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(forthcoming in J. OF EMPIRICAL STUDIES (2004))**

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**USC CLEO Research Paper No. C04-12
USC Law and Economics Research Paper No. 04-17**



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Where have all the trials gone? Settlements, non-trial adjudications and statistical artifacts in the changing disposition of federal civil cases

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If trials have been “vanishing” from the federal courts in the past few decades, it matters, from a normative perspective, whether this trend reflects an increase in private settlements (as many assume) or an increase in public non-trial adjudication. In this paper I investigate the coding of “disposition” by the Administrative Office of the United States Courts as the first step in an effort to assess changes in the use of trial, non-trial adjudication (such as summary judgment and dismissal) and settlement to resolve federal civil cases. Based on audits of the 2000 data using electronic docket information available through PACER, I identify substantial “error” rates—as high as 70%-- in the most ambiguous and relevant disposition codes, making simple interpretation of the raw codes highly unreliable. Using the sample frequencies of true dispositions determined from these audits, I correct the 2000 data. Comparing this corrected data to the raw 1970 data would lead to the surprising conclusions that a smaller percentage of cases were disposed of through settlement in 2000 than was the case in 1970, that vanishing trials have been replaced not by settlements but by non-trial adjudication, and that it is the bench, not jury trial, that has been transformed in this way. These conclusions are suggestive only, but they point to the importance of performing the more onerous task of auditing the pre-PACER data produced by the federal courts in order to assess whether we are witnessing a fundamental shift out of public adjudication into private settlements or merely a shift in how and when judges decide cases.

I. Introduction: The “vanishing trial” and its causes

The trial lies at the heart of most images of the American legal system. Most popular images of litigation—in books, movies, television dramas—portray the life of the law as one fought out in courtrooms, before judges and juries. Most lawyers, however, are early on disabused of this image; few get through law school without hearing at least one professor tell them that only “5% of cases go to trial; 95% settle.” But even this “5%”

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figure of conventional wisdom, it appears, may be an overestimate. According to Galanter (2004) and the published statistics from the Administrative Office of the United States Courts (AO), it would seem that trial rates are not just low, they are vanishing: according to these statistics, the percentage of civil cases terminated by either a bench or jury trial fell over the past several decades, from 11.5% in 1962 to 1.8% in 2002.

Should we worry about the “vanishing trial”? That depends on what is causing the statistics we observe to change. In the most prevalent model of lawsuits—the one that informs the law and economics literature on suit-settlement-and trial in particular (Shavell 1982, Bebchuk 1984, Priest and Klein 1984, Spier 1994) — “cases” involve a choice between taking a suit through to trial and settling it before trial; this is the image that lies behind conventional wisdom’s quick calculation that if 5% of cases are tried, then 95% must settle. In this model, the vanishing trial signifies a shift from public adjudication of disputes to private settlements of disputes. As a normative matter, that is either a good thing—if one is focused, as the federal courts and proponents of alternative dispute resolution such as Menkel-Meadow (1995) are, on the costs of public adjudication and the imposition of public solutions on private problems¹—or a bad thing—if one is focused, as Fiss (1984) and Luban (1995) are, on the loss of public opportunities to create law and express public values.² As a matter of positive—predictive—analysis, if trials are disappearing into settlements, then we should be looking to the determinants of settlements for the cause: litigation costs, uncertainty, asymmetries between plaintiff and defendant, and so on.

The problem with the settlement versus trial interpretation of case dispositions, however, is one that Kritzer (1986) and Baar (1999) have emphasized. Cases can be finally disposed of in many other ways. They may be abandoned by the plaintiff. They may end in a default judgment. They may be dismissed with prejudice (and treated as an adjudication on the merits) for a litigant’s failure to comply with case management orders.³ They may be dismissed for failure to state a claim on which relief can be granted or on a motion for summary judgment. They may be dismissed for a lack of either personal or subject matter jurisdiction, which may or may not be a final disposition of the underlying dispute.

Sometimes the law and economics literature shoe-horns this more complex world of case disposition into the simple settlement-trial model, counting an abandonment or a default

¹“A bad settlement is almost always better than a good trial.” *In re Warner Communications Securities Litigation*. According to a sign in the office of U.S. Magistrate’s office: “To sue is human, to settle divine” (quoted in Menkel-Meadow (1995). According to Learned Hand, “I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.” Learned Hand, “The Deficiencies of Trials to Reach the Heart of the Matter” 3 *Lectures on Legal Topics* 89 (1926).

² “Where would we be if *Brown v. Board of Education* had settled quietly out of court?” Luban (1995)

³ Federal Rule of Civil Procedure 41(b): Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under [Rule 19](#), operates as an adjudication upon the merits.

judgment as a “settlement” (although there has been no bargaining between the parties) and counting any adjudication (including dismissals for failure to state a claim or lack of jurisdiction as well as summary judgments) as “trials.” In a study intended to evaluate the Priest/Klein hypotheses about the impact of plaintiff win rates, uncertainty and stakes asymmetry on the decision whether to settle or litigate a case, Siegelman and Waldfogel (1998), for example, respond to the multiple dispositions coded by the federal court data by collapsing these distinctions, counting any case for which the AOC records a “judgment” (whether before, during or after trial) as an “adjudication” and any case in which a case is terminated but without a “judgment” as a settlement.⁴ This presents some problems arising from coding (for example, the AO data in many years record no judgment for cases dismissed by the court on a motion although these are clearly adjudications and not settlements), but it also raises deeper theoretical issues. Models of settlement and trial, such as the Priest/Klein model, assume that settlement negotiations take place in the shadow of a known or at least relatively predictable decision date (a trial date); more sophisticated models presume that private information is increasingly shared through discovery as the trial date approaches.

There are several disjunctures, however, between the basic model of settlement versus trial and the more complex environment that includes the full range of possible litigation outcomes. A case terminated by a pre-trial motion has an uncertain termination date; once the motion is submitted, there is uncertainty about when the decision may come down; random termination of the opportunity to negotiate alters settlement dynamics, notably the incentive to delay agreement and the payoffs to players with differing time preferences and beliefs about the risk of termination (Binmore, Rubinstein & Wolinsky 1986). Pre-trial motions have an asymmetric effect on plaintiffs and defendants; success for a defendant on a pre-trial motion to dismiss terminates the case whereas success for the plaintiff merely takes the case on to the next round of litigation. Finally, settlement at an early stage, before a pre-trial motion is decided, takes place under information conditions that differ from those that will prevail on the eve of trial; discovery may or may not proceed while the parties wait for a decision on a pre-trial motion. This can be expected to alter the probability and the content of settlements depending on whether they are negotiated in the shadow of a trial or the shadow of a pre-trial motion. A shift in the mix between trial and pre-trial adjudication can therefore cause changes in settlement. Thus it can be very important in the economic analysis of litigation that we distinguish between trial and non-trial adjudication for the purposes of predicting the incidence, content and timing of settlements, and that we properly count outcomes to test our predictions. An assessment of the impact of uncertainty of court outcome or rising legal fees on settlements, for example, will be distorted by a model that counts all abandonments and defaults as voluntary settlements⁵ or one that misses the shift from trial to non-trial adjudication because it collapses them into a single category.

⁴ For other empirical studies of models of settlement and litigation, see Johnston & Waldfogel (2002), Kessler, Meites and Miller (1996), Waldfogel (1998) and Waldfogel (1995).

⁵ Outside of an economic model, there is evidence that dispute resolution and settlement behavior is influenced by whether or not both parties are in fact negotiating as opposed to making unilateral decisions about whether to proceed or not with a case. One of the common objections to “mandatory” mediation, for example, is the claim that there is no point forcing individuals who reject settlement out of hand to meet in mediation. Some studies, however, have shown that mandatory mediation does increase settlement rates,

Moreover the distinction between non-trial and trial adjudication and between negotiated settlement and unilateral default or abandonment of a claim has substantial implications for the normative evaluation of the vanishing trial. If the reduction in trial rates is a consequence of increased rates of abandonment and default, does that reflect mounting barriers to engagement in the legal process? Does it reflect increased disparities between the haves and the have-nots? Are single-event trials before bench or jury being replaced by more piecemeal non-trial adjudication by judges as a consequence of increased case management (Resnik 1982) or heightened standards for surviving motions to dismiss or summary judgment (Miller 2003)? Is the American adversarial system converging with the European inquisitorial system of adjudication as Deborah Hensler has suggested?⁶ If the decrease in trials is fully taken up by increases in non-trial adjudication, increased case management and heightened standards for surviving motions to dismiss or for summary judgment may in fact be *increasing* judicial workloads and litigation costs, as cases that in the prior regime would have settled out of court are now resolved through judicial effort. And as for the concern that the falling trial rate implies an erosion of public adjudication and the production of precedents and caselaw—cases that terminate in non-trial adjudications may be more likely to produce written judicial opinions and published caselaw than cases that terminate in a trial verdict. It is clear that for many purposes, the distinction between trial and non-trial adjudication is essential and that the failure to account for non-trial adjudication will lead to a distorted interpretation that vanishing trials mean burgeoning settlements.

But the vanishing trial that shows up in the AO statistics might also be a mere statistical artifact, unrelated to any interesting changes in litigation dynamics or costs and without important implications for policy other than the distorting impact of distorted statistics on the management of judicial workloads. The “trial rate” reported by the AO is composed of a numerator consisting of all cases in a given year that are terminated “during” or “after” a bench or jury trial, and a denominator that includes all “terminated” cases in that year. Galanter notes that the inclusion of cases terminated “during” a trial will overcount the true incidence of trial adjudication because of the possibility that a case is settled or dismissed before a verdict is reached. The bigger risk of distortion in the statistic, however, probably comes from the denominator.

A large number of “terminations” in the federal court statistics do not reflect a final determination of a case. “Terminated” cases include those transferred to another district or consolidated with other cases, stayed for a bankruptcy proceeding, closed for administrative reasons (such as a lack of activity) or dismissed without prejudice to allow a plaintiff to refile elsewhere or to include other claims, or to allow the parties to pursue settlement discussions (successfully or not, we don’t know) without a trial schedule hanging over them. Changes in court management practices—dismissing cases pending settlement versus keeping cases open, for example, or increased propensities to use administrative closure to streamline “active” dockets—could lead the denominator count

as the act of sitting down and negotiating alters information and bargaining orientations/strategies. McEwen and Milburn (1993).

⁶ Presentation at the *Symposium on the Vanishing Trial*, San Francisco, December 14-15 2003.

of “terminations” to increase (thus reducing the reported “trial” rate) with no real underlying changes in the rate at which cases are finally adjudicated or settled.

More troubling (as we shall see) is the possibility that the coding practice of the courts has changed over time, for reasons related to the more complex management of cases and dockets, or for reasons related only to variability in coding systems and their changing (possibly error-ridden) implementation by individual clerks over time. There has been little auditing of the federal coding system by researchers outside of the courts.

Eisenberg and Schlanger (2003) present one of the first systematic studies of the AO data; they audited the accuracy of the “judgment” variable, which records whether there was a judgment for plaintiff, defendant, both or another party, and the award variable, which records the amount (if any) awarded to a prevailing party, for tort cases terminated in 2000 and for inmate civil rights cases terminated in 1993 with a judgment for the plaintiff. They found good reliability for the “judgment” variable in the sense of a low rate of false positives (the method they employed did not allow an assessment of false negatives) but systematic overstatements of amounts awarded. The problems they found are instructive: they found significant error rates in awards because the AO system calls for entering award amounts in thousands and only allows the entry of 4 digits. Thus an award of \$1,000 should be entered as a “1” and all awards of \$10 million or more should be entered as “9999.” Eisenberg and Schlanger, however, found significant numbers of cases in which, for example, an award of \$1,000 is entered as “1000” and significant numbers of cases in which there is no award but the amount “9999” is recorded, probably because “9” is frequently used in the AO system for missing data. Although some coding errors such as these are to be expected in any system, the frequency with which they arise in Eisenberg and Schlanger’s study raises the possibility of systematic and significant coding errors throughout the system; they find an error rate of 41% in the award amounts in their sample of tort cases in 2000 and 29% in 1993 inmate civil rights cases. Error rates such as these raise substantial caution in interpreting the source of an observed drop in trial rates.

In order to investigate the causes of the vanishing trial—and to see what role in fact the multiplicity of potential case dispositions, the counting of non-final cases as ‘terminations’ and coding error might play—I examined the case-level data on federal terminations between 1970 and 2001, available from ICPSR.⁷ These are the data on which the C-4 tables published annually by the AO and the trials rates Galanter presents in his study are based. These data provide, for each case terminated in a given year, a broad array of information: party names, amounts demanded and awarded (if any), cause of action, district, filing date, termination date, basis of jurisdiction, and so on. Most importantly for purposes of this study, they provide information on the way in which a case was terminated—whether by transfer, remand, dismissal, trial, etc.—and the procedural progress of the case at the time of termination. The data also provide information about whether the defendant or the plaintiff prevailed with a judgment.

Unfortunately, the data on disposition are missing from the ICPSR database between 1971 and 1979. As a result, I am only able to compare dispositions in one year at the

⁷ www.icpsr.org

start of this period (1970) with data beginning in 1979. There are a number of coding difficulties that become immediately apparent. First, between 1970 and 1979 there was a significant revision in coding, moving from a system that identified trials indirectly, through a combination of the “disposition” variable (showing “judgment for”) and the procedural progress variable. There was then another revision in 1987 which increased the number of disposition codes from 12 to 21, substantially refining categories. This shift was particularly problematic for at least one theory of the vanishing trial—namely the hypothesis that the 1986 Supreme Court trilogy of cases that raised the bar for surviving motions for summary judgment reduced trial rates—as it makes the data just before 1986 difficult to compare to the data after 1986. More significantly, as I will show, it is clear from an examination of the data surrounding 1986 that the shift in coding led to very large errors in coding which appear to take four or five years to resolve. Although the coding changes that happened subsequent to 1986 (one in 1992 and another in 1995) were relatively minor, allowing comparability in theory from 1988 through 2001, the coding errors introduced by the change in 1986 on their face suggest that it is not possible to rely on the data for non-trial adjudication and settlement prior to 1992 or 1993.

In order to investigate the reliability of the data on the full range of case dispositions reported by the AO—data we ultimately need, as I have discussed, for a truly adequate empirical investigation of the incidence of trials, settlements and non-trial adjudications and for a normative evaluation of the performance of the legal system—I audited the coding for particularly important and ambiguous codes (those for dismissals—necessary to distinguish between dismissals that are settlements, those that are abandonments and those that are non-trial adjudications—and those for non-trial judgments on motions) for samples drawn from 2000 and 2001, comparing the coding in the ICPSR dataset and docket entries available electronically through PACER.⁸ The results are disquieting, and suggest tremendous difficulty in discerning trends in non-trial adjudication and settlement; I found error rates of as much as 69% in the codes in which we would expect to find non-trial adjudications. Perhaps most importantly, I found substantial rates of “type 2” errors, that is, cases in which a disposition we are interested in counting—such as settlement, which we would expect to show up in the “dismissed: settled” category—shows up in other codes such as “dismissed: other” or “judgment on motion before trial.”

From these audits I then construct “corrected” data for 2000, applying the frequencies of dispositions from the audited samples to the raw data. As an exercise, I then compare this “corrected” 2000 data to 1970 data, first without any adjustments to the 1970 data and then by applying the 2000 frequencies to estimate settlement, non-trial adjudication and non-final dispositions in 1970. Ultimately, of course, to do a reliable comparison between 1970 and 2000 we need an audit of the 1970 data. This is, however, a costly undertaking because the 1970 cases are not available on PACER and so would have to be sampled in a representative way across the federal system through a review of paper dockets and court records. The results of the exercise, however, give an importance to

⁸ Nearly all of the federal courts are now using an electronic docketing system, Public Access to Court Electronic Records, which can be accessed over the internet; this allows one to read the actual docket entries and in many cases view images of documents such court orders.

this more burdensome undertaking: contrary to the presumption of many who see in the vanishing trial evidence of the increasing role of private dispute resolution and settlement, my technique suggests that the settlement rate may have been *lower* in 2000 than it was in 1970, while the non-trial adjudication rate may have been significantly higher.

II. Calculating trial, settlement and non-trial adjudication rates

The AO C-4 tables on which Galanter bases his assessment of the vanishing trial calculate bench and jury trial rates on the basis of one of the statistics collected by the individual courts in the federal system at the time a case is terminated: “procedural progress,” which codes the stage a case had reached at the time of termination. A case is counted as a trial by the AO if it terminates during or after a bench or court trial; according to the AO’s 1999 manual used to instruct clerks on how to implement coding of cases, “a trial is defined as ‘a contested proceeding where evidence is introduced.’”⁹

As a first step in assessing the role of coding in our understanding of the ‘vanishing’ trial, I compared the data presented by Galanter, based on the aggregate data in the C-4 Tables published by the AO, with alternative methods of counting trials based on the case by case data beginning in 1970 available from the University of Michigan’s Inter-University Consortium for Political and Social Research.¹⁰

As a first cut, we can see in Table 1 that the number of trials reported in the C-4 tables do not correspond to the numbers counted in the ICPSR case by case data. The more important observation about Table 1, however, is that we can see that there are important interpretive questions to be answered before we can decide which of the alternative ways of counting a “trial” is the most meaningful. Counting “trials” as those in which a trial is started, regardless of whether the case is then settled, dismissed or in fact determined by a bench or jury verdict, will be of interest if we want to know how often judges and courts are involved in conducting trials. (This could explain the AO’s approach to counting trials, as they are ultimately concerned with the allocation of resources to courts.) Note, however, that the procedural progress variable alone overcounts trials; if we restrict the definition of a ‘trial’ to be a case in which a “judgment” was reached (using the “judgment for” variable) during or after a “trial” (using the “procedural progress” variable); row 4 shows lower ‘trials’ than row 3 in Table 1. Counting trials as those in which a judgment was reached during or after a bench or jury trial, ostensibly corresponds with the disposition coding “jury verdict,” “court trial,” or “directed verdict,” and would appear to avoid the problem of counting as a “trial” any contested evidentiary hearing. This will be of interest if we want to assess the rate at which cases are finally adjudicated by a trial. The disposition coding would appear, therefore, to provide the more relevant definition of a ‘trial’ if we are interested in assessing alternative causal

⁹ AO CIVIL Statistical Reporting Guide (1999), 3:18.

¹⁰ www.icpsr.org. These data are provided by the Federal Judicial Center and are coded by the AO.

theories of settlement and adjudication and the normative implications of ‘vanishing’ trials. (As I will discuss in Section III, the problem we face with the disposition coding has to do with errors and ambiguities in the application of this coding and hence the reliability of analysis of the raw data based on interpreting the codes at face-value.)

Table 1: Trial Rates, All Terminations

SOURCE OF “TRIAL RATE”	1970 NUMBER OF TRIALS (PERCENT OF TOTAL TERMINATIONS)	1980	1990	2000
C-4 Tables ^a	7547 (10.0%)	9874 (6.4%)	9257 (4.3%)	5779 (2.2%)
ICPSR, Disposition ^b	<i>Not available</i>	10368 (6.5%)	7267 (3.5%)	4826 (1.9%)
ICPSR, Procedural Progress ^c	7902 (10.1%)	12817 (7.7%)	9214 (4.4%)	5795 (2.2%)
ICPSR, Judgment and Procedural ^d Progress	6073 (7.8%)	10441 (6.6%)	7231 (3.5%)	4805 (1.9%)

a From Galanter (2004) Table A-2.

b Counting dispositions coded as 7 (“jury verdict”) 8 (“court trial”) or 9 (“directed verdict”) as a trial. The disposition variable for 1970 did not include these codings.

c Counting all dispositions with procedural progress coded as 7 (“terminated during court trial”) 8 (“terminated during jury trial”) 9 (“judgment during court trial”) or 10 (“judgment during jury trial”).

d For 1970: Counting dispositions coded 6 (“judgment for plaintiff”) 7 (“judgment for defendant”) or 8 (“judgment for both or other party) as trials if procedural progress coded for termination during or after court or jury trial. For 1980, 1990 & 2000: Counting terminations with judgment (judgment for) variable coded 1 (“judgment for plaintiff) 2 (“judgment for defendant”) or 3 (“judgment for both”) as trials if procedural progress coded if procedural progress coded for termination during or after court or jury trial.

Figures 1 through 7 show the distribution of disposition codes in 1970 and from 1979 through 2001 in all cases except prisoner petitions and government recoveries of overpayments and student loans.¹¹ These cases represent a large share of federal civil litigation (together accounting for approximately 20% of cases in 1970 and 30% in 2000)

¹¹ In particular, Figure 1 removes the Nature of Suit codes 510, 520, 530, 535, 540, 550, 555, 150, 151, 152, and 153.

and tend to distort the generalizability of results regarding the changing disposition of federal cases.¹²

There were two significant coding changes for ‘disposition’ during 1970-2001 time period: first in 1979, and then again in 1987. In 1970 there were only two categories of dismissals: “dismissed for lack of prosecution” and “dismissed by action of the parties.” In all years, I refer to the “dismissal for want of prosecution” as “abandonments;” this code is used to indicate closure of a case after a period of inactivity.¹³ There were no disposition codes for trials or pre-trial judgments; there was only a disposition coding for a “judgment for” plaintiff, defendant or both. I have therefore constructed the 1970 disposition coding to show trials and pre-trial judgments by coding a jury trial if a judgment for any party was recorded in a case terminated after a jury trial, a court trial if after a judgment was recorded after a court trial and a directed verdict if a judgment was recorded in a case terminated during a jury trial. (There were no judgments in this year in cases terminated during a court trial.) I treat a judgment for any party in a case terminated before a trial begins as “pre-trial judgment.”

In 1979 the disposition variable changed significantly, although the number of codes only increased by one. In this year, jury, court and directed verdicts were coded directly as dispositions as were judgments on motions before trial. In addition, the designation of the dismissal category “dismissed by action of the parties” changed to “dismissed, discontinued, settled, withdrawn etc.” (“Dismissed for lack of prosecution continued in use.)

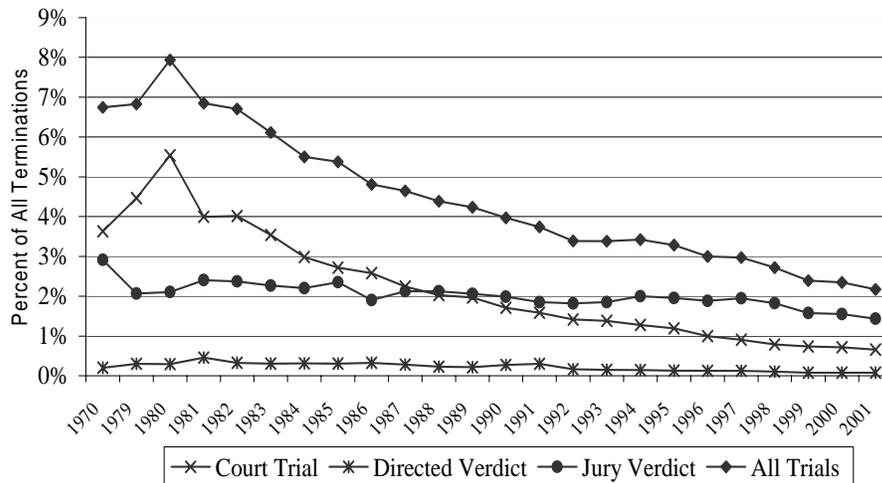
The 1987 coding change nearly doubled the number of codes. Dismissals were broken down into five categories rather than two: in addition to the “lack of prosecution” dismissal, dismissals were coded for lack of jurisdiction, voluntary dismissal, settlement and “other.” Codes for “appeal affirmed” and “appeal reversed” were introduced (although they do not show data until 1991), to capture terminations in cases in which the district court functioned as an appellate court (in 1996, the coding was renamed to specify that the category refers to appeals from magistrates.) Codes for judgment on award of an arbitrator and on trial de novo following arbitration were also introduced. (Other coding changes included distinguishing between transfers to another district and multi-district litigation transfers, and between remands to state court and remands to US agencies; the code for statistical closure of a case was also introduced at this time.)

¹² For a discussion of inmate litigation, see Schlanger (2003); these cases have very high dismissal rates (for frivolous claims, for example) and are also counted in subtle ways. The AO manual for data entry published in 1999, for example, instructs clerks to include prisoner petitions in which there is a denial of the petition to proceed *in forma pauperis*—and thus no filing fee collected and no case filed—as an “opened” (and hence potentially terminated) case in the data base only if the denial of the IFP petition is based on a determination that the filing is frivolous or malicious. Cases brought by the federal government to collect on student loans and recover overpayments of medicare and other benefit tend to have very high default rates. Changes in the proportion of these cases and their treatment over time may thus distort the picture we gain of what we think of as “ordinary” contested litigation.

¹³ Administrative Office of the U.S. Courts, *CIVIL Statistical Reporting Guide* (1999) instructs clerks to use this code if a case is closed by the clerk pursuant to a local rule following a specified period of inactivity.

Turning to first to Figure 1 and the “trial” rate: We see here the fall in the overall trial rate, defined as Galanter (2004) does (as a percentage of all terminations,) from approximately 9% to 2%. Note however that the drop is largely coming from a fall in bench, not jury, trials; indeed since 1979, the percentage of cases terminated in jury trial appears relatively stable. Rather it is the bench trial that is “vanishing” from the data over the past few decades.

Figure 1: Trial Rates: Federal Civil Cases, 1970 and 1979-2001



Source: Federal Judicial Center, Integrated Data Base 1970-2001

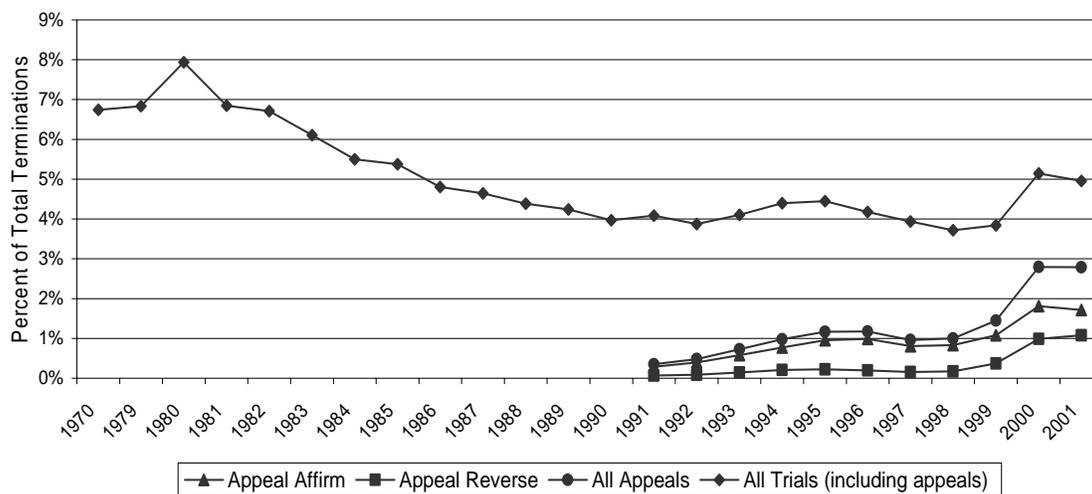
The trial rates in Figure 1 include cases terminated during or after contested evidentiary proceedings before magistrate judges.¹⁴ Some cases decided by a magistrate judge, however, are appealed to the district court and then terminate in an appeal. Cases that terminated in an appeal in the district court were separately coded beginning in 1987 (although there are no data in the code until 1991.) Given that we cannot separate out magistrate and judge trials in the disposition code, it seems appropriate to include appeal cases in our count of trials. Moreover, we cannot be sure that prior to 1991 appeals were not already counted in “trials.” Figure 2 shows the frequency of the “appeal” codes and recalculates the trial rate to include these appeals.¹⁵ As Figure 2 makes clear, appeals account for a significant fraction of “trials” beginning in the later 1990s. Including appeals suggests that the overall trial rate stabilized in the late 1980s and may have begun to rise in 2000, recovering to approximately 5%, due to an increase in appeal terminations (Figure 1 shows no rise in 2000.) This is significantly higher than the 1.8% rate reported by Galanter. As I will discuss in more detail in Section III, however, these data have to be interpreted with great caution. The absence of a separate code for appeals pre-1987 raises the question of how such cases would have been coded prior to 1987—“court

¹⁴ AO CIVIL Statistical Reporting Guide, 3:18.

¹⁵ The “appeal” codes beginning in 1996 were clearly labeled as appeals from magistrates and thus counting them would equate to counting magistrate evidentiary proceedings. It is unclear whether the “appeal” codes between 1991 and 1996 were used to count only appeals from magistrates or also appeals from agencies. I have treated them here as if they were intended to count only magistrate appeals.

trial?” “judgments on other?” “dismissed: other?” Without knowing how these cases were coded previously, we cannot reliably distinguish between changes in the trial rate caused by changes in coding as opposed to changes in litigation outcomes. Moreover, as we shall see, there is reason to be cautious about the interpretation of new codes as it may be that it takes some time for clerks to adapt to the new coding.

Figure 2: Trial Rate including Appeals: Federal Civil Cases, 1979 and 1970-2001



Source: Federal Judicial Center, Integrated Data Base 1970-2001

The trial rates reported in the C-4 tables and Galanter, and all in Figures 1 and 2 calculate trials as percentage of *all* case terminations in a given year. These terminations, however, include a large number of terminations that do not in fact reflect a final case disposition, that is, either an adjudication on the merits (whether by trial or by pre-trial motion) or a settlement. Large numbers of cases each year are coded as “terminated” in the AO data because they are transferred to another district, remanded to state court, consolidated with other cases, closed administratively or “statistically” (sometimes for inaction, sometimes to streamline the docket), stayed for bankruptcy proceedings, and so on. Studies analyzing how final dispositions are changing over time—are more cases being settled? Are more being decided by summary judgment or other pre-trial motion? How do legal fees or uncertainty or litigant characteristics affect the incidence of settlements, trials and non-trial adjudications?—should not include these managerial terminations in the denominator when assessing trial (or settlement or non-trial adjudication) rates.

Another large group of cases each year are coded as “terminated” because they were dismissed for reasons that do not clearly represent a final determination of the underlying dispute. A case may, for example, be withdrawn by a plaintiff—voluntarily dismissed—because the plaintiff decided to revise the complaint, file in a different court, or was denied the right to proceed *in forma pauperis* (not required to pay filing fees; this is a frequent disposition for prisoner petitions which are excluded from the data in Figures 1 - 7.) Other cases are “terminated” in the data when dismissed without prejudice by the

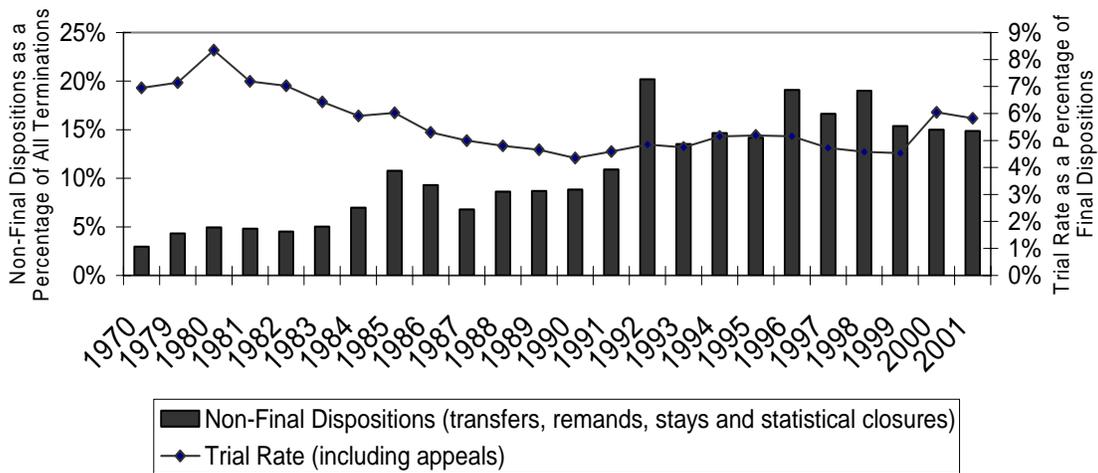
court—to allow settlement negotiations to proceed, or while waiting for further action to be taken by the parties or by another court or agency, or simply as an administrative matter to remove inactive cases from the court’s docket¹⁶—subject to reopening if and when the parties’ dispute comes back into active litigation. These cases too should be removed from the data when looking for disposition rates as evidence of any changes in litigant or court behavior with respect to the final resolution of cases.

We can correct for some of this overcount in the denominator—by removing transferred, remanded, statistically closed, stayed cases and so on—but not all of it. The coding of dismissals and pre-trial adjudication of cases is particularly hard to interpret in the AO data. In 1970, for example, the only ‘dismissal’ category is “dismissed by action of the parties.” Taking this at face value, it suggests that this category includes voluntary dismissals and stipulated dismissals. The latter would tend to indicate settlements and the former could indicate a settlement, especially if the dismissal is with prejudice; these dismissals should be counted as final determinations of the underlying dispute. But a voluntary settlement, and even some stipulated dismissals, may also be without prejudice and thus not indicative of a final determination of the dispute. In later years, the AO data distinguishes (on its face) between voluntary and settlement dismissals, but again we cannot tell within these categories what represents a final determination of a dispute and what is in effect case management (withdrawal to file in a different court, suspension of litigation during negotiations, etc.).

Figure 3 shows a lower bound on the changing proportion of non-final dispositions included in the AO data, specifically, those cases coded as having terminated in a transfer, remand (whether to state court or a US agency), a bankruptcy stay or a statistical closure. This is a lower bound because it does not include dismissals without prejudice. As we can see, non-final dispositions rose significantly beginning in the mid- to late-eighties. Adjusting the trial rate for these non-final dispositions suggests that trial rates, after falling significantly in the early 1980s, stabilized through 2000 and may have recovered to approximately 6% in the last few years. Note that this picture suggests a much smaller drop than the raw AO data based on the C-4 tables (Table 1). According to the C-4 tables, trials fell 78% between 1970 and 2000, from 10% to 2.2%. But according to Figure 3, trials fell by only 36% during this time frame, from 9.1% to 5.8%. Again, however, caution is in order because of the uncertainty in our methods of identifying non-final dispositions and possible changes in time in the identification of these non-final dispositions. The “statistical close” coding, for example, does not appear in the data until 1987. Nor is there a separate code for “remanded to US agency” until 1987: the remand code for 1970 is labeled “remanded to state court”; from 1979 through 1987 simply “remanded.” Thus we cannot be sure how much of the changes in the non-final disposition frequencies we are seeing is coming from a true increase in frequency and how much from a change in our ability to identify these cases or indeed from practices at the court (in the practice of statistical closure, for example.)

¹⁶ The AO statistics are used by the courts to allocate resources and so the removal of inactive cases is presumably intended to gain a more accurate picture of court workload, not to truncate legal rights.

Figure 3: Non-Final Dispositions and Trial Rate as a Percentage of Final Dispositions: Federal Civil Cases, 1970 and 1979-2001



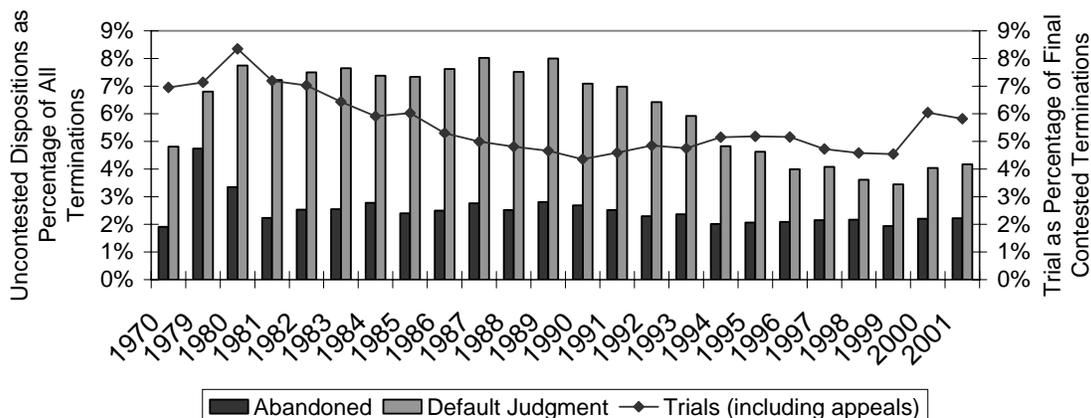
Source: Federal Judicial Center, Integrated Data Base 1970-2001

As a final adjustment to our measurement of trial rates, it is also important to assess how the rates of abandonment and default are changing over time. One theory of the fall in the trial rate is the possibility that increasing litigation costs or other barriers has increased the rate at which either plaintiffs or defendants give up on litigation and unilaterally withdraw (or never initially respond) to the other’s claims. Figure 4 suggests there may be something to this theory: the rate at which cases were defaulted rose significantly through the 1980s¹⁷, the same period over which we see (Figure 3) a substantial decline in the trial rate. The rate at which cases are abandoned, on the other hand, falls somewhat in the early 1980s and then largely stabilizes, and thus abandonment does not appear to account for the drop in trials. (I treat abandoned cases – cases dismissed by the court for lack of prosecution – as final dispositions.¹⁸)

¹⁷ One of the reasons I removed student loan and other overpayment recovery actions by the U.S. government from the data is that these cases are frequently disposed of by default, and they have risen significantly as a share of total terminations, from less than 1% in 1970 to almost 10% in 2000. Thus the increase in the default rate shown in Figure 4 does not represent the overall default rate in federal court.

¹⁸ See n. 3, supra.

Figure 4: Abandoned and Defaulted Cases and Trials as Percent of Final Contested Dispositions: Federal Civil Cases, 1970 and 1979-2001



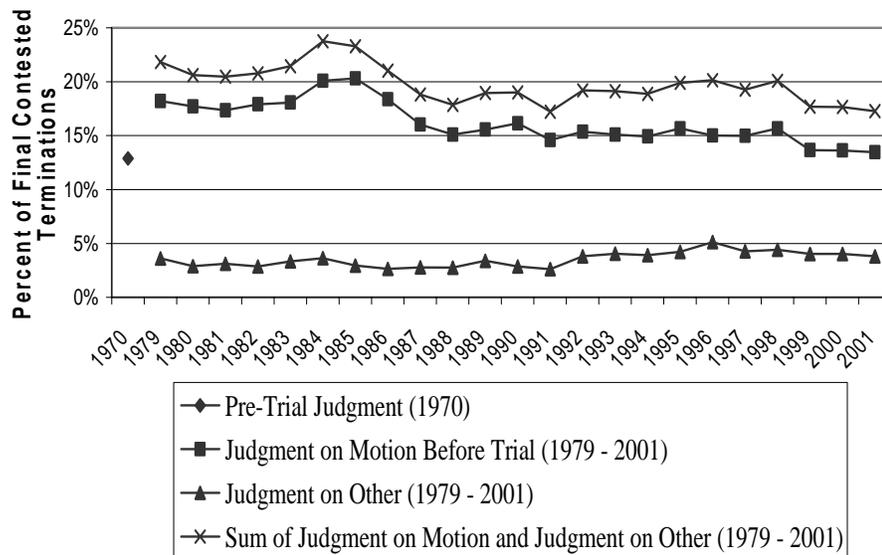
Source: Federal Judicial Center, Integrated Data Base 1970-2001

Changes in the rate of abandoned and defaulted cases are also relevant to the claim that trials are decreasing in frequency because parties are settling more often and thus choosing not to litigate; that claim presumes a *contested* case in which the parties bargain. Figure 4 shows the trial rate as a percentage of final contested terminations, that is, after removing abandoned and defaulted cases from the denominator.

This brings us to the complicated categories of dismissals and non-trial judgments. Non-final dispositions also appear in dismissals—dismissals for lack of jurisdiction, for example, (which can be identified in the data after 1987) and dismissals without prejudice (which cannot.) Examining these categories is thus, in theory, important to correcting our trial rates for non-final dispositions; unfortunately, however, the raw data do not distinguish between final and non-final dismissals, with the exception of dismissals for lack of jurisdiction which appear beginning in 1987. More fundamentally, however, it is to these categories that we must look in order to assess settlement and non-trial adjudication rates, and thus to evaluate the competing hypotheses about where such trials as are vanishing from the federal courts are “going.”

Figure 5 shows the percentage of final, contested cases coded as terminating with a non-trial judgment as captured by the codes “judgment on motion before trial” and “judgment: other” from 1979 through 2001. In 1970, there were no such codes; for this year, I have constructed a pre-trial judgment code to identify cases in which the disposition variable shows “judgment for” any party and the procedural progress variable shows termination at a stage prior to the commencement of a bench or jury trial.

Figure 5: Non-Trial Adjudications: Federal Civil Cases, 1970 and 1979-2001



Source: Federal Judicial Center, Integrated Data Base 1970-2001

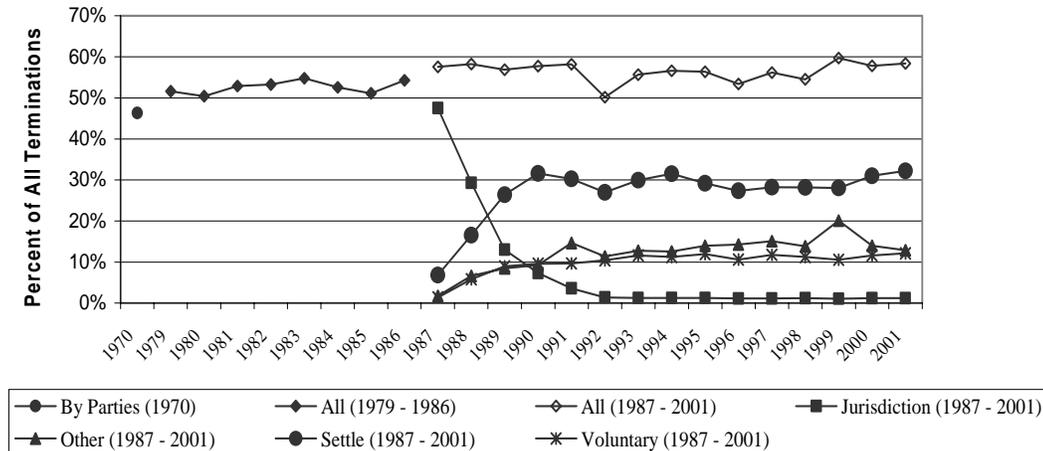
Looking first at the period 1979 through 2001, with unchanged coding, it appears that judgments on motion before trial have fallen by about 5%, while “other” judgments (“other” than judgments on motion, court or jury trial) remained largely constant. Overall, reading from these two codes alone, it would appear that non-trial judgments have fallen by about 5% over the last two decades. It also appears that, relative to 1970, pre-trial judgments have increased. The difficulty in making this comparison, however, comes from the changing coding. In 1970, all pre-trial judgments were combined—whether on motion or not—and there was no category of “other” judgments; these may well have been counted as “trials” if they were reached during or after trial begins. If “other” judgments in the 1979-2001 period were reached pre-trial, the sum of “judgment on motion before trial” and “judgment on other” would suggest that pre-trial judgments have also increased relative to 1970. Our difficulty, of course, is that it is not clear at all what “other” judgments includes. (I turn to addressing this difficulty in Section III, below.)

A further difficulty comes from the fact that we do not know what is in another “other” category, namely “dismissed: other.” This code may well include cases that we would also want to include as non-trial adjudications, such a dismissal for failure to state a claim. Recall again that there was no category in 1970 for any dismissals other than “dismissed by action of the parties” and thus we might also find an ambiguous use of the terms “dismissal” and “judgment:” presumably in 1970, dismissals for failure to state a claim were coded as “judgments” with procedural progress coded for a pre-trial stage. To assess non-trial adjudication accurately, then, we may need to include “other” dismissals.

Figure 6 shows the distribution of dismissal codes in 1970 and from 1979 through 2001 as a percentage of all terminations (that is, including non-final and non-contested terminations.) Substantial caution is in order here given the numerous changes in the dismissal codes over this time period. In 1970 the single dismissal code would appear to be intended to identify cases that are voluntarily dismissed by the plaintiff and those dismissed jointly by plaintiff and defendant, that is, a combination of non-final and settlement dispositions that exclude non-trial adjudications. In 1979 through 1986, there was also only one dismissal code; now, however, the code (designated “dismissed, discontinued, withdrawn, etc.”) appears intended to capture not only non-final and settlement dispositions but also non-trial adjudications such as dismissals for failure to state a claim.

After 1986 we see the catch-all dismissal category divided to ostensibly distinguish between voluntary, settlement, jurisdictional and “other” dismissals. Taking the coding at face value, it would appear that voluntary and settlement dismissals together are significantly lower throughout 1986-2001 than they were in 1970. “Other” dismissals—those that we might expect to include non-trial adjudications—appear to rise between 1987 and 1992 and then to hover around 11% to 12% through 2001 (with the exception of a spike in 1999.)

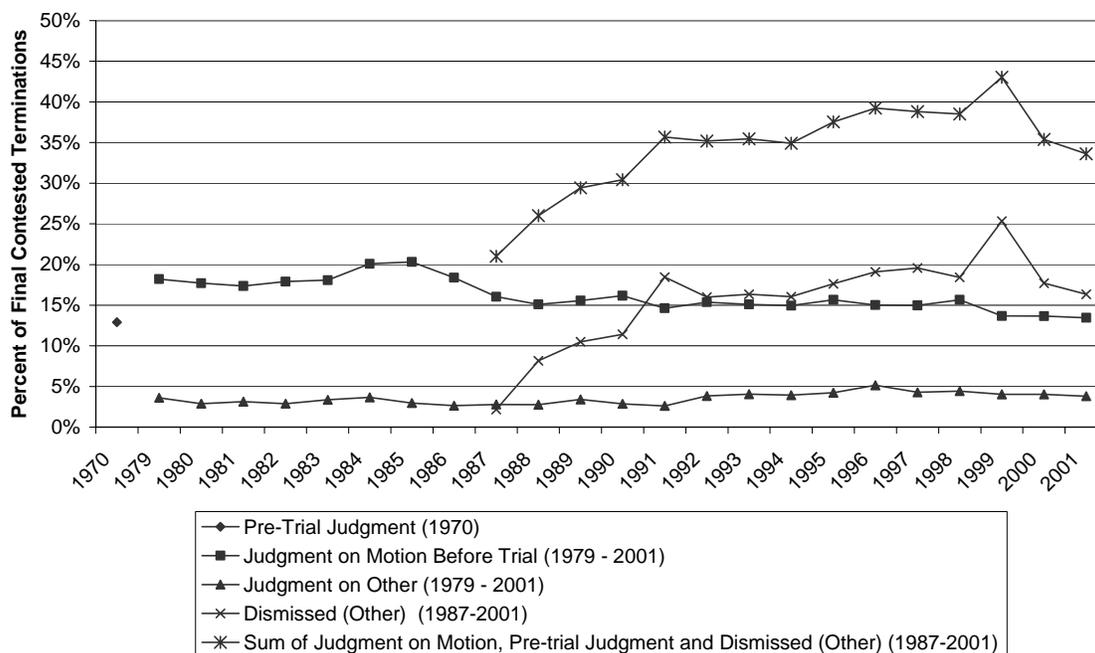
Figure 6: Dismissals: Federal Civil Cases, 1970 and 1979-2001



Source: Federal Judicial Center, Integrated Data Base 1970-2001

Returning to our investigation of non-trial adjudications, if we examine “other” dismissals as a percentage of final, contested cases (Figure 7) it appears that this category of dismissal grew substantially over the period 1987 through 2001. Adding “other” dismissals to judgments on motion and judgments on “other” would lead us to conclude that non-trial adjudication has grown tremendously among final, contested cases. The sharp growth following 1986 might be particularly indicative of change following the Supreme Court’s apparent effort in the *Celotex* trilogy to make it harder for plaintiffs to survive pre-trial adjudication. (Miller 2001).

Figure 7: Non-Trial Adjudication Including "Other" Dimissals: Federal Civil Cases, 1970 and 1979-2001



Source: Federal Judicial Center, Integrated Data Base 1970-2001

A close inspection of Figure 6, however, raises serious questions about the reliability of this coding as a whole. According to the reported raw codes, between 1987 and 1992 dismissals for lack of jurisdiction fell dramatically, from a high of 48% to a mere 1%. Correspondingly, other dismissal categories grew substantially, while overall dismissals were relatively flat. This looks suspicious. It looks especially suspicious if we notice that the code for the catch-all dismissal category in 1979 through 1986 was “3” and the code for dismiss for lack of jurisdiction in the new coding system in 1987 was “3.” Occam’s razor would favor the conclusion that we are not observing anything in this dismissal data immediately following 1987 except the length of time it took the federal district court clerks to adapt to the new coding system. And that raises overall suspicion about the reliability of the data across categories and across years. I turn now to investigating the reliability of this coding, and hence the reliability of a conclusion that what we are observing in the “vanishing” trial is largely a shift in judge-based decisionmaking from trial to non-trial adjudication.

III. Statistical artifacts: Audits of the AO’s disposition coding

In order to assess the reliability of these codes and hence the reliability of an inference that, contrary to conventional wisdom, cases are not settling more frequently today than

thirty years ago (before the tremendous push to increase settlement in federal courts), they are instead being disposed of through increased rates of non-trial adjudication, I audited the most significant and ambiguous disposition codes using the electronic access to court dockets available through PACER over the internet. As I report below, the results make reliance on raw AO data problematic, and go so far as to raise concerns about the underlying measurement of trial rates on which the conclusion that trials are ‘vanishing’ is based. They do, however, demonstrate a methodology for correcting the raw data and point the way to a more reliable investigation of the determinants of changing trial dispositions.

I examined samples of 400 cases terminated in 2000 or 2001 drawn randomly by docket number from all federal districts¹⁹ across all case-types except prisoner and student loan/overpayment recovery cases²⁰ for the following disposition codes: 6 (“judgment on motion before trial”), 12 (“dismissed: voluntary”), 14 (“dismissed: other”), and 17 (“judgment on other”). I examined a smaller sample (200) of cases coded 13 (“dismissed: settled”). I assessed “error rates,” meaning the rate at which the cases included in a particular code match the interpretation of the category that a researcher using the data is likely to use. I want to emphasize that the “error” I refer to is not error on the part of the AO’s coding per se; rather it is the error that researchers will make if they interpret the AO codes to be mutually exclusive and rely solely on the name of the category to understand the nature of the cases coded in that category.

Looking first (Table 2) at the coding for “dismissed: voluntary” in a sample of 400 (reduced to 379 once ambiguous or missing cases are removed), I found that the vast majority (97%) are correctly identified as cases voluntarily dismissed by the plaintiff. Over half (54%), however, are settlements: dismissed with prejudice on a stipulated or joint motion, a plaintiff’s motion or the court’s own motion.²¹ 43% are dismissed by the plaintiff acting alone and reflect a non-final disposition: the dismissal is either noted as being without prejudice or operates without prejudice because it is entered before an answer is filed (Rule 41). In a small number of cases in the sample the dismissal is apparently due to other proceedings such as bankruptcy. A small percentage of cases (2.4%) are non-trial adjudications. The error rate for this coding is nearly 57% if we expect “dismissed: voluntary” and “dismissed: settled” and “dismissed: other” to be mutually exclusive and in particular if we expect all settlements to be coded as “dismissed: settled.”

¹⁹ This was thus an unweighted sample, reflecting an assumption that error rates in the data are not district-dependent.

²⁰ The universe for these samples excludes the codes listed in footnote 11.

²¹ To be conservative, I have interpreted a joint or stipulated dismissal to be a settlement even if the docket does not indicate that the dismissal is with prejudice.

**Table 2: Distribution of Docket Disposition in AO Disposition Code 12:
“Dismissed: Voluntary” (2000)**

Disposition from docket	Count	Percent of all terminated cases in sample (N = 379)
Non-final dismissal by plaintiff ^a	163	43.0% ± 4.9% ^e (error = 57.0%)
Settlement ^b	205	54.1% ± 5.0%
Non-trial adjudication ^c	9	2.4%
Abandoned ^d	1	0.3%
Default	1	0.3%

a Case dismissed by plaintiff with no indication that dismissal is with prejudice, or on stipulated motion if expressly without prejudice

b Case dismissed on joint or stipulated motion, on plaintiff’s motion with indication of with prejudice or by court when docket indicates settlement reached

c Includes final dismissals with prejudice other than those resulting from plaintiff, joint or stipulated motion to dismiss. Does not include court dismissal for failure to effect service or following denial of motion to proceed *in forma pauperis* (case dismissed for failure to pay filing fee.) Does include summary judgments and motions for judgment on the pleadings.

d Includes cases dismissed for want of prosecution; ordinarily operates as an adjudication on the merits (FRCP 41(b)).

e Confidence interval based on population of 21, 623, confidence level of 95%.

Source: PACER electronic dockets, 2000

Table 3 presents the auditing results for the code 13: “dismissed: settled.” In a sample of 200 cases drawn from cases terminated in 2000 (reduced to 186 when missing and ambiguous cases are removed), I found 159 cases (85.5%) that were clearly settled as a final disposition. (In order to be conservative with respect to my claim that settlement rates today may be lower than in 1970, I assume any stipulated dismissal in fact represents a settlement.) I found another 7 (3.8%) that were dismissed without prejudice pending consummation of a final settlement; these are not final dispositions and so we cannot tell from the docket whether the case was finally settled or not, although it would be reasonable to assume that a significant percentage of them were. I also found 14 cases (7.5%) that were voluntary dismissals without prejudice, with no explicit indication in the docket that a settlement had been reached. Thus the error rate in this sample is 14.5% plus or minus 5.1% at the 95% confidence level if we restrict our identification of settlement only to those cases in which a final disposition is clearly reached; the error rate drops to 10.75% plus or minus 4.4% if we wish to include dismissals without prejudice to allow consummation of a settlement.

Table 3: Distribution of Docket Disposition in AO Disposition Code 13: “Dismissed: Settled” (2000)

Disposition from docket	Count	Percent of all terminated cases in sample (N = 186)
Settlement ^a	159	85.5% ± 5.1% ^e (error = 14.5.0%)
Non-final dismissal for settlement purposes ^b	7	3.8% ± 2.7%
Non-final dismissal by plaintiff ^c	14	7.5% ± 3.8%
Non-trial adjudication ^d	5	2.7% ± 2.3%
Default	1	0.5%

a Case dismissed on joint or stipulated motion, on plaintiff’s motion with indication of with prejudice or by court when docket indicates final settlement reached.

b Case dismissed without prejudice and docket indicates dismissal is for purposes of consummating settlement.

c Case dismissed by plaintiff with no indication that dismissal is with prejudice, or on stipulated motion if expressly without prejudice.

d Includes final dismissals with prejudice other than those resulting from plaintiff, joint or stipulated motion to dismiss. Does not include court dismissal for failure to effect service or following denial of motion to proceed *in forma pauperis* (case dismissed for failure to pay filing fee.) Does include summary judgments and motions for judgment on the pleadings.

e Confidence interval based on population of 56,252, confidence level of 95%..

Source: PACER electronic dockets, 2000

Although these error rates may seem high, they are well below the error rates that appear in the codes that a researcher is likely to interpret to contain only cases disposed of by final non-trial adjudication. Table 4 presents the results from an audit of 400 “dismissed: other” cases from 2001. 56 cases were either missing from the electronic docket system or the reasons for termination could not be reliably discerned from the docket. This left a sample size of 344.

Table 4: Distribution of Docket Disposition in AO Disposition Code 14: “Dismissed: Other” (2001)

Disposition from docket	Count	Percent of all terminated cases in sample (N = 344)
Non-trial adjudication ^a	120	34.9% ± 5.0% ^e (error = 65.1%)
Settlement ^b	91	25.5% ± 4.6%
Abandoned ^c	27	7.8% ± 2.8%
Default judgment	2	0.6%
Consent judgment	1	0.3%
Trial	5	1.4% ± 1.2%
Non-final disposition ^d	98	28.5% ± 4.7%

a Includes final dismissals with prejudice other than those resulting from plaintiff, joint or stipulated motion to dismiss. Does not include court dismissal for failure to effect service or following denial of motion to proceed *in forma pauperis* (case dismissed for failure to pay filing fee.) Does include summary judgments and motions for judgment on the pleadings.

b Includes plaintiff, joint and stipulated motions to dismiss with prejudice and court dismissals with prejudice where settlement indicated in docket.

c Includes cases dismissed for want of prosecution; ordinarily operates as an adjudication on the merits (FRCP 41(b)).

d Includes all motions to dismiss without prejudice, transfers, remands, statistical closings, stays, administrative closings, consolidations, dismissals for failure to effect service or following denial of motion to proceed *in forma pauperis*.

e Confidence interval based on population of 29,529, confidence level of 95%.

Source: PACER electronic dockets, 2001

The results in Table 4 are striking. Overall, the error rate, (allowing that a judgment on a motion pre-trial—which ostensibly should be coded “6”—is correctly coded as an “other dismissal”) is fully 65%. Almost a third of the cases (28.5%) do not in fact represent a final disposition of the underlying litigation but instead involve a transfer, stay, consolidation, or other dismissal without prejudice. There is a substantial number of settlements in the sample: 25%.

Table 5 tells a similar story, based on an audit of 400 cases terminated in 2000 with disposition code “6” for “judgment on motion before trial.” Missing and ambiguous cases in this sample resulted in a final set of 375 terminations. Again we see a very high base error rate: of cases coded “judgment on motion before trial” nearly 70% are incorrectly coded if we interpret this coding to represent cases finally disposed of by a non-trial adjudication. Again, almost a third (27.7%) are non-final dispositions, and again settlements make up a large share of cases coded ostensibly as an adjudication by the court (28.2%). We also see a significant number of default judgments in this code, suggesting caution in the implication in Figure 4 that default judgments have fallen over the past decade; we cannot be sure that this is not due to a change in coding behavior and the miscoding of default judgments as “judgments on motion before trial.”

Table 5: Distribution of Docket Disposition in Disposition AO Code 6: “Judgment on motion before trial” (2000)

Disposition from docket	Count	Percent of all terminated cases in sample (N = 375)
Non-trial adjudication ^a	118	31.1% ± 4.6% ^e (error = 68.9%)
Settlement ^b	107	28.2% ± 4.5%
Abandoned ^c	6	1.6% ± 1.3%
Default judgment	33	8.7% ± 2.8%
Consent judgment	4	1.1% ± 1.1%
Trial	3	0.8%
Non-final disposition ^d	104	27.7% ± 4.5%

a Includes judgments on motions for summary judgment, dismissal for failure to state a claim etc. and contested dismissals with prejudice.

b Includes plaintiff and joint/stipulated motions to dismiss with prejudice.

c Includes dismissals for want of prosecution.

d Includes transfers, stays, consolidations, remands, and dismissals without prejudice

e Confidence interval based on population of 21,392, confidence level of 95%.

Source: PACER electronic dockets, 2000

Table 6 reports the results for the audit of cases coded as “other” judgments. The final sample size after removing missing and ambiguous cases was 336. Table 6 shows that the coding error is somewhat lower but still very high: only 50% of cases coded as an “other” judgment are in fact a non-trial adjudication of some kind. This is a conservative assessment of the error rate: We find here summary judgments and motions to dismiss for failure to state a claim, which ostensibly should be coded as either “judgments on motion before trial” or “dismiss: other.” We also find here, among other things, judgments based on affirming the decision of a magistrate, appeals from agency decisions (such as social security appeals), and dismissals for failure to comply with case management orders or for a frivolous suit. And again, some 25% of the terminations are settlements and a significant percentage (13%) are non-final dispositions and not judgments at all. Finally, we also find a significant number of *trials* in this code: 4% of all dispositions and almost 5% of final dispositions.

The coding difficulties with non-trial adjudication in the form of judgments and dismissals is particularly important because of the way it affects the coding of the “judgment for” variable. This is the variable used, for example, by Siegelman and Waldfogel (1998)—one of the few empirical studies to attempt to test theories of settlement behavior such as the Priest/Klein model—to distinguish between adjudicated and settled cases. The audit of these four codes reveals that the apparent distinction between a ‘dismissal’ and a ‘judgment’ in the coding does not reflect real distinctions in disposition: both codes contain a substantial number of non-trial adjudications,

settlements and non-final dispositions. There is evidence, however, that the AO, at least in recent years, has only coded “judgment for” data when the disposition code is a “judgment” of some sort. I ran cross- tabulations of the disposition and “judgment for”

Table 6: Distribution of Docket Disposition in AO Disposition Code 17: “Judgment on Other” (2000)

Disposition from docket	Count	Percent of all terminated cases in sample (N = 336)
Non-trial adjudication ^a	168	50.0% ± 5.2% ^e (error = 50.0%)
Settlement ^b	85	25.3% ± 4.4%
Abandoned ^c	2	0.6%
Default judgment	16	4.8% ± 2.23
Consent judgment	6	1.8% ± 1.4%
Trial	14	4.2% ± 2.1%
Non-final disposition ^d	45	13.4% ± 3.6%

a Includes judgments on motions for summary judgment, dismissal for failure to state a claim etc. and contested dismissals with prejudice.

b Includes plaintiff and joint/stipulated motions to dismiss with prejudice.

c Includes dismissals for want of prosecution.

d Includes transfers, stays, consolidations, remands, and dismissals without prejudice

e Confidence interval based on population of 6,439, confidence level of 95%.

Source: PACER electronic dockets, 2000

variables for 1980, 1990 and 2000. In 1980, “judgment for” is recorded as plaintiff, defendant or both in approximately 8% of cases coded “dismissed, discontinued, settled, withdrawn, etc.” and in approximately 90% of cases coded “judgment on motion before trial.” In 1990 and 2000, *no* cases coded “dismiss: other” record a judgment for any party whereas nearly 100% of cases coded “judgment on motion before trial” do. Yet the audits above reveal that the “judgment for” variable is not at all a reliable basis on which to distinguish between cases that are settled and those that are adjudicated before trial.

The audits I have performed focus on the non-trial disposition of cases, and reveal very large error rates in the interpretation of the AO’s disposition coding; this has the implication that the ‘judgment for’ variable used by some studies to distinguish between adjudication and settlement is also unreliable. This implies a need for tremendous caution in using the AO data to investigate the issue of greatest interest in explaining the vanishing trial, namely whether trials are disappearing into settlements or non-trial adjudication by judges.

The audits also raise suspicion about the reliability of our observation of the “vanishing trial” in the first place. As Tables 4 and 5 show, very large percentages of cases treated as “terminated” by either a final dismissal or a judgment on motion are, in fact, not final at all. Reading the dockets for these cases it is possible to understand the rate of error as

a consequence of the fact that litigation is not, contrary to our mental models of it, always a neat sequential process. The federal courts deal with large numbers of cases that are ‘messy’: transferred to other courts and agencies, consolidated with other matters, put into limbo for settlement negotiations or while bankruptcy proceedings take place, closed for administrative or “statistical” purposes, and so on. If these events occur once a “trial” has started, then there is good reason to believe that just as these non-final dispositions can be incorrectly coded as ‘judgments on motion before trial’ or “other dismissals,” they may also be recorded as judgments or dismissals “during or after trial.” This may happen, especially, with bench trials, in which a judge may initiate an evidentiary hearing but nonetheless never adjudicate the final result. Thus the effort that we made in Table 1 to correct for non-final dispositions in the calculation of the trial rate—which had a small effect on the measured trial rate—may simply be the tip of the iceberg for this necessary correction.

IV. Some tentative conclusions: Applying the audited “corrections” to the raw AO data

It would not take much for coding “errors” such as those in Tables 2 through 6 to swamp the observed drop from 8-9% trial rates to 2-3% trials rates over the past three decades. Moreover, there is reason to suspect that dockets have become more complex and less linear over the past three decades with the rise of alternative dispute resolution and complex multi-party litigation; this would have the effect of artificially depressing the trial rate in later years. Clearly, before we can conclude that trials have fallen, and certainly before we can conclude that they have fallen by an amount subject to causal investigation, we need to engage in some careful audits and corrections to the underlying data in which the “vanishing trial” appears.

Even with the errors, however, we can reach some tentative conclusions, conclusions that point to the importance of an effort to improve the available data and developed auditing “corrections” for the raw AO data. Table 7 compares the data from 1970 to the data from 2000, using the percentages reported as “errors” for 2000 in Tables 2 through 6 to supply “corrections” for the dismissal and non-trial judgment codes. Because we do not have auditing results for 1970, Table 7 assumes that in 1970 any court (ie adjudicated) dismissal of a case was recorded as a “judgment²²” and that any “dismissal by action of the parties” represented a settlement and that all dispositions in 1970 are final, other than those coded for transfer or remand. The rows of Table 7 show the distribution of

²² Under this assumption, the “judgment” variable is understood to record who prevailed in the case, rather than the legal distinction between a judgment and a dismissal. This seems a reasonable assumption to go on without conducting a (costly) audit into the docket records from 1970: in that year, 20% of the cases in which a “judgment for” is recorded were disposed of before issue was joined (that is, before an answer was entered by the defendant), suggesting these are cases dismissed for a variety of defects such as lack of jurisdiction or failure to state a claim on which relief can be granted or failure to prosecute. Recall that default judgments (which by and large are reached when no issue is joined) are separately coded. Although we should be suspicious, as we have seen in the 2000 data, as to whether default judgments are being coded as “judgments for plaintiff” rather than “default” the great majority of “judgments” reached before issue is joined are judgments for defendants, consistent with an interpretation that these are dismissals by the court.

dispositions for each first as a percentage of all terminations (including non-final terminations), then as a percentage of all final terminations and last as a percentage of terminations in contested cases, that is, cases which were not disposed of in a one-sided manner through abandonment or default.

Table 7: Comparing Raw 1970 Dispositions with Corrected 2000 Dispositions

		<i>Non-Final Disposition</i>	<i>Abandoned</i>	<i>Default</i>	<i>Settled</i>	<i>Consent</i>	<i>Non-Trial Adjudication</i>	<i>Court Verdict</i>	<i>Directed Verdict</i>	<i>Jury Verdict</i>
<i>All Terminations</i>	1970	3.8%	2.5%	6.2%	56.2%	7.8%	14.8%	4.7%	0.3%	3.8%
	2000	32.1%	3.5%	5.4%	40.5%	2.0%	13.3%	1.1%	0.1%	1.6%
<i>Final Terminations</i>	1970	-	2.6%	6.5%	58.4%	8.1%	15.4%	4.9%	0.3%	3.9%
	2000	-	5.2%	8.0%	59.7%	2.9%	20.2%	1.7%	0.1%	2.3%
<i>Contested Terminations</i>	1970	-	-	-	64.2%	8.9%	16.9%	5.4%	0.3%	4.3%
	2000	-	-	-	68.7%	3.3%	23.3%	1.9%	0.1%	2.6%

Source: Federal Judicial Center, Integrated Data Base 1970-2000 and corrections from Tables 2 – 6, *supra*.

The first row in Table 7 shows a much higher rate of non-final disposition in 2000 as compared to 1970, over eight times higher. If the assumption that 1970 cases were more accurately coded as final dispositions (perhaps because of different case management procedures and less complex dockets), we would see clearly the importance of correcting for non-final dispositions in assessing changes in trial, settlement and non-trial adjudication rates. When we include non-final dispositions in the denominator, it appears that the settlement “rate” (including consent judgments) in 2000 was substantially lower than in 1970 (over 20 percentage points lower) and the non-trial adjudication rate slightly lower in these two years. Removing non-final dispositions, however, shows us something different: among final dispositions, the settlement rate in 2000 was only about 4 percentage points lower than it was in 1970; the non-trial adjudication rate, on the other hand, was approximately 5 percentage points *higher*. Finally, if we focus on the set of cases our models of settlement and trial assume—contested cases in which both plaintiff and defendant remain active and engaged in bargaining—we see that under the assumptions of Table 7, the settlement rate in 2000 was essentially the same as it was in 1970 while the non-trial adjudication rate was over 6 percentage points higher. Table 7 shows the importance of taking non-final dispositions into account if we are interested in assessing claims about whether a falling trial rate is accounted for by increased settlement or increased non-trial adjudication; both of these theories of the vanishing trial presume cases that reach a final disposition. Indeed, these theories presume cases that are contested through to final disposition, and we see in Table 7 how focusing on this subset of cases alters our assessment of how and why case disposition is changing.

Table 7 also suggests that it may be the case that changes in the rate of non-final disposition, abandonment and default account for a least a portion of the observed change in the trial rate. Note that the abandonment rate in 2000 is twice as high as it was in 1970 among final terminations. According to Table 7, the ‘raw’ trial rate was 68% lower in 2000 than in 1970, with an overall rate of 2.8%; but the trial rate as a percentage of final, contested cases in 2000 was 4.6%, a drop of only 54% relative to 1970.

Table 7 also emphasizes that it is bench trials, not jury trials, that have fallen most significantly. Among final, contested cases, the bench trial rate is 65% lower in 2000 than it was in 1970; the jury trial rate is only 40% lower. Given that, having removed non-final and uncontested dispositions, we can see that non-trial adjudication may account for the fall in trials, the fact that a larger share of the drop in trials comes from bench trials gives us important insight into what may be changing in federal courts, namely the manner in which judges decide when they are the final adjudicator. It also has important normative implications: if judges are “merely” changing the stage at which they reach a final decision, is the vanishing trial a problematic phenomenon?

Table 7 is constructed under an admittedly heroic assumption: that the 1970 dispositions are all final and that the coding can be interpreted in a mutually exclusive way such that all settlements and only settlements appear in the ‘dismissed by action of the parties’ coding and that all non-trial adjudications and only non-trial adjudications appear in the ‘judgment’ code with procedural progress coded as some pre-trial stage. There may be some basis for the assumption, namely the fact that there were many fewer disposition codes in 1970 than there were in 2000 and the codes appear less ambiguous and with fewer overlaps. Undoubtedly, however, it is probably the case that some results coded as “judgments” are settlements or non-final dispositions. And we can be very sure that the cases dismissed by action of the parties include non-final dismissals without prejudice. Without a careful (and costly) audit of the 1970 data, however, we cannot correct the 1970 data reliably. I have, however, applied the 2000 corrections to the 1970 data to see what impact that would have on our conclusions. Table 8 presents these calculations, applying the 2000 corrections to both the 1970 and the 2000 data. Specifically, I assume that the distribution of voluntary and settlement dismissals was the same in 1970 as in 2000 and then applied the corrections for these two dismissal codes from 2000 to the 1970 data. I also assumed that the 2000 “other dismissals” “other judgments” and “judgments on motion before trial” codes would have accounted for the same percentage of pre-trial judgments in 1970 as they did in 2000, and then assumed that the distribution of dispositions for those 2000 codes (Tables 4, 5 and 6) applied in 1970.

Table 8: Comparing “Corrected” 1970 Dispositions with Corrected 2000 Dispositions

		<i>Non-Final Disposition</i>	<i>Abandoned</i>	<i>Default</i>	<i>Settled</i>	<i>Consent</i>	<i>Non-Trial Adjudication</i>	<i>Court Verdict</i>	<i>Directed Verdict</i>	<i>Jury Verdict</i>
<i>All Terminations</i>	1970	20.0%	3.2%	7.1%	46.4%	7.9%	6.4%	4.9%	0.3%	3.8%
	2000	32.1%	3.5%	5.4%	40.5%	2.0%	13.3%	1.1%	0.1%	1.6%
<i>Final Terminations</i>	1970	-	4.0%	8.9%	58.0%	9.9%	8.0%	6.2%	0.3%	4.7%
	2000	-	5.2%	8.0%	59.7%	2.9%	20.2%	1.7%	0.1%	2.3%
<i>Contested Terminations</i>	1970	-	-	-	66.6%	11.4%	9.2%	7.1%	0.4%	5.4%
	2000	-	-	-	68.7%	3.3%	23.3%	1.9%	0.1%	2.6%

Source: Federal Judicial Center, Integrated Data Base 1970-2000 and corrections from Tables 2 – 6, *supra*.

Table 8 shows dramatically the possibility that non-trial adjudication accounts not only for the decrease in trials but also for a decrease in settlements. If, as Table 8 assumes, coding in 1970 was done in the same way as in 2000, then we would have to conclude

that among final, contested cases, the overall settlement rate (including consent judgments) was 6 percentage points lower in 2000 than in 1970, whereas non-trial adjudications accounted for a substantially higher share of dispositions, increasing from approximately 9% to over 23%. In addition Table 8 shows an even sharper decline in bench trials as opposed to jury trials, emphasizing that the shift we may be observing is a shift in the way *judges* decide cases, away from full-scale trial adjudication towards more piece-meal non-trial adjudication.

As indicated at the start of this exercise, however, these conclusions can be tentative only. They require far more careful auditing and adjustment to the AO data on which our perception of the vanishing trial is based. Much turns on the accuracy of our understanding of what is really happening in federal litigation. If trials are disappearing not into private settlements but into public adjudications—albeit non-trial adjudications—then our concerns about the production of law and the opportunity for the expression of public values are misplaced. If the non-trial adjudications we are seeing are largely replacing bench, rather than jury, trials, then we may well be seeing what Deborah Hensler suggests, namely a convergence (in at least the non-jury realm) towards a more inquisitorial system of justice. And if cases are terminating more frequently in non-trial decisions on motions—with the implications I have discussed for the context this creates for settlement discussions—then we may find that even while settlement rates are decreasing, the timing and content of settlements may be changing also. The task of auditing and adjusting the AO data is substantial one; electronic access to court records is available only for cases terminated since the late 1990s. It is one that the empirical study of litigation generally, and the important issues raised by the ‘vanishing trials’ in particular, sorely need.

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