

JOURNAL OF  
EMPIRICAL LEGAL STUDIES

VOLUME 1 NUMBER 3 NOVEMBER 2004

## Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals

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The recent sharp decline in the rate of federal trials has many potential explanations. In addition to changes in the demand for trials, some commentary suggests that a shortage in judicial resources and the press of the criminal docket have led to problems of supply, inducing litigants to turn to alternative dispute resolution or other means of resolving their cases. The increased number of federal magistrate judges provides a counterweight to many of these claims about judicial shortages. Nonetheless, we show that a puzzle remains. Federal districts vary in their trial rates, and the rate of trial is negatively correlated with the number of civil cases filed per judge, regardless of whether magistrate judges are included in the total. Moreover, that relationship persists even after controlling for the rate of criminal cases filed in the district. Thus, unless other differences across districts explain the persistent negative correlation, the supply of judicial resources remains a potential contributor to the low rate of trial in the federal system, reducing the willingness of litigants to persevere until trial in districts with heavy caseloads. Prospective studies of the perceptions of litigants are needed to understand how the users of the civil justice system interpret trial signals and decide whether to resolve their dispute at trial.

The set of federal civil cases ending in trial bears a striking resemblance to Alice in Wonderland after she took her first bite of the mushroom. Trial rates have plummeted in recent years. Although filings have grown over time, even the raw number

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We thank the participants of the Vanishing Trials Conference for enlarging our appreciation of this puzzle. We are also grateful to Judge Marvin Aspen, Joe S. Cecil, John Elson, Kathy Marrone, Marc Musick, Mary Rose, Donna Siembra, and Jim Speta for helping us to fill in important gaps in our knowledge. Naturally, any remaining gaps or errors are ours alone.

of federal civil trials has gone from a high of 12,529 in 1985 to an all-time low of 4,569 in 2002.<sup>1</sup> As Marc Galanter and other scholars have suggested, a series of factors may have contributed to the sharp decline: changes in the mix of cases being filed, the increased role of class actions, the advent of multi-district litigation, the rise of alternative dispute resolution, increases in the cost of trial, and expansion of the use of summary judgment.<sup>2</sup> A further potential explanation is a rise in the fears of litigants contemplating trial. Media accounts of apparently erratic trial decisions, attributed primarily to juries, may encourage settlements and other nontrial resolutions that promise a reduction in uncertainty.<sup>3</sup> All these explanations aim primarily at the demand side of trial rates, focusing on factors that explain why courts are not being pressed to try more cases. Many of these demand factors have likely contributed to the decline in trial rate. In this article, however, we focus on the supply side of the explanation for decreasing trial rates. Accepting that the rate of litigants entitled and motivated to proceed to trial has dropped,<sup>4</sup> we examine whether capacity problems may also be deterring the use of trials to resolve cases. The evidence for capacity problems is decidedly mixed. Indeed, Galanter all but dismisses lack of judicial resources as an issue in explaining the vanishing trials phenomenon in federal courts.<sup>5</sup> Yet, the federal judiciary repeatedly and recently has claimed that growing workloads impair the ability of the federal courts to handle their cases. Our effort here will be to look for evidence that may explain this inconsistent picture. In Section I, we examine claims that the supply of federal judicial resources has failed to keep pace with the press of judicial business. In Section II, we examine the changes in federal caseloads over time and show how trial rates may be reacting to a shortage of judicial resources available for the trial of civil cases. We also evaluate the various

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<sup>1</sup>Administrative Office of the U.S. Courts 2002 Annual Report, tbl. C-4A (civil cases terminated during the 12-month period ending September 30, 2002).

<sup>2</sup>Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. Rev. 982 (2003); Joe S. Cecil, Dean P. Miletich & George Cort, *Trends in Summary Judgment Practice: A Preliminary Analysis* (Federal Judicial Center 2001).

<sup>3</sup>See Shari S. Diamond, *Truth, Justice, and the Jury*, 26 Harv. J. of L. & Pub. Pol'y 143 (2003). See also Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 Law & Hum. Behav. 419 (1996); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 Md. L. Rev. 1093 (1996).

<sup>4</sup>In addition to the increase in litigant decisions to forego trial, the increased use of summary judgment in federal courts has reduced the pool of litigants who may proceed to trial if they choose. See Cecil, Miletich & Cort, *supra* note 2.

<sup>5</sup>Marc S. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004) ("court resources appear to have increased relative to demand").

available measures that might be used to assess the effects of court overload on trial rates, such as median time until trial. Section III takes a cross-sectional approach to assessing the effects of caseload on trial rates. Drawing on data from the federal system, we find some evidence that the pattern of dropping trial rates is consistent with a supply-side explanation for at least part of the decline. Finally, in Section IV we consider the methods for resolving the puzzle of supply-side contributions to the vanishing trial and the implications of the disappearing trial for the justice system.

## I. CLAIMS ABOUT SHORT SUPPLY

Judges and critics have claimed that shortages in the supply of federal judicial resources hamper the ability of courts to meet the demand for trials in civil cases. These claims of supply shortages, viewed in the aggregate, may be categorized into three groups. The most prominent claim is that capacity is hampered by the failure of the executive and legislative branches to fill judicial vacancies promptly. Other frequently cited claims point to an increase in civil filings over time and the priority status of criminal cases in the judicial system.

### A. *Failure to Promptly Fill Judicial Vacancies*

Persistent judicial vacancies are not a recent problem, and have been a concern of the judiciary for more than 30 years.<sup>6</sup> At least two factors make it difficult to promptly fill judicial vacancies in the federal district courts. First, the differing political agendas of the president and the Senate can lead to a stalemate with respect to one or many judicial nominees. Second, the nominations and approval process itself is extremely slow.

In the past 10 years, the problem appears to have grown. The political agendas of both political parties have nearly halted the appointment of new judges to the federal bench so that the Senate has failed to act expeditiously in approving judicial nominees. As a result of these agendas, the parties have allowed the number of vacancies in the federal system as a whole to hover between 80 and 100.<sup>7</sup> In a speech addressing the American Bar Association House of Delegates, then Attorney General Janet Reno confronted this issue. Reno claimed that during President Clinton's second term, the Republican-controlled Senate relaxed its efforts to fill judicial vacancies in an effort to keep "liberal" and "activist" judges off the bench until a

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<sup>6</sup>Gordon Bermant et al., *Judicial Vacancies: An Examination of the Problem and Possible Solutions*, 14 *Miss. C.L. Rev.* 319, 323 (1994) (performing a statistical analysis of judicial vacancies from 1970 to 1992).

<sup>7</sup>This includes nominations at both the district and circuit court levels.

Republican president could be elected.<sup>8</sup> As support for her claim, Reno noted that out of 62 White House nominees presented to the Senate in 1997, only nine were approved. Reno suggested that this approval rate was particularly unsettling against the backdrop of more than 100 federal judicial vacancies, 33 jurisdictions qualifying for "judicial emergency"<sup>9</sup> status, and vacancies in one out of eight federal judgeships.<sup>10</sup> In 2001, Republicans asserted similar claims of malicious intent against Senate Democrats, when only 28 out of 66 White House nominees were approved by the Senate.<sup>11</sup>

Political agendas have had an obvious effect on the nominations and approval process, placing a heavier burden on the president and Senate to work together to promptly fill judicial vacancies. Many other factors have also worked to impede the nominations and approval process. One of the largest problems is the unpredictability with which vacancies occur. Some judges assume senior status,<sup>12</sup> resigning or retiring during the administration of a president of the same political party under which the judge was nominated.<sup>13</sup> However, as with judges who leave the bench without attention to the tradition, unless the judge provides ample notice, his or her departure from the bench remains unpredictable. Without being able to account for when and how many judges will leave the bench every year, it is difficult for the president to know whether a sufficient number of nominees have been presented to the Senate to fill vacancies as they occur.

Another claim made by the Senate as a defense to allegations of inefficiency in satisfying judicial vacancies is that the president has not supplied enough acceptable nominees in a timely fashion to the Senate for approval.<sup>14</sup> The counterclaim is that the Senate is not holding fair hearings and prompt votes on judicial nominees.<sup>15</sup>

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<sup>8</sup>E.E. Anderson, Legislative Update, 15 No. 1 *Compleat Law* 55 (1998); Foolish Delay, *Nat'l L.J.* Aug. 18, 1997, at A18.

<sup>9</sup>A jurisdiction qualifies as having a "judicial emergency" where it has had a vacancy for at least 18 months. Anderson, *supra* note 8.

<sup>10</sup>*Id.*

<sup>11</sup>Judgeships, 23 No. 2 *Jud./Legis. Watch Rep.* 5 (2002).

<sup>12</sup>Senior status may be taken by a judge when the combination of age and years of service totals 80 or more. 28 U.S.C. § 371 (1994).

<sup>13</sup>Carl Tobias, The Judicial Vacancy Conundrum in the Ninth Circuit, 63 *Brook. L. Rev.* 1238, 1237-38 (1997).

<sup>14</sup>Foolish Delay, *supra* note 8.

<sup>15</sup>President Announces Plan for Timely Consideration of Judicial Nominees, White House Press Release, 2002 WL 25974905 (Oct. 30, 2002).

For example, in 2002, the Senate voted on only 80 of the president's 131 nominations.<sup>16</sup> Furthermore, many of the president's nominees have had to wait over a year for a hearing before the Senate Judiciary Committee.<sup>17</sup> Where action is not being taken with respect to the current nominees, some might claim that there is little incentive to supply the Senate with more nominees. For whatever reasons, what has become a painstakingly slow process of nominations and approvals has had a deleterious effect in federal districts, such as the Western District of Pennsylvania, with large numbers of judicial vacancies. In 2000, there were nine federal judgeship vacancies in Pittsburgh alone.<sup>18</sup> During this critical time for the district, one of Pittsburgh's last two nominees, Judge John Binger Jr.,<sup>19</sup> withdrew his name from consideration after his nomination languished in Congress.<sup>20</sup> In 2002, the federal district courts in New Jersey and Michigan faced similar shortages as a result of delay in confirming nominees.<sup>21</sup> The squabbles persist. Most recently, a seven-week impasse over votes on Bush's judicial nominees was broken only when the White House pledged that President Bush would not bypass the Senate in appointing federal judges during congressional recesses for the rest of his term.<sup>22</sup> The agreement affected 25 nominations to district and appeals court positions.<sup>23</sup>

#### *B. Increased Civil Filings Over Time*

In addition to delays in filling vacancies, critics point to increased civil filings and expanded federal court jurisdiction as explanations for supply shortages in the federal courts.<sup>24</sup> They claim that as a result of the pattern of increase in civil filings

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<sup>16</sup>Id.

<sup>17</sup>Id.

<sup>18</sup>Niki Kapsambelis, *Western District Suffering Monumental Backlog. Federal Vacancies Are Here to Stay, Chief Judge Ziegler Fears*, *Pennsylvania L. Wkly.*, Feb. 21, 2000 at 10; See also Mia Angiolillo et al., *Pittsburgh District Judge Shortage Will Continue*, *Pennsylvania L. Wkly.* July 31, 2000.

<sup>19</sup>Judge John Binger Jr. was given the American Bar Association's highest ranking of "well qualified." Kapsambelis, *supra* note 18.

<sup>20</sup>Id.

<sup>21</sup>See George Weeks, *Michigan Senators Create Crisis by Vetoing Judicial Appointees*, *Detroit News*, June 30, 2002 at A17. See also Kate Coscarelli, *Hope Rises for Action on 5 District Court Nominees*, *Star-Ledger* Nov. 8, 2002 at 16.

<sup>22</sup>Helen Dewar, *President, Senate Reach Pact on Judicial Nominations*, *Washington Post*, May, 19, 2004, A21.

<sup>23</sup>Id.

<sup>24</sup>Carl Tobias, *Federal Judicial Selection in a Time of Divided Government*, 47 *Emory L.J.* 527, 528 (1998).

in federal courts, judges have become overburdened in an effort to keep pace with demand. Where judges are unable to keep pace with the increase in civil filings, backlogs are becoming permanent fixtures.<sup>25</sup> In an effort to deal with supply shortages and eliminate backlogs, some jurisdictions have resorted to borrowing judges from other jurisdictions<sup>26</sup> or requiring mandatory arbitration for new tort and contract claims.<sup>27</sup>

Where increasing judges' caseloads alone will not solve supply problems, stop-gap measures such as borrowing judges from other jurisdictions have helped alleviate the immediate burden in some jurisdictions. For example, in 1998 then Chief District Judge Marvin Aspen collaborated with six federal judges from across the country to help dispose of the civil case backlog in the Northern District of Illinois. Visiting judges spent anywhere between one day and four weeks hearing civil cases.<sup>28</sup> Aspen commented: "It doesn't relieve all of the pressure, but we couldn't survive without them."<sup>29</sup> Aspen attributed the need for stop-gap measures in Illinois to increased civil filings and the Senate Judiciary Committee's more than two-year delay in confirming two judicial nominees.<sup>30</sup> Similar panels of visiting judges have been assembled in jurisdictions such as Florida and the District of Columbia to deal with problems of short supply and high demand.<sup>31</sup>

Other jurisdictions have dealt with supply problems differently. For example, the Northern District of New York, with a backlog of more than 3,000 civil cases, employed mandatory arbitration, mediation, and/or early neutral settlement to ease the backlog created by increased filings and fewer judicial resources.<sup>32</sup> Nonbinding alternative dispute resolution became mandatory when judges in the Northern District faced a yearly caseload of 1,000 cases. Judges attributed their burdensome case-

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<sup>25</sup>Kapsambelis, *supra* note 18 (explaining that because there are fewer judges hearing more cases, Pittsburgh's civil docket backlog has been in place for three years).

<sup>26</sup>See generally, *Six US Judges Drafted from Other States*, *Chicago Daily L. Bull.* Mar. 24, 1998 at 3. See also Deborah Pines, *Disposition Rates in Federal Courts Slower*, *N.Y. L.J.* June 9, 1995 at 1.

<sup>27</sup>Gary Spencer, *Understaffed Federal Court Turns to Arbitration; Down 2 Judges, Northern District Tries Alternative*, *N.Y. L.J.* Sept. 15, 1998 at 1.

<sup>28</sup>*Six Judges Drafted from Other States*, *supra* note 26.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.*

<sup>31</sup>*An Overwhelming Case Load Tests Florida Court, The Third Branch*, available at <<http://www.uscourts.gov/ttb/aug99ttb/florida.html>>; Eva M. Rodriguez, *D.C. Federal Courts in Flux; Short-handed Trial and Circuit Judges Juggle High-Profile Caseload, Ranging from Censorship to Moonlighting to Lawyer Sanctions*, *Legal Times*, Dec. 27, 1993 at 20.

<sup>32</sup>Spencer, *supra* note 27.

load to increased civil filings and the failure of the president and Congress to fill two 10-year-old judicial vacancies.<sup>33</sup>

Additional concerns about the effects of overburdened judges and the use of stop-gap measures have prompted claims of poor-quality and inconsistent decision making within the federal courts. Chief District Judge John Bissell of New Jersey expressed concern that supply shortages coupled with increased caseloads for remaining judges threatened the quality of decision making by limiting the amount of time that a judge is able to devote to each case.<sup>34</sup> Chief Justice Deborah Poritz, also of New Jersey, noted that she did not think that the judicial caseload had become so heavy that decisions had become flawed or hasty, but that if the vacancy rate continued to grow she was concerned that the quality of judicial decisions might become compromised.<sup>35</sup> An additional concern stemming from the use of visiting judges is a lack of consistency in decision making. Inconsistency within a jurisdiction may lead to the erosion of federal district court precedent in a particular jurisdiction.<sup>36</sup> Both these concerns underscore the overarching problem created when the supply of judicial resources cannot keep pace with the demands of judicial business.

Even a seemingly simple solution for processing the increase in civil filings, such as authorizing additional judgeships per jurisdiction, is complicated by shortages of physical space in many federal courthouses.<sup>37</sup> Federal district courts in New Mexico, Texas, and North Carolina have been able to gain additional judgeships to help ease the burden of short supply and increased caseloads.<sup>38</sup> Each of these jurisdictions is now confronted with a new issue: where to house these new judges. For example, the Western District of North Carolina had two federal judges and recently gained two additional judges. However, the Charles R. Jonas Federal Building and Courthouse in Charlotte has been out of space since 1995, leaving the four judges to share a total of three courtrooms.<sup>39</sup> Similarly, the El Paso Courthouse reached capacity in 1991 and currently has six courtrooms for three judges and three magistrates. As a result, recently confirmed Judge Frank Malvo will not have a courtroom, his chambers may be the U.S. Marshal's Office, and his clerks will be housed in a dif-

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<sup>33</sup>*Id.*

<sup>34</sup>Jim Edwards, *Two State of Judiciary Speeches Offer a Contrast in Dispositions*, N.J. L.J. May 27, 2002.

<sup>35</sup>*Id.*

<sup>36</sup>Tobias, *supra* note 13.

<sup>37</sup>*New Judges, No Room, The Third Branch*, available at <<http://www.uscourts.gov/ttb/aug03ttb/new/index.html>>.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.*



ferent location.<sup>40</sup> Even in jurisdictions that do not gain additional judgeships, a lack of available physical space may prevent reductions in backlogs by eliminating the possibility of housing visiting judges.<sup>41</sup>

*C. Priority Status of Criminal Cases in the Judicial System*

Critics also point to the priority treatment given to criminal cases in federal district courts, as required under the Speedy Trial Act,<sup>42</sup> as a further contributor to the backlog of civil cases in jurisdictions where judges are in short supply.<sup>43</sup> In some jurisdictions, the criminal case demands are so high that some judges cannot hear a civil case for an entire year.<sup>44</sup>

Maintaining manageable criminal caseloads is important for processing civil cases in jurisdictions where judges are in short supply. However, the Federal Sentencing Guidelines and recent efforts to limit the number of plea bargains work against reducing the amount of time and judicial resources expended on criminal cases.<sup>45</sup> Judges reported that after the Sentencing Guidelines were promulgated by the federal court, judicial workloads increased exponentially.<sup>46</sup> In 1990, a poll of federal judges revealed that sentencing guidelines requiring minimum sentences caused sentencing hearings to become 25–50 percent more time consuming.<sup>47</sup> More recently, Attorney General John Ashcroft ordered federal prosecutors to limit plea bargains and pursue maximum criminal charges and sentences in criminal cases whenever possible.<sup>48</sup> Both judges and attorneys responded to Ashcroft's order with concern. Essentially, Ashcroft's orders guarantee an increase in the amount of time required to dispose of criminal cases within the federal judicial system, promising to exhaust judicial resources and leaving little time for judges to hear civil trials.<sup>49</sup> Dis-

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<sup>40</sup>*Id.*

<sup>41</sup>See *An Overwhelming Caseload Tests Florida Court*, *supra* note 31 (explaining Florida's good fortune to have 11 available courtrooms for visiting judges).

<sup>42</sup>18 U.S.C.A. § 31611 (1994).

<sup>43</sup>Tobias, *supra* note 24, at 527.

<sup>44</sup>*Id.*

<sup>45</sup>Diana G. Culp, *Fixing the Federal Courts*, 76 A.B.A.J. 63 (1990).

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>Kate Coscarelli, *Ashcroft Limit on Pleas: Crime Deterrent or Court Bottleneck?*, *Star-Ledger*, Sept. 24, 2003.

<sup>49</sup>*Id.*

strict Court Judge Nicholas Politan believes Ashcroft's orders "will virtually rule out the trial of civil cases."<sup>50</sup>

These claims of judicial overload suggest that one explanation for the drop in federal trial rates is simply judicial capacity. To evaluate those claims, however, it is necessary to look systematically at the actual changes in capacity within the federal system. We turn now to more systematic evidence on supply issues.

## II. EVIDENCE ON TRIAL RATES AND SUPPLY QUESTIONS

### A. Caseloads and Trial Rates

An examination of federal court filings provides the first suggestion from systematic data of a growing problem of supply. The number of federal civil filings quintupled over the past 40 years, from 54,615 in 1962 to 274,841 in 2002.<sup>51</sup> The number of criminal defendants more than doubled during the same period, increasing from 33,110 in 1962 to 76,827 in 2002.<sup>52</sup> Even if the mix of cases had not changed over the time period and the complexity of cases had not increased, a growth in filings would require a substantial growth in judicial resources to dispose of the influx of cases.

Failure to provide that increase in judicial capacity would in turn be likely to affect trial rates. Suppose that litigants during this period of increasing judicial caseloads continued to have the same level of preference for trial.<sup>53</sup> We would nonetheless expect to see a drop in trial rates over time if the supply side of the equation, that is, the ability of the courts to provide civil trials, suffered a loss. The drop would even occur if court resources increased but did not keep pace with an increasing caseload, so that the supply of judicial resources suffered a loss *relative* to demand. If trial courts were faced with an increase in filings (as they are) *and* with more motions and other pretrial case demands (as they appear to be),<sup>54</sup> they would require

<sup>50</sup>Id.

<sup>51</sup>Administrative Office of the U.S. Courts Judicial Caseload Profiles, Overall Caseload Statistics.

<sup>52</sup>Galanter, *supra* note 5, at 495.

<sup>53</sup>This "level of preference" of course varies depending on the cost of trial relative to settlement. Because litigants are likely to incur extra costs if the trial date is postponed, trial becomes more costly and therefore less desirable. Whatever the initial preference for trial among litigants, it will decrease with litigation delay. See George L. Priest, Private Litigants and the Court Congestion Problem, 69 B.U.L. Rev. 527 (1989).

<sup>54</sup>John Twohig, Carl Baar, Anna Myers & Anne Marie Predko, Empirical Analyses of Civil Cases Commenced and Tried in Toronto 1973-1994, in Ontario Law Reform Comm'n, Rethinking Civil Justice: Research Studies for the Civil Justice Review (1996).

commensurate increases in court resources to handle an unchanged demand for trial. Unless commensurate increases in court resources kept pace with additional pretrial procedural demands, courts would not be able to provide litigants with the same opportunity to resolve their disputes by trial. Litigants would find the path to trial slowed by traffic from other cases competing for judicial resources. With the prospect of trial receding and the costs of trial increasing, other methods of dealing with pending claims, both settlement and alternative dispute resolution, would become more attractive, siphoning off cases that would otherwise go to trial if an earlier trial date and less costly trial preparation were available. Even simply giving up on attempts to obtain compensation would in some cases become preferable to waiting and incurring the interim costs of holding out for trial. The result would be a drop in trial rates.

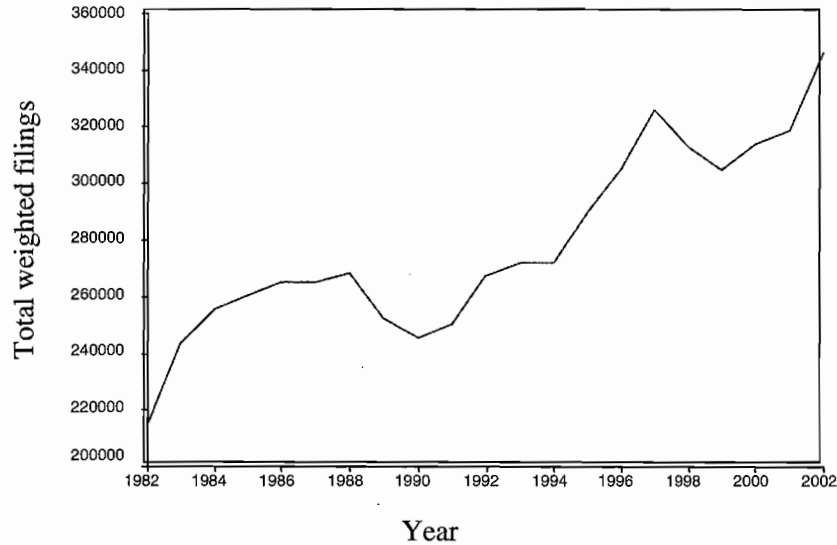
We begin, therefore, by examining changes in the supply of federal judges over time. In 1962 there were 307 authorized district court positions in the federal system. By 2002, the number had grown to 665. Although that rate of growth matched the growth in criminal filings, it was only 40 percent of the rate of growth in the raw number of civil filings, ignoring any increase in the complexity of the cases filed. In the past 20 years, which have seen the most dramatic drop in civil trial rate, from 6.1 percent to 1.8 percent, authorized judgeships rose from 515 to 665, a 30 percent increase that mirrored the 33 percent rise in civil filings from 206,000 to 274,645 over the same period. The number of criminal felony filings in 2002, however, was 55,860, two and a half times the 1982 level of 22,660. More importantly, according to the federal court system's weighting index for case complexity,<sup>55</sup> weighted filings, including both criminal and civil cases, grew from 214,755 to 346,465, a 61 percent increase (see Figure 1).

Thus, the 30 percent increase in authorized federal judgeships over the past 20 years has failed to keep pace with the much larger growth of the federal criminal caseload and the increased caseload overall when case complexity is considered. Moreover, while the federal courts have added Article III judgeships as the workload of the federal courts has increased, actual judicial appointments have not kept pace with the increase in authorizations for those positions. Both retirements and delays in the confirmation process have left the federal courts with substantial vacancies. For example, during 2002, the 94 federal district courts had 665 judgeships and 807 vacant judge months or over 67 vacant judge years, producing an effective number

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<sup>55</sup>The weighting index is applied to filings in the U.S. districts courts as a means of accounting for differences in the time required for judges to resolve various types of civil and criminal actions. Average cases each receive a weight of approximately 1.0; more complex types of cases receive higher weights. For example, a death penalty habeas corpus case is assigned a weight of 5.99 while a student loan case is assigned a weight of 0.031. Administrative Office of the U.S. Courts, 2001 Judicial Business at 25–26.

Figure 1: Total weighted filings over time.



SOURCE: Computed from Federal Court Management Statistics—District Courts, U.S. District Court—Judicial Caseload Profile (years 1982–2002) (total weighted filings = weighted filings per judgeship \* actual judge-ship years). Actual judge years = total judgeships - (vacant judge months/12).

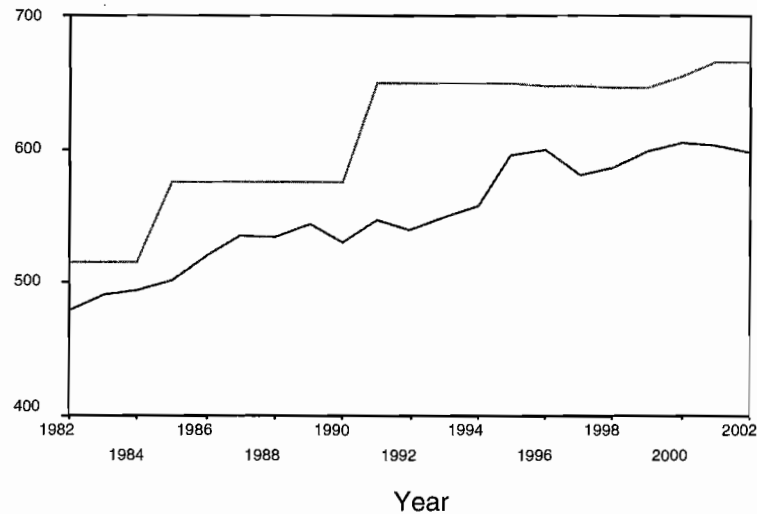
of 598 judge years.<sup>56</sup> In contrast, the number of vacant judge months in 1982 was 425 or 34 judge years for 515 judgeships (see Figure 2).

Although many of the recent Senate conflicts over judicial confirmations have occurred at the appellate level, the confirmation process has a gap between nomination and confirmation for federal district court appointments as well. The result is that despite increases in authorized judgeships, the caseload per actual judge year has risen. Using the rate of weighted filings per actual judge year, the caseload per Article III judge year shows an increase over the past 20 years (see Figure 3).

We have thus far omitted an important piece of the judicial supply story: non-Article III judges. The number of Article III judges captures only the most publicly

<sup>56</sup>Vacant judge months naturally increase temporarily when new judgeships are added. Thus, when 74 judgeships were added in 1991, the number of vacant judge months increased dramatically the following year and the percentage of vacant judge months doubled temporarily from 8 percent to 16 percent.

Figure 2: Judgeships and actual judge years over time.



SOURCE: Computed from Federal Court Management Statistics—District Courts, U.S. District Court—Judicial Caseload Profile (years 1982–2002). Actual judge years = total judgeships – (vacant judge months/12).

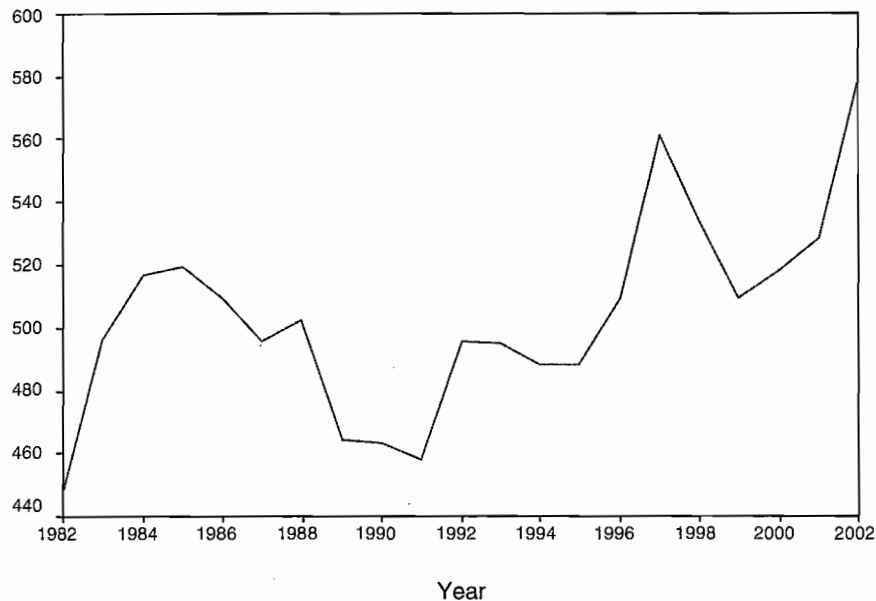
visible portion of the judicial resources available in the federal courts.<sup>57</sup> Federal magistrate judges have assumed an increasingly significant role in handling the federal caseload. In 2002, a total of 959 civil trials were conducted by magistrate judges, along with the trials of 3,680 criminal defendants accused of petty offenses and misdemeanors.<sup>58</sup> Magistrate judges, however, are not authorized to try felony cases, and thus cannot relieve the Article III judges of that responsibility, a responsibility that takes precedence over the civil docket due to the Speedy Trial Act.<sup>59</sup> The Article III judges retain both the more demanding felony trials and the more involved sentencing hearings that are associated with the modern era of federal sentencing guidelines. Nonetheless, magistrate judges significantly augment the supply of federal judicial resources.

<sup>57</sup>For an analysis of the expansion of non-Article III judges in the federal judiciary, see Judith Resnik, "Uncle Sam Modernizes His Justice"; Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation, 90 Georgetown L.J. 607 (2002).

<sup>58</sup>Administrative Office of the U.S. Courts, tbl. S-17, Matters Disposed of by U.S. Magistrate Judges During the 12-Month Periods Ending June 30, 1992, and September 30, 1998 Through 2002 (figures for 2002).

<sup>59</sup>See text at note 42.

Figure 3: Total weighted filings per actual judge year over time.



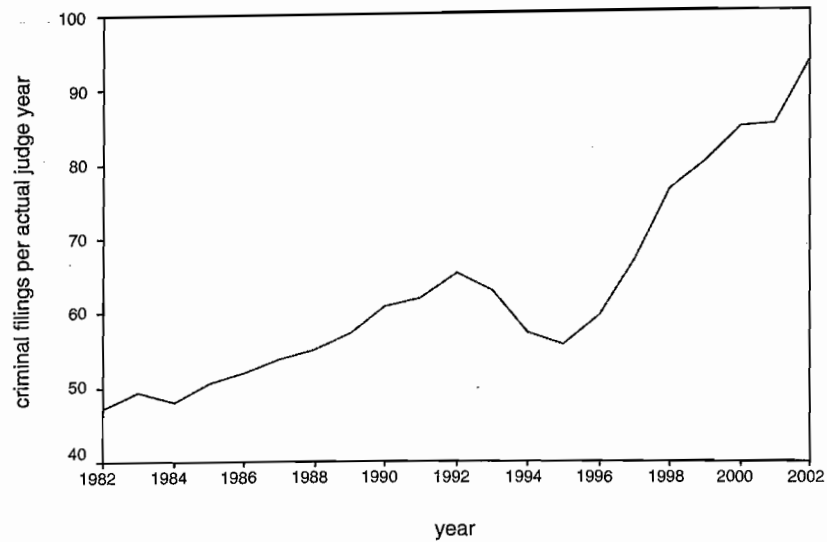
SOURCE: Computed from U.S. District Courts—National Judicial Caseload Profile (total weighted filings per actual judge year = total weighted filings/total actual judge years). Actual judge years = total judgeships - (vacant judge months/12).

Galanter<sup>60</sup> rejects the suggestion that the press of criminal business contributes much to the drop in federal civil trials. Acknowledging that courts may occasionally refuse to try civil cases because of the press of criminal behavior, Galanter points out that the small number of federal criminal trials, 5,097 in 1962, actually dropped to 3,574 by 2002, a reduction of 30 percent in raw numbers. Thus, he suggests, it is hard to assign the bulk of the shrinkage in civil trials to the requirements of the Speedy Trial Act.<sup>61</sup> The drop in criminal trials, however, fails to capture the demand for non-trial federal judicial time that the criminal caseload may demand and the substantial growth in that caseload. Figure 4 shows the increase in the number of felony cases filed per actual Article III judge year in the past 20 years.

<sup>60</sup>Galanter, *supra* note 5, at 492.

<sup>61</sup>*Supra*, at note 42.

Figure 4: Criminal felony cases filed per Article III judge year.



SOURCE: Computed from U.S. District Courts—National Judicial Caseload Profile (total weighted filings per actual judge year = total weighted filings/total actual judge years). Actual judge years = total judgeships - (vacant judge months/12).

With the exception of a temporary dip in the mid 1990s, a steady increase has doubled the number of cases per actual judge year since 1982. Although federal magistrate judges can handle pretrial motions and conduct evidentiary hearings in felony cases, they cannot conduct trials or handle any other case-dispositive events. Sentencing hearings, which reportedly consume substantial time under the Federal Sentencing Guidelines, may also produce increasing demands on Article III judges even as the felony trial rates have dropped.

An additional limitation on the use of federal magistrate judges is that they cannot handle civil trials without the consent of all parties.<sup>62</sup> The consent requirement can pose a serious obstacle, even in the 23 districts that add magistrate judges to their civil case assignment “draw” or “wheel.” The systems for assignment vary widely across these districts, but equal treatment is maximized in the Eastern District of Missouri where civil cases are directly assigned to magistrate judges and Article III

<sup>62</sup>28 U.S.C. § 636(c).

judges on an equal footing. The retention rate there, that is, the share of directly assigned civil cases in which consent occurred, was 60 percent in the year 2000.<sup>63</sup>

The more limited activities of magistrate judges, even if they focus primarily on nontrial matters, still add substantially to the supply of judicial resources. Their availability for these other judicial activities should free up more time for Article III judges to handle trials. The question is whether the addition of federal magistrates to the judicial resources of the federal court system has supplied a sufficient influx of judicial resources to handle the increased federal caseload. Indeed, if we treat a full-time authorized magistrate position as the equivalent resource of an Article III judge, the overall rate of filings per judge year over time does not show a substantial rise.

It is clear that magistrate judges are not equivalent to Article III judges in the cases and motions they can decide, but it is not clear how a magistrate judge should be weighted as a judicial resource compared to an Article III judge. For example, because a magistrate judge's work on a case-dispositive motion is subject to *de novo* review,<sup>64</sup> some duplication of effort will occur when the magistrate judge is required to write a report and recommendations, which the district judge must then review. No available data tell us how often this occurs and how much cost it entails in judicial duplication. To the extent that Article III judges supervise various activities by magistrate judges, the additional resource provided by the magistrate judge has a lesser impact on caseload pressures and, as a result, the addition of a magistrate judge amounts to less than the addition of an Article III judge.

In addition, magistrate judges play different roles in different districts, including some nonjudicial roles.<sup>65</sup> To the extent that a magistrate judge engages in nonjudicial activities, there is no reason to expect that those activities will assist the court in making judicial resources available for trials.

Finally, a magistrate judge, unlike an Article III judge, has fewer resources to support the judge's judicial activities. A magistrate judge is permitted to employ two support persons, traditionally one secretary and one law clerk.<sup>66</sup> In contrast, since 1965, federal district court judges have had two law clerks in addition to secretarial

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<sup>63</sup>Administrative Office of the U.S. Courts Magistrate Judges Division, *Facilitating the Use of Magistrate Judges' Civil Consent Authority 2* (2003).

<sup>64</sup>28 U.S.C. § 636(b)(1).

<sup>65</sup>This nonjudicial use of magistrate judges is acknowledged and discouraged by the Magistrate Judges Committee of the Judicial Conference, *Suggestions for Utilization of Magistrate Judges 14* (Dec. 1999) ("The letter and spirit of the Federal Magistrates Act are undermined when magistrate judges are assigned tasks that can be performed by law clerks.").

<sup>66</sup>*Id.* at 4.



support.<sup>67</sup> The difference in support, whether in dealing with pretrial motions or judicial opinions, must necessarily reduce the ability of federal magistrates to handle a caseload equivalent to that of an Article III judge. The question remains: How much do these differences affect the ability of the district courts to manage the growing caseload? Without a detailed study of caseloads that tracks the progress of litigation through court systems using different approaches to the availability of magistrate judges, it is impossible to assess how much they contribute to easing the press of business.

*B. Other Measures for Assessing Judicial-Capacity Levels*

If a shortage of judicial capacity were at least in part responsible for the drop in trial rates, what signs would we expect to see? One sign might be an increased time to trial. The Administrative Office of the U.S. Courts regularly reports three indices of case duration: (1) the median time from filing to disposition, reported separately for civil and criminal felony cases (see Figure 5), (2) the median time in months from filing to trial for civil cases (see Figure 6), and (3) the percentage of pending civil cases over three years old<sup>68</sup> (see Figure 7).

If these measures reflected the ability of the federal courts to dispose of cases and to get cases to trial, the apparent increases over time reflected in all Figures 5, 6, and 7, with the possible exception of the nearly level median time to disposition for civil cases over time, would support a finding that delays in the federal courts have been increasing. These measures, however, do not offer an accurate picture of supply. For example, the actual time to trial for cases that remained in the trial queue does not tell us anything about the litigants who gave up and left the queue as the prospect of waiting made alternative methods of resolving the case more attractive. Suppose that at Time 1 a court could provide a trial for 100 civil cases within 24 months and at Time 2 the court would make the same cases wait 36 months. The prospect of a shorter delay might encourage more of the Time 1 cases to hold out for trial (causing a drop in trial rates at Time 2). Thus, the median time between filing and trial could remain precisely the same over time while access to a prompt trial, however defined, suffered a dramatic decline and produced a drop in the rate of cases going to trial.

As John Shapard has pointed out,<sup>69</sup> terminated cases are not representative of a court's caseload. A rise in filings, for example, holding all else equal, can actually

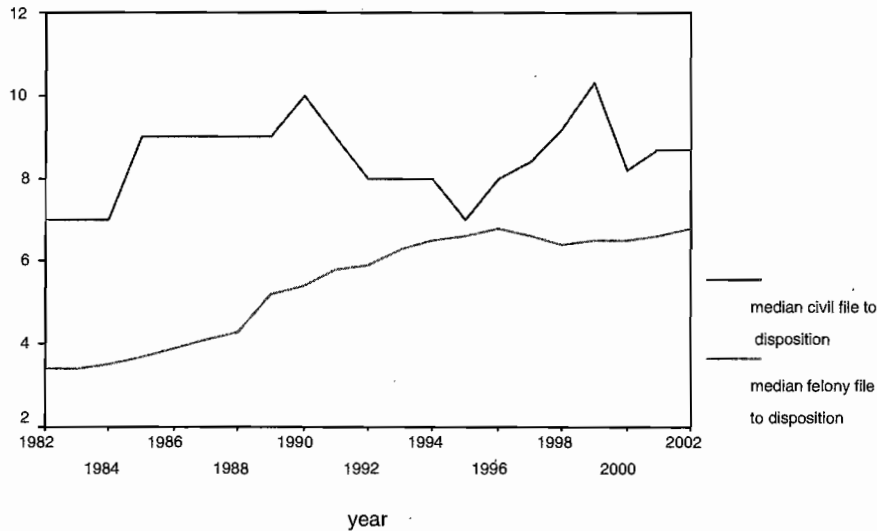
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<sup>67</sup>Richard A. Posner, *The Federal Courts: Crisis and Reform* 102 (1985).

<sup>68</sup>The percentage is expressed as the number of civil cases pending three years or more as a percentage of the pending civil caseload.

<sup>69</sup>John Shapard, *How Caseload Statistics Deceive* (Federal Judicial Center 1991).

Figure 5: Median time from filing to disposition (in months)—civil and criminal.

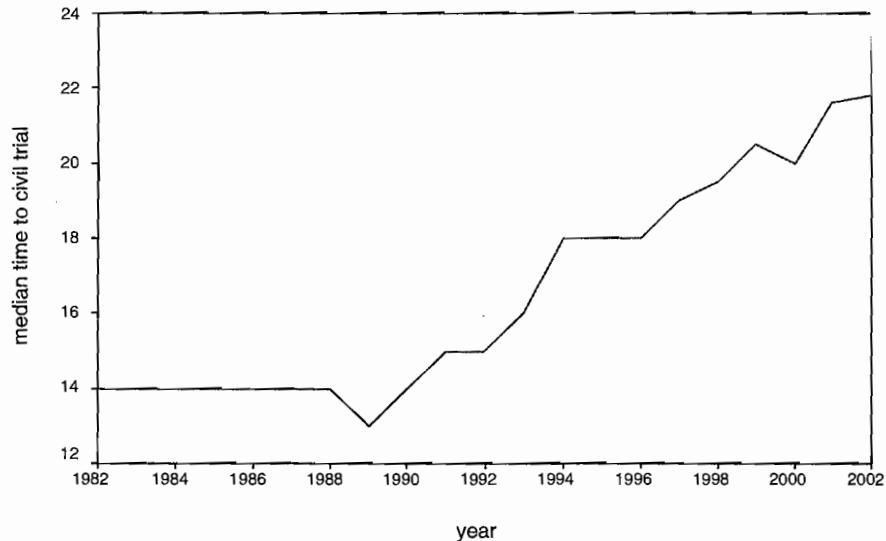


SOURCE: Federal Court Management Statistics—District Courts, U.S. District Court—Judicial Caseload Profile (years 1982–2002).

reduce the average age at termination. The rise in filings creates an influx of young cases in the pending caseload. Since most cases are disposed of relatively quickly, the number of cases swiftly disposed of rises dramatically, reducing the apparent average age at termination, as well as the trial rate for terminated cases. Similarly, the percentage of pending cases that are over three years old depends on the mix of cases in the queue.

To know why litigants are disposing of cases using methods other than trial requires information about the expected costs of discovery and trial that includes a prospective measure of expected time until trial. This expected value is the subjective perception of litigants, rather than the actual delay they face. Without knowing whether litigants are turning to alternatives to trial in part as a result of increases in the delay they *expect*, we cannot interpret their decision to forgo trial. With the constant barrage of media stories about confirmation squabbles over filling federal judicial positions and the pressure of federal criminal cases on the civil trial docket, it would be reasonable for civil litigants and even their attorneys to anticipate long delays to trial and to make their decisions accordingly even if trial resources were actually in reasonable supply.

Figure 6: Median time from filing to trial for civil cases (in months).



NOTE: Until 1994, the median time to trial for civil cases was calculated from the date the answer or response was filed. Beginning in 1994, the time period began when the case was filed. That change may account partially or completely for the apparent increase in the median time from filing to trial after 1994. Administrative Office of the Federal Courts, *Statistical Profiles—Explanation of Selected Terms* (1997).

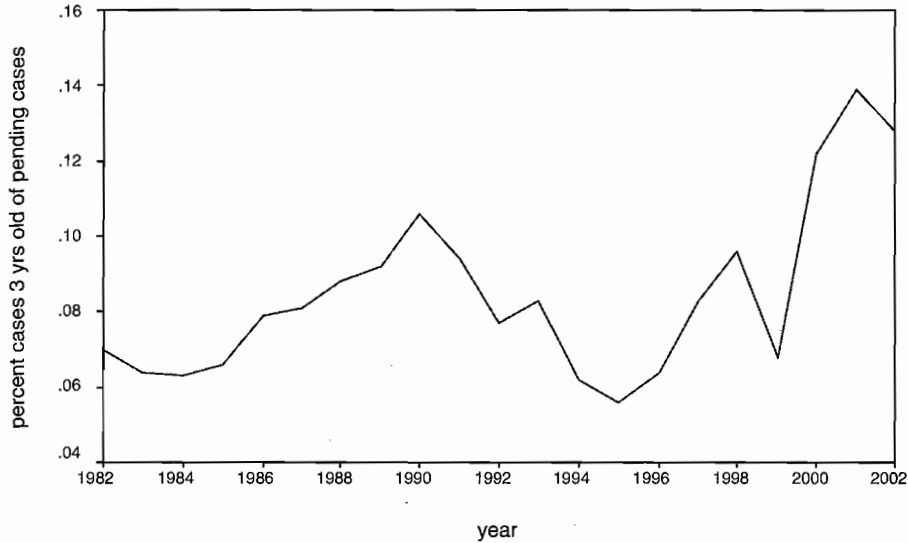
SOURCE: Federal Court Management Statistics—District Courts, U.S. District Court—Judicial Caseload Profile (years 1982–2002).

### III. CROSS-SECTIONAL EVIDENCE ON TRIAL RATE AND SUPPLY

This longitudinal picture of trial rates and judicial capacity has presented an ambiguous picture of supply-side explanations for the vanishing trial. Although caseload pressures would be expected to produce the reduction in trial rates we have observed in the federal civil justice system over time, the pattern of vanishing trials over time is also consistent with changes over time in the preferences of litigants as well as changes in the law that affect the rights of litigants to trial. A cross-sectional analysis of differences across federal district courts provides an opportunity to examine the relationship between caseload pressures and trial rates while controlling for systematic changes in the overall legal environment over time.

Across the 94 federal district courts, both caseloads and the supply of judicial resources vary. Civil trial rates also vary across district courts, whether computed as a percentage of terminations or as a percentage of filings. If a shortage of judicial

Figure 7: Percentage of pending civil cases over three years old.



SOURCE: Federal Court Management Statistics—District Courts, U.S. District Court—Judicial Caseload Profile (years 1982–2002).

resources deters the use of trials to resolve cases, we would expect to see a negative correlation between a measure of the caseload pressure and the rate of trials that terminate with a trial. Districts that can handle the press of cases they receive can more promptly offer litigants a trial if the litigants want one. To conduct this analysis, we used two alternative measures of trial rate and two measures of judicial availability. Trial rate for 2002 was measured as (1) number of civil trials completed in 2002 as a percentage of all civil cases filed in 2002, and (2) number of civil trials completed in 2002 as a percentage of all civil cases terminated in 2002. We also used two measures of judicial capacity. The first measure of judicial capacity was the total number of cases filed per available Article III judge year in the district. The total number of vacant months was subtracted from the full complement of judge months that would be available if all of the judicial positions had been filled. This measure of judicial capacity thus controlled for differences in district size and total caseload. The second measure of judicial capacity included the number of full-time magistrate judges in the district as well as the Article III judges. For magistrate judges we used the number of filled positions. Although some months may have been vacant for some of these positions, the position of magistrate judge is less likely to be vacant due to unanticipated retirements or because a nominee is awaiting confirmation. Filling magistrate judge positions is under local rather than Senate control. Table 1

shows the summary statistics for 2002 on these measures for the 94 federal judicial districts.

Table 2 provides the correlation between each measure of judicial capacity and each measure of trial rate, first for all 94 districts (Panel A) and then for the 84 districts with at least one judgeship and without an unusual influx of cases in 2002 (Panel B).

During 2002, six districts had an unusual and temporary influx of cases due to plaintiffs filing cases in which they alleged injury from exposure to asbestos in automotive brake pads. Most of the cases were returned to state court for final resolution. An additional district received an unusually large number of filings concerning alleged injuries from the anti-cholesterol drug Baycol that were transferred as new filings under a multi-district litigation. Finally, three small districts each had the equivalent of only one judge year. These 10 districts were removed from the analysis and the correlations were rerun to check for the stability of the results. A similar relationship between caseload and judicial capacity persisted on all four measures.

Table 1: Summary Statistics for All 94 Judicial Districts in 2002

	<i>Civil Trial Rate (per Cases Filed)</i>	<i>Civil Trial Rate (per Cases Terminated)</i>	<i>Civil Cases Filed per Article III Judge Year</i>	<i>Civil Cases Filed per Article III or Magistrate Judge Year</i>
<i>N</i>	94	94	94	94
Mean	0.019	0.026	426.97	226.93
Median	0.016	0.022	402.00	209.84
<i>SD</i>	0.013	0.015	205.34	105.50
Minimum	0.00	0.00	46	23
Maximum	0.11	0.11	1,288	782

SOURCE: Computed from Federal Court Management Statistics, 2002. District Courts and data on magistrate judge positions supplied by the Magistrate Judges Division of the Administrative Office of the U.S. Courts.

Table 2: Correlations Between Trial Rate and Judicial Supply

	<i>2002 Civil Trial Rate</i>	
	<i>As % of Filings</i>	<i>As % of Terminations</i>
<i>A. All 94 Districts</i>		
Filings per Article III judge	-0.39**	-0.35**
Filings per Article III and magistrate judge	-0.41**	-0.36**
<i>B. 84 Districts Without Unusual Caseloads</i>		
Filings per Article III judge	-0.34**	-0.27**
Filings per Article III and magistrate judge	-0.32**	-0.25*

\**p* < 0.05; \*\**p* < 0.01.

SOURCE: Computed from Federal Court Management Statistics—District Courts, U.S. District Court—Judicial Caseload Profile (years 1982–2002) (authorized magistrate positions for each district obtained from Magistrate Judges Division, Administrative Office of the U.S. Courts).

As we have seen, the criminal docket is a second potential source of caseload pressure for civil trial rates in the federal courts. Adding criminal caseload as a predictor did not affect the results when all 94 districts were included in the analysis whether or not filings were computed per Article III judge or included magistrate judges in the index and whether trial rates were computed as a function of cases filed or cases terminated. When the 10 outlier districts were removed, adding criminal caseload actually significantly increased the predictability of civil trial rates as a percentage of case filings whether or not magistrate judges were included in the index of filings per judge. While the bivariate correlation was  $-0.30$  for trial rates as a percent of filings, the addition of criminal caseload per Article III judge year raised the multiple  $R$  to  $0.40$ ; the corresponding change when magistrate judges were included was from  $-0.32$  to  $0.43$ . When the civil trial rate was computed as a percentage of case terminations, the addition of criminal caseload as a predictor did not significantly alter the predictability of civil trial rates for the Article III judge index, although the pattern was the same ( $\beta = -0.17$ ,  $t = -1.64$ ,  $p < 0.11$ ); when the index included magistrate judges, adding criminal caseload as a predictor significantly raised the bivariate correlation of  $-0.25$  to a multiple  $R$  of  $0.34$ .

These results indicate that the negative correlations between civil caseload and trial rates cannot be attributable to differences in the criminal dockets of the federal districts. The persistence of the negative correlations whether or not the supply of magistrate judges is included also eliminates that judicial resource as an explanation for the cross-district differences. The obtained correlations remain consistent with the hypothesis that a shortage of judicial availability is in part driving the drop in rates of civil trials in the federal courts.

#### IV. REMAINING QUESTIONS

The increasing civil caseloads at filing and the negative correlations between trial rates and caseloads within the same judicial system and at the same point in time are consistent with the notion that supply limitations are part of the explanation for the vanishing trial, but these statistics provide only a piece of the puzzle and leave some questions unanswered. The key mechanism by which the supply of trial time influences the decisions of litigants to forego or wait for trial is through the litigants' perceptions of how costly pretrial time will be and how long they will have to wait to go to trial. Do litigants in jurisdictions with lower trial rates perceive the time until trial to be greater than litigants in jurisdictions with higher trial rates? How do perceptions of likely time until trial enter into decisions to settle or turn to alternative dispute resolution after a suit has been filed? Until we conduct a prospective life-span study of litigant expectations and behavior over time, we will not be able to fully assess the role played by capacity—or perceived capacity—in explaining the vanishing trial. Until that research is done, it may be premature to conclude that trial has

become a disfavored mechanism for resolving disputes rather than a valued commodity whose perceived costs have become too high.

If supply deficits are in part responsible for the drop in trial rates, should we be concerned with providing sufficient resources to increase the frequency of trials? Trials are always costly and a good argument can be made that many civil litigants are better off settling their disputes by less adversarial means. Even accepting that view, however, it is hard to challenge the value of trial verdicts as benchmarks against which would-be litigants and their attorneys can evaluate claims and consider how to resolve them short of trial. That signaling mechanism, while imperfect under the best of circumstances, is in serious jeopardy in the time of the vanishing trial.

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