THE ROLE OF JUDGES IN ADJUDICATION, SETTLEMENT AND OTHER VANISHED TRIALS: EVIDENCE FROM CIVIL TRIAL COURTS

Ayelet Sela* and Limor Gabay-Egozi†

CONTENTS

I. INTRODUCTION ......................................................................................................................... 2
   A. Vanishing Trials, Rising Settlements, and a Proposed Conceptual Approach for Evaluating the Role of Judges ........................................................................................................... 3
   B. Research Population, Sample and Database ............................................................................. 8

II. THE PROCEDURAL AND DISPOSITIVE DIMENSIONS OF CIVIL LITIGATION ............ 9
   A. Case Terminations by Procedural Phase ................................................................................. 11
      1. Classification and Measurement ......................................................................................... 11
      2. The Distribution of Case Terminations by Procedural Phase ............................................. 11
   B. Case Terminations by Mode of Disposition .......................................................................... 12
      1. Classification and (Nuanced) Measurement ....................................................................... 12
         2. The Distribution of Case Terminations by Mode of Disposition .................................... 14
   C. The Relationship between Mode of Disposition and Procedural Phase of Termination ................................................................................................................................. 16

III. THE ROLE OF JUDGES IN CIVIL LITIGATION: TRIAL, JUDGMENT AND SETTLEMENT THROUGH THE PRISM OF JUDICIAL ACTIVITY ............................................................. 18
   A. Capturing and Evaluating Judicial Activity in an Era of Vanished Trials ......................... 18
      1. Case Terminations through the Prism of Judges’ Procedural Actions ............................... 18
      2. Operationalizing Case Terminations in Terms of Judicial Activity ............................... 20
   B. Describing the Relationship between Judicial Activity and Mode of Disposition .......... 23
   C. Modeling the Relationship between Judicial Activity and Mode of Disposition .......... 27

IV. CONCLUSION ........................................................................................................................... 32

* Fellow, Center for Judicial Conflict Resolution, Faculty of Law, Bar Ilan University, Ramat Gan, Israel. Work on this article was partly sponsored by the European Research Commission (ERC) Consolidator Grant 647943/14 “Judicial Conflict Resolution (JCR): Examining Hybrids of Non-Adversarial Justice” (2016-2021).
† Assistant Professor, Department of Sociology and Anthropology, Bar Ilan University, Ramat Gan, Israel.
I. INTRODUCTION

In an era of diminished trial rates and high settlement rates, what is the role of trial courts and judges in civil litigation? This article tackles this question by introducing an analytical approach that explores the relationship between judges’ procedural actions (JPAs) and lawsuits’ modes of disposition (MoDs). It then reports and discusses the application of this approach to a sample of civil trial court cases.

Empirical studies based on court docket registered data tend to approach case terminations in a binary fashion. On the procedural level, they examine the rate of cases in which a specific procedural event occurred, such as allocation to a judge or progression to trial; or more broadly, whether any court action occurred. On the dispositive level, studies tend to measure the rate of judgment on the merits (as contrasted with all other MoDs), or to obtain some measurement of the rate of settlement. Such studies may create the impression that the role of judges in civil litigation is diminishing in scope or importance. We propose that in order to understand the scope and nature of the role that judges effectively play in civil litigation it is necessary to account for the highly heterogeneous nature of both JPAs and MoDs. Accordingly, we distinguish between different types of JPA that judges can undertake in the lifecycle of a lawsuit, ranging from no action to ruling on motions, conducting pre-trial case-management and settlement hearings, and presiding over trials. Similarly, we differentiate between all MoDs, to account for the profound differences that exist not only between settlement and judgement on the merits, but also between settlement and other MoDs, such as default judgments, dismissal due to lack of prosecution or voluntary withdrawal, which involve minimal exercise of judicial discretion.

We apply this approach to a representative sample of Israeli civil trial court cases which were meticulously coded for procedural and dispositive information. Subsequently, we present the relationship between judges’ engagement with the process in terms of JPA and the lawsuit MoD. We further introduce a multivariate model of the likelihood of adjudication on the merits, settlement and other MoDs in cases that terminated under each category of JPA, controlling for other procedural and case characteristics.

To anticipate some of our findings, we observe that the portion of cases that terminate under the auspices of the court’s institutional function, namely, without substantive judicial involvement in terms of JPA—is very significant. In order to provide a measure for the role that judges play in the current landscape of civil litigation, we turn our focus to the subset of cases in which judges are involved through JPA, as these are the cases that judges have the potential to directly impact. This targeted sample naturally yields a higher rate of adjudication by trial and judgment and it exposes a significant rate of judicial activity in settlements, which we argue provide a more relevant depiction of
judges’ role in litigation. Furthermore, the differentiation between the various types of JPA enables us to quantify the odds ratio of settlement given each type of JPA: the increased likelihood of settlement (compared to other MoDs) in cases that terminate after judges rule on motions or conduct pre-trial hearings, and the decreased likelihood of settlement (compared to adjudication on the merits) once a trial ensues. Finally, we discuss our findings and relate them to the literature on the role of judges in civil litigation and settlements and its relationship to the vanishing trial phenomenon as well as the social-political role of the judiciary. Our findings lead us to consider whether, from a dispute system design and public policy perspective, certain types of “vanished trials” should no longer be directed to courts.

A. Vanishing Trials, Rising Settlements, and a Proposed Conceptual Approach for Evaluating the Role of Judges

The popular image of civil litigation portrays an image of a judge presiding over a case in a courtroom. It depicts a process whereby lawyers recite legal arguments, present evidence and examine witnesses in a courtroom, culminating in a binding judgment that reflects a decision of a judge or jury on the merits of the case.1 This image represents the two principal components of the paradigmatic model of civil litigation: a full trial process and a judgment on the merits. In reality, both trial and judgment on the merits are not the norm in today’s civil courts, and they have not been the norm for quite some time.2 This trend is commonly referred to as “the vanishing trial”3 phenomenon: while there is a substantial increase in the number of case filings, trials are conducted in only a small fraction of civil lawsuits—most cases terminate in the earlier stages of litigation. Since the 1990s, only about 2% of civil lawsuits in American federal courts reach trial.4 Trial rates in state courts also tend to decline, with some variations in rate among and within states.5

The literature on vanishing trials has predominantly focused on describing where the disputes that enter the court system are going, explaining why they are not proceeding to

---

1 See the vivid description in: Lawrence M. Friedman, The Day Before Trials Vanished, 1 J. EMPIRICAL LEGAL STUD. 689, 690-91, 693 (2004)
2 Id., at 691; Herbert M. Kritzer, Adjudication to Settlement: Shading in the Gray, 70(3) JUDICATURE 161 (1986); Stephen C. Yezell, The Misunderstood Consequences of Modern Civil Process, WIS. L. REV. 631, 636 (1994) (“In 1938, 63% of the adjudicated terminations of civil cases were trials and directed verdicts. In 1990, trials accounted for only 11% of all adjudications; the remainder were disposed of before trial.” (citations omitted))
4 Id.
5 See: Robert Moog, Piercing the Veil of Statewide Data: The Case of Vanishing Trials in North Carolina, 6 J. EMPIRICAL LEGAL STUD. 147, 151 (2009) (reviewing and categorizing these studies)
the trial phase, evaluating the likely benefits and possible costs attached to these changes, and considering how these trends affect core values of the adversarial system. As part of this discourse, the vanishing trial phenomenon is often associated with the idea of a prevalent “settlement culture” in courts. It is based on the observation that while civil litigation rarely terminates in a judges’ final decision on the merits, settlement has become “the modal civil case outcome.” This association is reinforced by empirical studies that use the term “settlement” to describe a general measure of litigated disputes that were resolved without final adjudication, rather than as a substantive measure of an agreement between the litigants on a specific outcome that ends the litigation.

In this article, we untangle the empirical relationship between the vanishing trial phenomenon and the settlement culture, by distinguishing between different types of “vanished trials” in terms of both the procedural phase in which they terminated and their MoD. The analysis paves the way for linking the discourse on vanishing trials and the settlement culture to the debate about the changing role of courts and judges.

Over the years, growing caseloads and the influence of alternative dispute resolution concepts, have led judges to shift their focus from trial and adjudication to pre-trial case management and active promotion of settlements. The legal institutionalization of

---

6 Moog, supra note 5, at 148.
7 D. Michael Risinger, Wolves and Sheep, Predators and Scavengers, or Why I Left Civil Procedure (Not With a Bang, but a Whimper), 60 UCLA L. Rev., 1620, 1649 (2013) (discussing factors affecting “the rise of a settlement culture and the near disappearance of the jury trial.”); Bobbi McAdoo & Nancy A. Welsh, Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, 5 Nev. L. J. 399, 410 (2004) (pointing to “the settlement culture to which judges are now accustomed.”)
8 Theodore Eisenberg & Charlotte Lanvers, What is the Settlement Rate and Why Should We Care? 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009)
9 E.g. Kevin M. Clermont, Litigation Realities Redux, 84 NOTRE DAME L. REV. 1919 (2009), Galanter, supra note 3, at 501 suggests that growing caseloads prompted courts to shift some of their efforts from trials to early resolution of cases in the pretrial stage. This idea received empirical confirmation in Shari Seidman Diamond & Jessica Bina, Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals, 1 J. EMPIRICAL LEGAL STUD. 637, 654-56 (2004) (Finding that courts in federal trial districts with higher caseloads generally have lower trial rates.). The mechanism behind this phenomenon was theorized long ago by William M. Landes, An Economic Analysis of the Courts, 14 J.L. & ECON. 61, 102 (1971) (hypothesizing “a reduction in desired trials as the queue lengthened, since the defendant's settlement offer remains constant or increases while the plaintiff reduces the amount he is willing to accept.”)
11 Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982); Yeazell, supra note 2, at 637 (“today's federal judges have moved their focus away from trial to earlier stages of litigation.”); Wolf Heydebrand & Carroll Seron, Rationalizing Justice: The Political Economy of Federal District Courts 17, 45-57, 81-89, 185-219 (1990) (Describing how courts shift away from adjudication to "technocratic administration" as a result of the increased demand (growing caseloads) on their limited resources, structural reorganization, and procedural innovation)
judges’ settlement promoting capacities has further boosted these trends. In Israel, Rule 140 to the Rules of Civil Procedure authorizes the judge to conduct a pre-trial hearing “to examine the possibility of a settlement between the litigants.” In the U.S., Rule 16 of the Federal Rules of Civil Procedures states that “the court may consider and take appropriate action… settling the case and using special procedures to assist in resolving the dispute.” Thus, settlement promotion formally has become part of the “trial judge's job description”. This transition in the role of judges has drawn considerable scholarly attention, describing, hailing, criticizing and analyzing its nature and meaning for judges, litigants, litigation and the legal system as a whole.

As the rate of trials diminishes and settlements become common, one has to question whether the trial judge has become an “endangered species”—vanished along with trials or significantly transformed in nature. On the dispositive level, settlements appear to replace judges’ discretion with that of the parties. Instead of adjudicatory decision-making in the form of a judge’s declaration of liability and damages or the rights and duties of the litigants, the dispute ends with the litigants’ own determination, in the form of a settlement agreement. Notwithstanding the shift in control over the decision-making, bargaining for settlement still happens in the shadow of the law, and judges continue to play a role in litigants’ settlement decisions. First, judges remain “a ghostly but influential presence, through their rulings in adjudicated cases and their anticipated response to the case at hand.” Moreover, judges “stand ready to step from the shadows and resolve the dispute by coercion if the parties cannot agree.”

13 See: Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements 46 STAN. L. REV. 1339, 1340 (1993) (“judges have embraced active promotion of settlement as a major component of the judicial role”); Yeazell, supra note 2, at 648 (“Discovery, joinder, and judicially guided settlement discussions (which often include alternatives to litigation) now dominate civil lawsuits.”); John Lande, Shifting the Focus from the Myth of "the Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter, 6 CARDozo J. OF CONFLICT RESOL. 191 (2005).
14 Israeli Rules of Civil Procedure-1984, §40
17 See e.g.: Resnik, supra notes 18, 16 and 12; Yeazell, supra note 2; Owen Fiss, Against Settlement, 93 YALE L. J 1073 (1984); David Luban, Settlements and the Erosion of the Public Realm, 83 GEO. L. J 2619 (1995); Alberstein, supra note 11; Carrie Menkel-Meadow, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 GEO. L.J. 2663 (1995)
19 Galanter & Cahill, supra note 13, at 1340.
In addition to the “shadow” of their anticipated adjudicatory decisions, judges exert direct influence on litigants’ decision to settle through their actions throughout the litigation process—their JPs. Our proposed conceptual approach is based on the premise that in order to understand the role that judges play in litigation we need to examine both the procedural dimension and the dispositive dimension of their work, as well as the relationship between them. It enables us to offer an innovative account of the distinct roles that judges and courts play in relation to adjudication, settlement and other MoDs.

The procedural dimension refers to litigation-related judicial procedural activities (JPs): ruling on motions during the filing and pleading phases, conducting pre-trial case-management and settlement hearings, and presiding over trials. This conceptualization allows us distinguish between the judicial and institutional functions in litigation. Judicial functions refer to actions of judges throughout the litigation process that rely heavily on judicial discretion and skill, namely ruling on motions, facilitating pre-trial case management and settlement discussions, or presiding over trials.21 Institutional functions involve the application of the court’s authority to terminate the litigation without substantive judicial discretionary activity. In other words, cases that terminate without any prior JP through ruling on motions or conducting case-management, settlement or trial hearings—are affected solely by the court’s institutional function.

The dispositive dimension of civil litigation is defined by the final adjudicatory decision that terminates it, as reflected in the mode of disposition (MoD). MoDs range between highly discretionary judicial decisions—such as adjudication on the merits; and non-discretionary judicial decisions that result directly from plaintiff action or inaction—such as dismissal due to lack of prosecution or default judgements. Settlements can be viewed as an interim category: While they are the result of the litigants’ decision, this decision is potentially influenced by judicial actions, as we elaborated earlier.22

Differentially analyzing case terminations based on the nature of judicial engagement enables us to evaluate the role that judges perform in the relevant subset of cases (those they engaged with and whose MoD they had the potential to impact). Similarly, differentiating between the various MoDs enables us to evaluate the rate and type of judicial involvement in tried cases, settled cases and other case terminations, and to model and quantify the likelihood of adjudication, settlement and other MoDs given different types of JP in the case.

21 Substantively, this category should include issuing the final dispositive decision (judgment). However, given our focus on the relationship between procedural actions and MoDs, we exclude this judicial action from the JPs.

22 See the text associated with notes 20-13 supra.
Empirically, we rely on a representative sample of 1036 cases from civil trial courts in Israel.\textsuperscript{23} The sampling strategy, coding methodology and attributes of the sample are detailed in Subsection B. At this point, however, it is useful to underscore what makes this sample uniquely conducive to exploring the relationship between judges’ procedural functions and dispositive decisions. First, our dataset overcomes a common and fundamental challenge that characterizes empirical studies in this area: the low reliability of registered data in courts’ electronic docket.\textsuperscript{24} Certain types of registered information drawn from the Israeli judiciary’s electronic docket system are highly unreliable,\textsuperscript{25} and specifically, information about cases’ MoD is only 60% reliable.\textsuperscript{26} Our analyses, on the other hand, rely on highly reliable data: Cases in our sample were manually coded based on a careful reading of all case documents. A second related advantage is that the manual coding enriched the dataset with information beyond the original registered data. The coders captured a host of variables pertaining to case attributes, procedural actions, and outcomes, including information about pleadings, motions, pre-trial and trial hearings, and nuanced disposition data.

An equally important attribute of this article has to do with its setting: Certain characteristics of civil litigation in Israeli courts render it extremely well-suited for exploring the relationship between the procedural and dispositive dimensions of judges’ work. First, there are no jury trials in Israel. Accordingly, judges have full authority over all procedural and dispositive decisions,\textsuperscript{27} and there is no selection bias in the subset of cases which they decide. Second, in Israel, generally, the same judge who governs the pre-trial phases of litigation (including case-management and settlement hearings) continues to preside over the case if it reaches trial. In contrast, in the United States, for example, it is typical for different judges to preside over the pre-trial settlement conferences and the subsequent trial (when relevant).\textsuperscript{28} Finally, Israeli Law does not


\textsuperscript{26} \textit{Id.}

\textsuperscript{27} Certain procedural decisions and dispositive decisions can be rendered by court registrars, who are not necessarily judges (see: ISRAELI COURTS LAW (CONSOLIDATED VERSION) 5744-1984 (Articles 84-96)

\textsuperscript{28} As a comparison, in the United States, “[t]he primary distinguishing feature among the two main models of judicial settlement conferences is the role that the judge who conducts the conference plays in other
allow judges to conduct confidential settlement conferences in chambers. Thus, like all other in-person interactions that involve the judge, judicial promotion of settlements can only take place in formal decisions and public hearings in an open court of law.29

By applying our proposed conceptual approach to this dataset, we observe that in Israeli trial courts of original jurisdiction, judges have not vanished. Judges play an important role not only in terms of presiding over trials and issuing judgements on the merit, but also in cases that settle. We provide a multinomial logistic regression model that quantifies the relationship between JPAs and the odds ratio of settlement, adjudication on the merits or other MoDs, net of other procedural events or case attributes. Thusly, we provide a measure for the significantly higher likelihood of settlement in lawsuits that terminate after judges rule on motions or conduct pre-trial hearings, compared to both adjudication and other MoDs.

B. Research Population, Sample and Database

Our analyses are based on a sample of Israeli civil trial court cases. The Israeli court system has two general civil trial courts of original jurisdiction: Hashalom Courts, which have jurisdiction over civil lawsuits up to 2,500,000 NIS (roughly 700,000 USD), and District Courts, which have jurisdiction over lawsuits of higher value.30 Hashalom courts handle the overwhelming majority of the civil court docket in Israel: In 2015, 167,833 general civil cases were filed in Hashalom Courts (excluding small claims), approximately eighteen times more cases than the 9,139 general civil cases that were filed to District trial courts in original jurisdiction.31 Given that nearly 95% of general civil litigation is conducted in Hashalom courts, and in order to avoid potential variance between the two instances, we focus our analysis on Hashalom Courts. As we further explain below, for similar reasons our sample comprises cases filed in the three most common procedural tracks, which represent 80% of the general civil docket in Hashalom Courts.

The sample consists of 1,036 general civil cases that terminated in Hashalom Courts between December 2008 and December 2011. It originates from a database that the...
Supreme Court of Israel Research Division compiled, which includes a representative sample of 2,000 civil cases from ten Israeli trial courts of original jurisdiction (six Hashalom courts (1,284 cases) and seven District courts (716 cases)). The sample size amounts to approximately 2% of civil cases that terminated in the selected courts during that time; its reported confidence level is above 95% and the sampling error is below 6%. In order to ensure that the sample accurately and proportionally represents the total population of civil cases of original jurisdiction, a stratified sampling method was used. For each selected court, cases were randomly sampled to represent the distribution of cases that open in that specific court. Five law students that were employed by the Court Research Division read all case documents and coded them for variables relating to the attributes of the case, procedural events throughout the litigation process, and its final outcome. For purposes of the present study, we analyzed all Hashalom court cases in the three most prominent case types: regular civil procedure (32%), fast track (27%) and shortened track (21%), totaling 80% of Hashalom court cases.

II. THE PROCEDURAL AND DISPOSITIVE DIMENSIONS OF CIVIL LITIGATION

The paradigmatic model of civil trials involves a procedural component and a dispositive component that secure the administration of justice. The procedural component is achieved through a public, fair and impartial process of examining facts and legal issues arising between the parties. The dispositive component is encapsulated in a binding judgment which ends the (legal) dispute regarding all relevant matters of fact and law. Despite their obvious relatedness, the procedural and dispositive dimensions of litigation do not fully overlap. Judgments on the merits do not necessarily occur or vanish at the same rate as trials. Similarly, settlements can occur at any procedural stage,

32 Weinshall-Margel & Taraboulos, supra note 23.
33 Hashalom courts in Haifa, Petah-Tikva, Herzeliya, Tel-Aviv, Jerusalem and Beer-Sheva.
34 District courts in Tel Aviv, Jerusalem, Beer-Sheva, and Hamerkaz-Lod.
36 Reportedly, 10% of the cases were double coded, achieving over 90% of inter-coder reliability, Id Further information on the sampling and coding of the data is available in: Keren Weinshall-Margel & Ifat Taraboulos, Equal in the Eyes of the Law? Pro-Plaintiff Cost Shifting in Civil Procedures, Paper presented in the Conference on Empirical Legal Studies in Asia (2017)
37 Galanter, supra note 3, recognizes that his measure of trials over-counts the true incidence of adjudication on the merits because cases can be settled or dismissed during trial, before the judge renders a judgment on the merits.
before, during and even after trial, and other MoDs can occur in different phases of the litigation. Indeed, understanding the relationship between the procedural and dispositive attributes of litigation is critical to any normative consideration of the vanishing trial and settlements phenomena, as well as the role that courts and judges play. Such an analysis may lead to reconsideration of the nature of the civil litigation landscape, raising a host of empirical and normative questions, such as the ones Hadfield aptly puts forward:

[i]f 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 nontrial adjudication by judges as a consequence of increased case management or heightened standards for surviving motions to dismiss or summary judgment? Is the American adversarial system converging with the European inquisitorial system of adjudication[?] If the decrease in trials is fully taken up by increases in nontrial 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.39

Accordingly, in this section we lay the foundations for considering the relationship between the procedural dimension and the dispositive dimension of civil litigation. We present the range of procedural phases and MoDs that characterize case terminations in our sample, and their distribution. The discussion familiarizes readers with the procedural and dispositive attributes of civil litigation in Israeli courts, and explains how each variable is defined empirically. Further, we demonstrate that the magnitude of the vanishing trial phenomenon depends on what is measured: the progression of cases to the trial phase; the disposition of cases in a judgment on the merits; or the incidence of traditional adjudication by both trial and judgment. Finally, this section sets the stage for the presentation of our concept and methodology for capturing judges’ procedural engagement in litigation in terms of JPAs in Section III. Accordingly, Subsection A presents the percentage of cases that terminate in each procedural phase of litigation, and Subsection B presents the frequency of all modes of disposition among terminated cases.

38 Eisenberg & Lanvers, supra note 8, at 114 (“settlement itself can and does occur at any stage: before trial as is widely recognized, after trial, and during the appellate process.”).
39 Hadfield, supra note 24, at 708 (references in body of text omitted)
A. Case Terminations by Procedural Phase

1. Classification and Measurement

This subsection provides an overview of the procedural phases of litigation in Israeli civil courts, and explains how they were empirically defined in our study. In Israel, a full traditional adjudication process comprises five procedural phases: filing, pleading, pre-trial, trial and post-trial. Litigation is initiated with the filing of an action in court by a plaintiff. In our data-set, cases that terminated prior to the submission of defense pleadings or occurrence of hearings were classified into the filing phase. The pleading phase includes the filing of the defense pleadings (and potentially additional pleadings by either or both the plaintiff and defendant). We classified a case in the pleading phase if a defense motion was filed but no pre-trial or trial hearing took place prior to their termination.

The following two procedural phases involve a direct encounter with a judge in a courtroom hearing. According to the Israeli rules of civil procedure, a judge has the discretion to hold one or more pre-trial hearings after defense pleadings are filed. The goal of the pre-trial phase is “to clarify the dispute and the procedures necessary for addressing it, in order to promote efficiency, simplification, brevity and speed in the proceeding, and to explore whether a settlement can be reached.”\footnote{Israeli Civil Procedure Regulations, 1984 (Article 140). [Hebrew] (Translated by the Authors)} Accordingly, during the pre-trial phase, judges can engage in a wide range of case management practices as well as promote the discovery process and the finding of facts. We classified cases as terminated in the pre-trial phase if at least one pre-trial hearing took place and no trial hearings occurred.

During the trial phase testimony and evidence on behalf of both the plaintiff and the defendant are presented to the judge. Subsequently, the post-trial phase begins, as the judge deliberates, composes a written judgment on the merits and announces it (in some cases the parties submit written summations (concluding arguments) prior to judicial deliberation). Our dataset does not indicate if a case was terminated during the trial phase or only after the trial ended and the post-trial phase began. Thus, we classified all cases in which at least one trial hearing took place into a single “trial phase” category.

2. The Distribution of Case Terminations by Procedural Phase

Figure 1 summarizes the frequency of cases in our sample, according to the procedural phase of litigation in which they terminated. As such, it provides a measure of where cases vanish procedurally in the litigation process: 60% do not progress beyond the filing phase, 10% terminate after pleadings were completed, 19% terminate during the
pre-trial phase, and 11% terminate during or after trial.\textsuperscript{41} Thus, according to the procedural criterion, in Israeli Hashalom courts, 89% of cases are vanished trials. Moreover, the majority of cases (60%) terminate prior to the submission of the defense pleadings. Thus, not only is the civil trial vanished; the entire adversarial litigation process is diminished: most cases terminate without the presentation of pleadings by both the plaintiff and the defendant. Moreover, the ideal of a public hearing before a judge in an open court of law is achieved in only 30% (309/1036) of terminated cases. Nearly two thirds of these “courtroom encounters” with judges take place in pre-trial case-management hearings (191/309=62%), which lack much of the ceremonial aura and procedural attributes of trial hearings.\textsuperscript{42}

Figure 1: Case Terminations by Procedural Phase (N=1036)

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Case Terminations by Procedural Phase (N=1036)}
\end{figure}

B. Case Terminations by Mode of Disposition

1. Classification and (Nuanced) Measurement

This subsection briefly overviews the MoDs that are used by Israeli civil courts to terminate cases, and explains how they were empirically defined in our study. Studies of court dockets differ in their definitions of dispositions (and outcomes). Thus, it is

\textsuperscript{41} As a comparison, Galanter, supra note 3, observed that in his sample, about 15% of the cases filed in state courts were disposed without any court action, about 75% of cases were disposed before pre-trial and about 8% of cases were resolved during or after pre-trial.

\textsuperscript{42} See: Sela et al, supra note 51.
extremely important to address definitional issues regarding all modes of disposition, especially settlements\textsuperscript{43} and other non-contested MoDs.\textsuperscript{44} Our dispositive definitions, which follow Weinshall-Margel and Taraboulus,\textsuperscript{45} offer two qualitative improvements compared to registered data in the electronic docket. First, since cases were hand-coded, our data overcome the low reliability of disposition data in the electronic docket. Second they provide a clear and nuanced categorization of the various MoDs, including settlements.

A \textit{judgment on the merits} is a reasoned judicial decision that determines the extent to which the plaintiff or the defendant legally prevailed (or partially prevailed) in the contested proceeding. In addition, Article 79A of the Israeli Courts Law authorizes judges in civil lawsuits to issue another type of contested judgment: \textit{judgment by way of compromise}. The Article states that, “A court presiding over a civil matter is allowed, by consent of the parties, to rule in the matter before it, partly or fully, by way of compromise.” The law does not define what “judgment by way of compromise” means,\textsuperscript{47} but the “law in action” appears to be that judges use Article 79A in various ways, such as a means to provide a bottom-line outcome without a reasoned decision, avoid strict application of the law, or simulate a fair settlement between the parties.\textsuperscript{48}

A \textit{default judgment} can be issued when the defendant fails to file the defense pleadings or to appear in court, subsequent the plaintiff’s motion to issue a default judgment based solely on the merit of the claims stated in the lawsuit.\textsuperscript{49} Cases are dismissed due to \textit{lack of prosecution}, if the plaintiff fails to complete a required procedural action (such as filing pleadings or motions, or complying with a court order), and remains inactive for a certain period of time. Dismissal due to a \textit{voluntary withdrawal} of the lawsuit by the plaintiff reflects the plaintiff’s decision not to pursue litigation or to refile at a later date. Importantly, in our database, cases were categorized as voluntarily dismissed only if, after careful review of all case documents, there was no

\textsuperscript{43} Eisenberg & Lanvers, \textit{supra} note 8
\textsuperscript{44} Hadfield, \textit{supra} note 24.
\textsuperscript{45} Weinshall-Margel & Taraboulus, \textit{supra} note 36, at 15-17.
\textsuperscript{46} See the description of the database \textit{supra}
\textsuperscript{47} The expression “to rule… by way of compromise” is taken from Hebrew Law (Maimonides, Judges 22, 4), where it is usually refers to an effort to avoid the strict commitment to divine law, while empowering the rabbinical decision maker with broader discretion (Itay Lipschutz, 2015)
\textsuperscript{48} See further: Jacob Turkel, \textit{Strict Law or Compromise}, 3(1) \textit{SHAAREY MISHPAT} 13 (2002) [Hebrew] (discussing its merits and the tension between justice and compromise); and Menahem Klein, \textit{A Proposal for a Scientific Formula Enabling an Arithmetic Calculation of A Decision Under Section 79A(a) of Israeli Court Law”} (2008) http://www.psakdin.co.il/fileprint.asp?FileName=/sada/public/art_cceh.htm [Hebrew] (pointing to the open ended nature of this form of judgment).
\textsuperscript{49} Weinshall-Margel & Taraboulus, \textit{supra} note 36, at n.12 report that in the event that the defendant requested to reopen the case after a default judgment was issued, the subsequent final disposition of the case was coded.
evidence that the case was withdrawn following an out-of-court settlement that the parties reached. In contrast, when there was evidence that the case was withdrawn due to a settlement between the parties, it was categorized as *out-of-court settlement*. Parties who reach a settlement—whether by judicial promotion, mediation or another manner—can request the court to roll it into judgment, turning it into a *court-approved settlement*. Since the term “settlement” has been attributed different meanings in litigation-related studies, let us state clearly that for purposes of our discussion, “settlement” is an agreement by the litigants to end the litigation, which has been brought to the attention of the court, by either requesting to roll it into judgment (“court approved settlement”) or referencing it in the plaintiff’s motion to voluntarily dismiss the case (“out-of-court settlement”). Finally, there are a host of other “technical” case dispositions, such as statistical closing or joinder of claims, which amount altogether to a miniscule portion of case terminations (3%), which we lumped together into a category we termed “other.”

2. The Distribution of Case Terminations by Mode of Disposition

Much of the law and economics literature assumes that litigation involves a choice between taking a lawsuit to trial and settling it before trial. This line of research conceives of all cases that are not adjudicated as settled. Despite its neat appeal, such a binary conceptualization does not provide valuable information for a normative evaluation of the vanishing trial phenomenon or of judges’ role in the current landscape of civil litigation. In order to evaluate the “meaning” of the vanishing trial phenomenon and judge’s role in relation to it, it is extremely important to understand how vanished cases dispose.

Figure 2 represents the rate of the various MoDs among all terminated cases. Thus, it indicates the dispositive nature of vanished trials, that is: how cases that are not adjudicated on the merits dispose.

---

50 Parties will opt for out-of-court or court-approved settlement based on various considerations, for example, confidentiality or attorney fees. See: Weinshall-Margel & Taraboulus, *supra* note 36, at 17.

51 Eisenberg & Lanvers, *supra* note 8, at 114 note, “[n]o single, agreed method of computing settlement rates exists because judgment calls exist how about to translate a range of formal case outcomes into the dichotomous characterization of settled or not settled. There may not even be a single “best” measure of the settlement rate. The specific research question being considered can influence what should and should not be counted as a settlement.”). Accordingly, the term “settlement” has been defined empirically in various ways, such as: settlement as a proxy for plaintiff litigation success (*id*); settlement as a measure of litigated disputes resolved without final adjudication (Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919 (2009); and settlement as any consensual resolution that ends the litigation (Ayelet Sela, Nourit Zimerman & Michal Alberstein, *Judicial Techniques for Promoting Settlement: Evidence from Courtroom Observations*, A Paper Presented in The Law and Society Association Annual Meeting, Mexico City (June 2017))

52 E.g.: Clermont, *supra* note 9.
Figure 2: Case Terminations by Mode of Disposition (N=1036)

Figure 2 shows that only 8% of cases end in judgment on the merits. Thus, according to the dispositive criterion, 92% of cases are vanished trials. Settlements account for nearly half (489/1036=47%) of all case terminations, and constitute the majority of vanished trials (489/954=51%). Most settlements are court-approved (35%), namely, they are rolled into judgment; additional 12% are settlements that were reported by the parties to the court at the time the case was withdrawn (“out-of-court settlements”). Another 7% of the cases were voluntarily withdrawn by the plaintiff without an indication that a settlement was reached. Notably, 30% of terminations are the direct result of litigants’ inaction and effective disengagement with the litigation process: 22% were terminated in a default judgment due to the defendant’s failure to file pleadings or appear in a hearing, additional 8% were dismissed due to lack of prosecution on the part of plaintiffs. While some of these case terminations could have been the result of out-of-court settlement, our data do not provide indication that a settlement was reported to court.

Finally, let us note that 5% of the cases are terminated in a “judgment by way of compromise”, the unique hybrid of adjudication and settlement created by the Israeli legislature. In the context of our study, its meaning depends on the perception of the determinant qualities of adjudication on the merits. If one ascribes great importance to the
public nature of adjudication, through transparent and impartial deliberation, reasoning and application of law, then judgments by way of compromise are probably more akin to the 47% of settlements. On the other hand, if the important quality of adjudication on the merits pertains to ending the dispute through judicial discretionary determination, then they are more akin to the 8% of judgments on the merits (8%). The multinomial model we present in Subsection III(C) takes the latter approach, assuming 13% an overall category of adjudication on the merits (5%+8%).

C. The Relationship between Mode of Disposition and Procedural Phase of Termination

The finding that only 11% of cases reach the trial phase and only 8% (13% including “judgment by way of compromise”) terminate in adjudication on the merits can be construed to suggest that the role of courts as social-political institutions that promote public values, proclaim norms and deliver justice is eroding. However, we argue that in order to understand the role that courts and judges actually play, case termination should not be analyzed as a homogenous population. Rather, it is necessary to explore the relationship between specific procedural roles and dispositive roles that judges play. The next section presents the results of this analytical strategy, which demonstrate that in the relevant subset of cases—cases in which judges are effectively involved by way of JPAs—judges continue to play an important dispositive role. First, the public qualities of the judicial role, as embodied in a full trial process and adjudication on the merits, have vanished to a significantly smaller extent than suggested by the aggregate data. Second, when a trial does not ensue, the data suggest that judges’ involvement in litigation is not merely managerial, as the likelihood of settlement increases in cases in which judges are involved by way of ruling on motions or presiding over pre-trial hearings. As expected, once a case gets to trial the likelihood of settlement significantly decreases and adjudication on the merits becomes the most likely MoD.

Table 1 summarizes the distribution of both MoDs and procedural phase of termination of the 1036 cases in our sample. The cross-tabulation indicates that the incidence of both trial and judgment occurs in 6% of the cases (62/1036). Thus, the magnitude of the vanishing trial phenomenon based on the criterion of traditional adjudication by trial and judgement is measured at 94%. Equally important, the cross-tabulation makes it apparent that the relationship between the various MoDs and the procedural phases of litigation is not straightforward. Nearly half of the cases

53 See: Judith Resnik, Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. EMPIRICAL LEGAL STUD. 783 (2004); Resnik, supra note 18; Luban, supra note 17. See further the discussion in Section IV.
54 See also: Sela et al., supra note 51.
(56/118 = 47%) that reach trial are not traditionally adjudicated on the merits but are otherwise terminated; and nearly a quarter of judgments on the merits are issued before trial (20/82 = 24%). As a mirror image, the vast majority of settlements (343/489 = 70%) occur without the litigants ever meeting the judge in a hearing, during the filing phase (270/489 = 55%) or the pleading phase (73/489 = 15%). Still, 30% of settlements (146/489) are reached following an in-person interaction with the judge: mostly during the pre-trial phase (126/489, 26%), and to a lesser extent during or after trial (20/489 = 4%).

**Table 1: Mode of Disposition and Procedural Phase of Termination**

<table>
<thead>
<tr>
<th>Mode of Disposition</th>
<th>Filing</th>
<th>Pleading</th>
<th>Pre-trial</th>
<th>Trial</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judgment on the merits</td>
<td>3</td>
<td>3</td>
<td>14</td>
<td>62</td>
<td>82 (8%)</td>
</tr>
<tr>
<td>Judgment by way of compromise (79A)</td>
<td>0</td>
<td>2</td>
<td>17</td>
<td>29</td>
<td>48 (5%)</td>
</tr>
<tr>
<td>Default judgment</td>
<td>215</td>
<td>3</td>
<td>10</td>
<td>1</td>
<td>229 (22%)</td>
</tr>
<tr>
<td>Settlement</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court-approved settlement</td>
<td>170</td>
<td>61</td>
<td>114</td>
<td>19</td>
<td>364 (35%)</td>
</tr>
<tr>
<td>Out-of-court settlement</td>
<td>100</td>
<td>12</td>
<td>12</td>
<td>1</td>
<td>125 (12%)</td>
</tr>
<tr>
<td>Voluntary withdrawal</td>
<td>44</td>
<td>13</td>
<td>12</td>
<td>5</td>
<td>74 (7%)</td>
</tr>
<tr>
<td>Lack of prosecution</td>
<td>72</td>
<td>9</td>
<td>6</td>
<td>0</td>
<td>87 (8%)</td>
</tr>
<tr>
<td>Other (stat closing, joint claims, etc.)</td>
<td>17</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>27 (3%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>621</td>
<td>106</td>
<td>191</td>
<td>118</td>
<td>1036 (100%)</td>
</tr>
</tbody>
</table>

Considering what we learned from Table 1, Figure 1, and Figure 2, several interesting questions arise: If plaintiffs receive trial and/or judgment on the merits in such a small subset of cases, why do they still turn to courts? If the majority of litigation-related settlements are achieved without meeting a judge, should these cases be filed in court in the first place? What qualities of the litigation process continue to draw litigants into court? Specifically, what roles do courts and judges play that attract (or compel) plaintiffs to file a lawsuit rather than resolve the dispute otherwise? In the following section, we shed light on these questions by examining four types of procedural roles that courts and judges play in litigation, and their relationship to the way cases end: the MoD.

In order to shed light on the role of judges, rather than conduct the standard analysis of the procedural progression of cases through the phases of litigation, we propose a measure that captures the procedural engagement of judges in the process. To that end, we construe the two procedural phases that are originally defined in terms of litigants’ actions—filing and pleading—using alternative terms that measure judges’ procedural actions (JPAs) in them. Specifically, in cases that terminated during the filing and
pleading phases, we use judges’ rulings on motions as a measure of their procedural involvement, which can then be used in conjunction with their procedural actions in later phases: presiding over pre-trial case-management hearings and trial hearings. Section III details the operationalizing of this approach and the findings it yields: outlining the relationship between JPAs and MoDs.

III. THE ROLE OF JUDGES IN CIVIL LITIGATION: TRIAL, JUDGMENT AND SETTLEMENT THROUGH THE PRISM OF JUDICIAL ACTIVITY

A. Capturing and Evaluating Judicial Activity in an Era of Vanished Trials

1. Case Terminations through the Prism of Judges’ Procedural Actions

How is the vanishing trial phenomenon reflected in the role of courts and judges? Our discussion in Subsection I(A) suggests that the fact that the overwhelming majority of cases do not reach trial or end in a judgment on the merits does not necessarily mean that the centrality of judges in litigation is diminishing. The literature on settlements assumes that the most typical barrier to reaching a compromise in a disputed issue is uncertainty or asymmetric information about the case.55 Judges’ decisions in previous cases (the “shadow of the law”) and their actions in the litigated dispute at hand (the JPAs) can promote settlement because they provide the parties with information that can help them develop more similar estimates of liability and damages, which in turn would improve the prospects of settlement.56 Previous trial outcomes supply reference points that affect the parties’ decision to end the litigation without trial. In addition, judges can directly promote settlements throughout the litigation process by directly facilitating the bargaining process, transmitting valuable information to litigants, or creating procedural mechanisms that affect litigants’ decision to pursue a particular MoD. Thus, not only does the litigation process require parties to exchange information through their pleadings, the discovery process,57 and the filing of other motions,58 it also enables

56 See Landes, supra note 10, at 101-102.
57 See e.g. Steven Shavell, The Sharing of Information Prior to Settlement or Litigation, 20 RAND J. ECON. 183 (1989); Kuo-Chang Huang, Does Discovery Promote Settlement? An Empirical Answer6 J. EMPIRICAL LEGAL STUDS. 241 (2007)
58 See e.g Christina L. Boyd & David A. Hoffman, Litigating Toward Settlement, 29 J. L., ECON. & ORGANIZATION 898, 900 (2012) (Explaining that motion practice outside discovery “produces two additional sources of information: how the filing party understands the facts and law—their strategy for the case—and how committed they are to the case—the kind of resources they are willing to expend.”)
parties to gain insight about how the court (preliminarily) views the facts and legal merits of the case, through the judge’s ruling on motions and direct input in case-management and settlement hearings. Judges’ settlement promoting “interventions” can take the form of on- and off-the-record pre-trial interaction with lawyers and litigants about settlement or other aspects of the case, case management techniques, and procedural governance over the trial itself.

A recent study based on courtroom observations of pre-trial hearings in Israeli Hashalom courts reports the extensive—and often intensive—settlement promoting practices that judges exhibit. Examples include persistently encouraging the parties to negotiate, opining on the merit of the case, emphasizing the costs and risks of proceeding to trial, and providing implicit or explicit prediction of the likely outcome of adjudication. Indeed, judicial settlement promoting practices have become so deeply embedded in litigation, that “[r]ather than two separate tracks—adjudication on the one hand and negotiation and settlement on the other—there is a single process of pursuing remedies in the presence of courts.” This convergence raises questions about the nature of the institutional role that courts play in society, and the specific role that judges play, as their primary agents.

In order to understand and evaluate the actual role that judges play in civil litigation nowadays, case terminations cannot be treated as a homogenous population. Rather, it is necessary to distinguish between cases in which judges are actively involved by way of exercising JPAs, and cases which terminate without any substantive judicial involvement. Similarly, we ought to consider that cases that dispose for reasons such as lack of jurisdiction, statistical closing, or litigant inaction do not inform our understanding of judges’ role as much as cases that dispose substantively, including both adjudication on the merits and settlement.

Accordingly, we define four types of JPAs that precede the termination of the case: ruling on motions, conducting pre-trial hearings, presiding over trial hearings, and lack of substantive judicial involvement (by way of motions or hearings); and we look at the relationship between each JPA and the various MoDs. Subsection A2) presents the methodological operationalization of our approach, Subsection B presents the results of

59 Id.
60 Sela et al., supra note 51
62 Resnik, supra note 12.
63 Elizabeth G. Thornburg, The Managerial Judge Goes to Trial, 44 U. RICH. L. REV. 1261 (2009)
64 See: Sela et al., supra note 51.
65 Galanter & Cahill, supra note 13, at 1341-1342.
its application of to our data and discusses how they reflect on the nature of vanished trials and the role that judges play in civil litigation in Israel. Subsection C provides a multinomial logistic analysis that quantifies the relationship between JPAs and MoDs, net of other procedural and case-specific traits.

2. Operationalizing Case Terminations in Terms of Judicial Activity

In Subsection II(A) we discussed four procedural phases in litigation: filing, pleading, pre-trial and trial. The latter two phases—pre-trial and trial, which account for 30% of the sample, are well defined in terms of JPA, and are measured by the average number of hearings: 1.72 hearings in pre-trial (SD=1.07) and 2.84 hearings in trial (SD=2.77). In contrast, the 70% of cases that terminate during the filing and pleading phases are defined in terms of litigants’ procedural activity—filing and defending a lawsuit. In order to describe these case terminations in terms of JPA, we capture the primary measureable judicial activity available in our dataset that can affect their MoD, and specifically, the prospect of settlement: ruling on motions. Thus, we classify all case terminations during the filing and pleading phases into two categories, based on whether judges ruled on motions prior to the final disposition. We propose to treat cases in which no judicial activity took place (neither motions nor hearings), as cases in which the court exercised only an institutional function.

Since our database does not include a count of judges’ rulings on motions, we relied on the filing of motions by litigants as a proxy. Case termination requires the filing of at least one motion, except in instances in which the court is authorized to initiate it, such as lack of prosecution. Therefore, we operationalized all case terminations in which one or less motion was filed (and no hearing was held) as impacted by the court’s institutional function; and all case terminations in which two or more motions were filed (and no hearing was held) as affected by judicial motion activity. Since only a negligible number of case terminations during the filing and pleading phases included defendant motion activity that fulfilled the abovementioned criteria for judicial motion activity (in 45/727 cases there was more than one defendant motion), we relied on the much richer motion activity by plaintiffs (298/727 cases, see Table 2).66

Figure 3 presents the operationalization of case terminations in the filing and pleading phases as either the court’s institutional function or judges’ motion activity. It shows that roughly 60% of the cases that terminated during the filing or pleading phases did so under the auspices of the court’s institutional function; and complimentarily, about 40% of case terminations in these phases occurred following judicial motion activity.

66 Moreover, 60% (=27/45) of the cases that fulfilled the criteria of “judicial motion activity” were already
Table 2 presents the means and standard deviations for judicial motion activity in cases that terminated during the filing and pleading phases. It shows that the average number of motions that precede the termination of these cases is 2.84, and that there are no statistically significant differences between judicial motion activity in the filing or pleading phases. While the intensity of judicial motion activity ranges between 2-9 motions, the variance is not high (SD=1.20). Notably, this range refers only to judicial motion activity: it excludes cases that terminated under the auspices of the courts’ institutional function or subsequent JPAs in the pre-trial and trial phase. In our study, the role of judges in the latter two categories is not defined in terms of judicial motion activity but rather in terms of judges’ conduct in pre-trial hearings, or their presiding over trial. This approach reflects the stance that the procedural involvement of judges intensifies as their exposure to litigants increases: from rulings on motions, through pre-trial case management and settlement practices to governance over a full trial process.67 This approach receives empirical support from our analysis of the mean number of plaintiff motions by JPA. The only JPA category that is significantly different from other JPA categories in terms of mean number of motions is the court’s institutional function. In contrast, the mean differences between JPA categories that involve judges (motion activity, pre-trial and trial) are not significant. In other words, as further supported by the

---

67 The idea that the intensity of judges’ involvement in the case impacts its termination, was suggested early on, for example: Herbert M. Kritzer, *The Judge’s Role in Pretrial Case Processing: Assessing the Need for Change*, 66 Judicature 28, 36 (1982) (Analyzing a survey of CLRP lawyers, finding a .56 correlation between the intensity of judicial participation in settlement and attorneys’ assessments that the judges made an impact in their cases)
model presented in Subsection III(C), motion activity is a useful differentiator between the court’s institutional function and judicial motion activity, but not between judicial motion activity and pre-trial or trial activity (ΔMeans(IF-Motions)=2.04, p<0.001, ΔMeans(IF-Pre-Trial)=2.07, p<0.001, ΔMeans(IF-Trial)=2.23, p<0.001).

Table 2: Judicial Motion Activity During the Filing and Pleading Phases

<table>
<thead>
<tr>
<th># of motions by the Plaintiffs</th>
<th>N</th>
<th>Range</th>
<th>Mean</th>
<th>Std</th>
<th>t-test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filing</td>
<td>259</td>
<td>2-8</td>
<td>2.78</td>
<td>1.09</td>
<td>-1.474</td>
</tr>
<tr>
<td>Pleading</td>
<td>39</td>
<td>2-9</td>
<td>3.21</td>
<td>1.74</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>298</td>
<td>2-9</td>
<td>2.84</td>
<td>1.198</td>
<td></td>
</tr>
</tbody>
</table>

Note: The information in this table excludes cases that terminated during the filing or pleading phases pursuant the court’s institutional function (in which 0-1 motions were filed), and cases that terminated in the pre-trial or trial phases (in which the mean number of motions is higher (3.03), albeit not significantly different).

Figure 4 summarizes the implications of operationalizing case terminations in terms of the JPAs that preceded them. It shows that judges have “vanished” from litigation in 41% of case terminations. In these cases, the court fulfils solely an institutional function, as no JPA through motions or hearings is exercised. This finding is critical in understanding the relationship between the role of judges and the vanishing trial phenomenon. It demarcates the limits of the assertion that judges’ managerial and settlement promoting practices contribute to the vanishing of trials.68 In our sample, judges were not engaged in 41% of the cases in the docket, which evidently terminated solely on account of the litigants’ action or inaction.

68 For example, Resnik suggests that “this “new [multitasking] judicial posture is a factor contributing in the United States to the now-familiar ‘vanishing trial.’” (supra note 53, at 1814)
Figure 4: Case Terminations by Judicial Activity

What separates JPA through motions (29% of case terminations) and JPA in the pre-trial (19%) and trial (11%) phases is the type and extent of interaction between the judge and the litigants (and their attorneys). Judicial motion activity is performed through written rulings on motions filed by the parties. Thus, it is limited to the specific issues raised in the motions, and it is completely “on-the-record.” Nonetheless, research shows that motion practice can substantially shape parties’ knowledge about their cases and thereby influence their dispositive decisions, and especially their settlement activities.69 In contrast, in Israel, judicial pre-trial and trial activity involves hearings in an open court of law, which entail direct interaction between the judge, the litigants and their lawyers. The “courtroom encounter” that the hearing facilitates creates ample opportunities for providing information and influencing the dispositive decisions of the parties, both on- and off- the record.70

B. Describing the Relationship between Judicial Activity and Mode of Disposition

Figure 5 shows case terminations divided by the three JPAs and the court’s institutional function. For each category, the rate of the various MoDs is presented.

---

69 See: Boyd & Hoffman, supra note 58; Huang, supra note 57.
70 Sela et al., supra note 51.
Figure 5: Court Function by Mode of Disposition

Figure 5 suggests that the court’s most predominant institutional function is to validate the legal result of litigants’ inaction or erroneous action (53%): issuing a default judgment due to defendants’ inaction (33%), case dismissal due to plaintiffs’ lack of prosecution (16%), and technical termination due to reasons such as lack of jurisdiction or statistical closing (4%). Plaintiffs actively cease the litigation process in 7% of the cases that do not involve JPA. Finally, the court’s institutional function also serves as a platform for litigants to settle the lawsuit on their own (26%+12%=38%).

In the sub-set of cases which terminated subsequent judicial motion activity, the most frequent MoD is settlement (40%+20%=60%), although litigant inaction continues to account for 30% of terminations (26% in the form of default judgment). Among the cases that terminated during the pre-trial phase, after the judge interacted with the parties in a case-management and settlement hearing, settlement remains the most common MoD (60%+6%=66%). In 16% of the cases which terminated during the pre-trial phase, litigants opted for adjudication on the merit without trial, either through a traditional judgment on the merits (7%) or through “judgment by way of compromise”\textsuperscript{71} (9%). Case

\textsuperscript{71} See the discussion associated with notes 47-48, supra.
termiations during the trial phase present the reverse distribution of settlement and judgment: An adjudicatory determination by the judge is a significantly more frequent MoD (78%), either by a traditional judgment on the merits (53%) or through a “judgment by way of compromise” (25%). Only 17% of the cases that reach trial settle, and additional 4% are voluntarily withdrawn, at this advanced stage of litigation, likely representing some form of settlement.

In order to understand the landscape of litigation and judges’ role in it, the findings presented in should be interpreted in the context of the magnitude of case terminations in each category of JPA. Judicial trial activity (N=118) is approximately one and a half times less frequent than judicial pre-trial activity (N=191) and 2.5 times less frequent than judicial motion activity (N=298). Thus, altogether, among the cases that terminated subsequent either of the three types of JPA, settlement is the most likely MoD (324/607=53%), and adjudication on the merits accounts for 20% of the terminations (78/607=13% by judgment on the merits, and 46/607=7% by judgment by way of compromise). In other words, about half of the cases that judges substantively handle, by either ruling on motions or presiding over hearings—settle; and trials have not vanished to as large an extent as suggested by the aggregate data. Moreover, of the cases that are publicly heard in a hearing in an open court of law, and in which litigants interact directly with a judge (pre-trial and/or trial), 47% settle and 40% are adjudicated, either through a judgment on the merits (76/309=25%) or judgment by way of compromise (46/309=15%). As we elaborate in Section IV, these figures are meaningful to the discussion about whether judges’ public-political role is eroding.

Figure 6 flips the perspective on the relationship between JPAs and MoDs. It enables us to observe with greater clarity the nature of the complex relationship between the role of judges, the settlement culture and other types of non-adjudicatory MoDs that characterize vanished trials. Not surprisingly, adjudication on the merits is observed most frequently in the trial phase (76% of traditional judgments and 60% of judgments by way of compromise). However, the courtroom encounter in the pre-trial hearing sufficed for a considerable portion of litigants who requested judgments by way of compromise (30%) and traditional judgments on the merits (16%) at this phase.
Figure 6: Modes of Disposition by Judicial Procedural Activity

As far as settlements are concerned, Figure 6 makes it clear that judges are involved in the majority of cases that settle, either through motion activity, pre-trial activity and trial activity (252/364=69% of court approved settlements and 72/125=58% of out-of-court settlements, totaling 324/489=66% in both). However, the nature of judicial involvement in settlements is different between settlements that are achieved out-of-court and settlements that receive the court’s approval (rolled into judgment). Out-of-court settlements are most likely to be exposed to judicial rulings on motions (47%) or only to the court’s institutional function (42%), while court approved settlements are almost equally likely to be exposed to the court’s institutional function (31%), judicial rulings on motions (34%) or judicial pre-trial case-management hearing practices (31%). In this context, let us note that the majority of voluntary withdrawals (57%) occur subsequent some judicial activity. Specifically, 23% of the withdrawals occur after the lawsuit has been defended and the parties interacted with the judge in a courtroom encounter during the pre-trial (16%) or trial (7%) phase. These withdrawals are possibly the result of out-
of-court settlement which was not reported to the court—adding 2% to the overall settlement rate.72

Furthermore, one can contend that the rate of cases that terminate without substantive judicial involvement is even higher than the 41% of cases that terminate under the court’s institutional function. Theoretically, when a case terminates due to litigant inaction or technical reasons the relationship between the JPA and the MoD is very weak. Although the majority of default judgments, dismissals due to lack of prosecution or terminations due to technical reasons occurred under the auspices of the court’s institutional function 66% (226/343),73 it is difficult to assume that the remaining 34% (117/343) were substantively impacted by the JPAs that preceded them (93 of these 117 cases (80%) terminated subsequent judicial motion activity). Thus, it seems plausible to argue that this sub-set of cases, which amounts to 11% (117/1036) of case terminations, are more akin to the 41% of cases that terminated under the auspices of the court’s institutional function. If we were to add these two sub-sets together, then the overall rate of cases that terminate independent of a judge’s procedural or dispositive discretionary activity would become 52%: the majority of cases.

C. Modeling the Relationship between Judicial Activity and Mode of Disposition

In Subsection B we presented the association between the JPAs and MoDs. In this subsection, we present a multinomial logistic analysis that uses the JPAs to predict the odds ratio of three MoD scenarios: adjudication on the merits, settlement, or other MoDs, while controlling for several other characteristics of the case and the procedure. Thus, the multivariate model quantifies the relationship between judges’ procedural involvement in litigation in terms of JPA and the likelihood of settlement (compared to adjudication on the merits or other MoDs), net of other process and case characteristics. Specifically, we control for the filing of the defense pleadings, the number of motions filed by the plaintiff and the defendant, the number of hearings that were held, the number of hearings that were canceled, and the value of the claim (the sum claimed). The application of the model to our representative sample allows us to generalize its findings to the population.

72 In fact, the settlement rate may be even higher, as some of the cases adjudicated on the merits are likely appealed and settled before the appeal process concludes. See: Theodore Eisenberg & Michael Heise, Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal, 38(1) J. LEGAL STUD. 121, 133 (2009) (Noting there is an “appeal dropout” phenomenon: “of the 965 cases that initiated the appeals process, 549 pursued an appeal to completion. Appeals that dropped out prior to decision were resolved through settlement, withdrawal, or other disposition.”). See also: Eisenberg & Lanvers, supra note 8, at 114 (“settlement itself can and does occur at any stage: before trial as is widely recognized, after trial, and during the appellate process.”)

73 Default judgments: 61% (140/229); dismissals due to lack of prosecution: 79% (69/87); terminations due to technical reasons: 63% (17/27).
of general civil litigation in the three most common procedural tracks in Hashlaom courts in Israel.

Due to the small number of cases within some MoDs, and in order to simplify the predictive analysis of case termination, we grouped the eight MoD categories into three MoD clusters. Adjudication on the Merits is a cluster that combines judgment on the merits and judgment by a way of compromise. Theoretically, the two MoDs can be clustered because they both reflect termination of the case by a substantive decision of the judge. Empirically, this clustering is motivated by the relatively small number of cases within each of these MoDs and the similarity in their outcome patterns: the difference in distribution of case outcome in judgments on the merits (N=82) and judgments by way of compromise (N=47) was not statistically significant ($\chi^2=3.325$, p=0.344), as shown in Figure 7. The Settlement cluster includes court approved settlements and out-of-court settlements, which are differentiated only by whether litigants’ chose to roll their settlement agreement into a judgment. Finally, Other MoDs is a residual cluster that lumps together all MoDs which are neither adjudication on the merits nor settlements: default judgment, dismissal due to lack of prosecution, voluntary dismissal, and technical MoDs such as statistical closing or joinder of claims.

Figure 7: Case Outcomes in Judgments “on the Merits” and “by Way of Compromise”

Table 3 displays the parameter estimates of the contrast between settlement and adjudication on the merits (Column 2), and the contrast between settlement and other MoDs (Column 3). We estimate the likelihood of case termination on JPAs, net of the filing of defense pleadings, the number of motions filed by both the plaintiff and the defendant, the number of hearings that were held or were cancelled, and the value of the

---

74 See the discussion of “judgment by way of compromise” in Subsection II(B)
claim (the sum claimed). Generally, we anticipate that settlement is more likely than adjudication under all types of JPA except trial, and that once a trial ensues adjudication becomes significantly more likely than settlement. We further expect that a lower value of the claim, a lower number of hearings, and a higher number of hearing cancellations would improve the odds ratio of settlement. Comparing the likelihood of settlement to other MoDs, we expect settlement to be more likely when judges are actively engaged in the case. In other words, the odds ratio of settlement would be higher in cases that terminated after judges ruled in motions and conducted pre-trial hearings compared to cases terminated under the auspices of the court’s institutional function. Furthermore, we anticipate that the chances of settlement are higher when defense pleadings are filed, the number of motions filed by the litigants is higher, and the value of the lawsuit increases.
Table 3: Multinomial Logistic Regression Explaining Case Termination with JPA

<table>
<thead>
<tr>
<th></th>
<th>Settlement vs. Adjudication on the merit</th>
<th>Settlement vs. Other “vanished trials”</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial involvement (JPA)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Institutional function</td>
<td>4.717*** (0.656)</td>
<td>Ref. category</td>
</tr>
<tr>
<td>Motions</td>
<td>5.670*** (0.846)</td>
<td>0.617** (0.206)</td>
</tr>
<tr>
<td>Pre-trial</td>
<td>3.076*** (0.379)</td>
<td>0.861* (0.353)</td>
</tr>
<tr>
<td>Trial</td>
<td>Ref. category (0.628)</td>
<td>0.376 (0.628)</td>
</tr>
<tr>
<td>No defense pleading</td>
<td>0.779 (0.513)</td>
<td>-0.971*** (0.228)</td>
</tr>
<tr>
<td># of motions by the plaintiff</td>
<td>0.074 (0.049)</td>
<td>0.139* (0.066)</td>
</tr>
<tr>
<td># of motions by the defendant</td>
<td>0.029 (0.066)</td>
<td>-0.026 (0.074)</td>
</tr>
<tr>
<td># of hearings</td>
<td>-0.208 (0.127)</td>
<td>-0.127 (0.158)</td>
</tr>
<tr>
<td>Hearing Cancelations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>[ref. category at least 2 hearings cancelled]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No hearing was cancelled</td>
<td>-1.233* (0.489)</td>
<td>-0.631 (0.463)</td>
</tr>
<tr>
<td>One hearing was cancelled</td>
<td>-0.913 1 (0.501)</td>
<td>-0.321 (0.486)</td>
</tr>
<tr>
<td>Claim sum [ref. category 100k+]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>0 - 10k</td>
<td>-0.323 (0.487)</td>
<td>-0.100 (0.227)</td>
</tr>
<tr>
<td>50k - 100k</td>
<td>-0.314 (0.465)</td>
<td>0.397 (0.231)</td>
</tr>
<tr>
<td>50k - 100k</td>
<td>-0.834 (0.533)</td>
<td>-0.399 (0.242)</td>
</tr>
<tr>
<td>Missing information</td>
<td>0.816 (0.546)</td>
<td>0.625* (0.313)</td>
</tr>
<tr>
<td>Constant</td>
<td>-0.522 (0.729)</td>
<td>0.847 (0.541)</td>
</tr>
</tbody>
</table>

**X2**  569.930***

Degree of freedom  26

Cox and Snell  0.423

*** p<0.001, ** p<0.01, * p<0.05, 1 P=0.069

Note: No significant differences were found between judicial motion activity and pre-trial in the likelihood of case termination by settlement rather than other "vanished trials" (e0.244, p>0.05)
Column 1 quantifies the expected growing likelihood of settlement compared to adjudication on the merits, as the judicial involvement in the case intensifies, compared to trial. Given the scarcity of adjudication on the merits during the filing and pleading phases this analysis is most relevant to detect differences between JPA in pre-trial and trial. Cases that terminated after the trial ensued multiplied their chances to terminate in adjudication on the merits rather than settlement by 22 compared to cases that terminated during pre-trial ($e^{3.076}, p<0.001$). In other words, once a lawsuit proceeds to trial, the chances for settlement significantly drop. Contrarily, as expected given the procedural lifecycle of lawsuits, cases that terminated after judicial motion activity ($e^{5.670}, p<0.001$) or under the auspices of the court’s institutional function ($e^{4.717}, p<0.001$), were significantly more likely to settle than be adjudicated on the merits compared to cases that reached trial.75

Column 2 measures the likelihood of settlement compared to other MoDs (other “vanished trials” in the dispositive sense) given the different types of JPA. Since the “Other MoDs” cluster includes default judgments, dismissal due to lack of prosecution, case withdrawal, and other “technical” MoDs—this analysis is most relevant for cases which terminated during the filing and pleading phases. We find that lawsuits that end following judicial motion activity are more likely to settle by 85% compared to cases terminated under the court’s institutional function ($e^{0.617}, p<0.05$). This finding is consistent with the theoretical prediction that information signals contained in both the defense pleadings and judges’ rulings on motions each independently help the parties bargain a settlement. It also supports the notion that even if judges do not directly encounter litigants in a hearing, they are able to impact case terminations through their rulings on motions. As expected, the likelihood of settlement over other MoDs persists, and even increases, in pre-trial. Cases which terminated during pre-trial were more likely to settle by 137% compared to cases that terminated under the court’s institutional function ($e^{0.861}, p<0.001$). Interestingly, however, the analysis did not detect significant differences in the likelihood of settlement in cases that were exposed only to judges’ ruling in motions and cases that were exposed to presumably more intensive judicial settlement-promoting interventions during pre-trial hearings.

To summarize, our multinomial model confirms that the likelihood of settlement before trial increases in cases in which judges are involved: compared to other MoDs, settlement is approximately twice more likely to occur in cases terminated following judicial motion activity or pre-trial activity than in cases terminated under the court’s institutional function ($e^{0.617} = 1.85; e^{0.861} = 2.37$). Once a case progresses from pre-trial to

75 The likelihood of settlement versus adjudication on the merits was not significantly different between cases in which judicial motion activity took place and cases that were subject only to the court’s institutional function ($e^{0.953}, p>0.05$, not shown in Table 3).
trial, settlement becomes 95% less likely compared to adjudication on the merits (e^{-3.076}=0.046).

Net of lawsuit's JPA, the analysis shows that other case features are relevant to the MoD, specifically the filing of defense pleading, the number of motions filed by plaintiffs, and the number of hearings that were cancelled. Predicting the likelihood of settlement versus adjudication on the merits, we can see that apart from hearing cancellations, no significant effects were found for other case features. A higher number of cancelled hearings increases the likelihood of settlement (e^{-1.233}, p<0.05 for no cancellation and e^{-0.913}, p<0.1 for one hearing cancellation). This finding is consistent with the idea that litigants request to postpone or cancel a hearing when they are engaged in negotiations to settle the case. In addition, comparing settlement with other MoDs, we find that cases in which the defense pleading was submitted and cases with higher number of motions were significantly more likely to dispose by settlement (e^{-0.971}, p=0.001 for no defense pleading and e^{1.139}, p<0.05, respectively). This finding is consistent with the theoretical prediction that the likelihood of settlement increases when litigants have more information about the dispute, the position of the other party, the legal status of the claim or the position of the decision-maker (the judge). Notably, the value of the claim was not associated with the likelihood of settlement in any of the scenarios.

IV. CONCLUSION

In this article, we examined the role of judges in the current landscape of civil litigation. This landscape is characterized by growing caseloads, vanished trials and rising settlement rates. Accordingly, our starting point was that in the vast majority of cases—trial judges do not perform their paradigmatic roles: presiding over trials and issuing judgments on the merits; rather, they engage primarily in case-management and settlement promotion. As a practical matter, this state of affairs is not new, and it will likely continue to shape the civil justice system in the years to come. Litigants’ “[d]emand for adjudication-backed remedies” does not subside—notwithstanding the fact that those remedies are rarely delivered in the form of adjudication on the merits. At the same time, the legal system has not taken significant measures to boost the “supply of

76 Contrarily, given that the lion’s share of the other MoDs category are rendered during the filing or pleading phases, hearing cancellation plays no significant role in predicting the likelihood of settlement compared to other MoDs.

77 Galanter & Cahill, supra note 13, at 1387.
facilities for full-blown adjudication.” The normative implications of the discussed trends are subject to debate. Some scholars suggest that they reflect a privatization of courts that erodes their ability to perform their important public roles: creating law and promoting public values. Others suggest that these trends create a space for more nuanced and inexpensive modes of dispute resolution that can improve the legal processing of disputes and introduce non-binary notions of justice.

Arguably, evaluating the nature of litigation-related settlements, and specifically—the subset of settlements in which judges are involved, requires a comprehensive dispute system design analysis of courts and the entire eco-system of extra-judicial dispute resolution options. This process may call for a reconsideration of the goals of courts and adjudicatory processes, and a restatement of the attributes of desirable procedures. As Galanter and Cahill aptly argue: “[s]ettlement is not intrinsically good or bad, any more than adjudication is good or bad…. [t]he task for policy is not promoting settlements or discouraging them, but regulating them… [to] encourage settlements that display desirable qualities.” Therefore, they call on us to develop a better empirical and normative understanding of the effects of judicial intervention on the number and the quality of settlements. Specifically, they observe that “the available studies provide no basis for thinking judicial promotion leads to a number of settlements that is sufficiently higher than would otherwise occur to compensate for the opportunity costs of the judicial attention diverted from adjudication.”

Our analytical approach contributes to the understanding of this dynamics. It provides measures for various types of judicial engagement in civil courts, in relation to trials, settlements and other MoDs. This approach is premised on several ideas. At its core lays the notion that we need to develop a better understanding of the relationship between the

78 Id. See also: Luban, supra note 17, at 2643-2644 (“we should expect to see exactly what we do in America: a litigation rate that increases faster than the population … It is unlikely either that legislatures will appropriate funds for enough new courts to handle the entire caseload increase, or that a speed-up alone can deal with major increases.

79 See e.g.: Owen Fiss, Against Settlement, 93 YALE L. J 1073 (1984); Luban, supra note 17, at 1835 (“the public dimensions of [judges’] work are diminishing” and “the framework of "due process procedure," with its independent judges and open courts, is replaced by what can fairly be called "contract procedure."” (id, at 1837)

80 See e.g.: Carrie Menkel-Meadow, Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases), 83 GEO. L.J. 2663 (1995); Michal Alberstein, Judicial Conflict Resolution (JCR): A New Jurisprudence for An Emerging Judicial Practice 16 CARDOZO J. CONFLICT RESOL. 879 (2015)


82 Galanter & Cahill, supra note 13, at 1388.

83 Id.
procedural role and the dispositive role of judges. To that end, we explored the frequency of the various MoDs not only in relation to the progression of lawsuits through the procedural phases of litigation, but also in relation to the different types of JPAs (rulings on motions, pre-trial case-management and settlement hearings, trial hearings, and lack of JPA. This operationalization enabled us to demonstrate the importance of distinguishing between cases in which judges are involved, and cases which terminate without any discretionary judicial involvement—procedural or dispositive.

Analyzing all case terminations, we found that only 11% reach trial, and in only 30% an in-person encounter with the judge takes place (through pre-trial or trial hearings). On the dispositive level, looking at all case terminations, only 13% of lawsuits are adjudicated on the merits,\(^{84}\) 47% are settled,\(^ {85}\) and the remaining 40% are terminated due to technical reasons, litigant inaction (default judgments or lack of prosecution) or voluntary withdrawal. We proposed that these figures should not serve as the basis for evaluating the role of judges in civil litigation, because they do not provide an accurate depiction of what judges actually do: 41% of these cases terminated without any judicial involvement by way of ruling on motions or presiding over hearings. Thus, in two fifths of the cases, the court performed a predominantly institutional function: a forum under whose auspices cases terminate, absent any significant judicial input. It follows, that in order to describe and understand judges’ role in civil litigation, it is more helpful to focus on the 59% of cases in which judges were actively involved and had the potential to influence.

Turning our focus to cases which terminated subsequent JPAs, provides a more relevant depiction of the scope and nature of the civil trial judge role. First, we naturally observe increased rates of trial, adjudication on the merits and settlement: 19% of the cases go to trial, 20% are adjudicated on the merits,\(^ {86}\) and 53% are settled.\(^ {87}\) Our multinomial model quantifies the relationship between different types of JPA and the likelihood of settlement compared to different MoDs. It shows that compared to other “vanished trial” MoDs, settlement is approximately twice more likely to occur in cases that terminated following judicial motion activity or pre-trial activity than in cases terminated under the court’s institutional function, and that once a case progresses from pre-trial to trial, settlement becomes 95% less likely compared to adjudication on the merits. Moreover, when litigants, lawyers, the media and the public frequent the halls of justice, the public image of courts and judges is shaped by a fairly high rate of “traditional judging”: of the 30% of cases that terminate following a public hearing in an

\(^{84}\) 7% by judgment on the merits and 5% by judgment by way of compromise
\(^{85}\) 35% in court approved settlement, 12% in out of court settlement.
\(^{86}\) 13% by judgment on the merits and 7% by judgment by way of compromise.
\(^{87}\) 41% in court approved settlement, 12% in out-of-court settlement.
open court of law during either pre-trial or trial, 40% are determined by adjudication on the merits.

These analyses provides useful information in response to the calls for more nuanced empirical analysis of settlement and adjudication, and specifically for analyses that account for the significant variation within them, which makes them “almost meaningless concepts to compare in the abstract.” In this sense, our study provides some of the “empirical verification [that] is essential if we are to get past the overly generalized and abstracted claims made both for and against settlement.”

Indeed, our study does more than provide fine-grained description of the MoD categories of adjudication on the merit and settlement. By differentiating between case terminations based on whether they were exposed solely to the court’s institutional function or also to the types of judicial functions, the article provides a measure for the scope and nature of the role of judges in the legal system as distinct from the role of courts as an institution. It enables us to distinguish between the demand-side use-patterns of litigants vis-à-vis courts and judges, and the role that judges effectively supply. It also calls into question whether all the cases that utilize only the court’s institutional function should continue to be directed to court.

David Luban distinguishes between two types of justifications for the judicial function in the legal system, which he terms the “problem-solving conception” and the “public-life conception.” The former emphasizes the court’s dispute resolution function; the latter emphasizes its political, value-promoting and declaratory function. As Luban’s explains:

The problem-solving conception of adjudication is broadly Hobbesian in character. Peacekeeping and coordination require governmental monopoly or near-monopoly on the use of violence and coercion. Justifying this monopoly, in turn, requires government to engage in the business of adjudicating disputes, because dispute resolution is effective only when the state's coercive power backs it up . . . the wisdom of the judge consists not in issuing the wisest orders, but in facilitating the quickest and most painless resolution of disputes. Rather than debating principles, the judge tries to wrestle the interests of the parties into alignment.

Luban contrasts the problem-solving conception with the public-life conception, which focuses on the role of courts in defining, declaring, and promoting the public values that are realized in laws. Thus, “even ostensibly private disputes between

---

89 Id.
90 See: Luban, supra note 17, at 2632-2635.
91 Id., at 2634.
apolitical citizens may have a public dimension engaging these values . . . Adjudication, then, is necessary to define and redefine the conditions of the public space . . . [and] all adjudications are public in significance.”\footnote{Id., at 2634-2635.} In this sense, Luban considers adjudication “as much a part of political vitality as free elections and legislative debate.”\footnote{Id., at 2637.}

Settlements are commonly understood as a part of the court’s problem-solving conception, and not its public-life conception, although there are certainly other views which justify settlement on its own moral ground as promoting important values that are consistent with the values of the legal and political systems.\footnote{See: Menkel-Meadow, supra note 88, at 2669-2670 (Pointing to values such as consent, participation, empowerment, dignity and empathy)} Luban, too, recognizes that it would not be desirable—either pragmatically or normatively, to abolish settlements altogether. Rather, he questions what should be the appropriate rate of settlement and adjudication, given the “forces of friction in the legal system.”\footnote{Luban, supra note 17, at 2642.}

Our study allows us to reconsider our understanding of the magnitude and impact of the court’s function in terms of both the problem-solving and public-life conceptions. The common juxtaposition of adjudication on the merits (13%) and “all other case terminations” (87%) suggests that there is a 1:9 ratio between the public-life function and the problem-solving function of courts. However, our analysis unbundles the latter category, showing that it comprises of 47% settlements (in the sense of a substantive agreement that ends the legal dispute), and additional 40% that terminated due to other reasons: litigant inaction, withdrawal, or technical reasons. Those 40% of cases represent some form of attrition from judicial influence: they did not present judges with the potential to exercise either their problem-solving role or their public-political role (notably, default judgements do result in a problem-solving outcome, but in a technical institutional form).

Considering only the cases in which the court—through its judges—had the potential to exercise a substantive discretionary function, we obtain a strikingly different 1:3 ratio between the problem-solving and public-life conceptions: for every three cases in which the court exercises solely its problem-solving role (facilitating settlement), there is one case in which it exercises its public role (adjudicating on the merits). Whether this is a normatively appropriate ratio between the two roles may still be subject to debate, but the debate should be based on the relevant data.

Our analysis further portrays the boundaries of an even bolder claim: some settlements also fulfil the public-life function of courts, because they are brokered, or at least shaped or supervised, by judges. In the most expansive sense, judges are procedurally involved and have the potential to influence the majority of settlements (66%), by way of ruling on
motions or presiding over hearings. In a more restricted sense, 34% of settlements are reached following a public hearing (in pre-trial or trial), where judges are often actively involved in promoting and shaping settlements. Studies that inquired lawyers and judges about judges’ settlement promoting practices reveal there is a plethora of such judicial behaviors, some of which more "directive" (focusing on the legal strengths and weaknesses of the lawsuit and the related evaluations of costs and risks); others more "problem-solving" (facilitating communication between the parties and focusing on the underlying issues giving rise to the conflict—the parties’ needs, goals, fears, and feelings).\(^{96}\) The observational study of pre-trial settlement hearings in an Israeli civil court documented similar judicial settlement promotion practices in our study population, observing significant input and influence of judges on settlements during pre-trial hearings.\(^{97}\) In the process, judges contribute to the elaboration (or enforcement) of public values, at least for litigants. In Israel, where these settlement discussions occur in an open court of law (and not in the private chambers of the judge), this effect may extend to others who are present in the courtroom or otherwise learn about the process and its outcome. This procedural design also mitigates—albeit to a limited extent—some of the concerns that settlements "privatize" information to which a democratic society should have access, by keeping some (or all) elements of the settlement process, information and outcome open to the public.\(^{98}\) Finally, let us recount in this context that adjudication on the merits shapes much of the dispute landscape in courts from the perspective of litigants, lawyers and the public who attend court hearings: in two out of five cases that are heard in an open court, judges fulfill their archetypical political public-life archetype role: publicly determining the outcome, applying the law and declaring social values.

In conclusion, our analysis of the procedural and dispositive actions of Israeli trial judges points to the need for a more detailed and cautious evaluation of the current role of trial courts and judges. The recognition that 41% of the cases that go through civil courts are pipelined through them without any substantive treatment or consideration by a judge, and oftentimes, not even by the litigants themselves. In those cases—where settlement is


\(^{97}\) Sela et al. supra note 51.

\(^{98}\) Luban, supra note 17. Let us note, however, that while judicial settlement discussions in Israeli courts take place in an open hearing that can be publicly observed, judges are authorized to include in the formal record that documents the hearing only a summary of the discussions (§68A(a) ISRAELI COURTS LAW (CONSOLIDATED VERSION) 5744-1984.
reached without any judicial involvement or litigants opt out of the litigation altogether—there is no potential for judges to exercise any meaningful function. It raises the question of whether a better mechanism should be designed for dealing with those disputes, rather than their idle filing to court. In this context, our primary proposition becomes clearer. Trial rates are low and settlement rates are high, but these are not appropriate measures for the magnitude of neither the political, public-life function of courts, nor for the role of judges in civil litigation. Judges are involved in the majority of litigated cases, and their procedural involvement affects the way cases terminate. Specifically, judges are significantly involved in many of the cases that settle, thereby channeling some form judicial public function into them. Judges are not vanishing.