

SHIFTING THE FOCUS FROM THE MYTH OF  
“THE VANISHING TRIAL” TO COMPLEX  
CONFLICT MANAGEMENT SYSTEMS, OR I  
LEARNED *ALMOST* EVERYTHING I NEED TO  
KNOW ABOUT CONFLICT RESOLUTION  
FROM MARC GALANTER

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I. INTRODUCTION

The vanishing trial<sup>1</sup> myth has three elements: (1) The, (2) Vanishing, and (3) Trial. “The” implies, inaccurately, that there is a single uniform phenomenon of trial. “Vanishing” implies, inaccurately, that “the trial” is on the verge of disappearance. “Trial” evokes many images, most of which are highly idealized and unrepresentative of the vast majority of trials. Although this phrase is misleading, the phenomenon known as the vanishing trial (“TPKATVT”) has taken on a life of its own that transcends empirical reality. In TPKATVT’s short career to date,<sup>2</sup> the ABA Litigation and Dispute Resolution Sections established task forces to

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\* Associate Professor and Director, LL.M. Program in Dispute Resolution, University of Missouri-Columbia School of Law. J.D., Hastings College of Law; Ph.D., University of Wisconsin-Madison. As a graduate student, I was a student of and research assistant for Marc Galanter, who was a member of my dissertation committee. Though this essay quibbles with a few aspects of his Vanishing Trial Report, I write this with great affection and admiration for his tremendous contribution to our understanding of conflict resolution. I include extensive cites to and quotes of his scholarship to introduce readers to it (or remind them of it). Many of his writings are posted at <http://marcgalanter.net/docs.htm>. Thanks to my good friend, Lela Love, for inviting me to participate in the symposium, “Trials on Trial: Are Trials Vanishing and Why?” at Benjamin N. Cardozo School of Law on Dec. 3, 2004. Thanks to Chris Honeyman, and Marc Galanter, as well as participants in the symposium particularly Kevin Stack for helpful comments.

<sup>1</sup> The phrase “the vanishing trial” is the title of a report that Professor Marc Galanter prepared on behalf of the ABA Litigation Section’s Civil Justice Initiative. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>2</sup> The first citation I could find for “the vanishing trial” is an article in the ABA Journal, which referred, *inter alia*, to Galanter’s study for the Litigation Section. See Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 25.

study it and there are three symposia (and counting)<sup>3</sup> in legal publications on it, as well as other law review articles that refer to it.<sup>4</sup>

To say that “The Vanishing Trial” is a myth is not to suggest that the facts or analysis in Professor Galanter’s report are fictional or inaccurate.<sup>5</sup> Indeed, he marshals a massive amount of data to show that the number of trials and the trial rates have been declining for the past four decades, particularly in the federal courts. The report documents an apparent paradox: the proportion of cases going to trial has dropped sharply during the past forty years despite substantial increases in many other legal indicators including the number of lawyers, the number of cases filed, and the amount of published legal authority.<sup>6</sup> The most stunning fact is that the civil trial rate in the federal courts steadily dropped from 11.5 percent in 1962 to 1.8 percent in 2002.<sup>7</sup> Even as the number of federal cases filed grew, the absolute number of trials decreased.<sup>8</sup> If the report was titled, “Trial Rates Continue Longstanding Decline, Especially in the Federal Courts,” there would be much less to quibble about. Of course, this would not have the mythic quality of TPKATVT. This refers not to the definition of myth as untruth but rather as a “popular belief or story that has become associated with a person,

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<sup>3</sup> See Symposium, 1 J. EMPIRICAL LEGAL STUD. v (2004); Symposium, *The Vanishing Trial*, 10 DISP. RESOL. MAG. 19 (Summer 2004); Symposium, *The Vanishing Trial*, 6 CARDOZO J. CONFLICT RESOL. 1 (2005). The Journal of Dispute Resolution at the University of Missouri-Columbia is also planning to publish a symposium on the subject. It has also been the subject of a number of presentations at judicial and legal conferences and meetings.

<sup>4</sup> A recent Westlaw search for “vanishing trial” yielded fifty-four articles in the “Journals and Law Reviews” database. Apparently there is only tepid public interest if accurately reflected by the fact that a search of Westlaw’s “Allnews” database yielded only thirty-eight articles. This database includes more than 6,000 publications including “newspapers, magazines, journals, newsletters, government press releases, and transcripts of television and radio shows and congressional testimony.”

<sup>5</sup> This article assumes that the Report’s findings are generally accurate and that trial rates, especially in the federal courts, have decreased. Professor Gillian analyzes federal court data for 1970 and 2000 and finds that although the trial rate declined, the rate of nontrial (or pretrial) adjudication substantially increased during that period. See Gillian K. Hadfield, *Where Have All the Settlements Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004). Her data suggests that it is incorrect to infer that declining trial rates are due to increased settlement or decreased court adjudication.

<sup>6</sup> See Galanter, *supra* note 1, at 460.

<sup>7</sup> See *id.* at 462-63. This observation is part of a longer trend. Almost two decades ago Galanter reported, “[w]hile federal court filings have risen dramatically, the percentage of cases reaching trial has diminished from 15.2 percent in 1940 to 6.5 percent in 1980.” Marc Galanter, *Adjudication, Litigation, and Related Phenomena*, in *LAW AND THE SOCIAL SCIENCES* 151, 226 (Leon Lipson & Stanton Wheeler, eds., 1986) [hereinafter Galanter, *Adjudication, Litigation, and Related Phenomena*].

<sup>8</sup> See Galanter, *supra* note 1, at 462-63.

institution, or occurrence, especially one considered to illustrate a cultural ideal.”<sup>9</sup> This article argues that TPKATVT is a misleading and counterproductive myth and suggests alternative myths and methods for addressing the ideals embodied in TPKATVT.

Part II of this article describes the mythical character of TPKATVT and why it is a misleading portrayal of empirical reality. Using Galanter’s concept of the “ecology” of conflict resolution,<sup>10</sup> Part III sketches an ecological description of our system of managing conflict and the place of trials in that system. Part IV describes a range of goals that communities might adopt for their conflict management systems. Part V pictures several possible evolutionary paths for the conflict management systems and suggests ways to cultivate healthy systems including a valued place for trials. Part VI suggests adopting myths to celebrate people managing their ecology of conflict rather than to celebrate (or demonize) disputing procedures.

## II. THE MYTH OF “THE VANISHING TRIAL”

Let us begin by focusing on the mythical aspect of “trials” in TPKATVT. TPKATVT has great mythic power because of the mythic character of trials themselves in our popular and legal cultures. Professor Lawrence Friedman provides a wonderful portrayal of perhaps the most common myth of trial:

To the ordinary person, the word “trial” has a sharp and very definite meaning. It conveys a dramatic image. There is O.J. Simpson in the dock, charged with murder. There is Scott Peterson, accused of killing his wife and her unborn baby. The image is the image of the big trial — the trial of the Hernandez brothers, the trial of the Boston nanny, and all the other headline trials, past and present. It is the trial the ordinary person sees on television and in the movies. There is a definite image about every aspect of the trial, even what the courtroom is supposed to like: the jury sits in its box, the judge sits on his or her high bench in a robe with an American flag in the background, the witnesses come in and sit on the witness chair; they raise their right hands and swear; the lawyers and the defendant sit at tables facing the judge. The trial begins with elaborate voir dire — the meticulous process of selecting a jury. The lawyers battle

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<sup>9</sup> See Dictionary.com, at <http://dictionary.reference.com/search?> (last visited Jan. 2, 2005).

<sup>10</sup> For a discussion of “adjudication in the ecology of dispute processing,” see Galanter, *Adjudication, Litigation, and Related Phenomena*, *supra* note 7, at 160-64.

and squabble, trying to stack the jury with people who will vote the way they want. The trial itself gets going with opening arguments and statements from the lawyers. The trial itself is long, tense, and full of excitement. The lawyers joust with each other. There is clever and dramatic cross-examination. Lawyers jump up and cry, “I object”; they fight to prevent the jury from hearing material they think is unfavorable to their side, they posture and exclaim. They end the trial with impassioned arguments. Then the judge instructs the jury, the jury retires to a locked room, and a spine-tingling period of waiting begins. Finally, the door opens, a hush comes over the crowd in the courtroom, and the jury comes in and announces its verdict.<sup>11</sup>

This myth resonates with nostalgia for a “golden age of trials,” and Friedman argues that “[w]hat has vanished, then, is not only the trial in terms of numbers, but also the trial as it should be, the classic trial, the trial of the good old days.”<sup>12</sup>

Friedman, a legal historian, shows that this mythic portrayal “is not the norm, and [has] not been the norm for quite some time.”<sup>13</sup> This is an image of a criminal trial, and, even for criminal cases, the criminal trial rate has been declining since 1800 as the vast majority of criminal matters are resolved by plea bargaining rather than contested trials.<sup>14</sup> Before trials allegedly “vanished,” most trials were quite different from this myth. Felony trials typically were “quick, slapdash” proceedings with little or no voir dire, lawyers, cross-examination, objections, or attention to “the niceties of due process or the law of evidence,” or time spent in jury deliberations.<sup>15</sup> Trials of misdemeanors were dispatched even more summarily, “without anything that looked like a ‘trial.’”<sup>16</sup> The situ-

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<sup>11</sup> Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 690-91 (2004) (footnote omitted).

<sup>12</sup> *Id.* at 690.

<sup>13</sup> *Id.* at 691. In the Vanishing Trial report, Galanter cites data from the Administrative Office of the U.S. Courts, which defines a trial as “a contested proceeding at which evidence is introduced.” Galanter, *supra* note 1, at 461. This is a very broad definition, which is not limited to proceedings in courts, perhaps because that was implicit in the dataset. Nonetheless, this definition applies to proceedings outside of courts, such as administrative hearings and numerous private proceedings including arbitrations and organizational proceedings. See generally Marc Galanter & John Lande, *Private Courts and Public Authority*, 12 STUD. IN LAW, POL., & SOC’Y 393 (1992).

<sup>14</sup> Friedman, *supra* note 11, at 691.

<sup>15</sup> *Id.* at 692.

<sup>16</sup> *Id.* at 693 (footnote omitted).

ation for civil cases is “more or less analogous.”<sup>17</sup> Although trial rates have declined, trials “were the exception, never the rule.”<sup>18</sup>

There are other trial myths as well. An inspiring myth is of trials as vehicles for justice in which the “little guy” overcomes odds and prevails in the end. This myth sometimes extends to the legal system generally, with courageous appellate judges issuing controversial rulings that establish precedents to help people get justice in the future. Presumably, these myths are appealing to many people who are concerned that trials are vanishing. Yet another mythic portrayal is of a Kafka-esque trial, a trap that ensnares innocent people and produces injustice rather than justice. Some people view trials as full of absurd technicalities that prolong the conflict, aggravate adversarial tensions, and produce inscrutable results. These latter myths are favorites within the dispute resolution community and are often used as justifications for alternatives to trial. Although all these myths reflect some measure of reality, more typical experiences are probably more routine and less dramatic.

This brief discussion illustrates the mythic element “The” in TPKATVT. Trials are incredibly variable phenomena, changing significantly over time and even at any given time differing in myriad ways. Professor Stephen Burbank argues that this should be called the “vanishing trials phenomenon” rather than “the vanishing trial phenomenon,”<sup>19</sup> which better reflects the heterogenous nature of trials.

The active ingredient in TPKATVT is “Vanishing.” That word implies that something has gone terribly wrong with the legal system, which is on the brink of losing an essential element. This phrase, along with “trial implosion,” another phrase used in the report, suggests that “the trial” is about to disappear or is at least a candidate for the endangered species list.<sup>20</sup> Even as sharp a skeptic as Lawrence Friedman can be seduced by the mythical language, referring, in passing, to “the mass extinction of trials” as if it is an

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 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, 577 (2004). Apparently, the ABA project was originally called “The Vanishing Trials Project.” See Galanter, *supra* note 1, at 459 n.\*. It is unclear why this was changed from the plural to the singular.

<sup>20</sup> Galanter states that “[t]rials are not exactly an endangered species - at least for now.” Galanter, *supra* note 1, at 523. Although this fine-print equivocal disclaimer qualifies Galanter’s claims, TPKATVT carries on with great dramatic effect.

indisputable fact.<sup>21</sup> The phrases “vanishing trial,” “trial implosion,”<sup>22</sup> and “mass extinction” have foreboding connotations. They seem especially misleading given the ambiguities that Galanter and Friedman note in their analyses.

Like Mark Twain’s reported death, accounts of the impending demise of the trial are exaggerated.<sup>23</sup> Empirical data from Galanter’s report shows that there continue to be many trials in the state courts, which have substantially higher trial rates than federal courts.<sup>24</sup> A recent analysis by the National Center for State Courts analyzes data from twenty-two states between 1976 and 2002 and shows that the civil trial rate dropped by more than half, primarily because the number of filings more than doubled during that period. “The number of [civil] bench trials rose from approximately 500,000 in 1976 to 667,000 in 1983. They then varied between 600,000 and 700,000 for the next fifteen years before falling to less than 470,000 by 2002.”<sup>25</sup> Similarly, “from 1976 through 1998, the number of civil jury trials hovered between 23,000 and 25,000 per year, but then fell abruptly to less than 18,000 by 2002.”<sup>26</sup> During this period, the total number of civil dispositions in these courts increased fairly steadily, from about 1.5 million cases in 1976 to about 3.1 million cases in 2002.<sup>27</sup> As a result, the trial rate dropped from 36.1 percent to 15.8 percent.<sup>28</sup> Even so, the lowest state court civil trial rate is substantially higher than the highest federal civil trial rate since 1962, which is 11.5 percent. Similarly, the number of state court trials dwarfs the largest number of federal civil trials shown in Galanter’s report, which was 12,529 trials in 1985.<sup>29</sup>

Many trials take place outside the courts in administrative agency hearings conducted by administrative law judges and the

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<sup>21</sup> Friedman, *supra* note 11, at 689.

<sup>22</sup> Galanter, *supra* note 1, at 515.

<sup>23</sup> At the Cardozo Symposium, Dennis Drasco, the Chair of the ABA Litigation Section, argued that the trial rate is declining but rejected the idea that the trial is vanishing.

<sup>24</sup> Although trial rates in state courts have declined in recent decades, state courts still resolve a substantial number of cases by trial. Galanter’s report focuses primarily on federal courts, though it also presents data on trials in the state courts, where the vast majority of litigation occurs. In 1999, “state courts of general jurisdiction resolve nearly twenty-eight times as many civil cases and eighty-two times as many criminal cases as federal district courts.” Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 757 (2004).

<sup>25</sup> *Id.* at 768-69.

<sup>26</sup> *Id.* at 768.

<sup>27</sup> *Id.* at 776. Between 1992 and 2002, the number of dispositions fluctuated between about 3 million and 3.4 million cases. *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Galanter, *supra* note 1, at 461.

like. In a brief section of the Vanishing Trial Report, Galanter notes that in 2001 the federal government had more than twice as many administrative law judges as the number of authorized Article III district court judgeships.<sup>30</sup> Professors Fiss and Resnik cite data indicating that in the late 1990s, the Social Security Administration (SSA) alone dealt with more than 500,000 cases per year compared with about 260,000 cases filed in federal courts.<sup>31</sup> The number of SSA administrative hearings continues to rise, from 465,228 in 2001 to 532,106 in 2002 to an estimated 602,009 in 2003.<sup>32</sup> Resnik reports data on administrative hearings in 2001 in other federal agencies including 215,000 from immigration judges, 31,000 from the Board of Veterans' Appeals, and about 9,400 from the Equal Employment Opportunity Commission.<sup>33</sup> These figures obviously do not include hearings by other federal agencies or any state administrative agencies. Thus, notwithstanding TPKATVT, there seems to be no shortage of administrative trials (at least in terms of aggregate numbers).

Contrary to imagery of trials vanishing and leaving courts as virtual ghost towns, Galanter's report shows that, facing growing caseloads, courts have been quite busy and shifted some of their efforts from trials to pretrial work.<sup>34</sup> The workload of federal district judges has grown substantially as the caseload of district judges "more than doubled, from 196 in 1962 to 443 in 2002."<sup>35</sup> Galanter states that "[c]learly, courts are more involved in the early resolution of cases than they used to be."<sup>36</sup> A recent major study found that federal judges are actively involved in holding pretrial conferences, setting pretrial schedules and trial dates, setting limits on discovery, and ruling on motions. In more than half

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<sup>30</sup> *Id.* at 499-500.

<sup>31</sup> OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 40 (2003).

<sup>32</sup> Social Security Online, Annual Statistical Supplement, 2002, at <http://www.ssa.gov/policy/docs/statcomps/supplement/2002/2f8-2f11.pdf> (last visited Jan. 1, 2005); Social Security Online, Annual Statistical Supplement, 2003, at <http://www.ssa.gov/policy/docs/statcomps/supplement/2003/2f8-2f11.pdf> (last visited Jan. 1, 2005). Thanks to Jeff Lubbers for identifying these sources.

<sup>33</sup> Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 799 (2004).

<sup>34</sup> Shari Seidman Diamond and Jessica Bina analyzed federal court data and found that the civil trial rate is negatively correlated to the caseload, i.e., districts with higher caseloads generally have lower trial rates. Shari Seidman Diamond & Jessica Bina, *Puzzles About Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637, 654-56 (2004).

<sup>35</sup> Galanter, *supra* note 1, at 501.

<sup>36</sup> *Id.* at 482.

the cases, the judges described their level of pretrial management as moderate or intensive.<sup>37</sup> Moreover, Galanter cites data showing that the decrease in the trial rate has been accompanied by an increase in the rate of summary judgments from about 1.8 to 7.7 percent in the period from 1960 to 2000.<sup>38</sup>

Galanter's report does not present evidence of adverse effects commensurate with the amount of reduction in trial rates or the degree of alarm expressed about them.<sup>39</sup> In addition, the data, covers such a wide range of subjects that some broad generalizations are based on fairly thin empirical data masking a great deal of variation by geography<sup>40</sup> and type of dispute.<sup>41</sup> Galanter masterfully

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<sup>37</sup> JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 258-61 (1996). For further discussion of changes in pretrial processing, including use of ADR, see John Lande, "The Vanishing Trial" Report: An Alternative View of the Data, DISP. RESOL. MAG., Summer 2004, at 19.

<sup>38</sup> Galanter, *supra* note 1, at 484 (citing Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 590 (2004)).

<sup>39</sup> The Vanishing Trial Report questions whether the changing pattern of trials has had any distributive effect between individuals and corporate defendants, but does not present data to indicate any such effect. See Galanter, *supra* note 1, at 524-25. In his classic article, *Why the "Haves" Come Out Ahead*, Galanter argues that litigation is "unlikely to shape decisively the distribution of power in society." Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 159 (1974) [hereinafter Galanter, *Why the "Haves" Come Out Ahead*].

Most of the discussion in the Vanishing Trial Report of consequences of trial trends focuses on possible reduction of information about disputes available to litigants and the public. See Galanter, *supra* note 1, at 526-29. It is not clear how significant any such loss of information may be or how it compares to other, possibly beneficial, effects. Galanter notes potential problems of having too much information about the law:

The authoritative legal learning becomes more massive and elaborated. There are more statutes and more administrative regulations and more published judicial decisions. But rules propounded by legislatures, administrative bodies, and appellate courts do not carry a single determinate meaning when "applied" in a host of particular settings. Variant readings are possible in any complex system of general rules. Damaska . . . observes that there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decision-maker's freedom. Contradictory views can plausibly be held, and support found for almost any position.

Galanter, *Adjudication, Litigation, and Related Phenomena*, *supra* note 7, at 206 (citation omitted). In this context, it is hard to say that litigants or society are clearly disadvantaged by the loss of information from trial court decisions.

Although Galanter argues that trials have been vanishing, he does not find a problem of vanishing case law. He reports that the number of pages of federal opinions published yearly has more than doubled since 1962. Galanter, *supra* note 1, at 506. If lawyers and judges need more guidance from appellate decisions, presumably it would be more appropriate to increase the publication rate of appellate decisions than to increase the number of trials. See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999) (citing studies showing that approximately sixty to ninety percent of appellate decisions are unpublished).

<sup>40</sup> See, e.g., Ostrom et al., *supra* note 24, at 772-73 (graphs illustrating wide variation between states in trial rate trends).

pieces together the limited data available and provides a nuanced interpretation of the data. The picture he produces is not enough, however, to support the mythic implications of TPKATVT.

The next part describes the ecology of dispute processing to provide a better context for analyzing the legal world.

### III. MAPPING THE ECOLOGY OF CONFLICT IN A LEGAL PLURALIST WORLD

Like medieval astronomers who mapped the Earth as being the center of the universe, most professionals in the legal system – including lawyers, judges, and legal scholars — place the courts in the center of the world of conflict resolution. Galanter properly criticizes this “legal centralist” perspective,<sup>42</sup> favoring instead an alternative perspective called “legal pluralism.” In the latter perspective, courts are not the only or primary system of adjudication, and the courts have important functions beyond interpreting and applying legal rules.<sup>43</sup> Although the Vanishing Trial Report reviews a variety of dispute processes outside the courts, the overwhelming emphasis is on court trials, especially in federal courts. Thus, the Report produces a distorted picture of the overall ecology of conflict.

Empirical evidence is consistent with the everyday experience (of nonlawyers) that people turn to lawyers and courts in only a small fraction of their problems.<sup>44</sup> Galanter writes, “disputes and

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<sup>41</sup> For example, trials of securities investor-broker disputes may have already become virtually extinct given due to the virtually universal industry practice of using pre-dispute arbitration provisions to keep these cases out of court. See Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843, 906-07 (2004). On the other hand, there seems to be no shortage of Social Security Administration trials. See *supra* text accompanying notes 30-32.

<sup>42</sup> See Marc Galanter, *The Portable Soc 2; or, What to Do Until the Doctrine Comes*, GENERAL EDUCATION IN THE SOCIAL SCIENCES: CENTENNIAL REFLECTIONS ON THE COLLEGE OF THE UNIVERSITY OF CHICAGO, 246, 250-53 (J.J. MacAloon ed., 1992); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. OF LEGAL PLURALISM, 1, 1-3 (1981).

<sup>43</sup> See Stipanowich *supra* note 41. See generally Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869 (1988); John Lande, *The Diffusion of a Process Pluralist Ideology of Disputing: Factors Affecting Opinions of Business Lawyers and Executives* 7-8 (1995) (unpublished Ph.D. dissertation, University of Wisconsin-Madison).

<sup>44</sup> See Barbara A. Curran, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 175 n.109 (1977); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 537, 542-43 (1980-81) (finding in study of claims of \$1000 or more that lawyers were used in average of only 23 percent

controls are experienced for the most part not in courts or other forums sponsored by the state, but at the various institutional locations of our activities — home, neighborhood, school, workplace, business dealings, and so on — including a variety of specialized remedial settings embedded in these locations.”<sup>45</sup> Increasingly, the dispute resolution field (and especially those in the field who are not trained in law) are focusing on conflict resolution in countless institutions outside the courts.<sup>46</sup>

Stretching the ecological metaphor a bit more, by focusing so much on trials, we can miss the forest for the trees. Studying the forest and all the inhabitants who live there, we can better understand how the system works overall and why the trial species has declined somewhat. Indeed, we can best assess the health of this species by analyzing it in the context of the ecology as a whole. Professor Galanter’s scholarship provides some of the best field guides we have of the landscape of disputing. Galanter and Cahill write:

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of disputes and cases were filed in court in average of only 11.2 percent of disputes, which varied by type of dispute).

<sup>45</sup> Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 35 (1983) [hereinafter Galanter, *Landscape of Disputes*]. He elaborates:

[C]uriously those dispute institutions that flourish and enjoy relative autonomy tend to be omitted from discussions of ADR. Our social institutions are honeycombed by indigenous forums that elaborate and enforce complex codes of conduct - in hospitals, schools, condominiums, churches, the NCAA, and a multitude of other settings. Far more disputing is conducted within these indigenous forums than in all the free-standing and court-annexed institutions staffed by arbitrators, mediators and other ADR professionals. This profusion of indigenous law reminds us that the world of disputing includes much more than traditional adjudication and the new ADR institutions.

Marc Galanter, *Compared to What? Assessing the Quality of Dispute Processing*, 66 DENV. U. L. REV. xi, xiii (1989) (footnote omitted). See generally Galanter & Lande, *supra* note 13.

<sup>46</sup> See generally Stipanowich, *supra* note 41. The Association for Conflict Resolution, a major umbrella organization, has sections dealing with conflicts in a wide range of areas: commercial, community, consumer, court, crisis intervention, education, environment & public policy, family, health care, international, ombuds/ombudsman, online dispute resolution, organizational conflict management, research, restorative & criminal justice, spirituality, training, and workplace. Association for Conflict Resolution, Sections, available at <http://www.acrnet.org/sections/index.htm> (last visited Nov. 27, 2004). The ABA Section of Dispute Resolution has a similar array of committees dealing with conflict outside the legal sphere. This bar association’s committees deal with: construction, family function, tax matters, arbitration, community-based and peer mediation programs, corporate, diversity, education, entertainment, environment and natural resources, ethics, health care, international, lawyer as problem solver, legislation, mediation, negotiation, ombudsman, online dispute resolution, practice development, pro bono, public contract, public disputes, technology, and training. American Bar Association Section of Dispute Resolution, Committees, available at <http://www.abanet.org/dispute/committees.html> (last visited Nov. 27, 2004).

Once we recognize that all components of the intricate ecology of disputing are linked in complex and sometimes paradoxical ways to what courts do, it is manifest that the obligation of seeing that justice is done is not discharged by uncritical celebration of settlement (or uncritical condemnation of it). It requires a discriminating appreciation of the complex dynamics of the various species of settlements in different bargaining arenas and an appreciation of the limited capacity of the devices for regulating them. Settlement is not the answer; it is the question.<sup>47</sup>

By the same token, the project of law and justice is not discharged by uncritical celebration of trial (or uncritical condemnation of it). This article argues that trial (or settlement) is not the answer or even the question. Rather, to understand the evolving role of trials in contemporary U.S. society, we need to focus on the ecology of disputing. In that context, the question is how society can cultivate the environment so that the various inhabitants can deal with the challenges inherent in conflict in the most healthy and appropriate ways possible.<sup>48</sup>

Using an ecological perspective, Galanter shows that dispute resolution through trials is only one part of the work of the courts, and perhaps not the most important function:

[C]ourts resolve by authoritative disposition only a small fraction of all disputes that are brought to their attention. These in turn are only a small fraction of the disputes that might conceivably be brought to courts and an even smaller fraction of the whole universe of disputes. The observation of the limited use of courts in direct resolution of disputes should not be taken as an assertion that courts are unimportant in the whole matrix of disputing and regulation, however. The impact of litigation cannot be equated with the resolution of those disputes that are fully adjudicated. Adjudication provides a background of norms and procedures against which negotiation and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute but possible remedies and es-

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<sup>47</sup> Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1391 (1994).

<sup>48</sup> The methods for cultivating such an environment are complex, uncertain, and the subject of controversy within the ADR field. It is beyond the scope of this article to address this issue in detail.

timates of the difficulty, certainty, and cost of securing particular outcomes.<sup>49</sup>

Thus a major function of courts is to provide signals to help litigants and lawyers “bargain in the shadow of the law.”<sup>50</sup> This environment creates the context for the normal process of litigation, which Galanter calls “litigotiation.” He defines this as “the strategic pursuit of a settlement through mobilizing the court process.”<sup>51</sup> Even before most lawsuits are filed, everyone – at least all the repeat players – knows that the cases will probably be resolved without trial, and they act accordingly.<sup>52</sup>

Courts have taken on the role of case managers in addition to adjudicating the odd cases that do not settle before trial, ruling on pretrial motions, and providing substantive and procedural rules to help parties settle. This is especially true in courts where caseloads outstrip the courts’ resources to provide much individualized attention to a large volume of cases. In recent years, courts have become referral managers in various permutations of Professor Frank

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<sup>49</sup> Galanter, *Landscape of Disputes*, *supra* note 45, at 32-33. He elaborates:

The relation of official adjudicatory forums to disputes is multi-dimensional. Decisive resolution, while important, is not the only link between courts and disputes. Disputes may be prevented by what courts do, for instance by enabling planning to avoid disputes or by normatively disarming a potential disputant. Also, courts may foment and mobilize disputes, as when their declaration of a right arouses and legitimates expectations about the propriety of pursuing a claim, or when changes in rules of standing suggest the possibility of pursuing a claim successfully. Further, courts may displace disputes into various forums and endow these forums with regulatory power. Finally, courts may transform disputes so that the issues addressed are broader or narrower or different than those initially raised by the disputants. Thus courts not only resolve disputes, they prevent them, mobilize them, displace them, and transform them.

*Id.* at 34.

<sup>50</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979).

<sup>51</sup> Marc Galanter, *World of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

<sup>52</sup> Gross & Syverud write:

We define justice in procedural terms: the judgment of a competent court following a trial that was procedurally correct. . . . The upshot is a masterpiece of detail, with rules on everything from special appearances to contest the jurisdiction of the court, to the use of exhibits during jury deliberation. But we cannot afford it. As litigants, few of us can pay the costs of trial; as a society, we are unwilling to pay even a fraction of the cost of the judicial apparatus that we would need to try most civil cases. We have designed a spectacular system for adjudicating disputes, but it is too expensive to use.

Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 62, 63 (1996).

Sander's idea of multi-door courthouses.<sup>53</sup> By virtue of statutes, rules, and courts' inherent authority, courts have encouraged or ordered parties to use various methods of dispute resolution and have enforced the decisions from those procedures.<sup>54</sup> Courts provide the structure for the system of binding arbitration by providing mechanisms for staying trials, ordering arbitrations, and enforcing arbitration awards.<sup>55</sup> In many areas, courts routinely order cases to mediation or other ADR procedures. Adapting Galanter's concept of litigotiation, I coined the term "liti-mediation" referring to the situation where it is taken for granted that mediation is the normal way to end litigation.<sup>56</sup> In many places, by mandating ADR, the courts, in effect, create and regulate a private ADR market.<sup>57</sup> Similarly, government agencies and substantive legal rules stimulate private organizations to develop their own internal conflict management systems.<sup>58</sup>

Yet another deviation from a legal centralist perspective is the fact that our court system is highly fragmented and decentralized, despite symbolic images of uniformity.<sup>59</sup> Galanter writes that our

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<sup>53</sup> See Frank E. A. Sander, *Varieties of Dispute Processing*, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (The Pound Conference) (Apr. 7-9, 1976), reprinted in 70 F.R.D. 79, 111-14 (1976) (recommending that courts offer parties a range of dispute resolution procedures and help them choose among them in a "multi-door courthouse"). In the federal courts, the Alternative Dispute Resolution Act of 1998 mandates a weak version of a multi-door courthouse, requiring each federal district court to adopt local rules implementing its own ADR program. See 28 U.S.C. § 651(b) (2001).

<sup>54</sup> See generally Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999).

<sup>55</sup> See generally Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1947).

<sup>56</sup> See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997).

<sup>57</sup> See generally Brazil, *supra* note 54.

<sup>58</sup> For example, the U.S. Equal Employment Opportunity Commission recently set up a "Referral Back" Mediation Pilot Program, encouraging employers to use internal ADR programs to handle employment complaints. If charging parties choose to participate in a program that satisfies certain criteria, the EEOC suspends processing of the charge for up to sixty days while the matter is handled by the employer's program. If charging parties choose to participate in a program that satisfies certain criteria, the EEOC suspends processing of the charge for up to sixty days while the matter is handled by the employer's program. See U.S. Equal Employment Opportunity Commission, Questions and Answers, EEOC "Referral Back" Mediation Pilot Program, available at <http://www.eeoc.gov/mediate/referralpilotqanda.html> (last visited Nov. 27, 2004). U.S. Supreme Court decisions also encourage employers to provide internal complaint procedures as the availability of such procedures may be a defense to employees' suits. See *Burlington Industries v. Ellerth*, 118 S.Ct. 2257, 2261 (1998); *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2279 (1998). See generally Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497 (1993).

<sup>59</sup> See Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 200-02 (1997) (noting numerous and long-standing sources of procedural disuniformity "deeply interwoven" in the legal system). Professor Robert Kagan argues that the U.S. legal system is more fragmented

legal system is structured to “permit[ ] unification and universalism at the symbolic level and diversity and particularism at the operating level.”<sup>60</sup> Our federal court structure begins with a federal system and fifty state court systems. Each of those systems is further fragmented with a host of courts limited to particular subjects such as bankruptcy, family, and probate matters. Even within a given court, individual judges exercise tremendous discretion.<sup>61</sup> Thus much of the decision-making “action” within the courts occurs at a local level.<sup>62</sup>

Although one can make some generalizations about the conflict-related behaviors of individuals and systems, these generalizations are very weak because of the complexity of the interactions and multiple causal forces, including individuals’ cognitions and intentions. Galanter writes “the regularities in the litigation process

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than the legal systems of other industrial democracies and this fragmentation can be traced to deeply-rooted social, economic, and political values of individualism and distrust of concentrated government power. ROBERT A. KAGAN, *Adversarial Legalism: The American Way of Law* 3-16 (2002).

<sup>60</sup> Galanter, *Why the “Haves” Come Out Ahead*, *supra* note 39, at 148. He states:

The . . . features of the legal system then appear as a device for maintaining the partial dissociation of everyday practice from these authoritative institutional and normative commitments. Structurally, (by cost and institutional overload) and culturally (by ambiguity and normative overload) the unreformed [i.e., present] system effects a massive covert delegation from the most authoritative rule-makers to field level officials (and their constituencies) responsive to other norms and priorities than are contained in the “higher law.”

*Id.* at 147-48. Professor Thomas Main describes the symbolic appeal of uniformity this way: “Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism or some combination of these, the norm of procedural uniformity enjoys virtually universal approval.” Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 311-12 (2001) (footnotes omitted).

<sup>61</sup> As one illustration of intra-court variation, the U.S. District Court for the Eastern District of Missouri publishes a table listing the procedural preferences of each district and magistrate judge regarding ADR referrals. The tables have twelve columns for different aspects of judges’ procedural preferences. See U.S. District Court for the Eastern District of Missouri, *Procedures for ADR Referral*, available at <http://www.moed.uscourts.gov/forms/ADRDistrict.pdf>; <http://www.moed.uscourts.gov/forms/ADRMagis.pdf> (last visited Nov. 28, 2004).

<sup>62</sup> To illustrate local differences, consider the following. At a recent conference of the Missouri Bar Association ADR Committee, two judges were asked if it was hard to get to trial in their courts and whether there were enough trials for people to know what to expect in their cases. A federal court judge said that it was hard to get to trial, especially for small cases, whereas a state court judge said that they often had short trials in his court and that local lawyers do have fairly clear expectations about likely court decisions.

are not reducible to a comprehensive pattern since the activity is interactive and strategic.”<sup>63</sup>

Reviewing this quick tour of the ecology of conflict, it is clear that the court trial is an important but relatively small feature in a highly diverse and localized environment featuring various species of conflict processing. True to form, in the Vanishing Trial Report, Galanter surveys a broad scope of the disputing landscape, though the Report reflects a legal centralist bias by exaggerating the significance of trials (especially federal court trials) within the conflict management environment. The insights of legal pluralism show the importance of understanding the significance of trials in the context of the system as a whole. There is so much local variation within the system that we should be cautious in making generalizations about the system.

#### IV. GOALS FOR THE ECOLOGY OF CONFLICT MANAGEMENT SYSTEMS

The insights of legal pluralism suggest that it is important to analyze the overall ecology of conflict management rather than

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<sup>63</sup> Marc Galanter, *Case Congregations and Their Careers*, 24 *LAW & SOC'Y REV.* 371, 371 (1990). This outstanding article catalogs a long list of causal factors affecting what Galanter calls a “case congregation,” which he defines as “a set of cases arising from a specific event, product, or claim . . . that displays common features and that traces a discernable career over time.” *Id.* Galanter concludes:

We can, I think, identify many regularities in this process, many paths by which a variety of influences work. Whether these can be subsumed in a comprehensive master pattern seems doubtful. No one is in charge: a case congregation is “the product of the action of many men but . . . not the result of human design” . . . It is an interactive system that “utilize[s] the separate knowledge of all its several members, without this knowledge ever being concentrated in a single mind, or being subject to those processes of deliberate coordination and adaptation which a mind performs” . . . .” External events and the litigation system are simultaneously connected and separated by the strategies of the actors. External changes affect the litigation system as they are filtered through the strategic considerations of the parties. That is, we are dealing with a kind of behavior in which people are acting strategically; they are thinking about stakes, probable returns, and tactical options. This is not to say that their motives are solely economic. They may want vindication or revenge. They may be poorly informed or may miscalculate. But generally their behavior is not impulsive and irreversible: they recruit advisers and allies, ponder options, assess what the other side is doing, and act after some deliberation. So when we see changes in litigation over time, we see reflections of changes in the resources, alternatives, and strategies available to the players.

*Id.* at 394 (references omitted). Although there are differences in conflict management patterns between case congregations and legal communities, generally, many of the dynamics are similar, including the limited ability to make strong generalizations about the behavior in these systems.

merely focusing on the courts. Professor David Luban catalogs a variety of public goods produced through the legal system, which can be useful in assessing the larger ecology of conflict management. Luban points out that courts provide opportunities for the development of legal rules and precedents, discovery and publication of important facts, opportunities for intervention by persons not party to lawsuits, opportunities for structural transformation of large public and private institutions, and facilitation and enforcement of private settlements.<sup>64</sup> The legal system enables economic formation and transactions, deters health and safety hazards, compensates for injuries, protects basic civil rights, and provides an important forum for debating and establishing social norms.<sup>65</sup> It also serves as an essential alternative to private decision-making when parties need to enlist the power of the state to seek fair and non-violent resolution of claims. Indeed, much private decision-making would not occur without the threat of court action to validate and enforce legal claims if needed. The courts are not the only, or necessarily the best, mechanism for achieving these and other important social goals. Thus, dispute resolution professionals (including judges, lawyers, and third-parties) should consider a range of processes.

In addition to promoting these substantive goals, people expect trials and other conflict management processes to satisfy various procedural criteria. These may include (perceived) party control over the process and outcome, opportunity for expression, respectful hearing and treatment, focus on the merits of the issues, focus on parties' interests, exploration of potential for joint gains, enhancement of relationships (or minimizing harm to them), fairness and accuracy of decision, reference to appropriate norms, consistency of process and outcome, suppression of bias, protection from procedural abuses, opportunity to correct errors, protection of legitimate privacy, implementation of decisions, and efficiency in use of time and money.<sup>66</sup>

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<sup>64</sup> See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-26 (1995). See also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247-51 (1996) (citing benefits of public dispute resolution). For a discussion of how the courts promote private settlement, see Galanter & Lande, *supra* note 13; Richard Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 L. & SOC'Y REV. 91, 99-100 (1978).

<sup>65</sup> See generally KAGAN, *supra* note 59.

<sup>66</sup> See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335 (1989); Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41

Most people would probably agree that it is desirable for procedures to satisfy these general goals. Of course, no single procedure can satisfy all these expectations. Indeed, rather than focusing on particular procedures, it makes more sense to analyze the ecology of conflict as a whole. Some procedures may generally perform better on certain criteria than others, depending, in part, on how people use them.<sup>67</sup>

Part V considers how people might make adjustments within the ecology to satisfy various goals for the system.

## V. MANAGING LOCAL CONFLICT MANAGEMENT SYSTEMS

Professors Lawrence B. Solum<sup>68</sup> and Robert A. Baruch Bush<sup>69</sup> separately envisioned five possible future scenarios for the courts. I summarize them as follows: One scenario is that the courts would not fundamentally change their mission of adjudicating legal rights. A second scenario involves multi-door courthouses where courts, acting as “expert ADR managers,” selectively send some cases out for various forms of ADR and retain a relatively pure model of adjudication only for cases considered truly suited for adjudication. A third scenario relies increasingly on administrative agencies for handling multiple cases involving recurrent issues such as workers’ compensation and mass tort cases. Bush suggested a fourth scenario in which substantive and procedural legal rules are simplified by “bring[ing] ADR features into court procedures,” such as by changing the role of the judge from a relatively passive umpire in an adversarial system to an active trial manager in an inquisitorial model, as used in some European civil law courts. A fifth scenario involves what might be considered true “privatization” or “private

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FLA. L. REV. 253 (1991); Galanter & Lande, *supra* note 13; John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787 (2001).

<sup>67</sup> See Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 3 (1998) (arguing, in response to debates about the effectiveness of mediation, that “[i]nstead of asking whether mediation works or not, we need to examine how and why parties and lawyers ‘work’ mediation in varying ways”). *Id.*

<sup>68</sup> See Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2121 (1993).

<sup>69</sup> See Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades*, 15 REV. LITIG. 455 (1996).

ordering” in which disputants increasingly handle disputes through some combination of market and community mechanisms with little or no involvement of the courts or other state agencies.<sup>70</sup>

Bush and Solum indicated that these scenarios are not mutually exclusive and described them separately for convenience of analysis. The current situation — as well as most plausible futures — involve a combination of these scenarios (and perhaps others) to varying extents. Thus policymakers might consider how much of each scenario, if any, they want to promote. If policymakers are alarmed at the trend in trial courts’ adjudicatory activities described in the Vanishing Trial Report and believe that this trend is insufficiently satisfying top priorities for the system, they might try to change their policies and practices to achieve their goals better.

How might they do so? And who are “they”? Answers to these deceptively simple questions would involve analysis well beyond the scope of this article. The following discussion briefly sketches some considerations bearing on that analysis.

As described above, Galanter teaches that to understand the behavior of trial courts, we must recognize their place in the complex ecology of conflict management. Although central legal authorities provide some direction from above, much of it does not penetrate into the daily life of the trial courts, let alone the general population.<sup>71</sup> To understand and influence court policy, it may be especially appropriate to focus on the realities at the local level.<sup>72</sup> What goals and criteria for the community<sup>73</sup> do local constituencies value? What mechanisms for managing conflict do community members have access to and use? How well do these mechanisms meet these goals and criteria? How often do people want to handle problems through court trials but feel unduly precluded from doing so? To the extent that constituents have significant dissatisfactions, what changes might best address them? What economic and non-economic resources could be enlisted to make desired changes? What sources of resistance could be expected to oppose such changes? How would different stakeholder groups answer

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<sup>70</sup> See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers’ and Executives’ Opinions*, 3 HARV. NEGOT. L. REV. 1, 55-56 (1998) (footnotes omitted).

<sup>71</sup> Galanter notes that some rules do not “penetrate” into daily life as they are not “effectively applied at the field level.” See Galanter, *Why the “Haves” Come Out Ahead*, *supra* note 39, at 103, 138, 149.

<sup>72</sup> For example, even though the overall trial rates for the federal district courts declined to 1.8 percent in 2002, the trial rates for many local courts will differ and may be considered appropriate for those communities.

<sup>73</sup> See *supra* Part III.

these questions? Surveying the local community would help policymakers decide how to prioritize strategies such as those described by Solum and Bush.

Policymakers, conflict management professionals, and other concerned citizens who want to improve their conflict environment should consider using dispute system design (DSD) techniques. Private and public organizations use DSD techniques to manage a continuing flow of disputes by establishing a system that usually includes a range of procedural options.<sup>74</sup> DSD procedure generally involves convening a planning team of representatives of the important stakeholder groups. The team typically conducts a local needs assessment, develops options, consults with stakeholders about their preferences, seeks approval by the necessary authorities, plans for necessary training and education, and oversees the implementation and evaluation of the plan.<sup>75</sup> This brief description oversimplifies a complex, challenging process that will almost never satisfy all the stakeholders. A DSD process does, however, offer the potential for organizations, courts, and communities to manage their conflict management system wisely and address concerns such as whether their system needs more of the values that court trials provide. Just as some communities collaborate to wisely steward their natural environment, some may do so to wisely manage their conflict management environment.

## VI. ALTERNATIVE MYTHS IN THE ECOLOGY OF CONFLICT

Human societies need myths to help provide meaning for life.<sup>76</sup> The problem, therefore, with the myth of the vanishing trial

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<sup>74</sup> See John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 112-17 (2002).

<sup>75</sup> *Id.* The American Bar Association Section of Dispute Resolution established a Court ADR Program Advisors program to provide technical assistance to courts that want to develop ADR programs. American Bar Association Section of Dispute Resolution. Court ADR Program Advisors, at <http://www.abanet.org/dispute/capa/home.html> (last visited Nov. 29, 2004). The Federal Judicial Center provides similar assistance in designing and evaluating procedures. See 28 U.S.C. § 620(b) (2001); see generally Gina Viola Brown, *A Community of Court ADR Programs: How Court-Based ADR Programs Help Each Other Survive and Thrive*, 26 JUST. SYS. J. (forthcoming 2005).

<sup>76</sup> See Michael deHaven Newsom, *Independent Counsel? No. Ombudsman? Yes: A Parable of American Ideology and Myth*, 5 WIDENER L. SYMP. J. 141, 149-50 (2000) (citing anthropologist Bronislaw Malinowski to argue that “myth has considerable value and utility not just for primitive cultures, but for ours as well”); Joan R. Tarpley, *ADR, Jurisprudence, and Myth*, 17 OHIO ST. J. ON DISP. RESOL. 113, 114 (2001) (defining myths as “institutionalized customs, traditions, and

is not that it is a myth. The problems are that this myth is misleading (as described above in Part II) and, more important, that it teaches the wrong lessons. The implication of TPKATVT is that social life would improve if we could reverse the processes causing trials to vanish and restore a golden age of trials. Although virtually no serious analysts would endorse this formulation — and Galanter makes no such predictions or prescriptions — it seems to be the clear implication.

This is similar to other myths that portray disputing processes as carriers of good or evil. For example, many liberals remember fondly the Warren Court era as a demonstration of the virtue of courts as instruments of justice. For many in the dispute resolution field, the field's growth and legitimacy has demonstrated multiple virtues of ADR procedures. Those who believe that good citizens and businesses are being overrun by an explosion of frivolous lawsuits view trials (and litigation generally) as a plague on society. Some critics of ADR see it as a covert mechanism to roll back gains won in the courts and disempower the disadvantaged in society. In all these myths, litigation (or ADR) is the hero or villain (choose one) of the story.

This seems bizarre. Procedures are inanimate phenomena that should be means to ends, not ends in themselves. Yet many of us make fetishes of our favorite procedures as if they have some extra measure of goodness. These procedures are incredibly malleable and can yield better or worse effects depending on many things, especially how people use them. For example, TPKATVT can just as easily be framed as a story of the dangerous decline of civilization or innovative adaptation to changing conditions.<sup>77</sup>

Rather than making procedures the protagonists in these stories, we should celebrate humans and their wise and caring actions when working with conflict. This includes judges and lawyers who choose between the various procedural options (including, but not limited to, trials) to promote appropriate goals for litigants and societies. Judges can make some of their best contributions by helping design and manage disputing systems as well as trying cases. We should celebrate prosecutors and other government officials who investigate and prosecute wrongs including the full range of illegal acts including human rights abuses, corruption, discrimination, and violence. Mediators and arbitrators are often heroes,

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mores that have become individually accepted as our own, which in turn form our personal core values and beliefs”).

<sup>77</sup> See Lande, *supra* note 37.

helping people work through conflicts. So are inside counsel who mediate between business executives and outside counsel to manage conflicts effectively. And so are many unsung heroes who manage conflict every day with little outside recognition. These include military and police officers, legislators, organizational, community, and religious leaders, teachers, parents, and countless others. Although one can find examples of such stories, they do not seem to predominate as the myths that resonate most for many people in the legal and dispute resolution fields. Instead of investing so much of our cultural resources in myths about our most (or least) favorite procedures, we should invest more in realistic stories honoring people who work together to make good choices in using procedures to satisfy people's interests.

## VII. CONCLUSION

Considering all the needs that trials serve, it seems unlikely that "the trial" will vanish completely. Indeed, although the Vanishing Trial Report indicates a significant reduction in trials, especially in the federal courts, the Report shows that there continues to be a substantial number of trials, especially in state courts and administrative agencies. More importantly, the Report does not demonstrate that American society has suffered as a result of changes in trial rates in recent decades. Do the reported declines reflect appropriate adjustments to changing conditions or warning signs of serious problems in the legal system and society? Have the increases in the percentage of non-trial dispositions enabled trial courts to provide more careful adjudications in the cases that they do try? It is difficult to answer these questions without analyzing the trends in the context of the overall ecology of conflict management. As a practical matter, it would be impossible to do a comprehensive survey because of the multiplicity of mechanisms and functions involved, as well as the tremendous local variation. Before becoming horrified at the possible demise of the trial in general, we should have a clearer picture of the actual changes and their consequences. In the meantime, the insights of legal pluralism can help provide a balanced analysis by recognizing that much adjudication occurs before trial and outside the courts. For those interested in taking action to promote a healthy conflict management ecology in their area, dispute system design techniques may help people develop good systems for managing conflicts in their

communities. Rather than focusing on the myths that canonize or demonize particular procedures, let us realistically honor people in the challenging struggles of stewarding the conflict ecology.