A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts

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Abstract: Over the past half-century, the number of cases entering American federal and state courts has multiplied. But, largely unobserved by the public, the percentage of those cases that are disposed of by trial has steadily decreased. In recent decades, as the increase in filings has leveled off but the percentage of cases reaching trial has continued to fall, the absolute number of trials has decreased as well. Conducting trials is a shrinking portion of what judges do. The effects of this turn away from trials on judges, on litigants, and on public perceptions of the legal system remain to be explored.

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*(*See endnotes for complete contributor biographies.)*

Courts occupy a prominent place in American life. Common expressions such as having one's "day in court," "the truth, the whole truth, and nothing but the truth," and "the jury's still out on that" reflect this cultural presence. Americans typically link courts and trials: trials are what happen in courts; courts are the places where trials happen. Television news, the ubiquitous *Law and Order*, and *Judge Judy* present an unending stream of images of trials.

Together, the federal and state courts take up tens of millions of civil and criminal matters each year. Trials have always made up only a fraction of court proceedings. In the course of the last half-century, however, trials have become a much-reduced fraction of these proceedings; and, in turn, the courts themselves are the site of a shrinking portion of all trial-like events. During that period, the number of cases brought to the courts by a growing population increased. But in the last decades of the twentieth century, even as court caseloads continued to increase, a smaller and smaller portion of those cases led to trials, so that the absolute number of trials began to decline. These trends are found in federal courts and state courts, in criminal cases and civil cases, and they continue to this day.

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The Continuing Decline & Displacement of Trials in American Courts

For the federal courts, we have data from 1962 on that show a long, steady decline in the percentage of cases that reach trial. During the past half-century, the number of civil cases in the federal district courts rose by a factor of five and settled in the range of 250,000 a year. The percentage of civil cases reaching the trial stage, however, continued its long descent. The *number* of trials still continued to rise, somewhat more slowly than the caseload, until the mid-1980s, when they began to decline as the caseload leveled off.

The steady decline depicted in Figure 1 is a continuation of a much longer decline of trials as a portion of terminations in the federal courts.[1] Both jury trials and bench trials (that is, those conducted by the judge without a jury) have declined, but the decline of bench trials has been steeper. In 2012, the number of bench trials was 0.3 percent of total caseload, which is about one-twentieth of the 6.04 percent of dispositions by bench trials in 1962. In 2012, jury trials also reached a new low of 0.73 percent of total dispositions, marking a steady decline from 5.49 percent in 1962 and 2.33 percent in 1985.

Data from the state courts are less abundant and less readily comparable. The National Center for State Courts assembled data on civil trials in the general jurisdiction courts of twenty-two states from 1976 – 2002.[2] During that period of rising caseloads, the number of jury trials decreased by 32 percent, and bench trials (which were far more numerous) decreased by 7 percent. Subsequently, the Center assembled data for fifteen states for the period 1976 – 2009. These figures also show a declining portion of trials, both jury and bench, of comparable magnitude to that in the federal courts (see Figure 2).

This general trend is confirmed and elaborated on by state court data collected by the Bureau of Justice Statistics (BJS) of the U.S. Department of Justice. In a forty-five-county sample of the seventy-five most populous counties in the United States, the total number of civil trials fell 52 percent – from 22,451 in 1992 to 10,813 in 2005.

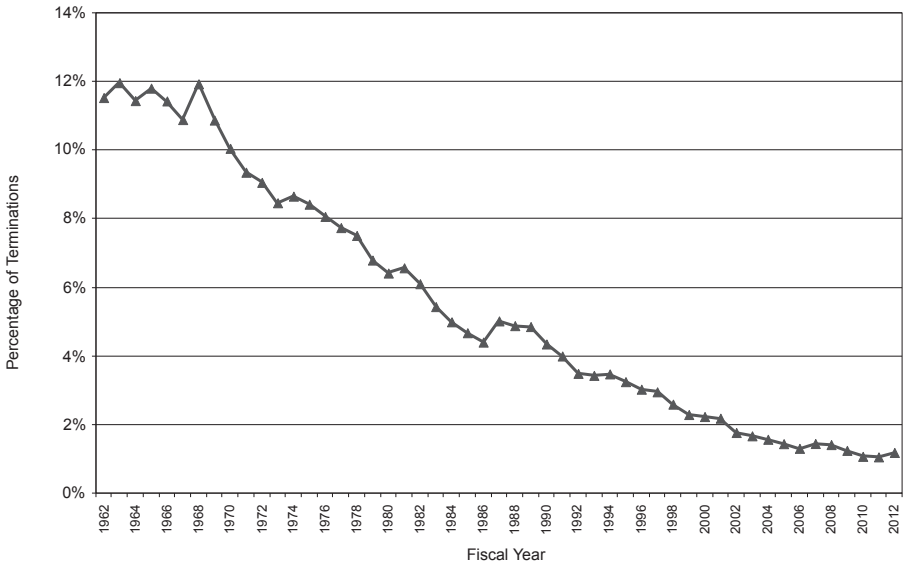
This mirrors the decline of the absolute number of civil trials in the federal courts.[3] In 2012, across the entire United States, 3,211 civil trials began in the trial level (district) courts. This number is 44 percent less than the 5,802 trials in 1962, when the district courts disposed of about one-fifth as many cases as they have disposed of in recent years. In other words, the ratio of trials to filings in 2012 is only about one-twelfth what it was fifty years earlier.[4]

The count of federal trials displayed in Figure 3 (as well as in all other federal data in this essay) is, in two separate ways, a very generous one. First, it is based on the Administrative Office of the U.S. Courts' very broad definition of a trial as "a contested proceeding before a jury or court [that is, a judge sitting without a jury] at which evidence is introduced."[5] Second, the "during and after" number includes all cases that reach the trial stage, not just those that complete it. Many cases are settled in the course of trial. Figures for the years up to 2002 indicated that nearly one-fifth of cases in which a trial began were resolved during trial.[6]

Only a small fraction of litigation takes place in the federal courts. The state courts, the site of the great bulk of litigation, exhibit a pattern of declining civil trials that resembles that seen in the federal courts, but is somewhat different. For example, the steady fall in the absolute number of trials begins later in the state courts, in the early 1990s rather than the mid-1980s (when the fall in the federal courts began).

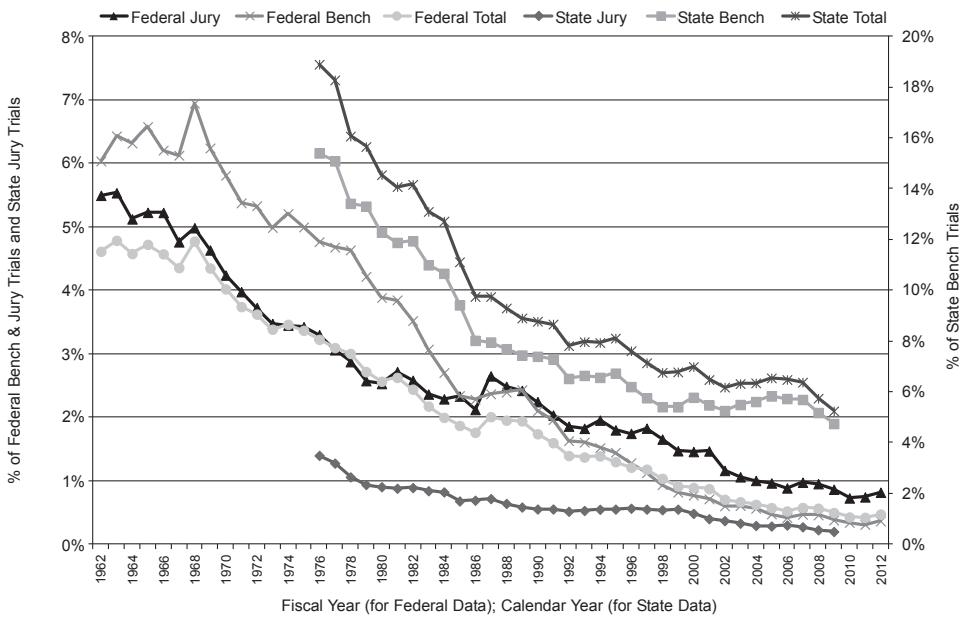
A series of studies of the nation's most populous counties conducted by the federal government's Bureau of Justice Statistics illuminates the changing composition

Figure 1
Percentage of Civil Terminations During or After Trial, 1962 – 2012



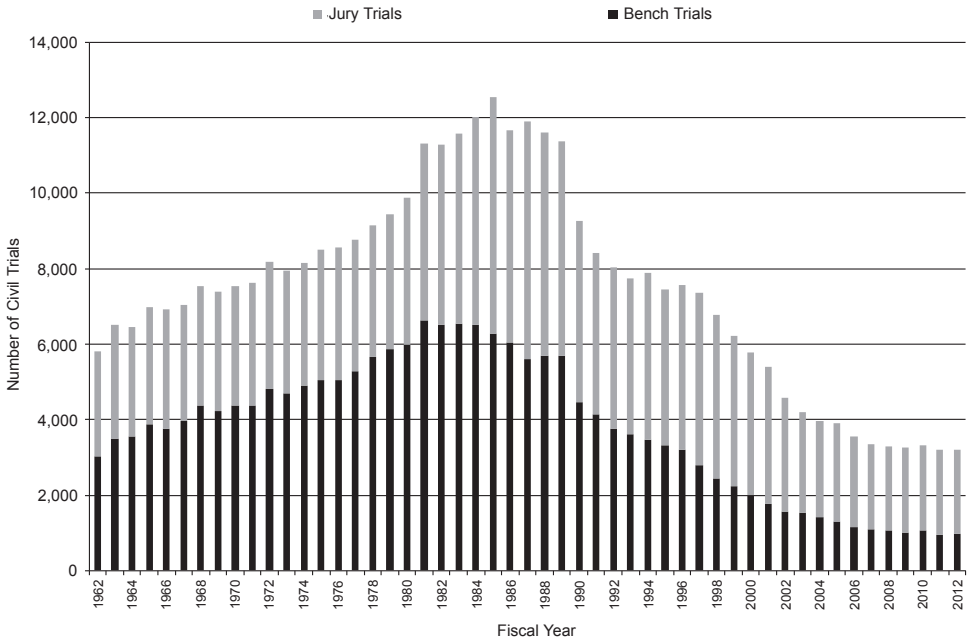
Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

Figure 2
Percentage of Civil Terminations by Trial in U.S. District Courts (1962 – 2012) and State Trial Courts in 15 States (1976 – 2009)



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012); National Center for State Courts (unpublished data).

Figure 3
Number of Civil Trials by Bench and Jury, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

of the trial docket.[7] As shown in Table 1, the absolute number of civil trials in these counties decreased 51.8 percent from 1992 to 2005. Trials on every subject declined over this period, but trials in some kinds of cases fell more dramatically than others. Premises liability and product liability saw declines of 59.7 percent and 65.8 percent respectively, while medical malpractice only declined 9.5 percent. In contracts, employment cases (9.83 percent) saw significantly less decline than fraud cases (47.04 percent), or buyer plaintiff cases (51.19 percent) and seller plaintiff cases (72.90 percent). Real property cases saw the greatest decline, at 77.11 percent.

Over this thirteen-year period, trials declined in every category of case, but at different rates, thus changing the makeup of the trial docket. The big gainers were automobile torts and medical malpractice, which together made up 44 percent of all civil trials in 2005, up from 28 percent in 1992. But these "gainer" categories were still shrinking in absolute terms. There was not a single category of civil trials that was more frequent in 2005 than in 1992. Both the overall shrinkage and the changing composition of this litigation is displayed in Figure 4.

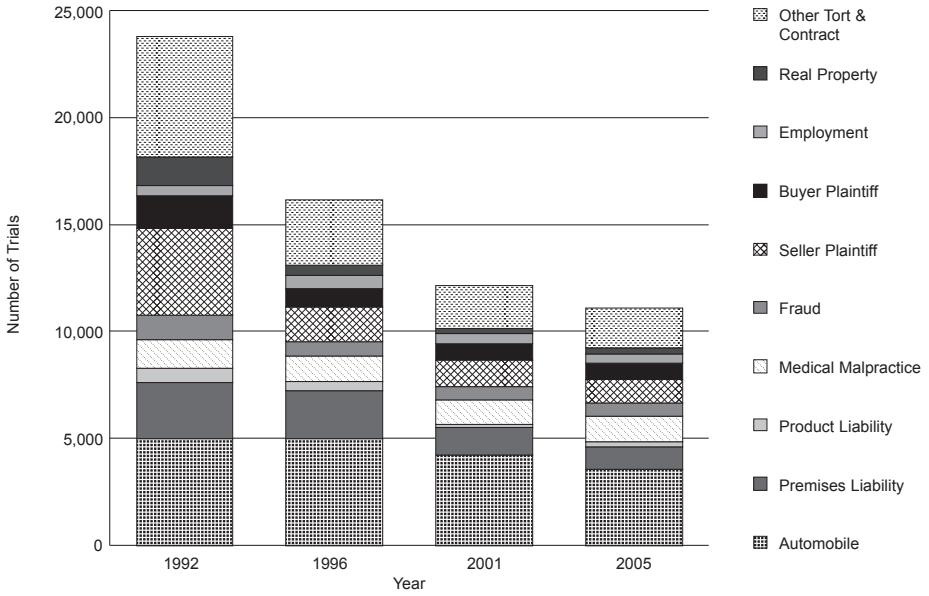
In the federal courts, the composition of the civil trial docket also underwent substantial changes in the course of the last half-century (see Figure 5). In 1962, nearly 55 percent of all federal civil trials were tort cases; in 2012, that portion fell to just 19 percent of civil trials. Over that same time period, civil rights became a significantly

Table 1
Number of Trials in State Courts of General Jurisdiction in Sample of Seventy-Five Most Populous Counties in Select Years, 1992 – 2005

	1992	1996	2001	2005	Change (1992 – 2005)
All	22,451	15,638	11,908	10,813	-51.84%
Tort	11,660	10,278	7,948	7,038	-39.64%
Automobile	4,980	4,994	4,235	3,545	-28.82%
Premises Liability	2,648	2,232	1,268	1,067	-59.71%
Product Liability	657	421	158	225	-65.75%
Medical Malpractice	1,347	1,201	1,156	1,219	-9.50%
Contract	9,477	4,850	3,698	3,474	-63.34%
Fraud	1,116	668	625	591	-47.04%
Seller Plaintiff	4,063	1,637	1,208	1,101	-72.90%
Buyer Plaintiff	1,557	832	793	760	-51.19%
Employment	468	621	453	422	-9.83%
Real Property	1,315	510	262	301	-77.11%

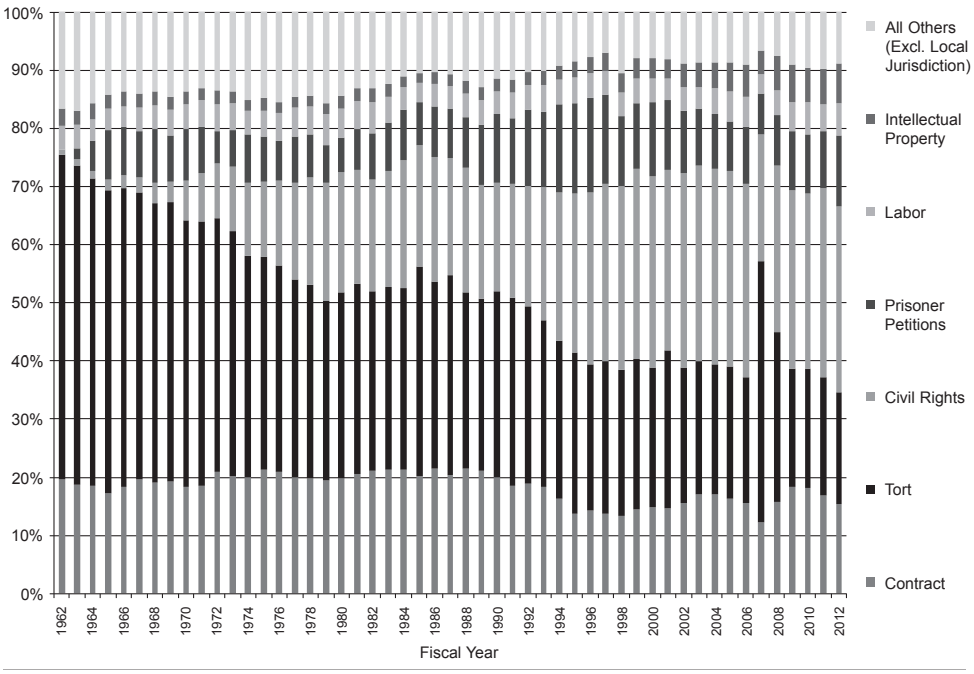
The counties included in the sample changed slightly over the course of the four BJS studies. Source: Thomas H. Cohen and Lynn Langton, "Civil Bench and Jury Trials in State Courts" (U.S. Department of Justice Bureau of Justice Statistics, 2005).

Figure 4
Number of Civil Trials in Courts of General Jurisdiction by Case Type in Sample of Seventy-Five Most Populous Counties in Select Years, 1992 – 2005



The counties included in the sample changed slightly over the course of the four BJS studies. Source: Thomas H. Cohen and Lynn Langton, "Civil Bench and Jury Trials in State Courts" (U.S. Department of Justice Bureau of Justice Statistics, 2005).

Figure 5
Makeup of Civil Trials by Major Case Type, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

larger share of trials, increasing from a fraction of 1 percent in 1962 to 32 percent in 2010. Given the enactment of landmark civil rights legislation in the 1960s, more litigation in this category in the late 1960s and early 1970s is not unexpected. The growth in the category as a percentage of trials was steep from the late 1960s until the late 1970s when civil rights began to make up 19 – 22 percent of trials. The portion increased notably again in the mid-1990s, within a few years of the passage of the Americans with Disabilities Act (ADA). In 2002 (two years post-ADA), civil rights trials were 20.7 percent of all civil trials; five years later, the portion had increased to 30.5 percent and has not dropped below 30 percent since that time.[8] Prisoner petitions and intellectual property cases have also seen increases in their portions since 1962.

The three categories that make up roughly 60 percent of trials in recent years – torts, civil rights, and prisoner petitions – are suits instituted by individuals complaining of injury and seeking recovery from insurers, corporations, or institutions. The other 40 percent is largely composed of claims by these institutions and corporations against individuals or against one another. The composition of the docket means that trials today are very much contests between parties of contrasting experiences and resources.

In the federal courts, we see a dramatic decline in tort trials, both absolutely and as a portion of all trials. In the state courts

(represented by the seventy-five most populous counties), torts decline moderately in absolute terms. But since virtually everything else fell even more, torts actually become a larger portion of trials. Medical malpractice has followed a distinctive path, rising from one of every nine tort trials to more than one out of every six over the course of the four BJS surveys. Since tort cases, although diminished in number, are a growing percentage of all trials, medical malpractice trials now make up almost one of every eight civil trials. Again, these shifts should be read against the overall declines. Malpractice trials have not actually increased; they have decreased slightly (some 9 percent from 1992 to 2005), while other tort categories have undergone massive declines.

The decline is more precipitous in some places than in others. There is no part of the country where the number of trials is increasing or has remained steady over the past quarter century.

It is important to understand that these patterns do not reflect trade-offs between trial time for civil and criminal cases. As Figure 6 shows, the decline in civil trials cannot be accounted for by a corresponding rise in criminal trials, which have also been declining in both state and federal courts.

In the federal courts, the decline in the rate of criminal cases that reach trial begins somewhat later than the decline in the rate of civil trials (see again Figure 1). Jury trials have been predominant and remain so. Figure 7 shows that the trial rate in criminal cases was much higher than the trial rate in civil cases from the late 1960s on, but has fallen more rapidly, such that the two are converging at present.

In federal as in state courts, the decline of civil trials is quite general and not confined to cases of any particular type. Since the mid-1980s, the number of civil trials has fallen in every major category (see Figure 8).

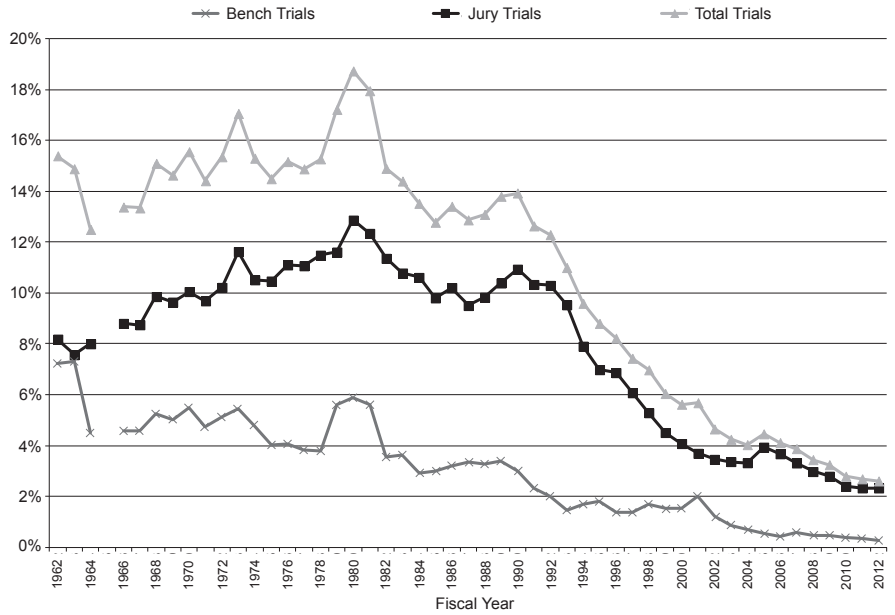
In the federal courts, the decline is steepest in torts and contracts, which have become a smaller portion of all trials. As a result, a growing portion of trials are in civil rights cases and prisoner petitions, even though these categories, too, are declining in absolute numbers.

The more abundant federal data enable us to mark the massive change in the modality of adjudication starting in the mid-1980s. Not only do fewer cases reach the trial stage, but the portion terminating without any court action whatsoever has shrunk dramatically ("no court action" means that cases were filed and then settled or withdrawn without any action or hearing by the court). The onset of judicial proactivity is neatly displayed in Figure 9, as dispositions "before pre-trial" (that is, before the stipulated pre-trial conference) displace dispositions with "no court action."

In addition to the continuing long-term decline in the *percentage* of cases that reach trial (see Figure 1), we see an *absolute* decline that has been proceeding without interruption for about a quarter-century. Although the rates of decline vary from one case type to another, there is no major category of cases that is exempt. From these data, we conclude that the decline has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties.

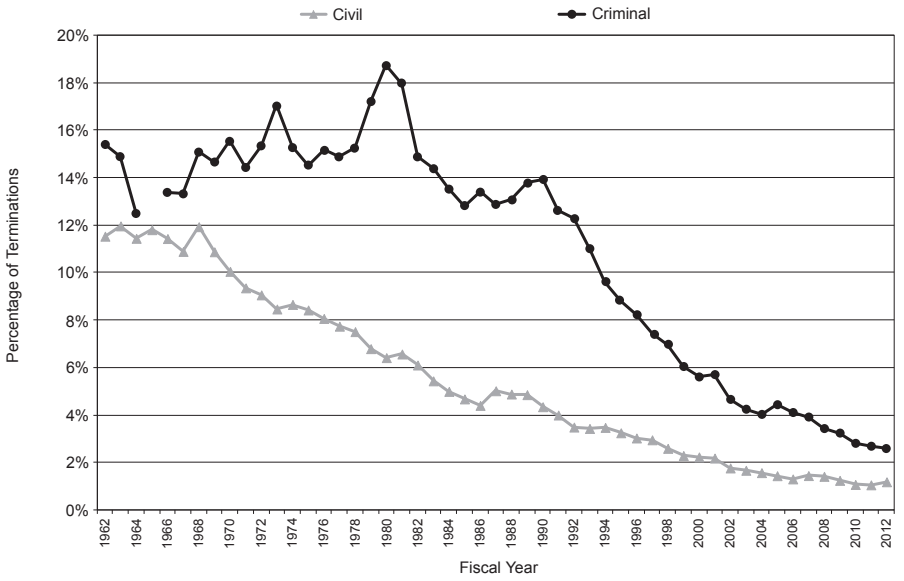
This decline is accompanied by an ideology that explains and promotes the absence of trials to judges, administrators, lawyers, clients, and policy-makers. Some elements of this ideology are that the role of judges is to manage and resolve disputes; that adjudication is only one – and not always the optimal – way to do that; that trials are expensive and wasteful; that ordinarily disputes are preferably resolved by mutual concessions; that settlement benefits parties and the courts themselves; and that outsourcing disputes to alternative dispute resolution (ADR) institutions

Figure 6
Percentage of Criminal Defendants Terminated by Trial in U.S. District Courts, 1962 – 2012



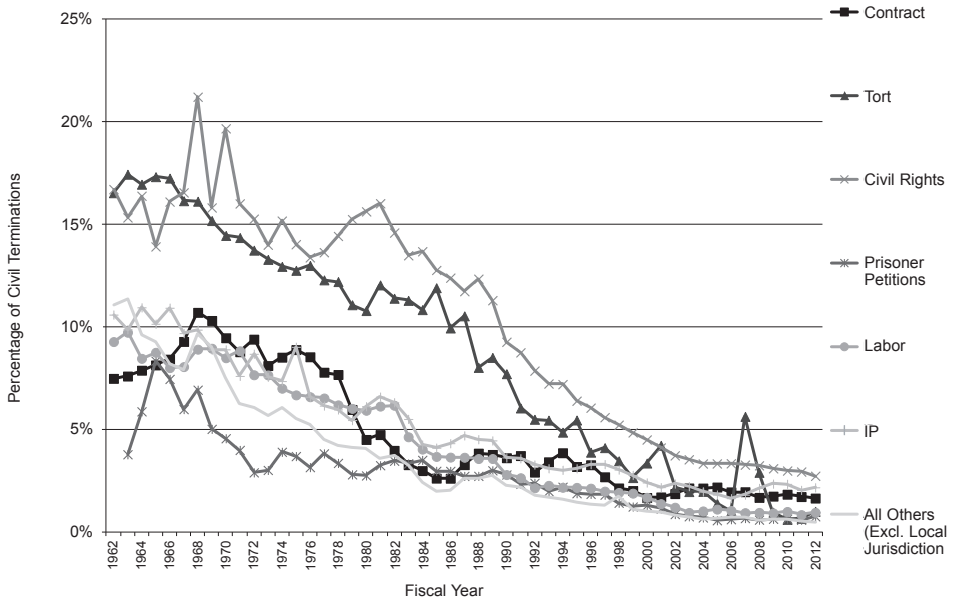
Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962 – 1964, 1966 – 2012).

Figure 7
Civil and Criminal Trial Rates in U.S. District Courts, 1962 – 2012



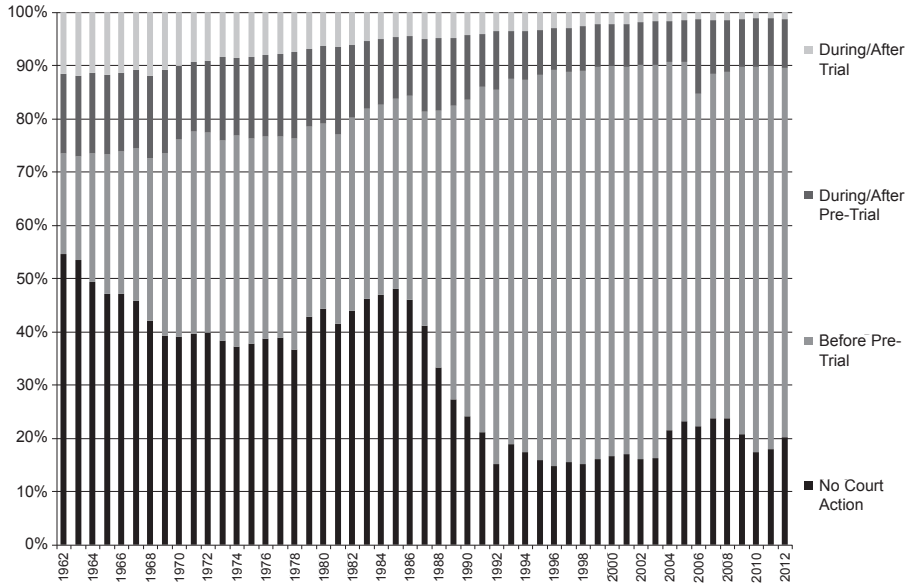
Base civil data are the number of "civil cases terminated," whereas base criminal data are the number of "criminal defendants disposed of." Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012); and Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962 – 1964, 1966 – 2012).

Figure 8
Percentage of Civil Cases that Reach Trial in Each Major Case Category, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

Figure 9
Percentage of Cases Terminated at Each Stage, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012).

benefits courts without detriment to parties. The trial-avoidance justified by this wisdom fits the interests of judges in keeping abreast of dockets and the interests of lawyers – both corporate lawyers who wish to minimize the risk of loss that might discredit them with clients, and plaintiffs' lawyers who seek to avoid the pro-defendant tilt of the appellate process.[9]

This shift in practice and culture means that the decline becomes self-perpetuating. There are fewer lawyers with extensive trial experience and new lawyers have fewer opportunities to gain such experience. As lawyers ascend into decision-making positions having less trial experience, the discomfort and risk of trials looms larger in their decisions. Judges, too, accumulate less trial experience and, in many cases, have less of an appetite for trials.

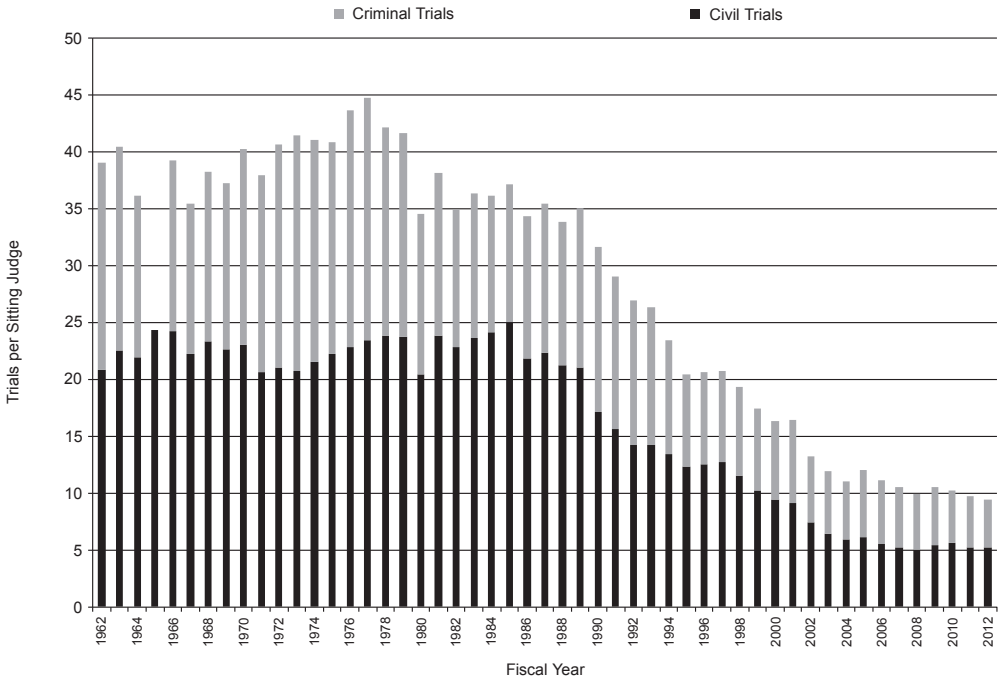
Figure 10 depicts the rate of trial activity by federal judges, which fell from about forty trials annually in the era before the arrival of "managerial judging" – with its heavy investment of judicial effort in the early stages of cases[10] – to about ten cases annually for the past decade. Figure 10 overstates the number of cases tried by "active" (non-retired) district court judges, because "retired" senior judges conduct many of the trials in these courts. Indeed, we know that hundreds of senior district judges do a great deal of the work in the federal courts: "senior status" district judges conducted an average of 18.1 percent of all trials during the 1990s. During the 2000s, the average portion rose to 19.9 percent of all trials, with a sharp increase in 2008 and 2009, when they conducted 25.1 percent and 26.0 percent of all trials.[11] So in calculating the actual trial activity of sitting federal judges in recent years, we must reduce the number of trials by roughly one-fifth to one-quarter to account for these active "senior status" judges. Thus, the total number of trials, civil and criminal, conducted by the average district judge in recent years would be approximately eight. A similar reduction of trial participation is occurring with many state judges. A recent study traces the number of civil jury trials per sitting judge in Massachusetts at five-year intervals from 1925 to 2000.[12] That study finds that jury trials were 11.19 percent of civil filings in 1925, but 2.65 percent in 2000. Verdicts per Massachusetts Superior Court justice fell from ninety-four in 1925 to seven in 2000. The number of sitting Massachusetts state court judges rose from thirty-two to eighty-two, while the number of trials fell from 3,022 to 571.

While the number of trials shrinks, the American legal system as a whole continues to grow larger in many dimensions. There are more lawyers, more laws and regulations, more enforcement activity, and more expenditure on law. These dimensions of legality have more than "kept up" with the growth of the U.S. economy and population, but the trial has not: there are fewer trials per capita and per unit of GDP. Each of these measures began to decline in the 1980s, when the absolute number of trials began to fall.

The data present a puzzle. The trial is shrinking institutionally at a time when law and legal institutions play a larger role in public consciousness, not least in the form of news coverage and fictional depictions of trials in television, movies, and books. Legends about increased litigiousness, a "litigation explosion," irrational juries, and monster awards gained wide currency in the years surrounding the decline in the number of jury trials.[13]

The combination of media attention to trials with folklore about litigation seems to have concealed the shrinking number of trials from the wider public. The public perception of legal institutions is increasingly through the media rather than through personal experience. The popula-

Figure 10
Number of Trials, Civil and Criminal, per Sitting Judge, U.S. District Courts, 1962 – 2012



Source: Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962 – 2012); Administrative Office of the U.S. Courts, Annual Report of the Director, Table D-4 (1962 – 1964, 1966 – 2012); and Administrative Office of the U.S. Courts, Annual Report of the Director, Article III Judgeship Tables (1962 – 2012).

tion of trials in the media, reportorial and fictional, has not tracked the implosion of real-life courtroom trials. Exposure to media trials – overwhelmingly criminal rather than civil – may have actually increased. Thus, cultural expectations of definitive adjudication are reinforced at the same time that its presence in real life shrinks.

With juries present less frequently and with the intensified management of cases, judges' range of decision and discretion has broadened. Their role as gatekeepers is enlarged, especially (in the federal courts, at least) by the elaboration of summary judgment (which now accounts for far more terminations than trials). This broad discretionary power may be further enlarged by recent Supreme Court decisions, empowering judges to reject cases at an early stage if they determine that the claims pleaded are not "plausible."[14]

In a setting in which trust in government is low, courts have managed to deflect most of the anti-government sentiment. As judges' work shifts away from adjudication toward administration and case management, it remains to be seen how this will affect public regard for them. To be perceived as just another part of the government, instrumentally pursuing policies and

dealing in compromise and tradeoffs, may jeopardize the aura that the courts have so far maintained.

We don't know to what extent that aura is generated by the trial as an institution. The trial, unlike dismissals and negotiated settlements, is a site of deep accountability in which the leeways and reciprocities present in most social settings are unavailable. It is an unanswered empirical question how much Americans regard judicial proceedings, especially trials, as fundamentally different from politics and administration. Do they see trials in courts as differing in quality and authoritativeness from proceedings in administrative tribunals or in arbitration?

The occurrence of trials in courts is increasingly rare and exceptional, but many trial-like things happen in forums that resemble courts (but are not quite). Herbert Kritzer documents the widespread occurrence of trial-like events in a variety of governmental settings outside the courts.[15] Lauren Edelman and Mark Suchman describe the rise of trial-like proceedings within organizations.[16] And, with the enthusiastic encouragement of the Supreme Court, there has been an increase in arbitration, especially claims against corporations, channeled by mandatory arbitration clauses in consumer and other boilerplate contracts.[17] These developments invite us to reconceptualize the decline of trials in the courts not as the disappearance of trial-like proceedings, but as their displacement or migration to a variety of other locations. In many of these settings, the proceedings are more perfunctory – with lower investments in evidence-gathering, lawyering, and deliberation. In short, courts and trials are parting ways. Courts are less focused on trials, and trial-like proceedings are far more numerous in settings other than courts, such as administrative agencies, arbitration tribunals, and forums within organizations. The judges in these trials are for the most part more specialized than the generalist judges in the courts. Public participation – as jurors, spectators, and consumers of media accounts – is eliminated. Many of the cases in these non-court forums involve contests between individuals and corporate or government entities. And in many instances, the forum is explicitly or implicitly sponsored or managed by that entity. The quality of factual presentation and legal argument in these forums remains unstudied and no doubt varies in quality.

Curiously, there are virtually no depictions of these trial-like occasions in settings other than courts (with the singular exception of court martials). All these proceedings before administrators, tribunals, and arbitrators are culturally invisible: they are not the subject of dramas, movies, jokes, stories, or news accounts. They give rise to no shared public knowledge. The media portrayal of courts – mostly but not exclusively criminal courts – reflects or generates expectations of solemnity, thoroughness, impartiality, and fairness. It is unknown whether administrative courts and arbitrators are associated with comparable expectations.

If courts are not conducting trials, what are they doing? With ever more elaborate rules and procedures, they preside over a movement toward trial that provides the frame for bargaining or summary disposition. Even if it doesn't occur frequently, the trial is a ghostly presence. It is present not as the culmination of the proceedings but as a doomsday machine – a demanding and risky thing, unwelcome to all the players (including the judge), that will occur if the matter is not resolved by settlement or dismissal. On the criminal side, the riskiness of trial is amplified by the tendency of many judges to impose heavier penalties on defendants who reject offered plea bargains and insist on trial – the so-called "trial penalty."[18] Judicial aversion to trial

may be another product of the intensified concern about dockets and judges' quantitative output. It may also be the case that as judges preside over fewer trials, each additional trial seems a weightier addition.

The continuing steady decline of the number of court trials is reminiscent of the famous disappearance of the Cheshire Cat in Alice in Wonderland:

> [A]nd this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.
>
> 'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!'[19]

Perhaps the abundance of trials in the media is the lagging grin of the trial cat. The question is whether trial in court is inevitably fated to extinction. The challenge is to imagine what might bring about a resurgence of trials. Our guess is that it would take a major impact from outside the system to initiate a turnaround. In the meantime, we may get no better guidance than from a further exchange between Alice and the Cat:

> "Would you tell me, please, which way I ought to go from here?"
>
> "That depends a good deal on where you want to get to," said the Cat.
>
> "I don't much care where – " said Alice.
>
> "Then it doesn't matter which way you go," said the Cat.
>
> " – so long as I get somewhere," Alice added as an explanation.
>
> "Oh, you're sure to do that," said the Cat, "if you only walk long enough."

ENDNOTES

* Contributor Biographies: MARC GALANTER, a Fellow of the American Academy since 2003, is the John and Rylla Bosshard Professor Emeritus of Law and South Asian Studies at the University of Wisconsin, Madison. His many publications include *Competing Equalities: Law and the Backward Classes in India* (1991), *Tournament of Lawyers: The Growth and Transformation of the Big Law Firm* (with Thomas M. Palay, 1994), and *Lowering the Bar: Lawyer Jokes and Legal Culture* (2005).

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1 Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War," *Stanford Law Review* 57 (2005): 1257 – 1259.

2 Brian J. Ostrom, Shauna Strickland, and Paula Hannaford, "Examining Trial Trends in State Courts: 1976 – 2002," *Journal of Empirical Legal Studies* 1 (2004): 755.

3 Adjustments have been made to the 2007 and 2008 data to account for a large number of misreported cases related to oil refinery explosions in the Middle District of Louisiana.

4 Because it is the year for which we are able to obtain the earliest comparable data, 1962 is the baseline.

5 Administrative Office of the U.S. Courts, Form JS-10.

6 Marc Galanter, "The Vanishing Trial," *Journal of Empirical Legal Studies* 1 (2004): 459, 462, figure 3.

7 Thomas H. Cohen and Lynn Langton, "Civil Bench and Jury Trials in State Courts" (U.S. Department of Justice Bureau of Justice Statistics, 2005), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554.

8 Unfortunately, the C-4 Table does not provide much detail as to the type of civil rights cases terminated. In 1982, the civil rights category was divided into two sub-categories: "Civil Rights, Employment" and "Civil Rights, Other." Additional breakdown was not provided until 2008, when the "ADA, Employment" and "ADA, Other" subcategories were added.

9 Kevin M. Clermont and Theodore Eisenberg, "Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments," *University of Illinois Law Review* 2002 (2002): 947; and Theodore Eisenberg, "Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes," *Journal of Empirical Legal Studies* 1 (2004): 659.

10 Judith Resnik, "Managerial Judges," *Harvard Law Review* 96 (1982): 374 – 448.

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