# A World Without Trials?

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## I. THE UNOBSERVED DECLINE OF TRIALS

Imagine some friendly visitors to America—from Europe or Asia or even from Mars—who are seeking to comprehend the American legal system. Our Martian visitors would have seen *A Civil Action* and *The Runaway Jury* at the Red Canal multiplex and surely they have seen syndicated episodes of the ubiquitous *Law and Order*. Upon arrival they turn on the TV news in their hotel room and scan the newspaper slipped under the door and find both saturated with accounts of square-jawed wife murderers, egomaniacal corporate executives, and freakish entertainers on trial. Unsurprisingly, our visitors readily conclude that the trial is the central pivot of the American legal process.

Curiously the view from the law school classroom bears a resemblance to that from Mars—although the medium is appellate opinions, the message is the centrality of trial. The world of hearings, depositions, conferences, bargaining, maneuvering, and routine processing in which lawyers and judges are immersed is barely visible.

If told that actually the trial is rapidly disappearing from the American legal scene our Martians or law students might be incredulous. Yet there is an abundance of data that shows that trials, federal and state, civil and criminal, jury and bench, are declining precipitously.

I begin with the federal courts because the data is more comprehensive and the trends easier to visualize. In 1962, there were 5,802 civil trials in the federal district courts, making up 11.5 percent of all terminations.[1] In 2004, when there

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1. 1962 is used as our starting point because, due to changes in record-keeping, it is the first year that is readily comparable to present-day figures. Figures on the number of trials are from Table C4 of the annual reports of the Administrative Office of the U.S. Courts (AO). The AO defines a trial as "a contested proceeding before a jury or court at which evidence is introduced" (AO, Form JS-10). The definition of trial varies in the state courts (see tbl. A-25 in the Appendix). In sorting out terminations, the AO's record-keeping category is cases terminated "during or after trial" so the number of trials counted includes cases that settle during trial and some evidentiary proceedings that do not lead to

were five times as many cases filed, there were only 3,951 trials, making up 1.7 percent of terminations.[2]

*Percentage of Civil Terminations During/After Trial in U.S. District Courts, 1962-2004*

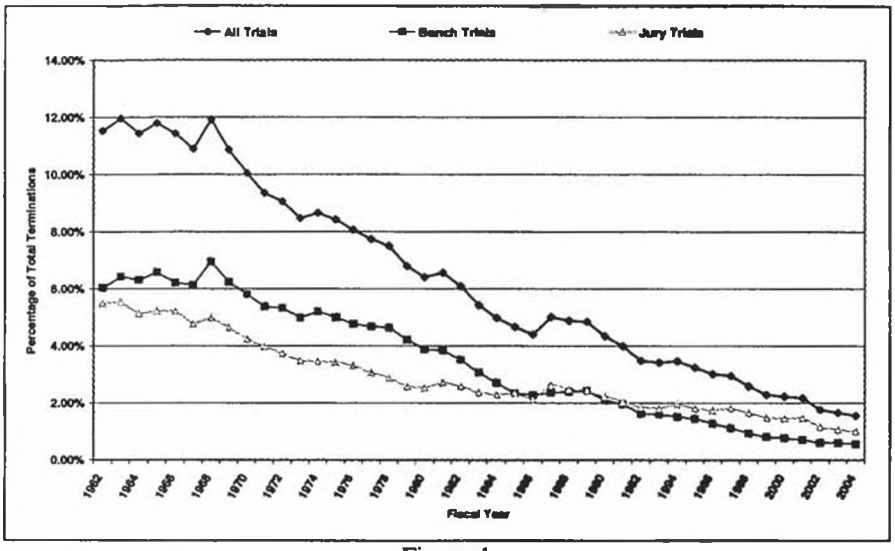



Figure 1

Over this forty-two year period the total number of civil cases terminated rose 400 percent while the number of trials fell 32 percent.[3] On the criminal side, the story is similar. In 1962, 5,097 defendants were tried, 15.4 percent of all defendants.[4] In 2003 only 3,463 defendants were tried, just 4.2 percent of defendants whose cases were terminated.[5] Again, the number of criminal defendants from 1962 to 2003 increased by 152 percent, while the number of trials decreased by 32 percent.[6]

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judgments. So the count given here is not a count of completed trials but of cases that reach the trial stage. These figures provide an inexact but useful indicator of both the magnitude and year-to-year-trends in trial activity. For a full discussion of the counting of trials problems, see Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460-61, 475-76 (2004) [hereinafter Galanter, *Vanishing Trial*].

2. 1962-2004 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP., tbl.C-4.
3. *Id.*
4. Galanter, *Vanishing Trial*, *supra* note 1, at 492-93.
5. 2003 ADMIN OFFICE OF THE U.S. COURTS ANN. REP., tbl.D-4.
6. 1962-2003 ADMIN OFFICE OF THE U.S. COURTS ANN. REP., tbl.D-4.

*Percentage of Criminal Defendant Dispositions by Trial in U.S. District Courts, 1962-2004*

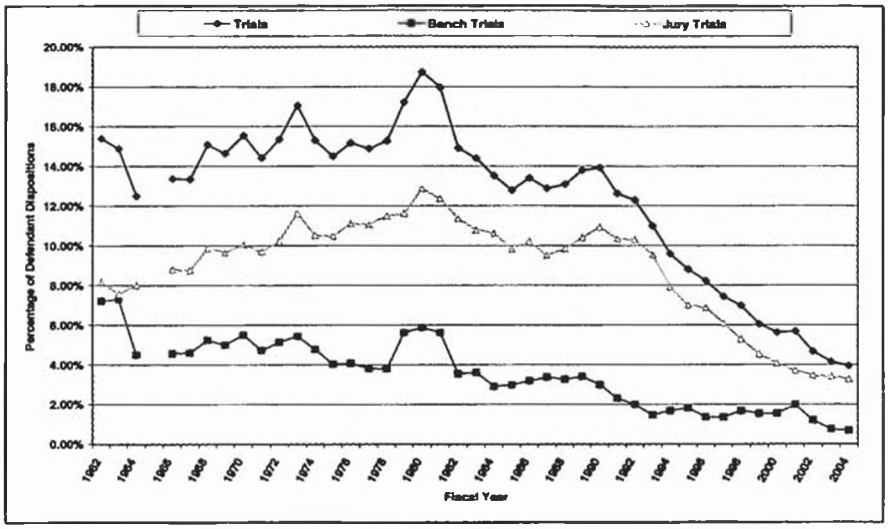



Figure 2

The number of trials in the federal courts is only a small fraction of the total number of trials. The great preponderance of trials—perhaps 98 percent—take place in the state courts. Data about the number, subject, and characteristics of state trials was scarce and difficult to analyze until Brian Ostrom, Shauna Strickland, and Paula Hannaford-Agor of the National Center for State Courts assembled an unprecedented bank of state trial data into comparable form.[7]

Their data provides a picture of trends in the state courts that, overall, bear an unmistakable resemblance to trends in federal courts.[8] In the courts of general jurisdiction of 22 states (and the District of Columbia) that contain 58 percent of the U.S. population, the portion of cases reaching jury trial declined from 1.8 percent of dispositions in 1976 to 0.6 percent in 2002; bench trials fell from 34.3 to 15.2 percent.[9] The absolute number of jury trials is down by one-third and the absolute number of bench trials is down 6.6 percent.[10]

7. Brian J. Ostrom, Shauna M. Strickland, & Paula L. Hannaford-Agor, *Examining Trial Trends in the State Courts*, 1 J. EMPIRICAL LEGAL STUD. 755 (2004).
8. *Id.* at 757.
9. *Id.* at 768-69.
10. *Id.* at 769.

*Civil Trials as Percentage of Dispositions in 22 State Courts of General Jurisdiction, 1976-2002*

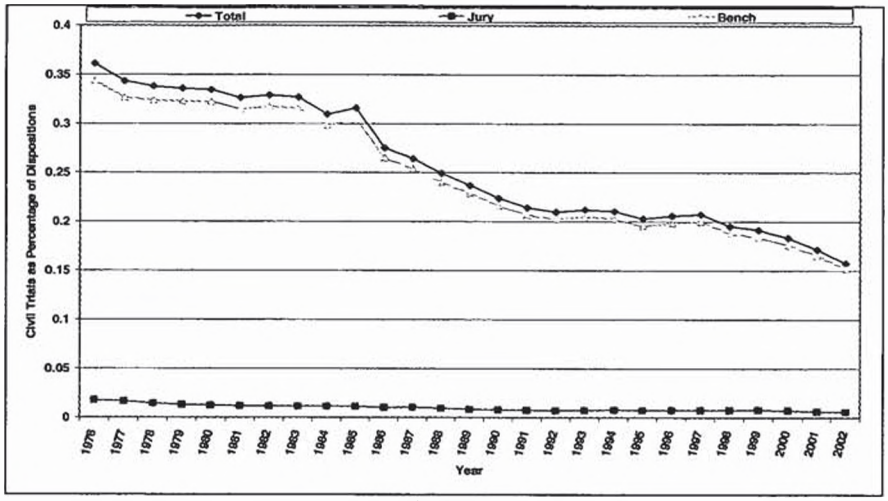



Figure 3

On the criminal side, the trial rate has moved in the same direction in the state courts as in the federal courts. From 1976 to 2002, the overall rate of criminal trials in courts of general jurisdiction in the 22 states for which data is available dropped from 8.5 percent of dispositions to 3.3 percent.[11] The pattern of attrition resembles those in the federal courts, where criminal trials fell from 15.2 percent to 4.7 percent of dispositions in those years.[12] The decrease was similar in jury trials (from 3.4 percent to 1.3 percent) and bench trials (from 5.0 percent to 2.0).[13] While dispositions grew by 127 percent in these courts, the absolute number of jury trials fell by 15 percent; the number of bench trials fell by 10 percent.[14]

11. *Id.* at 763-64.
12. Galanter, *Vanishing Trial*, *supra* note 1, at tbl.A-17.
13. Ostrom, *supra* note 7, at 764.
14. *Id.*

*Criminal Trials as Percentage of Dispositions in 22 State Courts, 1976-2002*

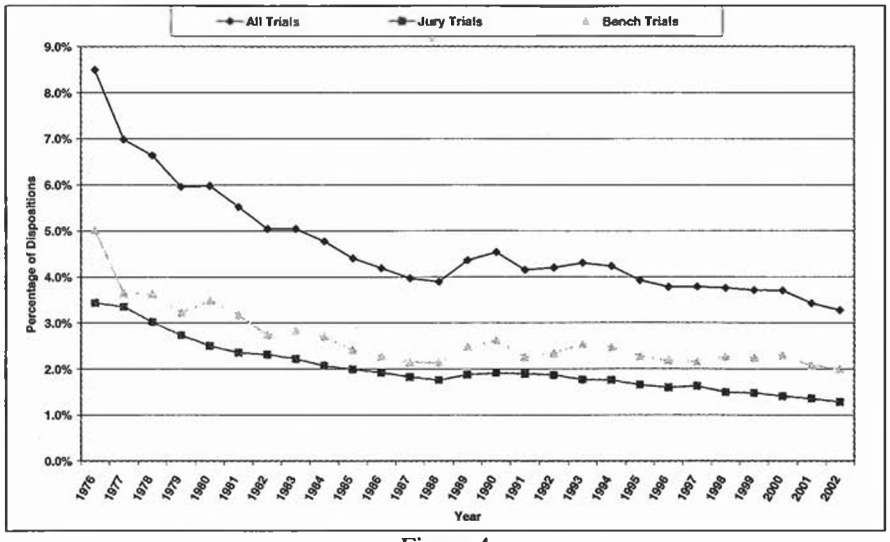



Figure 4

Although the state data is less comprehensive, it is sufficiently abundant to indicate that the trends in state court trials generally match those in the federal courts. In both there is a decline in the percentage of dispositions that are by jury trial and by bench trial. In both there is a decline in the absolute numbers of jury trials and bench trials. In the federal courts, bench trials have declined even more dramatically than jury trials; in the state courts, it is jury trials that are shrinking faster.

The shrinking of trials is particularly striking because virtually everything else in the legal world is growing. There is more law. The amount of regulation continues to grow.[15] The volume of authoritative legal material continues to expand. For example, the annual increment of published federal cases increased from 5,782 pages in 1962 to 13,490 pages in 2002, an increase of 133 percent.[16] Curiously the one other component of the legal world that seems to be shrinking while all else multiplies is definitive pronouncements of law at the peak of the judicial hierarchy. As the body of state law, case law and regulation becomes ever larger, the Supreme Court of the United States decides fewer cases—less than half as many as twenty years ago and less than a quarter as many as it decided in the earlier part of the 20th century[17]—and its decisions are marked by less consensus.[18] As doctrine multiplies, decisive adjudication wanes.

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15. CLYDE W. CREWS, JR., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE (2005).

16. *Id.* This includes Federal Reporter and Federal Supplement.

17. Edward Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUMBIA L. REV. 1643, 1646-50 (2000).

18. Philip Allen Lacovara, *The Incredible Shrinking Court*, THE AMERICAN LAWYER, Dec. 2003, at 53.

In 1960 there were 385,933 lawyers in the United States; in 2000 there were 1,066,328.[19] Over this forty year period, lawyers increased at a rate more than twice the growth of the population. There was one lawyer for every 627 Americans in 1960; at the end of the century there was one lawyer for every 264.[20]

Correspondingly, the portion of the Gross Domestic Product spent on law grew dramatically. In 1978, the receipts of law firms were something like forty cents of every hundred dollars of product.[21] By 2002 they were more than one dollar and sixty cents.[22] These figures are only for law firms. If we add in the work of government lawyers and in-house lawyers, we can estimate that law represented about two percent of the nation's product.[23] So for the last third of the twentieth century the legal business grew several times as fast as the overall economy.

Amid all this growth, the place of law, lawyers and courts in public consciousness continues to expand.[24] And in that consciousness, the image of the trial remains central. The decline of trials remains a well-kept secret. Since I began calling attention to this phenomenon a few years ago, I have encountered expressions of surprise and disbelief from citizens and students as well as from many judges and lawyers. The media's fixation on trials, fictional and otherwise, combines with myths about excessive litigation to make the decline invisible to the public and, in large measure, to legal professionals.

Is the decline of trials something to worry about? Or should it be a cause for celebration? Is it an omen of decay or a sign of progress? To answer these questions, it is useful to analyze the decline into two components: (1) a long-term and gradual decline in the portion of cases that terminate in trial over the past hundred or more years; and (2) a steep fall-off in the absolute number of trials during past twenty years.

## II. THE HUNDRED YEAR PLUS LONG-TERM DECLINE IN THE PORTION OF CASES TRIED

When the federal rules of civil procedure were enacted in 1938, about 18 percent of civil cases in federal court were resolved by trial. That figure fell to about 12 percent in 1962 and today it is 1.7 percent.[25] Put another way, back in 1938

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19. Clara N. Carson, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 1 (American Bar Foundation 2005).

20. *Id.*

21. Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and its Users*, 54 BUFF. L. REV. 1369, 1378 (2006) [hereinafter Galanter, *Planet*].

22. *Id.*

23. In-house corporate and government lawyers make up about one-fifth of practicing lawyers. If we assume that they are as productive as lawyers in private practice, we can estimate that the legal services portion of Gross Domestic Product is about one-and-one-quarter times the census figure for private practitioners.

24. On the saturation of American popular culture with legal themes, see Naomi Mezey and Mark C. Niles, Screening the Law: Ideology and Law in American Popular Culture, 28 COLUM. J.L. & ARTS 91, 93 (2005). The authors observe that "Of the thirty-seven original dramatic shows aired by the four major networks in the 2003 Fall season, thirty-one . . . had elected officials, lawyers, police officers, former police officers who are now vigilantes, or forensic officials as main characters." *Id.* at 93 n.6.

25. Galanter, *Vanishing Trial*, *supra* note 1, at 465. The 1938 figures are taken from Steven C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3.

about one in every four federal tort cases reached trial; today about one in 50 does. Data on the state courts are less comprehensive, but the direction is the same. Studies of specific state courts in the 19th century show us trials in as many as a third of cases.[26]

There are many factors that contribute to the long-term decline. At the center of these is resource constraints. By this I refer not to declining budgets, but to the lag in the provision of facilities for trial. The supply of courts is not designed to provide trials in all cases. Historically, as the size of the society and the economy have grown, as the web of legal regulation has thickened, and as an increasing portion of the population has gained access to the courts (whose users now include women, racial minorities, prisoners and other once legally quiescent groups), the potential for invocation of the courts has multiplied more rapidly than the size of the judicial "plant." As a result, fewer of the cases that come to court can get full-blown adjudication. The available "plant" is only sufficient to allow courts to provide trials for a smaller and smaller minority of cases. The promise of full-blown adjudication in a public forum, a "day in court" is increasingly redeemed by "bargaining in the shadow of the law."[27]

As waiting time and cost and uncertainty increase, settlement becomes more attractive. Increasingly the contribution of courts is to supply signals, markers and sufficient threats as to the likely outcome to induce resolution (or abandonment) of claims. This shift is facilitated by procedures that compel exchange of information and the communications technologies and skills that make lawyers better at reading judicial signals and devising bargains. The long-term decline of trials results from a conjunction of restricted supply with the generation of bargaining practices and the threat of judicial action that manage to stretch the small supply of adjudication to meet increased demand.

## III. THE RECENT PRECIPITOUS DECLINE IN THE ABSOLUTE NUMBER OF TRIALS

But these factors—resource constraints, increased cost and complexity, improved signaling, more lawyers—do not account for the dramatic decrease in trials in the last twenty years. The steady decline in the portion of cases tried has been in progress for more than a century, marking a long historic movement away from trial as the mode of disposing of civil cases. But rising caseloads meant that the absolute number of trials was stable or even increasing into the 1980s. In the past twenty years, the pattern has changed: the long-term decline in the portion of trials has intensified and accelerated, producing a dramatic drop in the absolute number of trials.

The recent decline has been precipitous in the federal courts where civil trials fell by two-thirds from a high point of 12,529 in 1985 to 3,952 in 2004 (when approximately the same number of cases were disposed of).[28] In the state courts

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26. Marc Galanter, *The Hundred-year Decline of Trials and the Thirty Years War*, 57 STANFORD L. REV. 1255, 1257-58 (2004).

27. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Marc Galanter, *Justice in Many Rooms*, 19 J. OF LEGAL PLURALISM 1 (1981).

28. 2004 ADMIN. OFFICE OF THE U.S. COURTS ANN. REP., tbl.C-4; Galanter, *supra* note 1, at 464.

the decline has been more gradual, but seems to have recently accelerated.[29] A revealing snapshot of the decline in progress is provided by another sampling of state court activity that provides a more precise picture of the parties, claims, and outcomes of trials. Under the sponsorship of the Bureau of Justice Statistics of the U.S. Department of Justice, the National Center for State Courts tracked the trial activity in state courts of general jurisdiction in the seventy-five most populous counties in the years 1992, 1996, and 2001.[30] The researchers counted all the tort, contract, and real property cases that were resolved by trial. In 1992, there were 22,451 such cases in these counties.[31] In 2001, there were only 11,908, a 47 percent reduction.[32] Tort trials were down 31.8 percent and contracts trials were down 61 percent.[33] During these same years, tort trials in federal courts decreased by 37.6 percent and contract trials were down 47.7 percent.[34]

29. *See* Ostrom, *supra* note 7, at 769.

30. Carol J. DeFrances and Marika I. Litras, *Civil Jury Cases and Verdicts in Large Counties, 2001*, BUREAU OF JUSTICE STATISTICS, Apr. 2004.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* Torts and contracts comprise practically the whole state trial docket but a declining sector of the trial docket in the federal courts. *See id.* In 1992, tort and contract were 48.6 percent of federal trials, but by 2001 this had shrunk to 41.9 percent. *Id.* at 9. (On the long-term shrinkage, see fig.8 *infra*) Whether there was a comparable decline in the portion of state court trials in these subjects is unknown because both the Trial Court Network and the state counts of "general" civil trials are only of torts, contracts and real property trials. In 1992, tort and contract accounted for 95.3 percent of the state court trials in the 75 counties. *Id.* In 2001, this had increased to 97.87 percent of all trials. *Id.* With the steeper decline in contract trials, tort trials were now two-thirds of all "general" trials, up from 51.9 percent in 1992. *Id.*

*Attrition of Civil Trials in U.S. District Courts, Three Sets of State Courts of General Jurisdiction, and Bankruptcy Courts, 1992-2001*[35]

| | All Civil Trials | | | | Tort Trials | | Contract Trials | | Bankruptcy Trials |
|---|---|---|---|---|---|---|---|---|---|
| | Federal | 22 States | 10 States | 75 Counties | Federal | 75 Counties | Federal | 75 Counties | |
| 1992 | 8,029<br>*4,279* | 712,667<br>*24,159* | 38,196<br>*11,224* | 22,451<br>*12,017* | 2,385<br>*1,728* | 11,660<br>*9,431* | 1,513<br>*745* | 9,744<br>*2,193* | 8,353 |
| 1996 | 7,565<br>*4,359* | 640,206<br>*23,649* | 40,454<br>*9,749* | 15,638<br>*10,616* | 1,902<br>*1,376* | 10,278<br>*8,786* | 1,081<br>*517* | 4,850<br>*1,743* | 5,802 |
| 2001 | 5,400<br>*3,632* | 527,225<br>*19,190* | 28,450<br>*7,235* | 11,908<br>*8,859* | 1,471<br>*1,151* | 7,948<br>*7,218* | 792<br>*405* | 3,698<br>*1,573* | 3,160 |
| Change 1992-2001 | -32.7%<br>*-15.1%* | -26.0%<br>*-20.6%* | -25.5%<br>*-35.5%* | -47.0%<br>*-26.3%* | -37.6%<br>*-33.4%* | -31.8%<br>*-23.5%* | -47.7%<br>*-45.6%* | -61.0%<br>*-28.3%* | -62.2% |
| *Note:* Roman figures are total trials. Italic figures are jury trials.[36] | | | | | | | | | |

Table 1

*Attrition of Criminal Trials in U.S. District Courts and State Courts of General Jurisdiction, 1992-2001*[37]

| | Federal | 23 States (All Criminal Trials) | 13 States (Felonies Only) |
|---|---|---|---|
| 1992 | 7,176<br>*6,011* | 105,216<br>*46,722* | 32,616<br>*24,245* |
| 1996 | 4,890<br>*4,084* | 100,323<br>*42,385* | 34,902<br>*23,331* |
| 2001 | 4,292<br>*2,789* | 94,786<br>*37,438* | 31,327<br>*20,664* |
| Change 1992-2001 | -40.2%<br>*-53.6%* | -10%<br>*-19.9%* | -4%<br>*-14.8%* |
| *Note:* Roman figures are total trials. Italic figures are jury trials. | | | |

Table 2

As we can see from the bottom row of Table 1, the attrition of civil trials in the decade covered was substantial in both state and federal courts, and across different case types. As Table 2 shows, there were comparable reductions in criminal trials. Although there are differences in the slope and timing of the de-

35. 1992, 1996, and 2001 ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS (providing data on the U.S. district courts). *See also* DeFrances & Litras, *supra* note 30, at 3, 9 (providing data on the seventy-five most populous counties); Galanter, *Vanishing Trial*, *supra* note 1, at 476; Ostrom, *supra* note 7, at 776-77 (providing data on state courts); email from Elizabeth Warren, Professor of Law, Harvard Law School to the author (May 31, 2004) (on file with author) (providing the data on bankruptcy courts); email from Thomas H. Cohen, Statistician, Bureau of Justice Statistics to the author (Nov. 1, 2004) (on file with author). (providing data on the seventy-five most populous counties).

36. General civil trials include tort, contract and real property cases. The "75 counties" noted in the table are the 75 most populous counties in the United States, containing about one-third of the U.S. population. The jury trial figures for the 75 counties exclude default judgments, directed verdicts, and judgments notwithstanding the verdict. If these categories are included, the decline in general civil trials is 24.5 percent rather than 26.3 percent. *Id.*

37. *See* 1992, 1996, and 2001 ANNUAL REPORTS OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 35 (providing data on the U.S. district courts). *See also* DeFrances & Litras, *supra* note 30; Ostrom, *supra* note 7, at 775, 777 (providing the data in the "23 States" and "13 States" columns).

cline, the generality and scale of the decline suggest that factors are at play that are not peculiar to federal or to state courts or to particular types of cases. It appears that the trial as an institutional practice is undergoing a major change.

The factors that seemed to explain the long-term decline in trials do not seem to account for the sharp decline since the 1980s. We do not see courts diluting the supply of adjudication to respond to increased demand; instead we see a transformation of the judicial product—a great increase in judicial case-management at the early stages of litigation and a substantial increase in non-trial adjudication. During the last years of the 20th century, dispositions by summary judgment in federal courts moved from a small fraction of dispositions by trial to a magnitude several times greater than the number of trials.[38] The shift of judicial attention to the early stages of cases is vividly displayed in Figure 5.[39]

*Percentage of Civil Cases Terminating at Each Stage in U.S. District Courts, 1963-2004*

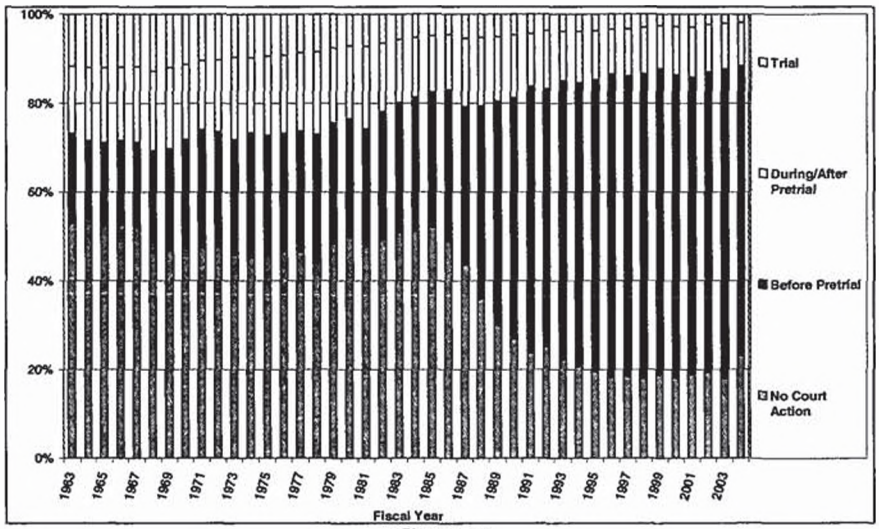



Figure 5

This transformation of judicial product involves factors that, if present at all, played at most a minor role in the long-term decline of trial. One such factor is the ascendance of a judicial ideology that commends intensive judicial case management and active promotion of settlements, which are defined as a superior result.[40] The primary role of courts, in this emerging view, is less enunciating and enforcing public norms and more facilitating the resolution of disputes. Elements of this perspective had been around for decades, but in the 1970s it was embraced

38. Stephen Burbank, *Drifting Toward Bethlehem or Gomorrah? Vanishing Trials and Summary-Judgment in Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 591, 592-93, 611-16 (2004).

39. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR, tbl. C-4 (1962-2002), tbl.C (2003-2004), *available at* http://www.uscourts.gov/caseload2004/tables/C00Mar04.pdf (last visited Apr. 3, 2006).

40. Galanter, *Vanishing Trial*, *supra* note 1, at 520.

by administrators in the federal judiciary and soon became the dominant view.[41] These changes in ideology and institutional practice are by no means confined to judges' changes in the beliefs, preferences, and expectations of judges, lawyers, corporate litigants—and to a lesser extent of academics, media people, and politicians.

While confidence in adjudication and courts has declined, the courts, politicians, and business elites have embraced "alternative dispute resolution." Courts have incorporated "alternative" processes like mediation, early neutral evaluation, arbitration, summary jury trial; they have engaged in outsourcing to ADR institutions; and doctrinally, they have enhanced both the power of those institutions and their exclusive jurisdiction.[42] ADR institutions and programs have proliferated.[43]

We should be cautious about attributing the decline of trials exclusively to the availability and attractiveness of alternative forums. For one, it does not explain the increase in non-trial dispositions within the courts. And it does not address the decline in criminal trials, where alternative forums are not a significant presence.

*Civil Trials per Capita in U.S. District Courts, 1962-2004 and 22 State Courts, 1976-2002*

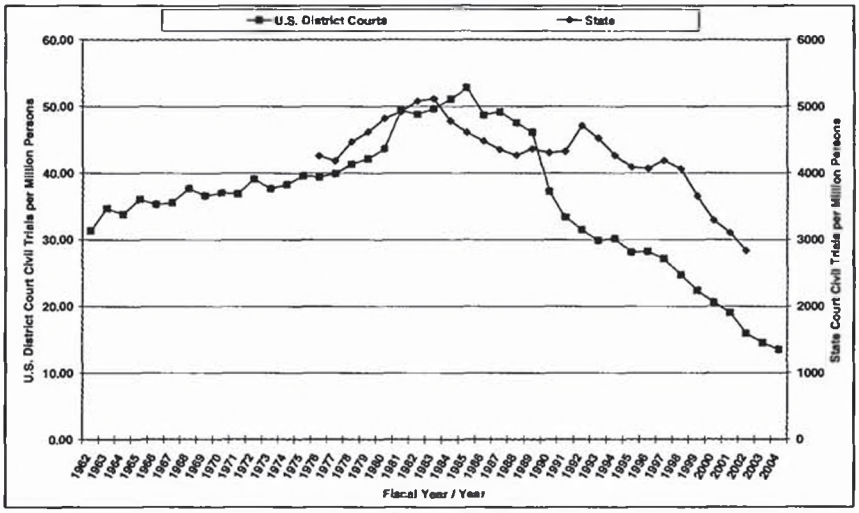



Figure 6

41. *Id.*
42. *Id.* at 514-15.
43. *Id.*

*Civil Trials per Billion Dollars of Gross Domestic Product*
*1962-2004 (In 2000 Chained Dollars)*

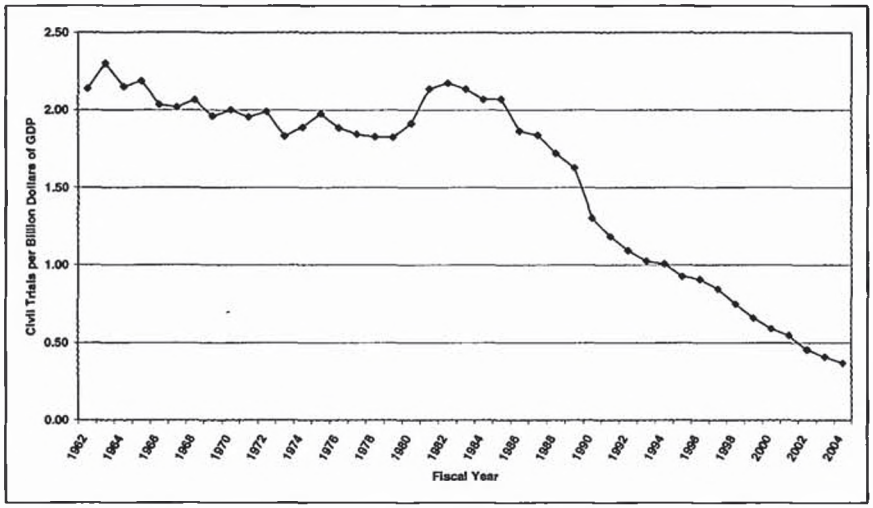



Figure 7

The result is not just a continuation of the long-term trend. The recent absolute decline is a phenomenon distinct from the long-term percentage decline. It marks a major change in the institution of litigation. The relation of civil trials to their wider social base has changed. In the federal courts, trials per million persons have fallen 70 percent since 1985.[44] Trials per billion (constant) dollars of Gross Domestic Product fell even more steeply—79 percent since 1982.[45] These rates have fallen steeply and steadily, similar to the decline in the absolute number of trials. Also similar to the decline in the absolute number of trials, the recent decline in these rates marks a reversal, rather than a continuation of the long-term trend. What civil trials were doing for society and economy either is somehow being done with far fewer trials or trials are not doing what they did before. Within the courts, trials occupy a diminished place in the judicial role. The average sitting federal district judge conducted about eleven trials in 2004, down from 35 in 1985 and 39 back in 1962.[46] And as ever-fewer young lawyers acquire trial experience, the pool of seasoned advocates is drying up, which further discourages the use of trial.

44. *See supra* fig.6.

45. *See supra* fig.5.

46. This is an overstatement and very possibly a rather large one. The 3,951 civil trials and 3,574 trials of criminal defendants (some in joint proceedings) were conducted not only by the 664 sitting federal judges, but also on occasion by about 300 senior judges and over 500 magistrate judges. Galanter, *Vanishing Trial, supra* note 1, at 500-01. This count is of cases that reached the trial stage. Of these, about one-fifth of the civil cases settle. *Id.* at 461, 466 fig.3.

*Civil and Criminal Trials per Sitting Judge in U.S. District Courts 1962-2004*

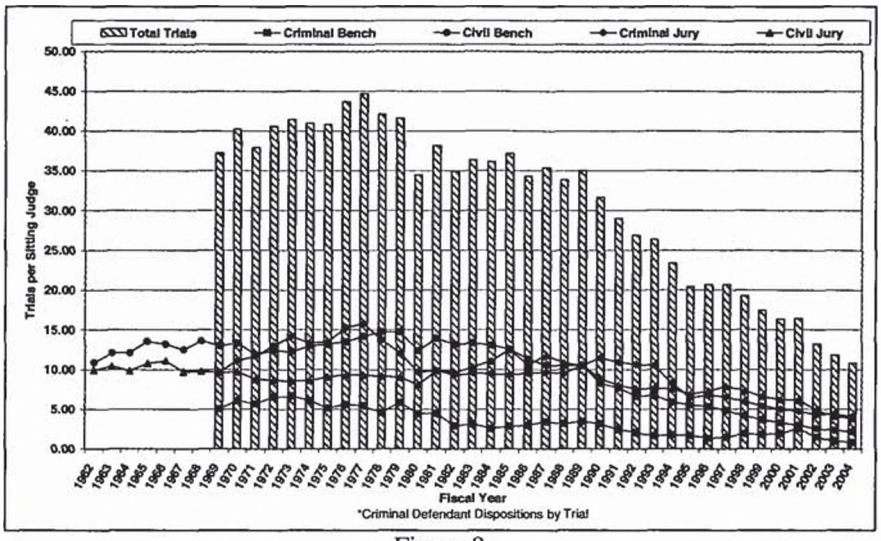



Figure 8

## IV. THE DECLINE OF TRIALS IN ITS RECENT AMERICAN CONTEXT

The decline of trials is not an isolated meteor flashing across the legal skies. Its current phase is intimately connected to a set of other changes in American law over the past thirty years: changes in elite ideology, institutional practice and legal culture that have transformed the legal environment.

From the 1930s through the 1970s, the law was the site of a vigorous uneven expansion of remedies and protections for ordinary people. The rudiments of a welfare state offered protection from many of life's predicaments. Barriers to litigation were lowered, immunities dismantled, standing widened. Civil rights were enforced and extended. By the mid-1960s, courts, legislatures and lawyers had transformed the legal landscape, providing opportunities for successful assertion of rights by outsiders and subordinates against society's managers and authorities. Tort remedies were enlarged; there was a proliferation of new rights, new players on the legal stage (as in the consumer, environmental and women's movements), and new formats for legal services (as in legal services for the poor and public interest law firms). Law school enrollments swelled with students who saw law as a vehicle for their visions of reforming society. The predominant critique of the law was its shortcomings in providing justice. From inside and outside the legal system, came a steady barrage of criticism of failures to provide justice and especially of lawyers for subservience to the powerful.[47]

These changes and the ferment portending further changes—which can be crudely summarized in the slogan "access to justice"—provoked a profound reac-

47. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

tion. Starting in the 1970s, large sections of business, political and legal elites embraced a set of beliefs and prescriptions about the legal system that, for want of a name, I have called the "jaundiced view." By this I refer to the view that American law is cut loose from its authentic moorings and is embarked on a hubristic crusade to extend remedies for all of life's injustices. The result, in this view, is a "litigation explosion": indiscriminate suing by opportunistic claimants, egged on by greedy lawyers, and enabled by activist judges and biased juries that capriciously award immense sums against blameless businesses and governments. Many were convinced that this firestorm of litigation was unraveling the social fabric and undermining the economy.[48]

The most visible edge of this reaction is what is labeled "tort reform"—a term that appears on the scene in 1976 and that encompasses a series of changes designed to curtail corporate responsibility, reduce remedies, and make access to them more difficult. A persistent and well-funded campaign depicts American civil justice as a pathological system, inflicting devastating damage on the nation's health care and economic well-being. Although the available evidence overwhelmingly refutes these assertions, this set of beliefs, supported by folk-lore and powerfully reinforced by media coverage, has become the conventional wisdom.[49]

The recoil against the expansion of rights and remedies was by no means confined to torts. There were comparable turns in the criminal law,[50] in contracts,[51] and in civil rights. Legislatures and courts drastically slowed or reversed the expansion of rights. The political discourse about the law increasingly pivots on a perception of "crisis" which entails a narrative of moral decline in which the virtuous and workable law of the "good old days" has been usurped and corrupted by activist judges, greedy lawyers and self-pitying claimants. In each case, the turnabout reveals a loss of confidence in government to promote and supply justice, increased reliance on markets and private providers, and a preference for retrenchment to modest aims that eschew promotion of solidarity or investment in public goods.

On the side of the law's suppliers, there was a profound change in ideology. Judges, or large numbers of them, cautiously shifted from an understanding that their role was to move cases toward trial (with settlement a welcome by-product

48. Marc Galanter, *The Turn Against Law: The Recoil Against Accountability*, 81 TEX. L. REV. 285 (2002)[hereinafter Galanter, *Turn Against Law*].

49. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS (2004).

50. These movements within the civil justice system were paralleled by a major turn in criminal law during the same 1970s period, an abandonment of rehabilitative principles and a shift in the direction of harsh punishment and control. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

51. Charles Knapp recounts a very similar "U-turn" in contracts. As tort remedies had expanded and civil rights had arrived, "American contract law underwent a major evolution during roughly the middle half of the [20th] century" from classical "Dominance of the Document" formalism to a law based on a "transactional and social perspective" that embodied "concepts of commercial reasonableness, good faith and fair dealing, and unconscionability." Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 772-73 (2002). The promulgation of the Restatement (Second) of Contracts in 1979, which marked the high water mark of the greening of contract law, was soon followed by a "U-turn" to a "New Conceptualism" that embraced with fervor all the earlier-disdained incidents of classical formalism—the duty to read, the 'plain meaning' rules, a vigorous parol evidence rule, a high tolerance for 'puffing,' etc.—with the effect, intended or not, of reducing or eliminating any constraints on the activities of the drafters of form contracts." *Id.* at 774.

of these efforts) to a view that it was their job to resolve disputes;[52] they also embraced process pluralism—i.e., the notion that there was more than one right way to deal with a dispute—and accordingly they welcomed "alternative" processes in the courts and in forums outside the courts.[53]

From the mid-1970s, tort reform, ADR, and anti-lawyerism were in the ascendant—as part of a wider wave of de-regulation, privatization and loss of confidence in government.[54] The most prominent critique of the law was no longer "not enough justice" but "too much law." In the new discourse about law, we are constantly reminded of the costs of law and litigation, but curiously tend to be forgetful of their benefits. The costs, all too evident, are presented vividly, frequently with exaggeration. On the other hand, the benefits are easily taken for granted and receive at most a perfunctory acknowledgment.

All the while, the presence of law and popular fascination with law continued to increase, even as optimism about emancipatory reforms and respect for lawyers plummeted.

In the "jaundiced view," trials are not only expensive, but are risky because juries are arbitrary, sentimental, and "out of control," which reinforces strategies of settlement to avoid trial. Misperceptions of claiming behavior, jury proclivities and the amount of awards and settlements are powerfully reinforced by persistent patterns of media coverage. The media are far more likely to report verdicts for plaintiffs and large awards than defendant verdicts, small awards, or the reduction or reversal of awards.[55] Media accounts focus on the size of claims rather than the scale of harm; presenting the injured party as the aggressor and the injuror as the

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52. *See* Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & SOC'Y 1, 14-15 (1985); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261-62 (1986).

53. John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 144-48 (2000).

54. SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND (1987).

55. Steven Garber studied newspaper coverage of verdicts in product liability cases against automobile manufacturers decided from 1985 to 1996. *See* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237. He found that almost three-quarters of those verdicts were in favor of the defendant. However, newspapers reported just 3 percent of defense verdicts and 41 percent of verdicts for plaintiffs. *Id.* at 277. In other words, a verdict for the plaintiff was twelve times more likely to be reported than a defense verdict. *Id.* Consequently, in the reports that a conscientious and omnivorous newspaper reader would encounter, some four-fifths would have been verdicts for the plaintiff—roughly the opposite of the true proportion. Other studies have shown that the amounts won by plaintiffs in newspaper and magazine reports are ten to twenty times as large as the average awards. Oscar Chase compared newspaper coverage of personal injury awards in New York with actual awards and discovered even larger discrepancies. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 772-73 (1995). Another study found comparable discrepancies in the coverage of tort cases in five national magazines (TIME, NEWSWEEK, FORTUNE, FORBES, and BUSINESS WEEK) from 1980 to 1990. Donald S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 436 (1996). Tort cases are not unique in provoking media distortion. A study comparing the outcomes of employment civil rights cases, with coverage from 1990 to 2000 in six newspapers and four magazines, found that plaintiffs won 85 percent of the time in media accounts, but only 32 percent of the time in federal district court. Laura Beth Nielsen & Aaron Beim, *Media Misrepresentations: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 251 (2004). The average award presented in the media was "almost thirty times greater than what plaintiffs in federal district court are actually awarded." *Id.* at 253.

victim. Lawyers and judges are not exempt from these misperceptions. Even appellate judges share the misperception about the pro-plaintiff bias of juries.[56]

This shift to the "jaundiced view" of the legal system is not something that has been going on since the 19th century, when the portion of trials started trending downward. It is a feature of the last thirty years. If the long-term decline of trials is the product of long-term constriction in supply together with improvements in the technology of disputing, the recent sharp drop is a component and reflection of a massive shift in legal culture that itself reflects other developments, within the legal system and in the wider society. This shift encompasses the ascendancy of business within the legal system, as consumer of an increasing portion of legal services; the disproportionate growth of the "corporate hemisphere" of the legal profession; and the development of think-tanks, university programs, and public interest law firms promoting pro-business policies, including massive campaigns to reduce legal obligations for business and to curtail legal remedies for others.[57] It is part of a much broader turn from law, a turn away from the definitive establishment of public accountability in adjudication. This aversion to adjudication is part of a mutually supportive complex of beliefs and practices—beliefs that we are suffering a litigation explosion, that juries are biased against corporate defendants, that courts should not be growing edge of rights, that litigation is hurting the economy, and that the solution is to curtail remedies, privatize, and de-regulate. This turn is institutionalized in new court practices: intensive case management, incorporation of meditative modalities, promotion of settlement, diversion into ADR forums, accentuation of non-trial adjudication, litigant preference for diversion into ADR forums and settlement, and the proliferation of ADR forums and professionals. As a result, it has become embedded in the changing work habits of judges and lawyers who rarely engage in conducting trials.

To a great extent the turn is based on a set of misperceptions about judges, trials and juries, shared by courts and lawyers as well as business people and politicians. Although trial judges overwhelmingly profess admiration for juries, many in the judiciary are attracted by the prospect of making their realm more rationalized and systematic by eliminating or at least taming the element of lay spontaneity. But beyond the misperceptions, there is a very real fear of trials. The animus against trials is not just objection to generous or individuated or expensive remedies; it also involves an aversion to the determination of corporate accountability in public forums. The trial is a site of "deep accountability" where facts are exposed and responsibility assessed, a place where the ordinary politics of personal interaction are suspended and the fictions that shield us from embarrassment and moral judgment are stripped away.

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56. In a series of articles, Clermont and Eisenberg have documented that defendants enjoy substantial advantages over plaintiffs in the disposition of appeals. In light of the weakness of various alternative explanations, they conclude that this probably reflects appellate judges' misperceptions that trial-level adjudicators (especially juries) are biased in favor of plaintiffs. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125 (2001); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947.

57. Galanter, *Planet*, *supra* note 21, at 1398-1404.

## V. VANISHING TRIAL STORIES

The vanishing trial phenomenon is intriguing because it goes against our expectations and touches something so close to the bedrock of our legal system. But what does it mean? In the previous section, I have tried to place the recent precipitous decline in its immediate American context, linking it to concurrent developments. But where is it taking us? What is the future that it points toward? My short answer is "I don't know." But I want to present several different scenarios, mixing explanation and prediction, that combine the vanishing trial with other ingredients into a wider narrative pointing to a possible future.

### *A. Convergence*

One might imagine that what we are seeing is a set of adaptations that will enable American procedure, an outlier even among common law systems, to converge with the "continental dossier system of trial"[58] by embracing a more investigative and managerial judicial role. As Hein Kotz, a distinguished European proceduralist, described the contrast

> European civil procedure . . . is wholly unfamiliar with, and knows nothing of, the idea of a "trial" as a single, temporally continuous presentation in which all materials are made available to the adjudicator. Instead proceedings in a civil action on the Continent may be described as a series of isolated conferences before the judge, some of which may last only a few minutes, in which written communications between the parties are exchanged and discussed, procedural ruling are made, evidence is introduced and testimony taken until the cause is finally ripe for adjudication.[59]

Edward Sherman, an American proceduralist, noted "the on-going evolution of the American trial process towards greater congruence with continental practice."[60] Such innovations as "utilizing multiple hearings in trials over extended periods of time, video-tape technology, submission of evidence in written form, and techniques for summarization of evidence reflect movement towards the continental practice."[61]

There is obviously some power in the convergence story,[62] but there is a real question of how far it can proceed, without running up against the great structural

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58. Edward F. Sherman, *The Evolution of American Civil Trial Process Towards Greater Congruence with Continental Trial Practice*, 7 TUL. J. INT'L & COMP. L. 125, 138 (1999).

59. Hein Kotz, *Civil Justice Systems in Europe and the United States*, 23 DUKE J. COMP. & INT'L. L. 61, 72 (2003).

60. Sherman, *supra* note 58, at 127.

61. *Id.* at 138.

62. In an overview of civil justice developments in three common law and ten civil law countries, Adrian Zuckerman concludes that "[t]he clearest trend emerging from the different national accounts is a general tendency towards judicial control of the civil process. Both common law countries and civil law countries display a shift toward the imposition of a stronger control by judges over the progress of civil litigation." Adrian A. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, *in* CIVIL JUSTICE IN CRISIS 47 (Adrian A. Zuckerman ed., 1999). ("Not only are the common law

root and shield of the continuous plenary trial and of lawyer-dominated adversary procedure—that is, decision by the lay jury. As Professor Kotz explains,

> Since a jury cannot be convened, dismissed and recalled from time to time over an extended period, a common law trial must be staged as a concentrated courtroom drama, a continuous show, running steadily, once begun toward its conclusion. This in turn entails a separate pre-trial process for the parties enabling them . . . to gather the evidence that they may need at trial . . . [and] also to prevent surprise. . . . This solution requires elaborate pre-trial interrogatory and discovery processes because once the trial commences, there is no opportunity to go back, search for further information, and present it to the court at some later date. . . . Because of their active role in the pre-trial phase, lawyers typically have a greater understanding of the case than does the judge. . . . It follows that lawyers run the show at trial and that they frame the issues, question the witnesses, and stage and present . . . [the] facts. . . . Since the judge comes to the trial with little more understanding of the controversy than he can have from the complaint and other documents filed with the court, he is hardly in a position to act as the examiner-in-chief. . . .[63]

Perhaps the most telling indication of convergence is the dramatic shift of judicial attention to the early stages of civil cases. Once most cases that entered the federal courts exited before there was any significant input on the part of the court. But in the mid-1980s, just when the number of trials started to fall, courts began to get more involved in the early stages of civil cases. In Figure 5, the swelling portion of cases that reach the "before pretrial" stage displays the burgeoning of judicial management. As the portion of cases that reach trial or even a formal pre-trial conference continues to decline, it suggests that intense early participation by judges is not incompatible with the forms of a system of jury trials.

Given the constitutional barrier to eliminating the jury and the deep cultural attachment to it—at least as a symbol—and to adversarial procedure generally, it is likely that moves toward convergence will be indirect and piecemeal. Whether they could cumulate into an initiative to eliminate the jury entirely seems improbable now. But any feeling of certainty should be tempered by consideration of its decline over the past century and the course of developments in Britain, where the elimination of the civil jury pre-dated the radical restriction of civil trials.[64]

### *B. Displacement*

Another vanishing trial story invites us to widen our vision beyond the classical definition of courts. If there are fewer trials in the core legal institutions that we call "trial courts," it could be because trials have re-located elsewhere. If we define a trial as a proceeding in which parties present proofs and arguments ac-

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systems adopting a more interventionist judicial approach, they also display a marked move away from orality.").

63. Kotz, *supra* note 59, at 72-73.

64. Herbert Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 746-47 (2004).

cording to a pre-set procedural template to an authoritative decision-maker who gives a binding decision, it appears that only a minority of this society's trial-like encounters are conducted in courtrooms by judges. A larger number of trial-like events occur elsewhere—before judicial auxiliaries, before administrative tribunals, in arbitration proceedings, in disciplinary hearings in universities, hospitals, churches and so forth.[65] Are we seeing not a diminishment of trials, but their relocation?

Again, it is useful to distinguish the long run and the short run. Over the past hundred years, there is considerable force in the displacement hypothesis. While courts have grown, their growth has been greatly outpaced by the proliferation of administrative and private tribunals. For example, in 1900 there were just 65 district judges in the US courts.[66] A hundred years later, there were 612 sitting district judges (and an additional 274 senior district judges, many of whom worked at least part-time).[67] These Article III judges were assisted by 456 full time (and 65 part time) magistrate judges.[68] Together, they disposed of some 259,000 cases in 2000.

Apart from the federal district courts, there were 307 bankruptcy judges who disposed of about a million and a quarter bankruptcies of which some 68,000 were 'adversary proceedings and 3,893 terminated during or after trial.[69] Thus, there were almost as many trials in the bankruptcy courts as in the civil side of the district courts.

A significant portion of all adjudication takes place in various administrative tribunals and forums. In 2001, the federal government had 1,370 Administrative Law Judges—more than double the 665 authorized Article III District Court judgeships.[70] The ALJs in the Social Security Administration disposed of about 465,000 cases, immigration judges another 215,000, the Board of Veterans Appeals 31,000, and the Equal Employment Opportunity Commission 9,400—a total of more than 720,000 proceedings.[71] Just how many of these might be defined as trials is not clear, but it seems that there are more trials outside the Article III courts than in them. There are also many other federal agencies and an uncounted number of judges and hearing examiners in state administration.

If the vanishing trial is really a story of displacement then we might expect that when trials depart the core adjudicatory institutions like federal and state courts there would be more trial-like events in the burgeoning periphery. But data

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65. Should we count as trials only those that have been removed from their original social setting to a specialized trial-conducting institution?

66. RICHARD POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 396 (1996).

67. Galanter, *Vanishing Trial*, *supra* note 1, at 500-01.

68. *Id.*

69. *Id.* at 558-59.

70. Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 799 fig.1 (2004). In addition to administrative law judges, who enjoy some protections to ensure their independence, there are other administrative adjudicators in the federal government. In 1992, John H. Frye III estimated their number at 2700, most of whom have duties in addition to adjudication. John H. Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 263 (1992). The total caseload of the 83 major case types handled by these non-ALJ "presiding officers" analyzed by Frye was about 343,000 (44 percent immigration; 20 percent Health and Human Services; 17 percent Veterans Affairs, 6 percent Coast Guard, 4 percent Agriculture, etc.). *Id.* at 343.

71. Resnik, *supra* note 70, at 799, 800 fig.2.

from the most recent period suggests that these peripheral institutions are undergoing some of the same decline of adjudication. In the federal district courts, where magistrate judges can preside over cases with the consent of the parties, trials made up fully a third of magistrate civil dispositions in 1982, but as the number of magistrate dispositions increased, the number of trials has not kept pace. In 2002, trials were only 7.5 percent of magistrates' civil consent dispositions.[72] From 1985 to 2002, trials in bankruptcy court fell from 9,287 to 3,190, declining from 16.4 percent of terminations of adversary proceedings to 4.8 percent.[73] A dramatic drop in protests and contract appeals connected to government procurement over the course of the 1990s suggests a shrinkage of trial activity in that segment of the administrative process. Protests at the General Accounting Office decreased by half over the course of the decade; cases docketed at the five largest agency boards of contract appeals fell to a third or less of their earlier peaks.[74] Last year, the Department of Health and Human Services modified provisions for trials of Medicare claims, shifting hearings from 1,400 Social Security offices around the country to just four sites; most hearings will be held by teleconference or telephone and those beneficiaries who insist on a face to face hearing will waive their right to receive a decision within 90 days.[75] At least in these governmental settings close to the courts, we find the precipitous decline of trials by district court judges matched rather than offset.

Our displacement scenario suggests a picture of the legal system that resembles the familiar landscape of the older American city, with its declining core and its sprawl of flourishing suburbs. Taken as a whole, the metropolitan area grows, but the central city shrinks even though it is marked by ever grander towers. The central core is increasingly devoted to corporate and governmental use; its imposing towers are surrounded by decay and depopulation. Except for a remnant trapped by race or poverty, the inhabitants have fled to the periphery, where they occupy an array of comfortable, but pedestrian tract houses and undistinguished high-rises, with commerce dominated by enclosed shopping malls, occupied by chain stores, and laced together by freeways. The sprawl, fragmentation and dearth of public space that characterize this urban prospect are matched by the legal landscape. In their imposing public structures, the core legal institutions house big-time litigation and celebrity trials, but routine legal business thrives in the sprawling suburbs of private institutions and the convenient malls of ADR. Linking all of these is a layer of media representation of the legal, a rich stew of fictional and newsworthy parties, lawyers, and courts, in which trials remain the central event. There is the elaborated celebrity trial, the reassuring fiction of *Law*

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72. Galanter, *Vanishing Trial*, *supra* note 1, at 541.

73. *Id.* at 559.

74. Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 644-48 (2001).

75. Robert Pear, *Medicare Change will Limit Access to Claim Hearing*, N.Y. TIMES, Apr. 24, 2005, at 1; Center for Medicare Advocacy, *Changes to the Medicare Administrative Law Judge Hearing Process*, *available at* http://www.medicareadvocacy.org/ (last visited Mar. 21, 2006). Part of the appeals process will be conducted by "qualified independent contractors." Kerry Hunt, *Medicare implements new claims appeal procedures*, ACR (American College of Physicians), *available at* www.acponline.com (last visited June 12, 2006).

*and Order*, and the capsulized version of Judge Judy.[76] The thrust of this media coverage is "a strong ideological message about law's ability to achieve justice in our society."[77]

### *C. Assimilation*

Suppose we shift the emphasis from re-location of disputes to the change that courts and other dispute institutions are undergoing, specifically the diminishing distinction among them. We can visualize a process of assimilation in which law is less an autonomous, self contained system distinct from the surrounding institutions that it controls or monitors, while at the same time these institutions become legalized—they adopt due process and mimic legal procedures.[78] Law mingles with other forms of knowledge. Observers have noted "the increasing prevalence of non-legal disciplines in both legal scholarship and judicial opinions."[79] Similarly, legal institutions become less distinctive in their practices while legal forms are replicated in and reflected in other institutions (corporations, universities, families) and projected in magnified form in popular culture. Lauren Edelman describes the "managerialization of law" as legal ideas and practices are assimilated into organizational governance and may be re-defined, weakened, or detached from their original goals. These organizational renditions may in turn be re-incorporated into legal standards as "judges tend to take their cues from norms and practices that become institutionalized in organizations."[80]

In the absence of trials, the decision-making process of adjudication may get swallowed up by the surrounding bargaining process. This dissolution of legal standards is evident in Janet Cooper Alexander's description of securities class action litigation as "a world where all cases settle."[81] In such a world, "it may not even be possible to base settlement on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes. . . . There is nothing to cast a shadow in which the parties can bargain."[82] Judges preside over routine settlements that reflect not legal standards but the strategic position of the repeat players:

> [B]ecause securities class actions rarely if ever go to trial, settlement judges, like lawyers, have little relevant experience to draw on other than their knowledge of settlements in similar cases . . . their role becomes not

76. Lawrence Friedman, *Lexitainment: Legal Process as Theater*, 50 DE PAUL L. REV. 539, 548-58 (2000).

77. Naomi Mezey & Mark Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 184 (2005). *See also* Jessica Silbey, *Patterns of Courtroom Justice*, 28 J.L. SOC'Y 97 (2001).

78. Lauren B. Edelman, *Legality and the Endogeniety of Law*, *in* LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 195-96 (Robert A. Kagan et al. eds., 2002).

79. James G. Milles, *Leaky Boundaries and the Decline of the Autonomous Law School Library*, 96 LAW LIB. J. 387, 409 (2004); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998).

80. Edelman, *supra* note 78, at 199.

81. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Action*, 43 STAN. L. REV. 497, 567 (1991).

82. *Id.*

> to increase the accuracy of settlements, but to provide an impetus to reach *some* settlement. In the absence of information about how similar cases fared at trial, settlement judges could be an important force in maintaining a 'going rate' approach to settlements.[83]

Marygold Melli, Howard Erlanger, and Elizabeth Chambliss observed that in the child support arena they explored, there was a:

> question of who is in fact casting the shadow of the law . . . [T]he expectation of what a particular judge would set for child support had to be determined from the cases in his or her court—most of which involved settlements. The shadow of the law, therefore, was cast by the agreements of the parties. It seems that, rather than a system of bargaining in the shadow of the law, divorce may well be one of adjudication in the shadow of bargaining.[84]

Judith Resnik found in the prevalence of consent decrees—in which judges (in effect) delegate official power to the negotiators before the bench—another example of the supposedly central and independent formal process of adjudication becoming subordinated to the supposedly penumbral process of bargaining that surrounds it.[85] In all of these instances the absence of an authoritative determination of facts transforms adjudication into a spiral of attribution in which supposedly autonomous decision-makers take cues from other actors who purport to be mirroring the decisions of the former.

Indeed, the portion of the shadow cast by formal adjudication may be shrinking. Although the number of appeals has increased, the number subject to intensive full dress review has declined. More appeals are decided on the basis of briefs alone, without oral argument.[86] Appellate courts decide many more of their cases without published opinions or without any opinion at all.[87] And increasingly they ratify what the courts below have done.

The corpus of authoritative legal material continues to grow, as does the amount of published commentary that glosses this authoritative material.[88] What is the relation between this profusion of legal information and the shrinking number of trials? Apparently, of the increasingly more numerous reported cases, a

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83. *Id.* at 566 (emphasis added).

84. Marigold S. Melli, Howard S. Erlanger, & Elizabeth Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1147 (1998).

85. Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43 (1987).

86. In 2002, some two-thirds of appeals to U.S. circuit courts of appeal were decided without oral argument. Nancy Winkleman, *"Just a Brief Writer"?*, 29(4) LITIG. 50, 51 (2003).

87. Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157 (1998); William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3 (1990).

88. The number of law reviews has multiplied and the average output of each has grown. Michael Saks found that between 1960 and 1985, the number of general law reviews in the United States increased from 65 to 186, while specialized reviews multiplied from 6 to 140. Michael J. Saks et al., *Is There A Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 28 SUFFOLK U. L. REV. 1163, 1173 (1994).

smaller portion reflect adjudication in which there was a trial.[89] And the secondary literature, which in almost every subject continues to grow at an even faster rate than the number of reported cases,[90] presumably analyzes materials that are generated in non-trial settings. As a result, we have a growth in the amount of legal doctrine that is increasingly independent of trials.

In a realm of ever-proliferating legal doctrine, the opportunities for arguments and decisions about the law are multiplied while arguments and decisions become more detached from the texture of facts—at least from facts that have weathered the testing of trial.[91] The general effects of judicial activity are derived less from a fabric of examples of contested facts and more on an admixture of doctrinal exegesis, discretionary rulings of trial judges, and the strategic calculations of the parties.[92] Contests of interpretation replace contests of proof. Paradoxically, as legal doctrine becomes more voluminous and more elaborate, it becomes less determinative of the outcomes produced by legal institutions.[93] Legal discourse and its techniques increasingly resemble the discourse that infuses politics, economics, education, social work, the arts, and popular culture.[94]

At the institutional level, as the various dispute institutions are more closely linked they tend to lose their distinctive quality. Courts become the site of bargaining, mediation and treaty-making. The use of mandatory arbitration clauses to block access to the courts and corral claimants into captive forums changes arbitration from a mutually preferred forum to one imposed by a repeat player on

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89. Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999).

90. Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, tbl. 12.

91. On the other hand, in appellate proceedings courts are bombarded by factual arguments that are not contained in the trial record. For example, in State Farm Mutual Automobile Insurance Co. v. Campbell, an amicus brief submitted by sixteen large corporations relied on research commissioned and funded by one of their number, the Exxon Corporation, in the wake of a very large punitive award arising from the Exxon Valdez oil spill. *See* Brief for Health Insurance Association of America et al. as Amici Curiae Supporting Petitioner, State Farm Mutual Automobile Insurance Company v. Curtis B. Campbell & Inez Preece Campbell, 537 U.S. 1042 (2002) (No. 01-1289). *See also* William R. Freudenburg, *Seeding Science, Courting Conclusions: Reexamining the Intersection of Science, Corporate Cash, and the Law*, 20 SOC. F. 3 (2005).On the funding of this research by Exxon, see Alan Zarembo, *Funding Studies to Suit Need: In the 1990s, Exxon Began Paying for Research into Juries and the Damages They Award. The Findings Have Served the Firm Well in Court*, L.A. TIMES, Dec. 3, 2003, at A1.

Quite apart from such deliberate "seeding," by parties, there has been a shift in sources cited in judicial opinions. A study of the citations in published opinions found that the number of non-legal sources (*e.g.* newspapers, general books) cited increased sharply after 1990, while citations of traditional legal secondary sources (e.g., law reviews, treatises) declined. Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000).

92. By "general effects," I refer to those effects of a legal decision beyond those in the case at hand. *See* Marc Galanter, *The Radiating Effects of Courts*, *in* EMPIRICAL THEORIES ABOUT COURTS 117-42 (Keith O. Boyum & Lynn Mather eds., 1983).

93. *See* Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 528 (1975) ("[T]here is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decisionmaker's freedom.").

94. RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000).

one-shot claimants.[95] Here the power of the courts to compel jurisidiction is transferred without the rights, procedures and publicity that accompany and justify that compulsion. In some arbitration settings, the proceedings have come to resemble litigation in the courts. For example, securities arbitration "has come to share more and more features with traditional court trial in some respects, including increased emphasis on prehearing discovery and the availability of punitive damages."[96] There is a specialized securities arbitration bar, published decisions, and a periodical tracking developments.[97] Both instances reveal arbitration at some remove from the model of a voluntary, flexible one-off non-cumulative process.[98]

Similarly mediation changes when it is attached to the courts. Nancy Welsh reports that mediation is transformed as courts have "come to rely on mediators as the next set of judging adjuncts."[99] She observes that "as attorneys have become more frequent participants in mediation sessions and have assumed responsibility for selecting mediators, the process has become less focused on empowering citizens and more focused on forcing these citizens to confront and become reconciled to the legal, bargaining and transactional norms of the courthouse."[100] So other locations, too, lose their distinctiveness and their independence and function as auxiliary courts while in the courts it is more difficult to get a definitive adjudication and there is more pressure to go along and make a deal.

### *D. Transformation*

Others read the vanishing trial as a manifestation or portent of a fundamental change in the character of the legal system. Wolf Heydebrand sees the vanishing trial as part of a post-Weberian transformation of law marked by the rise of a new process rationality that supplants rule-centered, top-down, formal rationality with a decisional process that is negotiative, informal, participative and interactive.[101] Heydebrand attributes the transformation of law to "structural changes in the modern state and in the capitalist political economy," especially "the momentous shift of the capitalist political economy towards economic and financial globalization."[102]

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95. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999)

96. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 907 (2004).

97. *Id.*

98. Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization*, 108 PENN ST. L. REV. 929 (2004); Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 Apr. DISP. RESOL. J. 37 (2003) (relating how survey of commercial arbitrators reveals widespread perception of judicialization of process).

99. Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 136-37 (2004).

100. *Id.* at 137. *See also* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165 (2003); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or The Law of ADR'*, 19 FLA. ST. U. L. REV. 1 (1991).

101. Wolf Heydebrand, *Process Rationality as Legal Governance: A Comparative Perspective*, 18 INT'L SOCIOLOGY 325 (2003) [hereinafter Heydebrand, *Process Rationality*]; Wolf Heydebrand, Hard but Soft: Having Law Both Ways (manuscript, 2004).

102. Heydebrand, *Process Rationality*, *supra* note 101, at 326.

Law shifts from being an accountable expression of national policy to an informal and flexible economic and political instrument that links public and private power. "Hard law," with its coercive exercise of jurisdiction and rigorous enforceability, is joined by flexible, discretionary, participative "soft law." Adjudication is displaced by open-ended bargaining and negotiation. Corporate and government actors manage to have it both ways—they enjoy the legitimation of law while being able to exert their economic and political power. We get, Heydebrand says, "governance in legal garb."[103] He sees the replacement of trials by negotiated settlements and plea bargaining as a mark of this transformation.[104] The decline in trials is one sign of this major shift in the character of legal processes in the U.S. and throughout the rich democracies.[105]

Direct evidence of such a transformation is elusive. But the vanishing trial is suggestive of a shrinking of the role of definitive adjudication in the whole complex of governance.[106] Trial activity is diminishing not only in comparison to the rest of the legal world, but compared to the society and the economy. As Figures 6 and 7 show, there are fewer trials per capita and fewer trials per unit of GDP.[107] We have no reason to think there is a corresponding decline in the need for signals and markers to guide actors in making, conceding, defending and resolving claims, or in modulating the underlying activity. This deficit in signals and markers may be offset by greater efficiency in broadcasting and interpreting them. But it seems that considerable space is available for the insinuation of other influences. In the "bargaining in the shadow of the law"[108] that underlies settlements, the influence of legal doctrine and tested facts is always thoroughly mixed with considerations of expense, delay, publicity and confidentiality, the state of the evidence, the availability and attractiveness of witnesses, and a host of other contingencies that lie beyond the substantive rules of law. The diminishing role of trials and the greater indeterminacy of doctrine provide more space for the play of enlarged judicial discretion and the stratagems of intensified lawyering.

### *E. Evolution*

In a recent article, Carrie Menkel-Meadow suggests that the 'demise' of the 'adversary system of trial' is a "continuing evolutionary development of our An-

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103. *Id.*

104. *Id.*

105. *Cf.* Simon Roberts' contention that, "we can no longer credibly conceptualize the courts [in the United Kingdom] essentially as agencies of third-party determination now that they have been given . . . a new primary role as facilitators of negotiated agreement." Simon Roberts, *Institutionalized Settlement in England: A Contemporary Panorama*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 17, 31 (2002).

106. Rex Perschbacher and Debra Lyn Bassett compile an extensive catalog of "devices and procedures" in contemporary courts "removing the decisionmaking process from public view, removing the decision itself from scrutiny, or distorting the decisionmaking process by using conclusory analytical shortcuts" that erode law as a normative presence. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 60 (2004).

107. *See infra* Part III

108. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

glo-American legal system."[109] She likens the current "evolutionary moment" to the "transition from trial by ordeal or battle to trial by court and jury."[110] Surveying the "veritable rainbow of possibilities . . . now available for parties, big and small, to use to resolve their disputes with each other" she suggests "we have evolved into something different in this new process pluralism that we are increasingly using . . . ."[111]

Invocation of the evolution idea in describing and explaining legal change has a long history in scholarship about law.[112] The evolution image borrows plausibility from the common understanding that big changes in the past have occurred that we now recognize as improvements, so we should not assume that present arrangements are the pinnacle of human achievement, immune from displacement by something better. Evolutionary theories typically involve a set of developmental stages and a mechanism for moving from one to another. Here there is only a vague suggestion of stages beyond reliance on an implicit "ladder of progress" in which later appearing forms are superior to their predecessors.[113]

The mechanism of change seems to be our preferences and policies: "perhaps we can try to alter (whether by regulation or cultural change) . . . how private dispute resolution is conducted."[114] Rather than the push of variation and natural selection, we have the pull of harmonious resolution (or other desired outcome). "In the private sphere market forces are producing the phenomenon of the vanishing trial with the increased use of pre-dispute contractual provisions for arbitration or mediation or post-dispute agreements to seek other formats of private resolution." It is not only cost but "parties are seeking more tailored, complex, and future-oriented, as well as more conditional and contingent-to-be-revisited-if-things-change outcomes, parties in dispute now look to places other than courts to help them resolve their disputes."[115] But is not all this "seeking" and revisiting and tailoring being undertaken primarily by one sub-set of "parties"—corporate and governmental repeat-players—who are with increasing success imposing those choices on individual claimants?[116]

We are urged to use "process innovations" to produce outcomes that "can be made as close to Pareto-optimality as possible" and to "use conflict constructively

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109. Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 CURRENT LEGAL PROBS. 85, 87 (2004).

110. *Id.*

111. *Id.* at 102.

112. PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA (1980). Recent developments are described in Simon Deakin, *Evolution for Our Time: A Theory of Legal Memetics* (ESRC Centre for Business Research, University of Cambridge, Working Paper No. 242, 2002).

113. The assumption that the new mediative processes are newcomers compared to adjudication may well be true in terms of recent decades or even centuries. More than a generation ago, Schwartz and Miller, looking for sequences in legal institutions over a more amply evolutionary time-scale, concluded that mediation preceded police (i.e., specialized enforcers) and counsel in the development of human societies. Richard D. Schwartz & James C. Miller, *Legal Evolution and Societal Complexity*, 70 AMER. J. OF SOCIOLOGY 159 (1964). Subsequently, Howard Wimberley postulated that "courts formed an intermediate stage of legal development which appears after the emergence of mediation and prior to the appearance of police." Howard Wimberley, *Legal Evolution: One Further Step*, 79 AMER. J. OF SOCIOLOGY 78, 79 (1973).

114. Menkel-Meadow, *supra* note 109, at 108.

115. *Id.* at 112.

116. *Id.*

to collaborate on solutions to meet the needs of all parties."[117] This sounds less a description of an evolutionary process that a prescriptive program of "intelligent design."

Both Heydebrand and Menkel-Meadow agree that the Vanishing Trial is a manifestation of fundamental change in the character of the legal world. For Heydebrand the emergence of process rationality and the ascent of soft law is driven by market forces shaping the demands and ambitions of economic and political actors and their institutions. For Menkel-Meadow, in contrast, "evolution" away from adversary trials arises from the initiatives of parties seeking a better way.[118]

## VI. MORE LAW, FEWER TRIALS

The vanishing trial alerts us that we can have a continuing legalization of society accompanied by the atrophy of a central and emblematic legal institution. The legal complex as a whole is flourishing, Law expands and diffuses throughout society. The culture is increasingly pervaded by images of law and of trials. At the same time legal controls becomes less distinctive, less differentiated, more diverse, less public. Within the core legal institutions, the template of adjudication is continuously elaborated and more frequently invoked, but less frequently pursued through full-blown adjudication with trial. The decomposition of adjudication into bargaining is certainly not a new thing. Its presence is marked in the institutionalization of plea bargaining and civil settlement and the long-term decline of the portion of cases that get to trial. The residue of trials remaining from this long-term attrition seems to be shrinking rapidly, so that fewer trials actually take place each year.

What do the various scenarios suggest about the leeways for policy? Is the role of trials in our legal system something we can manage or adjust or is it a reflection of a vast glacial movements in human affairs that lie beyond policy? Once again, it may be helpful to distinguish between the recent precipitous decline and the gradual long-term decline. If we are talking about the long, gradual decline in percentage of trials, we may enjoy less scope for modifying it by policy

The recent precipitous decline seems to involve factors that we have some control over and more scope for deliberate modification—for example, the deployment of judicial effort into managerial judging and the embrace of mandatory arbitration. But since these, in turn, are tied to many other facets of the system, it may not be possible to revise policies regarding trials without addressing the dominance of corporate actors in the legal arena[119] and the whole turn against the expansion of public legal remedy.[120]

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117. *Id.* at 103-04.

118. *Id.* at 112-14. Compare the call of Chief Justice Warren Burger, speaking to the Annual Meeting of the American Law Institute in 1985, for a searching examination of "the whole litigation process under the common law system" in the hope of finding "a better way." Burger, Opening Remarks, in American Law Institute, Remarks and Addresses at the 62nd Annual Meeting 1, 8-9 (1985).

119. Galanter, *Planet*, *supra* note 21.

120. Galanter, *Turn Against Law*, *supra* note 48.