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The Future of Oral Argument

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The Future of Oral Argument

Jay Tidmarsh*

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INTRODUCTION

The civil-justice literature is replete with discussions of two phenomena: case management and the vanishing trial.¹ These two phenomena are not unrelated. One commonly stated goal of case management is to find ways, other than trial, to resolve civil disputes that find their way into court.² Some observers find the movements toward case management and away from trial to be salutary;³ others find them disquieting.⁴ Regardless of the merits of this debate, the delivery of civil

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1. For one thoughtful examination of the case-management movement, see David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989). On the decline of civil trials, see generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

2. See FED. R. CIV. P. 16(a)(5) (stating that one goal of case-management conferences is “facilitating settlement”), FED. R. CIV. P. 16(c)(2)(I) (listing “settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule” as subjects for a case-management conference); cf. 28 U.S.C. § 651 (2012) (requiring each federal district court to implement a program of alternate dispute resolution).

3. For an article that sweeps broadly over the recent history of American civil procedure and lauds changes such as increased discovery, more case management, and fewer trials, see generally John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

4. For a classic critique of case management, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). For one critique of the sharp reduction in American civil trials, see generally Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399 (2011). See generally Owen M. Fiss,

justice is undeniably evolving.

This evolution affects and changes many of the traditional attributes of American-style civil justice. This Essay examines one of these attributes: oral argument. Although this Essay occasionally mentions oral argument at the appellate level, its specific focus is oral argument in the court of first instance—the trial court. To the extent that “form follows function,” the combination of case management and the vanishing trial makes one of the law’s oldest forms—oral argument before the trial judge—largely unnecessary.

I. FRAMING THE DEBATE OVER ORAL ARGUMENT’S FUTURE

Oral argument is probably as old as law itself. The two women contending to be an infant’s birth mother orally presented their claims to Solomon.⁵ Cicero famously (albeit unsuccessfully) defended Milo against accusations of murder before a hand-picked panel of Roman judges.⁶ But the tradition of orality has particular salience in Anglo-American law. In the early days of the common law, courtroom advocates were called “prolocutors” or “*narratores*,” whose “job was to recite the count or *narratio* of the plaintiff, and to engage in any argument which arose.”⁷ It is no accident that one of the fundamental rights contained in the Due Process Clause of the United States Constitution is “the opportunity to be heard,”⁸ not the opportunity to be read.⁹

Orality makes sense—and indeed is even necessary—in a world in which literacy levels are low¹⁰ and the written word is difficult and

Against Settlement, 93 YALE L.J. 1073 (1984) (criticizing the modern trend of courts to encourage civil litigants to settle).

5. 1 Kings 3:16–28.

6. *The Speech on Behalf of Titus Annius Milo*, in CICERO, PRO MILONE, IN PISONEM, PRO SCAURO, PRO FONTEIO, PRO RABIRIO POSTUMO, PRO MARCELLO, PRO LIGARIO, PRO REGE DEIOTARO 6 (N. H. Watts transl., Harvard Univ. Press rev. ed. 1953).

7. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 135 (2d ed. 1979). *See also* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1171–78 (2004) (describing the history of the oral tradition of the English common law).

8. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”).

9. Parties were not required to file written briefs in the United States Supreme Court and the federal courts of appeals until well into the nineteenth century. *See* Stephen L. Wasby et al., *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q. J. SPEECH 410, 412 (1976) (examining the historical relationship between written briefs and oral arguments); *see also* Ehrenberg, *supra* note 7, at 1182–83 (discussing the transition over the course of nineteenth-century appellate practice from orality to writing; further noting that “[t]he history of appellate practice in twentieth-century America shows a similar (although less dramatic) movement toward reliance on written briefs and curtailment of oral argument”).

10. *See* Ehrenberg, *supra* note 7, at 1186 (noting that “[a]ncient literate cultures almost

expensive to produce. While developing a written argument today can be expensive,¹¹ it is not technologically difficult; and Americans are a literate people. So, tradition aside, is there a reason for the survival of oral argument?

In my judgment, the answer requires a comparison of benefits and costs. Written argument possesses certain communicative advantages: a higher level of creative and critical thought, a better ability to ferret out ambiguity and contradiction, enhanced comprehension, and distancing from overly emotional appeals to the facts.¹² Oral argument also holds certain advantages: dynamism, flexibility, and responsiveness in presenting the argument; efficiency; attention to non-rational (and often emotional) aspects of a decision; a greater sense of transparency, litigant participation, and judicial engagement; and, in multi-member courts, channeling discussion for the benefit of other judges on the bench.¹³ On the cost side of scale, both written and oral arguments can be costly to make, although the process of reducing an argument to writing likely makes written arguments more expensive to produce (though more efficient for the judge to digest).

Of course, the choice between written and oral argument is not an “either-or” situation. A court could require oral argument for some

invariably had a legal system in which writing played a dominant role,” but “we typically do not find lawyers in oral cultures or in societies with minimal literacy”); *see also* Langbein, *supra* note 3, at 534 (“Medieval English jurors were commonly illiterate.”).

11. *See* Alfred S. Konefsky & Barry Sullivan, *In This, the Winter of Our Discontent: Legal Practice, Legal Education, and the Culture of Distrust*, 62 *BUFF. L. REV.* 659, 713 (2014) (noting that a law firm’s mentoring of young lawyers in brief writing may amount to a combined cost of “more than \$1000 an hour”).

12. *See* Ehrenberg, *supra* note 7, at 1186–93 (discussing the various advantages of written arguments).

13. *See* David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal*, 13 *J. APP. PRAC. & PROCESS* 119, 137–41 (2012) (contending that, in addition to enhancing the quality of judicial decision making, “[o]ral argument provides public visibility and institutional legitimacy”); Ehrenberg, *supra* note 7, at 1190, 1193, 1195 (discussing how oral argument fosters the values of dynamism, responsiveness, dialectic, efficiency, and accountability); William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 *MERCER L. REV.* 1015, 1022 (1984) (describing “[t]he sense of immediacy and involvement” that oral argument provides for judges); Wasby et al., *supra* note 9, at 417 (noting that Justices sometimes “debate each other either directly or indirectly, using what is ostensibly a question to counsel to get a point across to” other Justices).

matters¹⁴ and written argument for others.¹⁵ A court could also have its cake and eat it too: in some or even all cases, it could hear oral argument after submission of the briefs. Many American courts engage in this “both-and” practice, although the frequency with which they do so varies from court to court.¹⁶ In such a belt-and-suspenders world, the cost-benefit question is not whether written or oral argument is better *vel non*. It is whether the gains (if any) in accuracy, transparency, or participation from a system of both written and oral presentation outweigh the

14. For example, evidentiary rulings and other matters raised during trial are often handled orally. See *Retractable Techs., Inc. v. Becton, Dickinson and Co.*, 653 F.3d 1296, 1308 (Fed. Cir. 2011) (“[O]ral motions that succinctly state the basis for [a Rule 50 motion for judgment as a matter of law] are sufficient under Rule 50 to preserve the issue.”). There have been occasional proposals to eliminate briefs in favor of oral argument. See also A.B.A. ACTION COMM’N TO REDUCE CT. COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY: FINAL REPORT* 26 (1984) (“The basic problem is redundancy—in many cases briefs and oral arguments are not both necessary. This redundancy can be eliminated, or at least diminished, by curtailing briefs, while preserving oral argument.”).

15. See FED. R. CIV. P. 78(b) (“By rule or order, the court may provide for submitting and determining motions on briefs, without oral hearings.”); *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 477 (4th Cir.), *cert. denied sub nom. Foster v. Wynne*, 136 S. Ct. 693 (2015), *Marsh v. Wynne*, 136 S. Ct. 693 (2015) (“[I]t is within the sound discretion of the district court to dispose of a motion without a hearing.”).

16. Except in per curiam opinions rendered on the briefs submitted as part of the certiorari process, see SUP. CT. R. 16.1 (permitting the Court to dispose of a petition for a writ of certiorari by “a summary disposition on the merits”). The United States Supreme Court routinely hears oral argument before issuing an opinion. See SUP. CT. R. 27–28; see generally Stephen L. Wasby et al., *The Supreme Court’s Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. ILL. U. L. REV. 1 (1992) (analyzing per curiam dispositions issued both before and after oral argument). In the courts of appeals, however, only about one-fifth of the cases decided on their merits are both briefed and argued. See *Table B-10—U.S. Courts of Appeals Judicial Business (September 30, 2015)*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/statistics/table/b-10/judicial-business/2015/09/30> (last visited Dec. 29, 2016) (stating that, during the twelve-month period ending September 30, 2015, 20.5 percent of merit decisions in the federal courts of appeals occurred after oral argument, while 79.5 percent occurred after submission of the briefs; data do not include cases from the Court of Appeals for the Federal Circuit); *cf.* FED. R. APP. P. 34(a)(2) (requiring that oral argument occur “in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary” due to frivolity, a prior authoritative decision, or “the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument”). This percentage has been in decline. In 1997, the first year in which this information was tabulated, 40.1 percent of federal appellate decisions (aside from those decided in the Court of Appeals for the Federal Circuit, whose data were unreported) were resolved on their merits after oral argument. See *Table S-1—U.S. Courts of Appeals Judicial Business (September 30, 1997)*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/statistics/table/b-10/judicial-business/1997/09/30> (last visited Oct. 15 2016). There is no comparable statistical evidence about the prevalence of oral argument in the federal district courts, although anecdotally it seems that oral argument in trial courts is an increasingly infrequent occurrence. See Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 555 (2012) (“Lawyers frequently bemoan the lack of oral argument in district courts.”).

additional costs of employing both methods of argument.¹⁷

II. TOWARD A COST-BENEFIT APPROACH

Two basic principles can help in reasoning toward an answer about the marginal benefit of oral argument. First, it is important to attend to both sides of the cost-benefit equation. Most of the literature on the decline of oral argument in the civil-justice system bemoans the loss even as it acknowledges the necessity of less orality in a world of overcrowded dockets.¹⁸ Proponents of oral argument—sometimes armed with quotes from judges who state that oral argument changed their minds in particular cases—contend that oral argument sharpens the ultimate legal analysis; in other words, oral argument produces better law.¹⁹ Although

17. The principal additional cost in a hybrid system is the time of the lawyers and judge preparing for and participating in the oral of argument. Another cost is the judicial time expended to determine whether, under relevant criteria, a case merits oral argument. This latter cost is not inconsequential. See generally JOE CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: A DESCRIPTION OF PROCEDURES IN THE COURTS OF APPEALS (1985) (describing practices employed in courts of appeals to select the cases that receive oral argument); see also Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 333–38 (2011) (further describing screening practices in several courts of appeals). For present purposes, however, I ignore it. A small window into striking a balance between benefits and costs in a hybrid system is the Supreme Court’s tinkering with the length of oral argument over the years. Originally unlimited in length, the Court moved over the course of the nineteenth century to limit oral argument to two hours per lawyer, then to two hours per side; and then in the twentieth century to ninety minutes per side, then to sixty minutes, and finally to the present thirty minutes. See Ehrenberg, *supra* note 7, at 1181–82, 1183 n.147 (discussing that the time limitations for oral arguments have continued to decrease over the years); cf. Rehnquist, *supra* note 13, at 1020 (contrasting the limited time that an American appellate judge listens to oral argument with the full-day hearing schedule of his or her English counterpart). This history suggests that, over time, the Supreme Court has perceived fewer benefits of oral argument in relation to its costs.

18. See Cleveland & Wisotsky, *supra* note 13, at 121 (“The result is a more efficient but more paper-driven bureaucratic process of appellate decisionmaking. . . . The values implicit in appellate review are weakened or diluted.”). For similar observations, see J. Thomas Greene, *Oral Argument in the District Courts*, 26 LITIG. 3, 3 (Spring 2000); Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 3–4 (1986); Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 732–35 (1983); Rehnquist, *supra* note 13, at 1021–23. There is scant literature suggesting the opposite: that the value of oral argument is overstated. But see Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk’s View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 130 (2007) (“Oral argument can be critical, but only in a very small percentage of cases. This suggests both that oral argument should be granted in fewer cases, and that the important cases in which oral argument is granted should receive additional time.”); Martineau, *supra*, at 4 & n.14, 22 & n.131 (collecting authorities).

19. See, e.g., Cleveland & Wisotsky, *supra* note 13, at 121 (noting a “disturbing appearance of correlation” between a decline in appellate oral arguments and reversal rates); Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 264 (2009) (“The argument gives

it is difficult to define and measure “better law”—an oral argument could as easily persuade the judge to adopt “worse” rather than “better” law—I am willing to assume that oral argument improves the quality of judicial opinions and, in this sense, makes “better law.”

But the other side of the equation cannot be ignored. Every additional minute spent in hearing argument in one case is a minute spent not working on another case. The extra time spent on one case obviously delays justice in the other cases on the judge’s docket. Docket delay has other costs as well. Most notably, it discourages people with potentially meritorious claims from filing suit²⁰—at a time when inadequate access to our civil-justice system is already a critical problem.²¹ Moreover, if one party is poorly funded, the expense of both written and oral argument plays into the hands of the better-funded opponent, who can wage a war of attrition. If both parties are well-funded, awarding oral argument in only some cases creates the perception that those with the money to pay their lawyers can obtain “Cadillac justice,” while everyone else gets “Chevy justice.” Finally, even the supposed benefit of oral argument—that it allows a judge to understand the facts of a given case better and to apply more tailored law—is a potential cost if the tailoring process skews the law in a direction that works to the disadvantage of large groups of potential litigants unable to participate in the argument.²²

a judge the opportunity to try ideas out on counsel, to clarify the judge’s own thinking, or to put direct questions about issues that may puzzle the judge or that the lawyer did not cover in his brief.”); Wasby et al., *supra* note 9, at 410–13 (describing the positive effects of oral argument on various Supreme Court Justices and cases). See also CECIL & STIENSTRA, *supra* note 17, at 136 (quoting one judge’s observations that “[m]any lawyers can’t write,” that “their briefs are too unfocused[,]” and that “[a]rgument gives you a chance to focus on the issues”).

20. See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 539 (1989) (developing a “congestion equilibrium” model, in which reduced congestion and delay result in an increased volume of litigation, which creates more congestion and delay until the length of time to disposition returns to an equilibrium).

21. As Judith Resnik has argued:

If persons . . . have no way to voice their claims—be they right or wrong—in court, if the ordinary civil litigant is priced out or among the millions of pro se complainants, then courts become the domain of the criminal defendant; of the well-to-do litigants who opt in rather than buying private dispute resolution services; of the few constitutional claimants able . . . to attract issue-oriented lawyers; and of the government That reduced spectrum of users becomes a problem for the democratic legitimacy of courts

. . . .

Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 170 (2011).

22. Cf. William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1650 (1997) (arguing that procedural rules allowing individuals within groups to litigate separately “entitle any individual to litigate cases with groupwide effects regardless of the rest of the group’s desires” and “rewards

Of course, it is hard to quantify these costs, just as it is hard to quantify the benefit of “better law.” Thus, it is difficult—indeed nearly impossible—to arrive at any firm conclusion about whether oral argument is, either in an individual case or in a global sense, worth it. This difficulty in weighing benefits against costs might lead some to throw up their hands in resignation and to fall back on considerations such as tradition or personal experience to evaluate the importance of oral argument.²³

The same difficulty might lead others to adopt default rules or guidelines that help to sort the cases worthy of oral argument from those that do not merit it. For instance, Rule 34 of the Federal Rules of Appellate Procedure lists frivolity, prior authoritative decision, and adequate presentation of the issues in the brief as the three grounds for denying oral argument.²⁴ One former district court judge believed that oral argument should be provided in cases that demonstrate “good cause,” although his elaboration of this standard sounds a great deal like Rule 34’s factors.²⁵ Then-Justice Rehnquist suggested that the nature of the court was also a relevant consideration. He argued that oral argument in the United States Supreme Court—which largely controls its own docket and therefore tends to take “genuinely doubtful” cases—was especially useful, although it was less so in the appellate courts, which handle larger dockets and see more frivolous appeals.²⁶

Although adoption of default rules for oral argument is sensible, the rules should better reflect the complexity of the cost-benefit analysis than present guidelines do. For example, Rule 34’s three criteria for withholding oral argument are all trained on whether oral argument will produce better law: oral argument is unlikely to do so when the issue is frivolous, has been authoritatively decided, or has been adequately presented in writing. As relevant as these considerations are, the evident critique of Rule 34 is its utter silence on the criterion that is the elephant in the room: the cost of oral argument, both to the court and to the parties.

those within the group who have access to attorneys and thus to courts,” as a result of which “group disputes are exacerbated and constituencies are disharmonized”) (emphasis omitted).

23. For one analysis of oral argument driven largely by the anecdotes of the author and others, see generally Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451 (2002).

24. FED. R. APP. P. 34(a)(2)(A)–(C).

25. Greene, *supra* note 18, at 3 (“In our court, oral argument may be ordered by the court or requested by a party who can demonstrate good cause.”); *id.* at 4 (“[O]ral argument should always be requested with respect to motions of substance Unless the case is obviously frivolous or the briefs are sufficiently comprehensive for the court to conclude that oral argument would not be of significant assistance, oral argument ordinarily will be granted—or at least it should be.”).

26. Rehnquist, *supra* note 13, at 1019–21, 1027–28.

As for judicial cost, it is inconceivable that, in selecting cases for oral argument, the screening judges, clerks, and staff attorneys ignore the limited judicial resources available to prepare for and sit at oral argument. Yet this cost is not listed in Rule 34 as a relevant factor.

Nor is the cost to the parties. This omission is especially curious. The strongest trend in American civil procedure over the past thirty years has been the effort to bring litigation expense into rough proportion with the value of a lawsuit.²⁷ Most recently, the 2015 amendments to the Rule 26(b)(1) of the Federal Rules of Civil Procedure stressed the need to limit discovery according to the proportionality principle, thus highlighting the courts' responsibility to ensure that litigation is cost effective.²⁸ Although oral argument is not within the ambit of Rule 26, the concern is the same. The fees and travel expenses for a single oral argument might cost the parties thousands of dollars. Balanced against that cost is the possibility that oral argument will create a more accurate ruling on the motion at hand, which in turn might generate a more accurate outcome in the case. The cost is clear; but the benefit is uncertain. Few arguments can be justified under this balancing test. Indeed, taken as a whole, a flat ban on oral arguments might well be a less expensive course than undertaking the effort to cull out the few cases in which oral argument would be cost-effective.

Assuming that oral argument survives this analysis, other factors should also bear on a proper set of default rules, including the importance of the litigation, in terms of the amount at stake and the number of parties affected by the ruling;²⁹ the importance of the particular motion to the success or failure of that litigation; and party preference. Institutional concerns such as participation, transparency, and accountability are

27. See Jay Tidmarsh, *The Litigation Budget*, 68 VAND. L. REV. 855, 858 (2015) (“The central theme in the past thirty years of American procedural reform—with its rise of case management and its emphasis on proportional discovery—has been the effort to keep litigation costs under control.”); *id.* at 883–85 (noting the same trend in the United Kingdom).

28. The proportionality principle has existed in the Federal Rules of Civil Procedure since 1983; the 2015 amendments were therefore not ground breaking, but rather were intended to highlight the judicial obligation to ensure cost-effective discovery. See *id.* at 874–75 (illustrating how the proportionality principle is meant for judges to ensure cost-effective litigation); see also JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2015), <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> (“Rule 26(b)(1) crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality . . .”).

29. This factor may argue for more oral argument in appellate courts and the Supreme Court, at least in our system of hierarchical common-law development. *But see* Rehnquist, *supra* note 13, at 1021 (noting that the “different orientation” of the English appellate court, which is “not oriented around the production of written opinions which will refine or develop the substantive law” but “a tribunal devoted to the correction of error in the case before it,” can partially explain the greater emphasis placed on oral argument in England).

relevant, although they might best work in the background to shape the presumption that there should (or should not) be oral argument under certain conditions.

III. DEVELOPING DEFAULT RULES

Let me highlight two more, albeit less intuitive, factors that should also bear on oral argument, and in the process develop a second general principle concerning the establishment of default rules for holding oral argument. The first factor is the likelihood of trial, and the second is the judge's prior familiarity with the record. The broad principle, which circles back to the beginning of this Essay, is that form follows (or at least should follow) function. For the most part, the debates about the merits of oral argument have not been sensitive to developments in the procedural system within which judicial decision making is occurring. But the modern procedural context cannot be ignored.

Today we occupy a civil-justice world in which case management is the norm and trial as a dispute-resolution mechanism has all but disappeared.³⁰ The relationship between this reality and the future of oral argument might not be immediately apparent. But this procedural context reflects a world in which traditional forms of dispute resolution are breaking down. No longer is trial before the "umpireal judge"³¹ of the classic adversarial model the norm. To begin, trial is not the norm. Nor is the pretrial adjudication of disputes on their merits. Most cases settle;³²

30. See FED. R. CIV. P. 16 (b)–(c) (requiring federal district courts to use certain case-management practices and encouraging the use of other practices); see also *Table C-4—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (June 30, 2016)*, ADMIN. OFF. U.S. CTS., <http://www.uscourts.gov/statistics/table/c-4/statistical-tables-federal-judiciary/2016/06/30> (last visited Jan. 2, 2017) (indicating that, from July 2015 through June 2016, only 1.1 percent of federal civil cases went to trial, and that, of that number, approximately seven-tenths were jury trials).

31. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035–41 (1975) (discussing the roles of advocates and judges in an adversarial system).

32. Determining the exact settlement rate is a tricky business. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 281 (2004) (citing studies showing that over 96 percent of civil cases were settled without trial); see also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 136 (2002) (estimating a settlement rate to be at least 66.7 percent in federal civil cases terminated in 2000); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 132 (2009) (finding an aggregate settlement rate of 66.9 percent of civil cases in two federal district courts). The studies cited by Professor Shavell seem to overstate the incidence of settlement, but a two-thirds settlement rate appears roughly in line with other data that describes the likelihood of cases being determined on their merits through the two principal pretrial procedural vehicles for doing so: Rule 12 motions to dismiss and Rule 56 motions for summary judgment. See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882–86, 896 (2007) (reporting a Rule 56

others are abandoned or exit the court system through alternate techniques of dispute resolution.³³ Furthermore, no longer is the judge a *tabula rasa* whose knowledge of the matter in dispute comes only from the parties' arguments. Good case management demands that the judge of first instance learn about the nature of the dispute at an early stage, remain abreast of important developments as the litigation progresses, and shape the procedures that will resolve the case expeditiously.³⁴

To the extent that oral argument is intended to create better (or more accurate) legal outcomes or to give parties a sense of participation in the decisions that determine that outcome—and these are the principal arguments made in defense of oral argument³⁵—case management already provides the judge with a sense of the lawsuit and provides the parties with an opportunity to participate in the case-management conferences that shape the lawsuit's outcome.³⁶ These conferences will often give the judge enough information about the lawsuit that the judge can adequately shape the law to the case without the need for additional input from oral argument. Moreover, given that the focus of modern civil litigation is to resolve lawsuits expeditiously—not to try them on their merits, except as a last resort—accurate determination of the merits of a legal dispute is less critical. In the court of first instance, the judge's primary task is to provide the parties with enough guidance that they can come to a fair settlement or another appropriate exit from the litigation system. The production of enduring and accurate legal principles—a task for which it would be important to have procedures, such as oral argument, that create better law—is no longer the principal function of the (forgive the misnomer) trial court. And that reality sweeps away a principal premise for using oral argument.

For these reasons, oral argument in the Supreme Court or in a court of appeals stands on different footing from oral argument in the courts of first instance. Judges on appeal have less familiarity with the record; the

dismissal rate of 7.8 percent); William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to Bell Atlantic v. Twombly*, 42 J. LEGAL STUD. 35, 51 (2013) (reporting a Rule 12 dismissal rate of 12 percent to 14 percent).

33. See 28 U.S.C. § 651 (2012) (requiring each federal district court to “devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution in its district”); FED. R. CIV. P. 41(a)–(b) (allowing plaintiffs to voluntarily dismiss an action or for a court to involuntarily dismiss an action “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order”).

34. See MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.13, 11.13 (2004) (describing the characteristics of good case management).

35. See *supra* note 13 and accompanying text (highlighting the usefulness of oral arguments).

36. See FED. R. CIV. P. 16(a) (authorizing the court to order the attorneys and unrepresented parties to appear at case-management conferences).

decision in the case will have a broader reach; and the final-judgment rule means that nearly all cases on appeal are ones that the parties wished to litigate to conclusion rather than resolve through some other means.³⁷ Oral argument in the courts of first instance stands in a more precarious position. As a default position, a few matters still seem candidates for oral argument:

- Cases in which an accurate clarification of a point of law is necessary to remove a sticking point to settlement;
- Cases in which “genuinely doubtful” legal issues with broad significance beyond the individual lawsuit require a full and accurate development of legal principles; and
- Cases in which trial is likely, and maintaining the traditional forms of justice is appropriate.

In these instances, when oral argument would help the judge to craft an opinion substantially better than one based only on the briefs, then oral argument seems presumptively appropriate. But the presumption is rebuttable: the court must still consider the costs of oral argument to itself, to the parties, and to others. Given the costliness of oral argument,³⁸ the circumstances requiring argument should be construed narrowly, and doubts resolved against oral argument rather than in favor.

On this standard, it is unlikely that many cases will merit oral argument. As I have said, form should follow function. And the function of modern civil litigation makes oral argument largely unnecessary.

CONCLUSION

In suggesting that the debate about the future of oral argument should incorporate the reality of the modern civil-justice system, this Essay neither endorses the modern case-management approach to civil litigation nor extols the virtues of a system in which trial has all but disappeared. It simply injects modern developments in civil procedure into the analysis of the ancient form of oral argument. For anyone with fond regard for the traditional Anglo-American forms of dispute resolution and trial, the decline of oral argument is regrettable. Although we do not have the strong tradition of orality of our professional colleagues in the United Kingdom,³⁹ American lawyers are still raised in

37. See 28 U.S.C. § 1291 (2012) (permitting appeals from “all final decisions of the district courts”); cf. THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 314–17 (2016) (discussing limited exceptions and qualifications to the final-judgment rule).

38. See *supra* text accompanying note 28 (reiterating how the proportionality rule aims to reduce the often excessive costs associated with civil litigation).

39. See Ehrenberg, *supra* note 7, at 1171–85 (explaining how oral arguments are deeply rooted

a culture of orality from the first time they are called on in a law school class or present a moot court argument. Oral argument remains a core aspect of the professional identity of American lawyers.

At the same time, a more fundamental aspect of our identity—and a principal challenge that all lawyers face in the upcoming century—is ensuring access to justice for the broad swaths of American citizens who are effectively priced out of (or by contracts of adhesion forced out of)⁴⁰ the legal system. We cannot focus unduly on the delivery of more perfect justice in the individual case when many citizens receive no justice from the courts at all. The present trend toward more case management and less trial has not resolved the civil-justice crisis. As a result, case management and the disappearance of trials are not the endpoints of procedural reform. Indeed, a bold redesign of the civil-justice system is necessary if creating greater access to the courts is a priority. If trial is to survive as a form of dispute resolution in this brave new world, it must undergo radical changes.⁴¹ Whether oral argument also survives depends ultimately on the form that this redesign takes.

within the English legal system); *see also* Rehnquist, *supra* note 13, at 1020–21 (noting how the difference in judges' roles affects the relative importance of oral arguments in the English and American systems).

40. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013) (holding that federal law did not override a clause waiving class-action arbitration of merchants' antitrust claims against a credit-card issuer, even though individual arbitration of the claims was prohibitively expensive); *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 334 (2011) (upholding a clause in a consumer contract requiring individual, non-class arbitration of consumers' disputes).

41. *Cf.* LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: INTERIM REPORT 75–87 (2015) (describing a “radical and important” plan to establish an English “online court” that uses information-technology techniques to resolve simple civil disputes without legal representation and often without face-to-face contact with judges).