1</sup> In this brief essay, I offer one original observation and pose two new questions about the vanishing civil trial. My contribution is descriptive but normative in the sense that history reveals patterns and alternatives.

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Two characteristics of contemporary civil practice and procedure are familiar to all who practice or study in this area. First, the civil trial is disappearing.<sup>2</sup> In 2018, there were approximately 2,500 civil trials in federal court.<sup>3</sup> This is about one-third of the total number of civil cases that federal courts tried in 1940.<sup>4</sup> During

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1. MICHAEL VITIELLO, *ANIMATING CIVIL PROCEDURE* (2017).

2. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL & LEGAL STUD. 459 (2004); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006); Hon. Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mazingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99 (2010); Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 (2002); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004).

3. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-4 (2018) [hereinafter 2018 AO REPORT].

4. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. 7 (1940) [hereinafter 1940 AO REPORT] (reporting 7,402 civil trials). The 1940 federal judiciary tried three times as many civil cases as the 2018 federal judiciary, even though the latter had more than three times the number of federal judges, bigger and better courthouses, a more generous budget, and more robust staffs (including magistrate judges, law clerks, and judges with senior status). See Thomas O. Main, *Procedural Constants: How Delay Aversion Shapes Reform*, 15 NEV. L.J. 1597, 1606 (2015) (citing RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 27–28 (1996); Stephen B. Burbank et al., *Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences Those*

that same timeframe, the percentage of cases that are tried has fallen steadily from 20% to 1%.<sup>5</sup> Second, most cases settle. Studies estimate that about two-thirds of cases are resolved by agreement of the parties as opposed to some court-ordered resolution of the parties' rights and responsibilities.<sup>6</sup> The percentage of cases that settle has been relatively constant over time.<sup>7</sup>

Courts must resolve cases that do not settle—either by trial or motion. Of course, there is a relationship between cases that settle and cases that do not. The occurrence of settlements—and the precise contours of those settlements—are precipitated and shaped by the cases that do not settle.<sup>8</sup> The settlement value of a case is impacted by its merit, and its merit, in turn, is determined by the outcomes of cases decided by courts.<sup>9</sup> For decades, commentators have used the metaphor of a shadow to describe how parties negotiate settlements in the shadow of the law.<sup>10</sup> In addition to relying on the metaphor of a shadow, I refer to settlement and judicial determination, respectively, as the *passive* and *aggressive* components of our system of adjudication. Both of these components are essential. Aggressive determinations resolve cases that cannot be settled and cast shadows that passively facilitate settlements. Settlements lighten the judiciary's workload, allowing judges to allocate more time to cases that do not settle.

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*Choices, and Their Consequences*, 161 U. PA. L. REV. 1, 93 (2012); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1456 (1983); Judith Resnik, *The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations*, 86 GEO. L.J. 2589, 2605 (1998); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 949 (2000).

5. 1940 AO REPORT, *supra* note 4 (7,402 / 37,367 = 19.8%). 2018 AO REPORT, *supra* note 3 (2,469 / 247,741 = 0.9%).

6. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (“If a single settlement rate is to be invoked, it should be that about two-thirds of civil cases settle. . .”).

7. See Hadfield, *supra* note 2, at 706; Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994); Robert I. Weil, *This Judge for Hire*, CAL. LAW. 41, 42 (Aug. 1992) (reporting that 67 of every 100 cases settle); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 163 (1986) (finding in a study of 1,600 federal and state cases, approximately two-thirds of all civil cases settled).

8. See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 32–35 (1983) (discussing “courts as sources of bargaining and regulatory endowments”); James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 172 n.6 (2001).

9. Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication*, 3 NEV. L.J. 305, 347 n.149 (2003) (explaining how informal dispute resolution is dependent upon the “likely outcomes if [a] dispute is adjudicated to conclusion”); Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 715 (1985) (stating “the formal legal systems provides an important source of bargaining endowments and social values that shape the outcomes of out-of-court settlements”).

10. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) (describing how “[d]ivorcing parents do not bargain . . . in a vacuum” but instead “bargain in the shadow of the law” as each side understands it); see also Barak D. Richman, *Norms and Law: Putting the Horse Before the Cart*, 62 DUKE L.J. 739, 744 (2012) (tracing origins of the metaphor to Martin Shapiro's 1975 book).

In an earlier era, trials were the paradigmatic form of aggressive dispute resolution.<sup>11</sup> But beginning in the late 1970s, under Chief Justice Burger's leadership, the trial became something to be avoided rather than celebrated.<sup>12</sup> Specifically, trials were characterized as a failure of judicial case management.<sup>13</sup> Because trials were discouraged, district judges needed a substitute to dispose of cases and to cast required shadows.<sup>14</sup> The emergence of our now-familiar pre-trial motion practice corresponds in both time and magnitude with the disappearance of trials. Specifically, Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment have replaced trials as the aggressive component of formal adjudication.<sup>15</sup> Heightened pleading emerged in the lower courts in the late 1970s and, after decades of fits and starts, was ultimately endorsed by the United States Supreme Court in 2007.<sup>16</sup> A summary judgment with bite similarly emerged in the lower courts in the late 1970s, and the United States Supreme Court adopted it in 1986.<sup>17</sup>

These pretrial motions account for a relatively small percentage of all terminations today. Some recent estimates suggest that only 2–4% of civil cases are terminated by a motion to dismiss for failure to state a claim, and 8–10% are terminated by a motion for summary judgment. As a point of reference, in 1970, 11% of all cases were terminated at trial.<sup>18</sup> We thus have swapped trials for pretrial motions with respect to the aggressive component of adjudication. And most importantly, these pretrial motions now cast the relevant shadows for settlement.

These pretrial substitutes for trials have been criticized for their anti-plaintiff effects. Heightened pleading standards limit access to courts.<sup>19</sup> Heightened summary judgment standards limit access to trials.<sup>20</sup> The invigoration of these

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11. See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014) (finding pretrial motions challenging the merits of plaintiffs' claims played a very minor role in litigation prior to the 1970s).

12. See Thomas O. Main, *Mediation: An Unlikely Villain*, \_\_ OHIO ST. J. ON DISP. RESOL. \_\_, \_\_ (2019) (forthcoming).

13. See Resnik, *supra* note 4, at 925–26 (recounting the history of this phenomenon); Hon. Mark W. Bennett, *Essay: The Grand Poobah and Gorillas in our Midst: Enhancing Civil Justice in the Federal Courts—Swapping Discovery Procedures in the Federal Rules of Civil and Criminal Procedure and Other Reforms Like Trial by Agreement*, 15 NEV. L.J. 1293, 1305–06 (2015) (same).

14. See Main, *supra* note 12.

15. *Id.*

16. Subrin & Main, *supra* note 11 (collecting sources, citing cases, and recounting history).

17. *Id.* (collecting sources, citing cases, and recounting history).

18. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS tbl. C-5 (1970).

19. See generally Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823–24 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 54 (2010); Benjamin A. Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 466 (2008); Stephen N. Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 575 (2012).

20. See generally Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of*

pretrial motions has created a substantial risk of Type II errors at both stages.<sup>21</sup> Even a plaintiff who cannot satisfy a pleading or a production burden before trial might, if allowed to continue with the litigation, be able to carry their persuasion (and production) burden(s) at trial.

But such criticisms do not go nearly far enough. The shift from trials to pretrial motions does not merely push the day of reckoning to an earlier stage of litigation where false negatives may occur. Without trials, plaintiffs can never win on the merits.

There has always been a fundamental asymmetry in the litigation postures of plaintiffs and defendants. Defendants can win a case on a pretrial motion, or they can win at trial. But with few exceptions,<sup>22</sup> plaintiffs can win a case only at a trial. This asymmetry is attributed to the fact that plaintiffs carry the ultimate burden of proof. To be sure, a plaintiff can defeat a defendant's motion to dismiss or motion for summary judgment; and this would surely create settlement leverage. But by defeating a pretrial motion, she only survives to fight another day. *If* the plaintiff does not have the realistic prospect of a trial, then the plaintiff's only leverage—even with a meritorious case—is the nuisance value of the litigation until some non-trial event terminates the suit.

To be clear, my opposition here to this reframing of litigation is not about my nostalgia for trials.<sup>23</sup> This is not an argument about the Seventh Amendment being compromised.<sup>24</sup> This is not an argument that trials are the gold standard for integrating law and fact.<sup>25</sup> Rather it is an argument that, because trials are

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*Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988); Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L.J. 705 (2012); Melissa Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53 (1988); Suja Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crises," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1047 (2003).

21. See generally Mark Moller, *Procedure's Ambiguity*, 86 IND. L.J. 645, 703 (2011); Stempel, *supra* note 20, at 180–81 (1988).

22. A plaintiff can win her case on a summary judgment, but only in circumstances where the defendant's evidence is insufficient on all elements of the cause of action. By contrast, defendants prevail where the plaintiff's evidence is insufficient on any one element of the cause of action. See FED. R. CIV. P. 56. Similarly, a plaintiff could win her case on a motion for judgment on the pleadings, but only in circumstances where the defendant admits to all elements of the cause of action and, even then, only if the defendant also does not raise an affirmative defense. See FED. R. CIV. P. 12(c). Plaintiffs could also win if the defendant defaults or if the court enters judgment for the plaintiff as a discovery sanction, although these would not be victories *on the merits* in the sense intended here. See FED. R. CIV. P. 55; FED. R. CIV. P. 37.

23. I have already tried that. See Subrin & Main, *supra* note 11, at 1884. See also Young, *supra* note 2, at 83 (advocating a return to trials); Mark W. Bennett, Margaret H. Downie & Larry C. Zervox, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 308 (2005); 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, 1134 (2003).

24. See Subrin & Main, *supra* note 11, at 1851. See also Thomas, *supra* note 20, at 145–54 (2007); Stempel, *supra* note 20, at 162–65 (1988).

25. See Subrin & Main, *supra* note 11, at 1877–80 (2014); Stephen N. Subrin & Thomas O. Main, *The*

essentially the only mechanism in formal litigation where plaintiffs can win their case, trials—or some other procedural technique where plaintiffs can *win* rather than just *not-lose-yet*—are essential to basic fairness.

It is an empirical question whether trials still cast any meaningful shadow that plaintiffs can leverage. Put another way, can a plaintiff who has evidence that satisfies the summary judgment standard actually get a trial? To be sure, 2,469 cases reached the trial stage in 2018.<sup>26</sup> Moreover, it is at least theoretically possible that (many) more cases could be tried if only more plaintiffs were so inclined. In this line of thinking, plaintiffs are avoiding trials. After all, trials are expensive; maybe plaintiffs are increasingly risk averse. Similarly, the threat of losing at trial may be so ominous that defendants are increasingly cost- and/or risk-averse, and thus are offering generous settlement offers.

Yet if trials still cast a meaningful shadow, then we might expect not only more than 2,469 trials per year, but also more cases settling on the eve of trials—when the costs and risks of continuing would create leverage. However, cases do not reach that stage. According to statistics recently collected by the Administrative Office of U.S. Courts, about 88% of all civil cases are terminated (whether passively or aggressively) before the Rule 16 pretrial conference.<sup>27</sup> That conference occurs within a few months of service of the complaint.<sup>28</sup> Thus, it appears to be the shadow of the iron fist of a judge, rather than the shadow of a trial, that shapes settlement negotiations. That shadow of the iron fist is a product of rulings on pre-trial motions and of encouraging settlements.

This combination of passive and aggressive adjudication leads me to conclude with two research queries on my agenda.

The first is premised on the notion that plaintiffs do not have a realistic prospect of trial. How should we expect judges to respond to this phenomenon? One judicial response is to resist the premise and champion trials.<sup>29</sup> But for the fair-minded, justice-seeking public servants who accept the premise, the grossly anti-plaintiff effects of eliminating trial's shadow must be intolerable. Appreciate the allure of arbitration under such circumstances: arbitration is a forum where plaintiffs have the prospect of prevailing on the merits. Appreciate also that when plaintiffs' only leverage in litigation is the nuisance value of their suits, increasing the delays and costs associated with litigation has some pro-plaintiff effects.

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*Integration of Law and Fact in an Unchartered Parallel Procedural Universe*, 79 NOTRE DAME L. REV. 1981 (2004). See also Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739 (2018); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 5 (2010).

26. See *supra* note 5.

27. 2018 AO REPORT, *supra* note 3.

28. FED. R. CIV. P. 16(b)(2).

29. See, e.g., Hon. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30 (2003); Mark W. Bennett, *From the "No Spittin', No Cussin', and No Summary Judgment" Days of Employment Discrimination to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 704 (2012); Anderson, Jr., *supra* note 2. See also U.S. v. Mass., 781 F. Supp. 2d 1, 21–27 (D. Mass. 2011).

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The second query is premised on the notion that plaintiffs still have some realistic prospect of trial. How many more cases could be tried if parties who preferred a trial simply resisted judicial efforts to get them to settle? Specifically, I wonder whether we are teaching our students to be too deferential to judges. Indeed, I worry that we are not arming our students with the confidence and tools to resist judicial efforts to settle.