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THE BUSINESS OF THE U.S. DISTRICT COURTS

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THE BUSINESS OF THE U.S. DISTRICT COURTS

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UNITED STATES DISTRICT COURTS are the nation's federal trial courts. The traditional assumption has been that their primary business is umpiring trials and imposing sentences. With little public awareness, however, that business has changed dramatically over time: now, federal judges conduct fewer and fewer trials, and their sentencing authority has diminished greatly. But the volume of civil lawsuits and criminal prosecutions continues. What has the business of the federal "trial" courts become in the twenty-first century? What should be our contemporary image of a federal district judge at work?

The late management pioneer, Peter F. Drucker, offered business and nonprofit organizations a critical insight: look outside to determine your mission and measure your effectiveness.¹ According

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¹ Drucker, *THE ESSENTIAL DRUCKER* 12, 42 (New York: Collins Bus., 2001). Drucker applied that principle to nonprofit organizations, Drucker, *MANAGING THE NON-PROFIT ORGANIZATION* 120, 140 (New York: Collins Bus., 1990) ("no results inside an institution," "only costs"), not to government, viewing government as only regulatory, having "discharged its function when its policies are ef-

to Drucker, “any serious attempt to state ‘what our business is’ must start with the customer’s realities, his situation, his behavior, his expectations, and his values.”² The organization does not get to define its business. “It is defined by the want the customer satisfies” in obtaining the product or service.³ Value to the customer differs from value to the organization. Quality is “not what the supplier puts in. It is what the customer gets out and is willing to pay for.”⁴

This insistence upon customer focus may be an unfamiliar perspective for thinking about federal courts, whose “customers” are lawyers, litigants, the American public, and Congress (I shall call them users and stakeholders).⁵ But as the following exposition demonstrates, the perspective affords instructive insights into what federal “trial” courts’ business has become. I draw upon statistics when available, but when they are unavailable, I rely upon personal observation, experience, and discussions with colleagues. I welcome data corroborating, contradicting, or refining my conclusions.

CIVIL LAWSUITS

Trials decline markedly; filings do not

The numbers reveal that many federal court users no longer obtain civil trials. The percentage of these lawsuits reaching trial fell from 11.5% in 1962 to 6.1% in 1982 to 1.8% in 2002. The absolute number of civil trials has fallen 60% since the mid-1980s.⁶

fective.” *Id.* at xiv. But the principle is instructive for governmental institutions, like courts, that are not solely regulatory.

² THE ESSENTIAL DRUCKER, *supra* note 1, at 24.

³ *Id.*

⁴ *Id.* at 86, 172; MANAGING THE NON-PROFIT ORGANIZATION, *supra* note 1, at 140 (criticizing the view that a nonprofit’s “work can only be judged by quality – if at all”).

⁵ But see Lande, *How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. OF DISP. RESOL. 213, 224.

⁶ Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 461, 462 (2004).

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The figures demonstrate either a market shift or a weakening of federal courts' competence in delivering dispute resolution by trial, or both. But as trial numbers fell, case filings grew dramatically until 1985, before leveling off. Since then, they have moved modestly higher, peaking at 281,338 in 2004.⁷ The statistics do not reveal why filings persist while trials decrease. I suggest the following.

Often, plaintiffs and their lawyers still want a federal jury verdict or the threat of one, or at least the full disclosure of their opponents' case that federal rules compel. They continue to file federal lawsuits accordingly. But the desire to control costs (among insurers in particular) and a fear of jury unpredictability or break-the-company verdicts provoke greater defense willingness to mediate, arbitrate, or settle rather than bear the risk and extraordinary expense of trial. Fear of public access to confidential or damaging information also plays a part in trial avoidance.⁸ In 1998, Congress actually encouraged diversion of federal cases from trial by ordering courts to establish court-annexed programs for alternatives such as mediation.⁹

Another source of continued federal filings is defendants who, facing difficult lawsuits in state court, remove their cases to federal court. Removals from state court have trended upward over the

⁷ Table S-7 in 1997, 2001, 2005, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS (Wash., D.C.: U.S. Gov't Printing Office, 1998, 2002, 2006, 2007); Table S-4 in 1992 JUDICIAL BUSINESS OF THE UNITED STATES COURTS (Wash., D.C.: U.S. Gov't Printing Office, 1993); Table S-8 in 1988 JUDICIAL BUSINESS OF THE UNITED STATES COURTS (Wash., D.C.: U.S. Gov't Printing Office, 1989).

⁸ Drasco, *Public Access to Information in Civil Litigation vs. Litigant's Demand for Privacy: Is the "Vanishing Trial" an Avoidable Consequence?*, 2006 J. OF DISP. RESOL. 155, 163.

⁹ Some argue that civil trial time unavailability lowered the trial numbers. Undoubtedly some courts, overwhelmed with criminal cases, have little time for civil trials. But nationwide, the number of criminal trials has decreased as well, see p. 462 *infra*, and anecdotally I understand that civil trials have decreased in districts without severe criminal docket pressures. See also Galanter, *The Vanishing Trial*, 10 DISP. RESOL. MAG. 3, 5 (Summer 2004) ("history suggests that with fewer judges and personnel and far less money the federal courts 20 years ago were conducting more than twice as many civil trials, and more criminal trials as well").

past twenty-five years, moving somewhat erratically in the last decade.¹⁰ Defendants without local ties, who fear favoritism toward their in-state opponent in a state court, prefer a federal judicial officer who does not face retention or reelection campaigns. In complicated cases, they may conclude that federal courts can better manage the case and grapple with the issues, because federal courts have greater access to legal research, law clerks, and library materials, more time to deal with complicated issues, and greater experience with such cases. These defendants sometimes believe that they have a better chance in federal court at getting disclosure of their opponents' case (usually federal magistrate judges supervise and enforce discovery) and ultimately judgment without trial, avoiding the feared jury verdict. They may also believe that a federal court's generally wider geographic jury pool improves their bargaining position in mediation and settlement efforts short of trial.

Certain lawsuit categories that seldom or never go to trial can increase or maintain filing numbers because of executive branch policy initiatives – for example, student loan collections or social security disability benefit reviews. The demand to resolve these cases affects the filing numbers and the nature of federal judges' work, but not trial activity. Prisoners too create filing numbers in their quest for federal court relief, but seldom reach trial.

Congress regularly gives federal district courts new business. A recent example: unhappy with state courts' treatment of class actions, Congress enacted the Class Action Fairness Act of 2005 so that additional categories of class actions go to federal rather than state courts. Whenever Congress sees something bothersome enough to pass a law, it generally provides that federal district courts will hear the resulting disputes. Any new federal statutory remedy yields new federal case filings, whether or not trials result.

¹⁰ Statistics show a fairly steady, significant increase until 1996 (c. 41,000), an immediate 1997 drop-off (c. 31,000), plateauing there until a dramatic 2002 increase (c. 55,000), dropping each year thereafter through 2006 (under 30,000). See same tables cited *supra* note 7.

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Increased demands for law exposition

Congressional lawmaking carries a particular implication for federal courts' work. When Congress drafts a statute, it cannot possibly foresee all the disputes it will encompass or engender. As a result, statutory language often turns out ambiguous for particular circumstances. Sometimes, to submerge disagreement so as to get the law enacted, Congress intentionally chooses ambiguous language. Either way, users ask federal courts to expound upon what the new law means and the circumstances to which it applies. America's laws continue to multiply (about 1,900 pages of new statutes per session in the 1950s, 6,750 pages per session in the 1990s;¹¹ about 14,477 new Federal Register pages in 1960, 80,322 in 2002¹²) and, with them, insatiable demand for authoritative interpretation. The demand comes from individual users. It comes also from user segments, such as American business (e.g., trade association lawsuits), consumers, and the public (e.g., environmental groups). Alternative dispute resolution (mediation and arbitration) does not provide this authoritative interpretation; only courts do.

Now you might legitimately observe, "Law interpretation is the business of the Supreme Court and the appellate courts. What makes you think that users and stakeholders ask district courts to play an increased role here?" Four reasons.

First, law interpretation has always been district courts' business, but district judges used to deal with it primarily in jury instructions. Increasingly, litigants ask district courts to make discrete legal rulings before or instead of trial. As a result, "trial" courts now produce a multitude of written decisions that look very much like appellate opinions, expounding upon the law for the parties and the future. A large component of this shift from jury instructions to written opinions results from users – mostly defendants – asking more and more for summary judgment because, they say, the sig-

¹¹ Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation-of-Powers Doctrine*, in Miller & Barnes, eds., *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* 35 (Wash., D.C.: Geo. U. Press, 2004).

¹² Galanter, *supra* note 9, at 6.

nificant facts are undisputed.¹³ This quest for summary judgment usually reflects defendants trying to avoid the risk of a jury verdict and erecting expensive procedural obstacles to a plaintiff's effort to reach verdict or settlement. But sometimes litigants and lawyers simply cannot agree on what a new, complex, or ambiguous law means in particular circumstances. Thus, although the underlying facts may be not all that uncertain, they need an authoritative legal exposition. Whatever the cause, the resulting district court written opinions are more prominent and durable than jury instructions ever were.

Second, Congress has given district courts a quasi-appellate role in disputes such as social security disability and special education benefit entitlement. In those cases, facts are established mostly before an administrative law judge; the district court determines whether legal principles have been applied correctly, a law exposition function.

Third, Congress, Federal Rules drafters, and appellate courts increasingly instruct district courts to give detailed explanations for their decisions, explanations generally provided most effectively in writing. Congress requires that written decisions be available on the Web. Computerized legal research makes them easy for lawyers to find and cite as precedent. Subject-matter blogs, legal or nonlegal, find and discuss them. Thus, federal district courts' role in law exposition grows ever more visible.

Fourth, litigants generally cannot reach an appellate court or the Supreme Court except through a district court. If litigants obtain a clear statement of applicable law from the district court, they may decide to resolve their case without an appeal's added expense and delay (the Supreme Court has a small, discretionary docket; immigration and sentencing appeals swamp appellate courts). So the dis-

¹³Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. OF EMPIRICAL LEGAL STUD. 591 (2004). According to one commentator, "U.S. discovery renders law usually cheaper than fact investigation and discovery." Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. OF EMPIRICAL LEGAL STUD. 943, 951 (2004).

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district court's written opinion may be the final decision. At the very least, its written analysis informs any appeal and, through publication, perhaps decisions in other cases.

An expectation that courts will manage dispute resolution processes

Federal judicial officers increasingly are asked to step outside their traditionally passive umpire role. Scores of articles have recognized the aggressive case management responsibilities that Congress and Federal Rules drafters assigned, and district courts assumed, in the twentieth century's closing decades. These changes inserted federal judicial officers into what used to be exclusively lawyers' decisions on how to prepare cases. Starting with scheduling orders establishing deadlines for every important event, continuing through discovery management and final pretrial conferences, encouraging settlement or alternative resolution, judges and magistrate judges now play central roles in determining and limiting how lawsuits progress. (The discovery process generates a particular set of user demands, lawyers asking magistrate judges to protect clients from expensive, burdensome discovery – especially electronically stored data or messages – or compelling opponents to produce what they hope will be helpful information.) Court documents now are filed online over the internet. Federal judges and their administrative staff (“case managers”) track their caseload's progress electronically and intervene as needed to keep each case moving. Law professors debate the advisability of this active management, but Congress, the parties, and most lawyers seem to want it.

Consider the additional mandate to district judges in class actions: determining whether there is a structure and process by which hundreds or millions of people, sometimes nationwide or beyond, can obtain reimbursement for some injury-producing conduct. These cases often involve complex scientific or economic issues, and they carry tremendous administrative responsibilities. Congress, plaintiffs' lawyers, and defendants ask federal district judges to perform that task. Almost all class action disputes end in

dismissal or settlement without trial. So it is the judge's role first in helping structure the dispute and then in declaring applicable law that is critical. Indeed, in the class action context, the judge is asked to assume fiduciary responsibility (even farther from an umpire) for the aggrieved class, in determining whether a proposed settlement can end the lawsuit. If money is left over because some class members do not claim their shares, the judge may be called upon to act as a kind of grants manager, determining what charities receive the excess and ensuring that they use the funds properly.

A demand to evaluate factual assertions

Users increasingly ask district courts to engage in what I call “fact sorting.” Even if the law is not uncertain, there is a perennial dispute over whether a “genuine issue of material fact” exists, the standard for determining whether the judge can order judgment without trial. Lawyers regularly joust over who can prove what, and whether their opponents' version of the facts, if accurate, justifies their legal position (in a harassment case, for example, whether particular comments, if uttered, are enough for liability). In cases involving experts' opinions, they debate whether the underlying science or knowledge is valid (or “junk science”) and whether the expert has applied it appropriately. They demand that the judicial officer decide who has complied with or broken the procedural rules in presenting factual assertions or denials, and whether the opposition ultimately has admissible evidence, expert or otherwise, to back up its claimed facts. Typically, they present all this information electronically, through the courts' electronic case filing system. The district judge or magistrate judge sorts these electronically-provided facts, determines which are undisputed and which facts matter, thus discarding other facts, whether the outcome is judgment or trial. Disputes over experts require fact-finding on the adequacy of the expert's credentials, the status of the science or technical knowledge, how tests were conducted, what other experts do, and whether the expert's opinion fits the underlying facts, all affecting admissibility of evidence on important issues like causation. Sometimes, lawyers present live testimony on these expert issues in open

court. The complexity of many federal cases makes this process both time-consuming and hugely expensive.

Implications

These are my perceptions of what users and stakeholders – customers – currently demand in civil cases. If I am correct, how shall we describe the value that federal district courts provide, absent trial-number-counting? Remember Drucker: “What is value to the customer is always something quite different from what is value or quality to the supplier. This applies as much to a business as to a university or to a hospital.”¹⁴

Or to a court. Many district judges think that the primary value they provide is the availability of a well-run trial in a public courtroom, following on the heels of effective case management and open discovery. In that context, they may consider their legal rulings as mostly incidental to the underlying goal of successfully shaping a difficult case for a jury’s comprehension. Meanwhile, what have users and stakeholders been seeking? Plaintiffs who file federal lawsuits still seek the *threat* of a jury verdict, the leverage of federal litigation’s cost, and federal discovery. Defendants who remove their lawsuits from state courts still want the federal courts’ greater resources, the larger jury pool, perhaps better discovery, a realistic threat of summary judgment, and judicial officers who do not confront reelection. What has changed, I suggest, is that users increasingly do not expect or even want a trial. Congress likewise doesn’t particularly want trials; it wants judges to manage the caseload (prisoner grievances, student loan collections, and class actions, for starters), and it depends upon judges to clarify legislative ambiguities. Users’ and stakeholders’ primary demands have become authoritative law exposition, assistance in structuring disputes, organizing and managing litigation, controlling discovery, and fact sorting. Once litigants satisfy these demands, they resolve any remaining disputes. It is difficult to say even that they settle the disputes in

¹⁴ THE ESSENTIAL DRUCKER, *supra* note 1, at 86.

light of likely trial outcomes, since they have fewer and fewer such outcomes to assess, and the likelihood of trial has become so small.

So how might reality television portray a federal “trial” judge in civil lawsuit garb? In an office setting without the robe, using a computer and court administrative staff to monitor the entire caseload and individual case progress; conferring with lawyers (often by telephone or videoconference) in individual cases to set dates or limits; in that same office at a computer, poring over a particular lawsuit’s “facts,” submitted electronically as affidavits, documents, depositions, and interrogatory answers; structuring and organizing those facts, rejecting some or many of them; finally, researching the law (at the computer, not a library) and writing (at the computer) explanations of the law for parties and lawyers in light of the sorted facts. For federal civil cases, the black-robed figure up on the bench, presiding publicly over trials and instructing juries, has become an endangered species, replaced by a person in business attire at an office desk surrounded by electronic assistants.

CRIMINAL PROSECUTIONS

Trials decline precipitously; filings do not

For the criminal business of federal courts, the data reveal unequivocally that users mostly avoid trials. There still are showcase trials, recently Martha Stewart, Kenneth Lay, and Jeffrey Skill-ing, important public morality plays. But a severely declining frac-tion of federal criminal cases reaches trial (15% in 1962, 5% in 2002, the absolute number of trials falling 30%).¹⁵ At the same time, the number of federal prosecutions holds steady or trends upward. From 2001 to 2004, criminal case filings grew 13%¹⁶ (al-though in the past two years they have declined¹⁷).

¹⁵ Galanter, *supra* note 6, at 492-93.

¹⁶ 2004 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 21 (Wash., D.C.: U.S. Gov’t Printing Office, 2005).

¹⁷ 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 26 (Wash., D.C.: U.S. Gov’t Printing Office, 2007).

The demand to supervise guilty plea proceedings

What do users and stakeholders seek instead of criminal trials? Prosecutors want guilty plea adjudications; they are cheaper and more certain. Defendants would like the chance of a jury acquittal. But they do not want to face a substantially higher sentence if the jury convicts. Under federal Sentencing Guidelines, a trial virtually guarantees a convicted defendant significantly more prison time. Therefore, most defendants now join prosecutors in wanting no trial if they face a serious risk of conviction, because they can reduce their sentences by pleading guilty. Presumably, the American public wants a judicial process that keeps prosecutors and defense lawyers honest, where the innocent are set free, the guilty are punished, and the process acts as a deterrent to criminal conduct. To that end, the public depends upon federal judges' careful supervision at guilty plea proceedings, ensuring that pleas are voluntary, informed, and factually supported – together with the alternative availability of a jury trial, where the Constitution requires procedural protections and proof beyond a reasonable doubt – to maintain the integrity of the process and reduce the likelihood that innocent defendants will plead guilty.

Changed sentencing role

Federal judges' sentencing role has changed drastically. Perceiving disparities in nationwide sentencing practices, Congress ordered creation of Sentencing Guidelines in the Sentencing Reform Act of 1984 to restrict judges' sentencing discretion. In 2005, the Supreme Court declared the Guidelines "advisory,"¹⁸ but left standing the requirement that judges perform the Guidelines analysis as part of the sentencing determination. The Guidelines remain highly influential, and judges who sentence outside them must provide written explanations for appellate review.

The Guidelines increased dramatically the time that federal judges devote to sentencing. Presentence reports are detailed and

¹⁸ United States v. Booker, 543 U.S. 220 (2005).

lengthy. Probation Officers propose factual findings (e.g., the defendant's role as leader or follower, quantity of drugs/dollars involved, previous criminal convictions). If there is a dispute, the judge must find the facts, perhaps after a trial-type hearing. Those findings produce numerical scores determining, from a published grid, the prison time and fine range. The Guidelines are a complex Code, with commentary, drafting history, and thousands of appellate opinions interpreting them. They change almost annually because of Sentencing Commission or congressional action. More and more judicial time is devoted to studying, then expounding upon, this complicated law's application to particular factual circumstances.

Federal prosecutors decide which defendants to prosecute, which charges to press, which defendants to leave solely to state prosecutors, and whether to request a sentence below the Guideline range. Those under-the-radar decisions, subject to no judicial review and no public examination, hugely affect sentence length. Offenders and their lawyers try to persuade a judge that they are *different* from other offenders and deserve more mercy at sentencing. If they strike a favorable deal with the prosecutor, they try to prevent the probation officer or judge from undoing their bargain.

Sentencing demonstrates separation of powers in microcosm. Congress legislates the penalty range, sets some of the criteria and requires use of Guidelines. The executive branch, through the prosecutor, determines whom to charge and how, thereby creating sentencing limits. But in the end, the judge imposes the sentence. In an environment of wide prosecutorial discretion, that constitutional judicial role gains new significance: not just determining the sentence within limits set by Congress and prosecutors and with appropriate attention to the Guidelines, but also holding prosecutors to statutory and constitutional values, calling public attention to failures or unfairness in the prosecutorial process, in appropriate cases refusing to endorse them,¹⁹ and ensuring that defense lawyers

¹⁹The Guidelines explicitly recognize this underlying judicial responsibility:

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have provided adequate representation. Federal judges have lost free rein in sentencing, but the American public as stakeholder depends upon them to articulate publicly the principles that control a sentence, to monitor and expose prosecutorial failure to fulfill congressional goals such as proportionality and equality, and to ensure that defense lawyers fulfill their responsibilities.

The new demand to supervise released federal offenders

Federal offenders must serve the full prison time specified by the sentencing judge,²⁰ then a period of supervised release *on top of* that prison sentence. Users and stakeholders ask district judges to be responsible for this supervision through the courts' Probation Officers. Congress created that statutory requirement about twenty years ago, but its full consequences have become apparent only recently, as cumulatively large numbers of federal prisoners sentenced under it have finished their sentences and emerged from prison. Probation Officers work hard at helping these offenders transition to a law-abiding life. Of course they often do not succeed; over time there will be spectacular failures. But the threat of renewed imprisonment by a federal judge (perhaps along with decreasing criminal behavior as offenders age) seems to help deter some of the worst misbehavior. Standards for sending the person back to prison

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- Once a prosecutor files a motion to reward an offender's cooperation, only the judge can determine whether and how far to depart below the Guideline range. Guideline 5K1.1.
 - A prosecutor may not withhold information from the judge even if the prosecutor has agreed not to use it against a defendant. Guideline 1B1.8, Application Note 1.
 - Judges are not to accept a plea agreement dismissing or agreeing not to pursue other charges unless the judge determines "for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." Guideline 6B1.2 (Policy Statement) and Commentary.

²⁰ The Bureau of Prisons can reduce sentences modestly for prisoners who behave. 18 U.S.C. § 3624(b).

are much looser: no jury; no reasonable doubt standard; very few restrictions on evidence. Indeed, the conventional image of umpire in an adversarial system is an uncomfortable fit for judges here. A court employee, the Probation Officer, determines initially whether there has been a violation justifying a further penalty and starts the charging process. Although a prosecutor and defense lawyer then present the matter in open court for a judge's resolution, the Probation Officer's role as a Court employee/representative, initiator of the "prosecution," and consultant to the judge on the appropriate penalty challenges traditional assumptions about the adversary process. Federal judges may find themselves more like truant officers (what to do about failures to report to probation, substance abuse, mental health issues), or parents (hectoring, recognizing accomplishments, threatening punishment) with substantial additional paperwork (modifying conditions, issuing warrants, reading new reports), but it appears to be what users and stakeholders want.

Implications

Our new image of a federal "trial" judge for criminal cases ("Law and Order" and "Shark" take notice) still should be a black-robed person regularly up on the bench in a public courtroom, but far less frequently presiding at trials, and far more often taking guilty pleas, sentencing, and cajoling or disciplining offenders who misbehave after prison. There is still abundant public courtroom time because, as the number of trials has declined, sentencing proceedings have lengthened, and supervised release revocation hearings have been added to the judge's courtroom duties.

Federal judges must reconceptualize their sentencing role. They will not recapture their lost discretion. But their newer assignment, explaining sentencing law and resolving sentence-determining factual disputes, is centrally important to a rational punishment regime. Stakeholders expect federal judges to play a vital part in monitoring other actors (prosecutors, law enforcement, defense lawyers) and in safeguarding, from guilty pleas to sentences, the integrity of processes for sending defendants to prison without trial. Independent presentence reports by the court's Probation Officers

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are an important check in deterring sentencing fact manipulation by prosecutors and defendants. The judge at the guilty plea and sentencing hearing, and the Probation Officer at the presentence interview, are the only neutral decisionmakers in the process and the public's only independent assurance of fairness. Judges should expose prosecutors' actual role in determining sentences (and any unfairness) by highlighting unprosecuted charges, defendants left to state court, other defendants' sentences, and areas where no sentencing evidence has been offered. They should challenge defense lawyers' inadequacies. No private alternative can fulfill this judicial monitoring role, at least none acceptable in a democracy governed by the rule of law. District judges must embrace this altered, critical, responsibility.

CONCLUSION

So, what is the federal district courts' "business" in the twenty-first century? "Equal Justice Under Law,"²¹ a ringing phrase, is too broad a mission statement. Drucker said that a hospital's mission is not to provide health care, as hospital administrators profess, but narrower, to take care of illness.²² Likewise, the district courts' mission never has been the general maintenance of equal justice. Federal judges care intensely about equal justice, but that is not the courts' mission.

Instead, it is and always has been their mission to interpret and clarify laws, adjudicate and protect rights, maintain fair processes, and punish. But the method of carrying out that mission has changed. Federal judges accomplish these goals less through trials, sentencing discretion is drastically curtailed, and the traditional role of passive umpire has shifted in obvious and subtle ways.

Law professors and judges should stop bemoaning disappearing trials. Trials have gone the way of landline telephones – useful

²¹ THE ADMINISTRATION OF JUSTICE: A STRATEGIC BUSINESS PLAN FOR THE FEDERAL JUDICIARY 4 (Wash., D.C.: Admin. Office of the U.S. Cts., 1996) ("Equal Justice Under Law" is the "fundamental mission of the federal courts").

²² MANAGING THE NON-PROFIT ORGANIZATION, *supra* note 1, at 4.

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backups, not the instruments primarily relied upon, if ever they were.²³ Dramatists enjoy trials. District judges enjoy trials. Some lawyers enjoy trials. Except as bystanders, ordinary people and businesses *don't* enjoy trials, because of the unacceptable risk and expense.

In the twenty-first century, the federal district courts' primary roles in civil cases have become law exposition, fact sorting, and case management – office tasks – not umpiring trials. In criminal cases, the judges' work remains courtroom-centered but, instead of trials, it has become law elaboration and fact finding at sentencing, supervising federal offenders after prison, and safeguarding the integrity of a criminal process that sends defendants to prison without trial. In 2007, that is the federal district courts' business. Trials as we have known them, and unfettered sentencing discretion, are not coming back.



²³Friedman, *The Day Before Trials Vanished*, 1 J. OF EMPIRICAL LEGAL STUD. 689 (2004).

