# IN DEFENSE OF THE JURY TRIAL: ADR HAS ITS PLACE, BUT IT IS NOT THE ONLY PLACE†

*Honorable James E. Gritzner**

TABLE OF CONTENTS



## I. INTRODUCTION

I am proud to call myself a trial lawyer—not a litigator, but a trial lawyer. More recently, and for a shorter period of time, I served as a trial judge, though I still think of myself as a trial lawyer, which I think is a good thing for someone on the bench. I love trials. I love to watch them and I love to be a part of them. I enjoy the intellectual combat, the strategic chess match, the performance, the exhilaration of the risk, and the very process itself that challenges and advocates the factual details to a group of citizens whose common sense, attention to duty, and sense of community

† This essay is adapted from a lecture presented by the Author on August 26, 2011, to the International ADR Society Third Annual World Congress entitled "Is Mediation Undermining Our Judicial System?"

* Chief Judge, United States District Court for the Southern District of Iowa, appointed by President George W. Bush and confirmed by the Senate on February 14, 2002.

will ultimately control within the law. So, my essential message to the promoters, facilitators, and users of Alternative Dispute Resolution (ADR) is to stop what you are doing. Too much? Alright, slow down.

I was pleased when accomplished mediator and arbitrator Dick Calkins invited me to be a part of this discussion with members of the International ADR Society. Of course when you are in the judging business, where you disappoint or annoy at least half of the people you meet, it is nice to be invited anywhere. But I also appreciate being part of what I think is an extremely important discussion. There is value in what I do and there is value in what ADR provides, but I believe there is one adage that applies equally to all human endeavors: too much of anything will make you sick.

We could begin and end with this essential question: Is mediation undermining our judicial system? The answer would make for a short essay. Sometimes brevity is very effective. For example, there is the story of the defense lawyer whose final argument consisted of stacking twenty-one beer cans on the jury rail before announcing, "That is why this accident happened." Or there is the lawyer who argued for qualified immunity for his deputy sheriffs after remand from the circuit court and a 4-1-4 opinion by asserting, "If the learned judges on the court of appeals couldn't tell if there was a constitutional violation, how could my deputies be expected to do so?" But, I have more.

Unless you are actually present in a courtroom, the visual impression of a jury typically comes from melodrama or the work of artists and satirists like Charles Bragg. But a public artist from Seattle, the late Michael Fajans, is said to have grasped the jury's soul with eighty-foot long murals in the Seattle United States Courthouse. These murals illustrate how the jury is drawn from all facets of the community and becomes a group dynamic with geometric intelligence and experience and a strong sense of both community and responsibility.

Even though I sit in one of the most active trial districts in the country, there is a special experience in my work that I enjoy all too infrequently anymore. It is when I take the bench and announce the jury has advised they have reached a verdict. I direct the court officer to bring the jury into the courtroom and a group of citizens of all stripes files into the jury box. Their faces often show the strain of their difficult task, but they also show the resolve of knowing they, as a group, have done their duty. Some may show emotion. Some may look as firm as a warden. But each face reveals an understanding of the importance of what they have

just completed. The foreperson advises that they have reached a verdict and the form is brought to me. At that moment we all experience the purest form of democracy.

Compare that experience with disputing parties gathered in a conference room or dueling conference rooms with the assistance of a mediator who postures, insists, and negotiates in an effort to get the most bang for the parties' buck, to resolve the dispute in the least expensive way, to get the parties back to their normal business as quickly and cheaply as possible, and perhaps to obtain a result of strategic importance to their enterprise. At that moment we experience the purest form of capitalism.

They erect shrines to democracy. When reference is made to a shrine of capitalism, it is made ironically.

Now I can try to take the high ground, but I also must recognize that the term "alternative" used to be applied to the work of mediators and arbitrators. Now it more accurately applies to mine. If we are counting the number of dispute resolution proceedings occurring today, and we are, ADR wins. ADR has been winning for a long time, and the indicators are legion that it will continue to win well into the future. In the last twenty-five years, no area of law has grown as rapidly as ADR—it has accelerated due to concepts of economy, risk avoidance, budget predictability, and the enthusiastic participation of lawyers who recognize the trend and market their skills accordingly.

Writers addressing this issue frequently ask if the civil jury trial is becoming extinct. It is not extinct—I have seen civil jury trials recently. But it would be safe to say we are on fairly equal footing with the American bison.

There are several resources from which to garner an assessment of the magnitude of the problem. I have looked to Professor Marc Galanter of the University of Wisconsin Law School and the London School of Economics and Political Science, the data resulting from his work on behalf of the American Bar Association, and his own separate research, as that research seems most recent at the time of this writing.[1] Of course, we begin with the realization that the decline in the number of commenced cases being terminated by a trial has been occurring for one hundred years as

1. *See* MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INST., THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS 1–28 (2011), *available at* http://roscoepound.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf.

more and more cases have been resolved by settlements occurring within the litigation structure. Clearly it has always been true that most cases settle. This Article is not about turning the settlement phenomenon upside down. Trials have never been the dominant method of dispute resolution. But the trend away from trial resolution has gathered tremendous momentum. Only a modest amount of statistical analysis is necessary to make the point.

The percentage of civil cases terminated during or after trial, including cases settled during trial, fell from roughly twelve percent in the 1960s to less than one percent in 2010.[2] Bench trials actually dropped to below one percent seven years earlier than jury trials.[3] In 2009, 3,271 trials were commenced in the federal district courts, roughly half of the 6,228 trials commenced in those courts in 1999.[4] The actual number of trials increased in 2010 to 3,309, but the percentage of dispositions by trial, because of more case filings, actually decreased.[5]

A similar trend, over a shorter period of time, has been reflected in studies of state courts.[6] Again, the general observations I make also apply in general to the state courts' experience, though I approach the discussion from a federal court perspective, which is even worse.

What counts as a trial in federal court can be deceiving. The data is collected for "a contested proceeding before a jury or court at which evidence is introduced."[7] Thus, depending upon the nature of the proceedings, more than one "trial" can be counted in the same case. On the civil side, let's use a patent case. You could have an evidentiary hearing on a motion for preliminary injunction, a *Markman*[8] hearing on claim construction, and a jury trial, which together count as three "trials." On the criminal side, you could have a hearing on a motion to suppress, the jury trial, and a contested sentencing hearing, which together again count as three "trials."

Professor Galanter also reports the changing personality of civil trials

2. *See id.* at 3 fig.1.
3. *Id.* at 4.
4. *Id.* at 6.
5. *Id.*
6. *See id.* at 5.
7. ADMIN. OFFICE OF THE COURTS, MONTHLY REPORT OF TRIALS AND OTHER COURT ACTIVITY, Form JS-10 (Rev. 01/12).
8. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

in federal courts.[9] In 1962, about fifty-five percent of all civil trials were tort cases; in 2010, roughly twenty percent of the trials involved torts.[10] During that same period, civil rights trials rose from 0.9% in 1962, to roughly thirty percent in 2010;[11] and there are reasons the civil rights trial numbers will diminish, not because of fewer cases, but because of the selection of different court systems and prefiling resolutions.

Those of us hopeful of preserving the civil jury trial have admittedly moved from apprehension to dread to, in some instances, resignation. The very distinguished Judge Brock Hornby of the District of Maine wrote the following:

> Law professors and judges should stop bemoaning disappearing trials. Trials have gone the way of landline telephones—useful backups, not the instruments primarily relied upon, if ever they were. Dramatists enjoy trials. District judges enjoy trials. Some lawyers enjoy trials. Except as bystanders, ordinary people and businesses *don't* enjoy trials, because of the unpredictable risk and expense.[12]

And he finishes, "Trials as we have known them . . . are not coming back."[13]

I disagree with Judge Hornby's initial premise that we should stop bemoaning the disappearing trials. I think we should bemoan a great deal—we should bemoan and bemoan until we correct the trend to an appropriate degree—because the compelling question remains: What are we as a people losing as long as ADR grasps an ever-increasing share of our means to resolve our disputes?

I confess this is not entirely the fault of those who promote ADR. Walt Kelly's most famous line from the comic strip Pogo—"We have met the enemy and he is us"[14]—could hardly be more accurately applied than to the federal courts and trial lawyers. Again, because of where I work, my comments are most directly associated with the operation of the federal courts, though I believe the observations translate reasonably to the state

9. *See* GALANTER & FROZENA, *supra* note 1, at 11.

10. *Id.*

11. *Id.*

12. D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 467–68 (2007) (footnote omitted).

13. *Id.*

14. *See* WALT KELLY, POGO: WE HAVE MET THE ENEMY AND HE IS US 11 (1972).

court systems, especially because of additional budgetary burdens complicating the operation of those state systems.

## II. PARADIGM SHIFT: FROM THE TRIAL MODEL TO THE ADMINISTRATIVE MODEL

It is, I believe, fair, or at least accurate, to say that an overarching consideration has been a generic evolution over time from the "trial model" to the "administrative model" of case management. This is the thesis of many observers, but it has been ably championed by District Judge William Young of Massachusetts.[15] Simply stated, federal judges once engaged in the trial model of managing a case, which included preparing the case *for* trial with the anticipation that trial is precisely where everyone was headed. Somewhere along the line that approach was largely abandoned for the administrative model of trying to clear as many cases as possible in the shortest period of time by whatever means available. This is certainly no new revelation. In 1999, the late Judge Richard Arnold, a legal saint in this part of the world, commented:

> I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.[16]

While this no doubt seemed like a good idea at the time in response to increasing caseloads, it has been as successful for trial judges as the billable hour has been for insurance companies.

The new model has been hostile to attorneys and litigants, placing myriad restraints on their ability to pursue, prepare, and present their cases. It has sought to avoid the delay and expense of trials by making them difficult to obtain. Measurements of successful performance by the courts, used by our own Administrative Office of the United States Courts and Congress, encourage the use of the administrative model and evidence of terminating cases as quickly as possible.

15. *See generally* William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 79–82 (2006) (discussing judges' shifting role toward the administrative model of "managing cases" rather than trial "bench time").

16. Richard Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999).

No one suggests cases should not be managed. Ultimately, good case management is good for the litigants, attorneys, and the courts. It is the style of management that impacts the availability and occurrence of actual trials.

## III. JUDICIAL ACCEPTANCE AND ENCOURAGEMENT OF ARBITRATION

The historical posture of the courts, as illustrated by the 1953 Supreme Court case of *Wilko v. Swan*,[17] was to be wary of agreements for arbitration that extinguished a citizen's access to the courts.[18] That has substantially changed. Today you can find ample and consistent support for arbitration clauses. Further, the cases recite that there is "a liberal federal policy favoring arbitration agreements"[19] and a presumption in favor of arbitration.[20] This changing view rests in the ability of parties to contract and follows the policy of the administrative model of case management.

## IV. INCREASED IMPORTANCE OF DISPOSITIVE MOTIONS

Disposing of cases on summary judgment goes back a long time, and the procedure began increasing well prior to the frequent reference to twenty years ago. But the trilogy of cases decided by the Supreme Court in 1986—*Celotex*,[21] *Matsushita*,[22] and *Anderson*[23]—at least appear to have substantially *accelerated* that form of case termination. It is subject to some dispute whether those cases made the difference, but the number of terminations by means of summary judgment since those cases has increased by a factor of roughly four times.[24] I encourage you to examine the details, which we do not consider herein and which create the debate

17. Wilko v. Swan, 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484–86 (1989).

18. *See id.* at 438 ("[W]e decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.").

19. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (citing 9 U.S.C. § 2).

20. *See, e.g.*, Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943, 945 (8th Cir. 2001) (citations omitted).

21. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

22. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

23. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

24. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 616 (2004).

about exactly what has contributed to this increase. When these cases are examined, I submit there are not nearly as many close cases as you might expect or the plaintiffs' bar assumes. I do not think anyone is seriously concerned when an Americans with Disabilities Act claim for tennis elbow is resolved early, when an employment discrimination case ends early because the employee was found to have downloaded pornography on the employer's office computer, or when there are a large number of early terminations in cases filed by prison inmates—though we recognize our obligation to sift through the noise looking for the next Clarence Gideon.[25] Still, it is axiomatic that summary judgment has an obvious connection to terminating many cases without trial, and there is power in the perception and statistics that can contribute to decisions of whether and where to file a case and whether to reach a settlement.

Other cases are terminated even before the gathering of evidence through discovery on a motion to dismiss. The traditional standard from the case of *Conley v. Gibson*,[26] simplified for our purposes here, required the court to find there was no set of facts that would allow the plaintiff to prevail as a matter of law.[27] The 2007 case of *Bell Atlantic Corp. v. Twombly*[28] and the 2009 case of *Ashcroft v. Iqbal*[29] abandoned the *Conley* requirement that the complaint provide sufficient facts—not conclusory allegations—"to 'state a claim to relief that is *plausible* on its face.'"[30] The change seems intuitively more restrictive and designed to dismiss more cases. In practice it is less clear whether this change actually results very often in dismissal of cases that would not have also been dismissed under the old standard. But, it probably creates some increase, and it certainly creates the impression to litigants that there will be an increase.

## V. USER-UNFRIENDLY COURT RULES AND POLICIES

This is a category of its own only because of its impact on how litigants and lawyers view the federal courts. The things that create this impression are inherent in the other categories we are covering. When I

25. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (reversing the Florida courts, which denied Mr. Wainwright the appointment of counsel in a felony prosecution because his case was not a capital case).

26. Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

27. *Id.* at 45–46.

28. *Twombly*, 550 U.S. 544.

29. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

30. *Id.* at 1949 (emphasis added) (quoting *Twombly*, 550 U.S. at 570).

was nominated to the federal bench, an old friend who is a plaintiffs' lawyer left me a voice mail message in which he offered his congratulations and then said, "I will never see you again. Federal court is too hard." When I was a real lawyer, most of my practice was in the federal courts of this country, and I found them comforting in their structure and predictability. However, I recognize that some find them imposing, burdensome, and threatening in the event of noncompliance with the rules. I am compelled to suggest this is more perceived than real, and that federal court is, in fact, a predictable place to litigate and has the resources to allow you to litigate very effectively. But this perception creates a level of intimidation that one could argue is contrary to the mission of making justice in the federal courts accessible.

## VI. SLOW PACE OF PROCEEDINGS AND DECISIONS

The time it takes to move a case through federal court varies widely from district to district and from judge to judge. The public impression tends to arise from cases involving extraordinary delay and not from a careful study of cases generally. There is an increasing caseload nationally and it has been increasing continually in most locations. For the twelve-month period ending March 31, 2011, there were 384,708 filings and 413,502 terminations, leaving 332,035 pending cases.[31] In all districts, we have seen a 3.2% increase in filings in the past year.[32] The law demands priority for criminal cases,[33] and that is a problem in many districts, though it rarely impacts a civil case in our district.

The nature of civil cases has changed over the years. I do not see nearly the number of tort cases as when I was a federal law clerk many years ago. But, the cases we do see involve intellectual property, telecommunications law, complicated commercial transactions, and the like that require more time per case than the old tort docket. We are as occupied as ever but with significantly fewer civil cases.

As I said, districts will differ greatly in what occupies their efforts and in the speed with which they can get cases to trial and resolved. However, I believe this concern is overstated. At every conference I attend with other federal judges, judges appear universally to desire more civil trials and

31. Admin. Office of the U.S. Courts, *U.S. District Court—Judicial Caseload Profile*, U.S. COURTS, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2011Mar.pl (last visited Mar. 6, 2012).

32. *Id.*

33. *See* U.S. CONST. amend. VI.

have the time to do them.

## VII. COST

In my years as a trial lawyer, I normally represented business interests, running around the country defending companies in response to large fires and explosions. I watched the evolution among business people from outrage at being sued and aggressive defenses, to the business model that focuses on money and how to resolve the matter as quickly and cheaply as possible. I recognize that it often costs more to win than to buy off the pain. The greatest marketing tool available to ADR is the astounding cost of discovery, length of some trials, and cost of expert witnesses. It is difficult as a judge to know what to do about this because the cost is largely generated by the parties and lawyers, with some contribution by the courts, with motion practice and trial preparation requirements.

A corollary to the cost issue is the internal realities of large businesses. They do not like surprises. The general counsel wants desperately to avoid bringing bad money news to the CEO, and the CEO has a like aversion to taking that message to the board and the shareholders. They like to operate within budget. Mediation is vastly more friendly to the budgeting process than either an unexpectedly high verdict or unexpectedly high legal fees even in the wake of a defense verdict. This is the reality of the business model of today and the last twenty years. This business reality needs to be addressed by the members of the bar who fancy themselves trial lawyers in the first instance, and, in the second instance, courts need to be sensitive to the ways in which we can narrow this gap.

It is ironic to me that many trial-starved judges today try to address the cost issue by offering case management techniques that usurp the judgment of the lawyers and make appearance in federal court more confined and onerous. Proposals include status conferences in which the court muscles parties and lawyers away from what the court views as weaker claims; restrictions on the number of interrogatories, depositions, and expert witnesses a party can utilize; limitations on evidentiary exhibits; and arbitrary and shortened trial schedules. Ready, aim, fire!

## VIII. FAILURE TO RESPOND TO MISINFORMATION

The courts have been resoundingly criticized as an arena in which there are unacceptable levels of ultimate risk, ignorant and runaway juries,

and legions of frivolous lawsuits. I submit these are in the main, self-serving attacks by political, insurance, and corporate interests promoting tort reform or some other unique agenda. I will not go through the various studies that have examined concepts of frivolous lawsuits, the litigation explosion, and pro-plaintiff and runaway juries, except to note that other than anecdotal issues like hot coffee at McDonald's, there is no real empirical evidence to support those claims.[34] Sure, there are the rare surprising verdicts. But, in my experience in the well and on the bench, there is no real problem with either ignorant or runaway juries. To the contrary, juries possess geometric brain power and skills together with reasonable judgment in the *vast* majority of cases.

And, what is a frivolous lawsuit? Certainly I see them and they are handled expeditiously. But keep in mind that prior to the late 1970s, sexual harassment in the workplace would not have violated federal law. Today, thousands of such lawsuits are filed and successfully prosecuted or favorably settled.

The courts as an institution need to focus on responding to this misinformation. The members of the bar should be responding to this misinformation. It has been untrue and extremely effective in its impact on public attitudes.

## IX. ATTRACTION TO LAWYERS

In the business of the law, we all know a market when we see one. To paraphrase an old stump speech by California Governor Jerry Brown, when you see the people are all going the other way, you have to run around and get in front because you are their leader. Lawyers recognize the tide toward ADR and the training is available to be neutrals. Everyone gets paid in the ADR process—the neutral probably up-front—and the risk of a bad trial result is erased.

ADR also appeals to an endemic aversion to actually going to trial, despite the title of trial lawyer. I can recall thirty years ago listening to an in-house counsel for a company that seemed to get sued every ten minutes who complained that he had a very hard time finding trial lawyers who really wanted to go to trial. Truthfully you know some! That long-standing little secret of the profession is exacerbated as fewer and fewer people in the litigation departments of law firms have actually tried a case

34. *See* John T. Nockleby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind "Tort Reform*,*"* 86 OR. L. REV. 533, 582 (2007).

to verdict.

## X. JUDGE HOSTILITY TO TRIALS

Just as there are trial lawyers who find actual trials unattractive, some judges are just anti-trial, viewing themselves as case movers rather than trial judges. That someone would seek a trial bench and hate trials has always been perplexing to me. Early in my practice, I appeared before a judge in northern Iowa on a discovery motion. He opened the hearing by asking the lawyers, "What are requests for admissions?" It is not always helpful to know precisely where the judge is coming from.

## XI. INATTENTION TO THE PROBLEM

This problem of the vanishing civil trial has been studied, discussed, dissected, and analyzed by the courts, the commentators, and the bar, but corrective action has been elusive. The siren needs to sound or the ADR glacier will flatten the landscape.

So what is the harm in idle jury boxes? Essentially, it changes us as a people—what we have always stood for and what we promise each other to be. And, it loses structural benefits of no small importance to our society.

John Adams observed that "'representative government and trial by jury are the heart and lungs of liberty.'"[35] Adams was there when Thomas Jefferson cited an example of the king's tyranny in the Declaration of Independence as "depriving us in many cases, of the benefits of trial by jury."[36] The United States Constitution establishes the sanctity of the right to a jury trial in criminal and civil matters.[37] I tell jurors that while we take this responsibility very seriously, it is not unlike the way they go about making important decisions in their own lives; but it is really more important than that because there is something much more powerful in making the judgments in *other people's* lives and knowing that still more people could someday make important decisions in your life.

Reduction in the opportunity and obligation to serve on a jury is a reduction in participatory democracy and the opportunity to serve the country. It is the closest many citizens will ever get to actually participating

35. *See* Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 WASH. & LEE L. REV. 3, 8 (2011) (quoting Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. 48, 49 (2001)).

36. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

37. *See* U.S. CONST. amend. VI.

in government. This is an important form of citizen self-governance that at once provides an important public service and makes the participants better citizens. They experience working hard, working in a group dynamic, consistently doing the right thing, learning about the system, and learning about the impact of the law on real people.

After every trial, if I can, I go into the jury room and thank the jurors personally and answer their questions. That experience has fully convinced me of the seriousness with which they approach the task. They are moved by the experience of making the group decision and it results in an obvious personal growth. Their eyes are opened by the system, the process, and the people involved. In my experience, there was a black juror among eleven white jurors considering the case of a black defendant, and the black juror was deeply moved by the lack of prejudice and the careful consideration of the white jurors. There was the strict law and order juror who came to grips with his duty under the law and, to his own surprise, voted to acquit. There was the juror who sobbed at the sadness of a case and a defendant but found the courage to vote guilty. And, there was the patent jury of ordinary citizens who waded through organic chemistry to reach a decision that the appellate court found quite acceptable. This is a special experience.

Alexis de Tocqueville wrote extensively about the jury in his study of the American experiment—we frequently obtain our best analysis of the American system from the work of this aristocratic Frenchman. In his review of *Democracy in America* he observed:

> The jury, and above all the civil jury, serves to give to 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.
>
> 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.[38]

We are familiar with the phrase "sunlight is said to be the best of disinfectants."[39] But it is more than that. Resolving disputes in open court proceedings brings sunshine on the process. The people can openly observe the system's strengths and frailties, as we are by nature a careful and suspect people. The application and growth of the law can be openly observed and recorded to serve as precedent.

Sixth Circuit Court of Appeals Judge Damon Keith observed in the context of a government proceeding that "democracies die behind closed doors."[40] Northwestern University Law Professor Robert Burns adds more generically:

> That is true whether they are the closed doors of a judge's chambers where he is disposing of a case summarily, or of a conference room where a sealed settlement is reached, or of an arbitration which is not public, or of an office where an unreviewable decision of a corporate or government official takes place.[41]

Of course, being shielded from public observation is precisely what some, if not most, parties want, and thus being shielded is a selling point for ADR. But too much privacy in dispute resolution makes the entire process mysterious and suspect, and provides no standard or leadership to indicate how such proceedings have occurred or should occur. Private, unrecorded precedent cannot be intended to serve the public interest. There is no way to monitor the quality or consistency of such a legal system.

If we continue to have trials at all, where do we find the trial lawyers? We potentially reach a point where we have the inability to retain the trial even if we wanted. It is already true that the small lawsuits in which people like me got their initial training are gone. It is already true that the cost of litigation has diminished the second chair opportunities for young lawyers

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

39. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 92 (Fredrick A. Stokes Co. 1914).

40. Detroit Free Press v. Ashcroft, 303 F.3d 681, 683 (6th Cir. 2002).

41. Robert P. Burns, *What Will We Lose If the Trial Vanishes?* 2 (Nw. Univ. Sch. of Law, Faculty Working Paper No. 5, 2011), *available at* http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/5.

unless the firm is willing to eat that time. It is already true that lawyers become "experienced" partners in litigation departments of law firms for many years without ever having personally seen a jury trial to verdict. It is already true that trial advocacy seminars have cropped up to provide some exposure to the process beyond reviewing documents, answering discovery, taking depositions, and writing motions and briefs. How extreme has it become? In late 2010, the *Georgetown Journal of Legal Ethics* warned the vanishing jury trial, and related lack of opportunities to train young trial lawyers and to keep the skills of old trial lawyers sharp, raises the question of whether there is a legal obligation to disclose to clients a lawyer's lack of current skill in the area.[42] And then how enthusiastic is the client to proceed to trial?

Fading jury trials take away a valuable source of education about law and the judicial system. Trials are a major source of public information on important questions of our society—the severity of the issues, the complexity of the issues, and the manner in which they must be addressed. Again, de Tocqueville observed that jury service could "instill some of the habits of the judicial mind into every citizen," "teach each individual not to shirk responsibility," and provide "one of the most effective means of popular education."[43] This is not theoretical—it is real. Professor John Gastil of the University of Wisconsin and his team studied the behavior of a group of citizens after they served as jurors in a specific court and found the jury experience caused them to be more likely to vote, engage in other civic activities, and be more attentive to the news.[44]

Open trials involving thorough discussion of important issues, tested by cross-examination and the common sense of jurors within the context of the law, can be a catalyst for change. Private resolution of disputes in a closed conference room does not place parties outside of that discussion on notice of product defects and poor behavior. Trials are events of stark contrast, right and wrong, and innocence and guilt. Private settlements are gray.

42. *See generally* Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155 (2010) (addressing the ethical implications brought by the modern litigators' lack of trial experience).

43. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274–75 (J.P. Mayer ed., George Lawrence trans., Harper & Row, Publishers 1988) (1835).

44. *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 126 (2010).

Essentially, trials are a form of accountability to the community that we should not completely relinquish. Everyone is accountable in an open proceeding; the conduct and ability of the lawyers, the reasonableness and veracity of the parties, the conduct and wisdom of the judge, and the wisdom inherent in the jury's own work are all part of the open proceeding.

Despite the concept of a *neutral*, private facilitators do not have the inherent independence of life-tenured judges. They operate in a marketplace where the shoppers have an agenda and an expectation. It is not the motivation of the ADR neutral that is the focus of this comment, but the motivation of the people who select and pay for those services.

At bottom, the essential opportunity to be heard by your neighbors in an orderly presentation of your point of view has been an essential element of the concept of due process dating back at least to the *Magna Carta*. It is our sense of fairness and consistency. It is our political and cultural heritage. It is who we are.

## XII. CONCLUSION

Allow me to close with just a couple thoughts. My concerns for the jury trial are not a general condemnation of ADR. There are cases, and many of them, that should settle. There is value in being a "peacemaker," as some neutrals describe their role. I have told you what I believe is wrong with the judicial system that has contributed to this issue. Other than the danger of adopting a default business decision for ADR, which I would suggest is a questionable practice, I believe there are two essential things wrong with the promotion and operation of ADR.

It is common—I have seen it consistently—that mediators will tell the parties that the last thing they want to do is to place their matter in the hands of an untrained panel of people whose personal activities were not substantial enough to get out of jury duty and risk an untutored and unpredictable resolution of the claim. The actual statement is usually earthier and less clinically stated. This capitalizes on a misconception; it is not correct and should not occur. Participants in ADR should have objective information to assist in their decision making.

Lastly, mediation lacks an important element. Unless the parties walk away from mediation, the claimant always wins something and the defendant always gives up something—no one wins everything. Sometimes—indeed often—when one party wins everything, that is justice.