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Leading Article
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THE VANISHING TRIAL: A PROBLEM IN NEED OF SOLUTION?

Observant readers of the *New York Times* on Sunday, December 14, 2003 would have seen an article (indeed, a front-page article!) that provided what I believe is the first national press coverage of an important public policy issue that until then had largely received attention only from a coterie of judges -- in particular, federal judges -- and a limited number of scholars.[1] That same weekend, the American Bar Association ("ABA") held the first national symposium devoted entirely to this issue.[2] The symposium drew a wide spectrum of participants from the Bar, the Judiciary and the Academy, and they spent an entire weekend discussing the nature and extent of this issue, its likely causes, and possible responses. What is this issue that has drawn the attention of such venerable institutions as the *New York Times* and the ABA? It is the Vanishing Trial; or, as some judges nervously ask, "Can we still be called 'trial judges' if we don't try cases?"

The number of trials held each year in courts across the country, both state and federal, is declining at what to some is an alarming rate, all at the same time that nominal case filings are increasing. This phenomenon, which the data show is quite real, has potentially great implications for our justice system -- for the methods we have devised to resolve disputes; for the institutions we have created to entertain disputes; for the training of lawyers to represent clients in those disputes; and even for the body of law (for example, the rules ***2** of evidence) that we have developed to assist parties and juries to resolve disputes.

Indeed, according to Chief Judge William Young, of the United States District Court for the District of Massachusetts, what the existing data show "is nothing less than the passing of the common law adversarial system that is uniquely American."[3] As Chief Judge Young lamented in an article that he titled *An Open Letter to U.S. District Judges*, "This is the most profound change in our jurisprudence in the history of the Republic."[4] And, he warned darkly, "History will not judge kindly that generation of jurists that allow this 'purest example of democracy in action,' this 'stunning experiment in direct popular rule' [-- the civil jury --] to wither away."[5]

With less emotionally charged rhetoric but in a similar vein, Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit has also described the decline of trials as one of the most significant changes in the American judicial system since the Nation's founding. In an article aptly titled *So Why Do We Call Them Trial Courts?*, Judge Higginbotham describes the disappearance of trials as "a change in [the] very architecture" of our judicial system, a system for resolving disputes that, he notes, has largely remained constant for over 200 years.[6] No more.

I propose in this article to summarize some of the data that illustrate vividly this "change in architecture." I will then consider some of the likely causes of this change and discuss various views on whether the vanishing trial phenomenon is a problem in need of solution or not -- that is, whether we should care about this development as passionately as Judge Higginbotham and Chief Judge Young do, and why. My hope is that this discussion will prompt an examination of some of the possible solutions that have been proposed to stem the decline in the number of trials and whether such "cures" are ***3** likely to be more problematic than the "disease" itself.

Before beginning, however, I would be remiss if I did not acknowledge my debt to judges like Patrick Higginbotham and William Young and to scholars like Marc Galanter of the University of Wisconsin Law School[7] and others whom I will cite below. These individuals have done the hard work of pulling together the relevant data and thinking deeply about what it all means. In this article, I merely highlight their insights, data and observations. I do not pretend myself to have done any original thinking or research into this important question. However, given the readership of this venerable publication, I do hope to stimulate debate within the Connecticut Bar and Judiciary regarding this important development.

I. THE NUMBERS

In thinking about the data on the decline in trials, I am reminded of the debate that ensued over global warming. I do not for a moment suggest that the vanishing trial phenomenon is anything so cataclysmic as global warming. But there are parallels in the trajectory of the debate over the two issues.

You will recall that, at first, there were a few scientists who sounded an alarm about what they saw in the data as an emerging trend. These brave souls, who readily admitted their data were incomplete and in need of further study, were generally met with a mixture of skepticism, criticism and indifference. There followed a period of further study and debate, during which alternative explanations of existing data were offered and additional data were gathered. Indifference gave way to sharp debate. Over time, however, the emerging trends became too clear to deny and attention then turned to the causes of the warming, the harm it might produce and the methods of containing, or possibly reversing, the trend.

As with global warming, initially some far-sighted members of the judiciary noticed and commented upon what ***4** appeared to be a systemic decline in trials. However, others remained skeptical or, more typically, indifferent. As time passed, however, more data were collected and the trends became increasingly clear. While we still need better data, particularly at the state level, the trend is now not in doubt. As Professor Marc Galanter has documented, the number of trials has been declining for three decades in courts across the country, and the disappearance of trials holds true both for state and federal courts, for all regions of the country, for jury and non-jury cases, and for all categories of civil and criminal cases.[8] Although there have been ups and downs in the statistics across the three decades, over the last ten years, the trend has been decidedly and rapidly downward. Therefore, the question no longer is whether there is a decline in the number of trials; instead, we must now focus on: why this has happened; whether it is an entirely negative development; and whether there are sensible ways of containing or reversing the trend. And, as was true with global warming, to answer those questions in any meaningful manner, we will need much better information than we now have.

The statistics we do have, however, show a remarkably clear portrait. According to data collected by the Administrative Office of the United States Courts (the "AO") -- the administrative arm of the federal courts -- in the thirty-year period from 1970 through 1999, the total number of civil filings in federal courts rose by 152%.[9] Yet, in the same time period, the number of cases that were tried by federal judges dropped by 20%.[10] As Judge Higginbotham reports in his article, the decline in the absolute number of trials over the past thirty years that is shown in this data is also observed in a decline in the *rate* of trials, from about 12% of all civil cases in 1970 to somewhat less than 3% by 1999.[11]

As dramatic as those statistics may seem, Professor Galanter reports, in an article prepared following the ABA symposium, that by the end of 2002, the rate of trials in civil ***5** cases in federal courts had declined even further, to a paltry 1.8% of all civil cases filed; a figure that the AO reports has stayed about the same for 2003.[12] Notably, Professor Galanter reports that, at the time of the adoption of the *Federal Rules of Civil Procedure* in 1938, the rate of trial for civil cases was nearly 19%.[13] Moreover, Professor Galanter notes (as Judge Higginbotham did before him) that the implosion in federal court trials is not limited to a shrinkage in the overall percentage of cases tried -- which would be influenced by the increased number of case filings; it also involves a shrinkage in the absolute number of cases disposed of by trial.[14] Thus, Professor Galanter reports that, in 1962, the federal district courts disposed of approximately 50,000 cases and, in 2002, they disposed of 258,000 cases -- a five-fold increase in dispositions. However, the number of cases tried in 2002 was more than 20% lower than the number that proceeded to trial in 1962 -- about 4500 cases tried in 2002 system-wide versus 5800 trials in 1962. Therefore, as Professor Galanter reports, "the portion of dispositions that were by trial was less than one sixth of what it was in 1962 -- 1.8% as opposed to 11.5% in 1962."[15]

Professor Galanter also notes that the average federal judge in 1962 conducted thirty-nine trials a year (including both civil and criminal cases),[16] a figure I personally find astounding. Extrapolating from data provided in Judge Higginbotham's

article[17] and using Professor Galanter's 2002 data on the current rate of trials, it appears that, by 2002, the average federal district judge presided over only about nine trials, although, to be fair, the data also suggest that those cases that proceeded to trial in federal courts in recent years have consumed many more trial days than those tried in earlier periods. As Professor Galanter reports, "Civil trials that lasted four days or more were 15 percent of trials in 1965 and 29 percent of trials in 2002: trials of three days ***6** or more rose from 27 percent to 42 percent over the same amount of time."[18]

Data collected for this article from the District of Connecticut also show a downward trend in the number of trials held. In 1995, the District conducted 165 civil trials, while in 2002 it conducted only ninety-two, the lowest number of civil trials conducted in the last decade. If one includes criminal trials, in 1995 the District conducted 200 civil and criminal bench and jury trials; in 2002 the District conducted only 112 civil and criminal trials. On average, an Article III judge in the District presided over a total of seven civil and criminal trials in 2002, although the distribution of trials is uneven, with one judge presiding over thirteen civil and criminal trials in 2002 and two judges presiding over only three trials in the same period.

A number of aspects about the declining nationwide trial data are striking. First, the data may actually overstate the number of completed trials, since the AO statistics on trials (as well as our own District information) includes cases terminated during trial. Thus, the data are not limited to those cases that proceeded to verdict or judgment. Second, no region of the country is immune from this phenomenon. Circuit by circuit data show the same overall pattern, although in varying degrees and at different levels. For example, in 1970, trials in every circuit in the country represented in excess of 8.0% of the civil caseload.[19] Yet, by 1999, only two circuits had rates of trial in civil cases that were in excess of 3%.[20] It is also not limited to jury trials. Indeed, bench trials have declined more than jury trials over the relevant period (and that is true for the District of Connecticut as well). Therefore, it does not appear that it is jury trials alone that are driving the decline.

It is also noteworthy that the decline in trials shows up across all categories of civil cases. Tort cases once constituted the single largest category of cases tried -- nearly 81% of ***7** all civil jury trials in 1962 according to Professor Galanter.[21] However, by 2002, trials of tort cases had dropped to just 24% of all cases tried.[22] Thus, where once one in six tort cases went to trial, now only one in forty-six proceeds to trial. Professor Galanter also observes that, even though all categories of civil cases are declining, the decline in trials of civil rights cases (which includes employment discrimination cases) has been less pronounced than that of tort, contract or other civil cases, so that, of those cases reaching trial today, a larger portion is represented by civil rights cases.[23]

Prisoner cases were a great source of filings in the 1990s, and, as a consequence, those cases also provided relatively more trials in federal courts than many other categories of civil lawsuits in that time period. However, with the passage of the Prison Litigation Reform Act in 1995[24] (hereafter "PLRA"), it appears that prisoner filings are substantially down, and, for a variety of reasons, the PLRA has suppressed prisoner trials even more than filings, according to Professor Galanter.[25]

Criminal cases also have not escaped this development, although it is probably easier to discern the reasons for the decline in criminal trials than for that in civil cases. In the last four decades, the number of criminal prosecutions in federal court has more than doubled. However, during the same period, the number of criminal trials has declined from 15% of all criminal cases to about 3% of all criminal cases. The absolute number of criminal trials has also declined, from about 5000 to little more than 3000, again during a period in which the number of criminal prosecutions has risen steadily.[26] As Judge Higginbotham notes, "the jump in pleas of guilty in the post-1989 data must be associated in part with adoption of the Sentencing Reform Act of 1984 and the adoption of the Guidelines and minimum sentencing in 1986 and 1988."[27]

The data available from state courts are not as comprehensive ***8** or as readily comparable as those we have from federal courts. However, the statistics for state courts are getting better, and that is a welcome development, because it is apparent that any analysis of this issue must include state courts. And for one simple reason: state courts conduct more of the Nation's judicial business than federal courts by far. For example, a recent study prepared for the ABA Symposium by the National Center for State Courts reports that, during the same period in which federal courts conducted about 7000 civil and criminal trials, state courts nationwide presided over approximately 88,000 general civil and felony trials.[28] While civil filings in federal courts totaled approximately 250,000 cases in 2001, there were 15.8 million civil case filings in state courts in the same year.[29] Clearly, therefore, if we ignore what is happening in state courts, we will be seeing only a small piece of the picture.

The principal challenge has been to compile comparable national statistics on trial trends in state courts. The National Center

has now devoted its considerable resources to the task, and, although the Center continues to gather statistics, it has already compiled and analyzed data from about twenty-two states that it believes to be representative of trends nationwide.[30] The data show that, during the period from 1976 to 2002, the number of civil jury trials has fallen by nearly two-thirds in state courts; the rate of civil bench trials has also steadily declined, to less than one-half of what it was in 1976.[31] As with the federal courts, state courts have experienced the decline in civil trials on both a percentage and absolute basis. Moreover, each state studied experienced a decline in trials, and, although the percentages varied by state, they remained substantial throughout all states studied, thereby confirming that the decline in trials is not a regional ***9** phenomenon. State courts also experienced a decline in criminal jury trials, although there was somewhat of an increase in criminal bench trials.[32]

Based on the state statistics, which are admittedly still a work in process, it appears that we can say with some confidence that litigants intent on obtaining a trial are not turning from federal courts to state courts. Rather, litigants in all courts, in all regions and in all types of cases are increasingly opting to have their disputes resolved without a trial. The question then is: Why?

II. THE CAUSES

The truth is that we do not know precisely why at this point, although there are a number of likely causes. I intend to focus most of my comments on the possible causes of the decline in civil trials, since the Sentencing Guidelines, mandatory minimums and plea bargaining in general are widely recognized to be the cause of the recent decline in criminal trials. I will also mainly highlight the decline in federal courts, because the data on what is happening in state courts are less well developed, though, if my own experience in Connecticut state and federal courts is any guide, I suspect that the same factors that are affecting civil trial rates in federal courts are also at work to varying degrees in state courts.

Here, then is a brief discussion (not in order of importance) of the usual suspects when considering the etiology of the decline in the civil trials.

A. *Caseload Mix and Resources*

As an initial matter, it is important to emphasize that one thing is perfectly clear from the data and that is that the decline in the number of cases tried is not due to a reduction in case filings. To the contrary, both civil case filings and dispositions have actually increased fivefold in the federal courts during the same time that the number of trials, both the rate of trials and the absolute number of trials, has diminished ***10** substantially.[33]

Nonetheless, some commentators have looked to the case filings themselves as possibly influencing the decline in trials. For example, some have hypothesized that the types of cases filed today may have affected the rate of trials, since we know that there have been changes in the caseload "mix" in federal courts over the last three decades. Perhaps, it is theorized, the kind of cases being filed today do not lend themselves to trials as readily as those filed thirty years ago.

That hypothesis does not appear to be borne out by available data, however. For example, Professor Galanter reports that in 1962 tort and civil rights cases constituted about 38% of the civil docket. In 2002, those same categories made up about the same percentage of the overall civil docket, nearly 35%. Yet, during the same period, there was a sharp decline in trials in ***both*** tort and civil rights cases.[34] Moreover, Professor Galanter's data as well as Judge Higginbotham's, show that all types of civil cases have experienced a decline in trials during that period.[35] This appears to be true in state courts as well. Therefore, the change in caseload mix does not appear to have been a factor in the overall decline in trials.

We might also imagine that the demands imposed by the great increases in case filings have so stretched the resources of the federal system that courts today are simply unable to devote time to trials.[36] However, most commentators agree that the data do not support that supposition. At least for district judges (as opposed to appellate judges) court resources, in terms of numbers of district judges, senior judges and magistrate judges, have kept relative pace with demand over the relevant time periods.[37]

In the District of Connecticut, for example, we have never had more judicial resources, counting active, senior and magistrate ***11** judges. One might suppose, therefore, that we would be trying more and more cases, but we are not. As a consequence,

most commentators discount available resources as a likely cause of the vanishing trial development.

Nonetheless, I personally suspect that constraints on resources in the 1980s may well have caused a cultural shift among judges and lawyers, which in turn has affected the number of trials over time. As I will discuss shortly, in the 1980s and early 1990s there was a tremendous emphasis on settlement and case management, largely driven -- I suspect -- by ever increasing dockets. Where once a trial may have been seen as the crowning achievement of our judicial system, in the 1980s and 1990s, it was often seen as evidence of the failure of our judicial system. Thus, while the decline in trials predates the docket crunch of the 1980s, it may well be that the emphasis on "winnowing down the docket" -- preferably by a settlement rather than a "wasteful" trial -- changed the way in which judges and lawyers look at lawsuits and trials. And this attitudinal change may in turn have affected the frequency with which we currently try cases. Needless to say, I have not come across any data to support this supposition. But having been a litigator during this period, I do believe that attitudes toward trial changed during the 1980s, and I suspect that clogged dockets may well have played a role, at least in part, in shaping those attitudes.

B. ***Increased Use of Summary Judgment***

In an article in the *N.Y.U. Law Review*, entitled *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis" and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments*, Professor Arthur Miller argues strenuously that the decline in trials in federal courts is, at least in part, attributable to the 1986 trilogy of Supreme Court decisions that encouraged use of summary judgments.[38] Those cases are: *Matsushita Electrical Industrial* ***12** *Co. v. Zenith Radio Corp.*,[39] *Anderson v. Liberty Lobby, Inc.*,[40] and *Celotex Corp. v. Catrett*[41] -- three decisions that surely must be among the most frequently cited of Supreme Court opinions.

Professor Miller is not alone. Judge Patricia Wald made the same point in a 1998 *Texas Law Review* article, *Summary Judgment at Sixty*.[42] Also, in late 2001, the Administrative Office issued a report to the Judicial Conference's Committee on Court Administration and Case Management, entitled the *Changing Nature of Case Disposition in Federal District Court*.[43] That report also cites the *Celotex* trilogy as having encouraged federal judges to decide cases on the merits before trial, and it explicitly attributes at least a portion of the decline in trials to those Supreme Court decisions.[44]

One of the problems with this theory is that we do not have much nationwide data regarding the use of summary judgment. The Federal Judicial Center ("FJC") conducted one study that provides essentially the only hard data we currently have on the growth in summary judgment.[45] Sampling comparable cases in six metropolitan districts over the 1975-2000 time period, the authors of the FJC study found that the percentage of cases disposed of by summary judgment had doubled from 3.7% in 1975 to 7.7% in 2000.[46] In his article, Professor Galanter juxtaposed the FJC results onto his own data on the decline of trials and concluded that "[i]n 1975, the portion of disposition by trial (8.4%) was more than double the portion of summary judgments (3.7%). Now in 2000, the summary judgment portion (7.7%) was more than three times as large as the portion of trials (2.2%). In other words, the ratio of summary judgment to trials rose from 0.44 to 3.5 -- ***13** about 8 times as many summary judgments per trial."[47] Statistics from the Eastern District of Pennsylvania and the District of Maryland show similar increases in grants of summary judgment between 1985 and 1990.[48]

As an aside, I will note that my colleague Judge Janet Bond Arterton has looked at the District of Connecticut's data on summary judgments for remarks she delivered to the Westport Bar Association and which she was kind enough to share with me.[49] She found that between 1998 and 2002, the number of summary judgment motions filed in our Court had actually declined quite substantially from 746 to 586. At the same time, the number of summary judgment motions granted stayed about the same, approximately 240 in each year. That means that our grant rate has actually increased from about 30% to about 40%, although that percentage increase may just reflect the fact that lawyers are being more selective in the motions they file. During the same period the number of trials in the District declined modestly, although the number of trials has fluctuated greatly during this four-year period and our case filings are also somewhat down. Nonetheless, the data show that more cases in the District of Connecticut are disposed of by summary judgment than by trial -- indeed, two and one-half times as many cases are disposed of on summary judgment than proceed to trial and that ***14** figure is somewhat higher than it was just four years ago.

Therefore, increased use of summary judgment may well be at least one factor in the decline in dispositions by trials, though much more work is needed before we can place the blame on an increased use of summary judgment. The FJC is already at work on another, more comprehensive study that will analyze the actual cases in which summary judgment was granted to

evaluate the merits of the case and the summary judgment issued in each case. It may be that even a denial of summary judgment affects litigants' willingness to proceed to trial. A denial of summary judgment will often provide the parties with the court's assessment of the merits of their claims and defenses and that information may itself spur the parties on to settlement. Before summary judgment and detailed pretrial conferences became commonplace in federal courts, parties had to wait until trial to get a judge's view of the merits of their case.

Personally, however, I doubt that summary judgment is likely to be the principal culprit in the disappearance of the civil trial since the entire decline in trials cannot be explained by increases in summary judgments. Moreover, the decline in trials and the increase in use of summary judgments predated the Supreme Court trilogy. Therefore, 1986 is probably not the metaphorical "Source of the Nile" that Professor Miller supposes.

C. *Other Doctrinal Changes*

We should also not ignore other doctrinal changes, beyond summary judgment, during the relevant period. While there do not appear to be hard data to support the notion, simple common sense suggests that certain statutory and common-law developments must have contributed, at least to some extent, to a decline in dispositions by trial. For example, the Prison Litigation Reform Act's exhaustion requirement and the Private Securities Litigation Reform Act's scienter requirements have allowed an increasing number of prisoner and securities cases to be disposed without trial. Developments in the law of qualified immunity have also encouraged courts to take a hard look at civil rights claims at ***15** the outset of the litigation and to dismiss them or grant summary judgment to preserve the governmental officers' right to immunity from suit. Changes in the law of offensive and defensive use of collateral estoppel over the last three decades -- exemplified by decisions such as the Supreme Court's 1978 opinion in *Parklane Hosiery v. Shore*[50] -- have also allowed courts to dispose of cases short of trial. And the Supreme Court's decisions in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*[51] and *Markman v. Westview Instruments, Inc*.[52] have given courts new tools and incentive to weed out cases in advance of trial.

I am certain I have not exhausted the list of legal developments one could mention. The key point, however, is that while one can fashion a long list of doctrinal changes over the last three decades that allowed courts to dispose of cases short of trial, it is far more difficult to conjure up a similar set of developments that is likely to have resulted in more trials.

D. *Costs*

Most observers identify the cost of litigation and discovery as among the chief reasons contributing to the decline in civil trials. As Professor Samuel Gross of the University of Michigan Law School emphasized in his comments to the *New York Times*, "The striking problem is that we have generated a procedure that is way too expensive if actually employed."[53] Dean Kent Syverud, in an article entitled *ADR and the Decline of the American Civil Jury*, was equally blunt:

> Our civil process before and after trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details -- in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact finder and the choreography of the trial. But few litigants or courts can afford it .... We thus have increasingly designed our system to provide incentives, including delay, that drive all to settle.[54]

***16** In his article, Judge Higginbotham focused on two aspects of the costs of litigation that he believes have particularly affected the decline in trials. First, he believes that the costs of discovery have provided an incentive for litigants, particularly institutional parties, to turn to ADR rather than trial:

> The truth is that parties, and judges, expect that the case will settle -- an expectation largely fulfilled by the new class of lawyers, called litigators, few with substantial trial experience. As trials disappear, discovery is only a path to settlement [,not trial]. "ADR" becomes a choice between the expensive arm wrestling of discovery or more direct paths to agreement. Not surprisingly, the parties increasingly choose mediation and arbitration, not over a trial but as preferred alternatives to the settlement process launched by the 1938 Federal Rules of Civil Procedure .... The evidence is that parties flee the courts to escape the machinery of federal discovery. Only in this perverse sense is discovery "facilitating" settlement.[55]

Second, Judge Higginbotham emphasizes another, less tangible feature of our current civil justice system. He calls it the "indeterminancy of normative rules now deployed in civil trials," and he suggests that this may be our system's most costly feature.[56] Judge Higginbotham believes that the normative rules we ask judges and juries to apply operate at a "level of generality that erodes predictability of results and produces random outcomes."[57] He mentions as but one example Section 402 of the Restatement of Torts, which asks the trier to decide whether a product is defective by weighing its social utility against the risk of harm. Other rules ask the trier to determine what is in the "best interests" of the child, which is not a standard at all, but rather a formula vesting discretion in the trier to balance the interests of society, parents or even grandparents and the child. Or, our rules ask the trier to assess punitive damages without limits, based solely on the trier's view of the overall "egregiousness" of the conduct and of the sum needed to deter future misconduct. "The relevant point," says Judge Higginbotham, "is that the decline in trials is created by the high cost of indeterminancy and in turn reinforced by declining trials -- a growth that feeds on itself."[58]

17 E.** ***Beliefs About Juries

In a related vein, the decline in trials may also be a product of the beliefs of lawyers and litigants about juror competence (or incompetence), though I will hasten to add that litigants have been opting against bench trials as much as jury trials. It would be naive to think, however, that beliefs about juror competence do not play at least some role in the decision of litigants to proceed to trial. Whether those beliefs are well founded or not is, of course, irrelevant. Misconceptions can drive public opinion and choices as much as, if not more than, truths.

The jury's verdicts in the O.J. Simpson trial and the McDonald's spilled coffee case -- to name just two examples -- were prominently featured in the press, and those results, along with many others, contribute to a view that jurors frequently act irrationally.[59] Add to that negative press coverage some of the empirical data on juror attitudes that receive widespread publicity: For example, in a survey of 1000 respondents, the majority of whom had served on juries, conducted in 2000 by DecisionQuest and the *National Law Journal*, nearly 30% acknowledged that they could not, *and would not*, be impartial if a corporation or corporate executive were a party to a case.[60] Little wonder why corporate litigants get weak-kneed when approaching a jury trial.

Furthermore, the data indicate that, as fewer cases are tried, the verdicts have grown larger.[61] As Professor Galanter puts it: "As smaller cases leave the field, average awards go up."[62] Of course, as Professor Galanter points out, this phenomenon may simply reflect the fact that only the big ticket cases are worth the time and expense of taking to trial. No matter the cause, however, it is well documented that large verdicts receive a disproportionate amount of media coverage,[63] and this undoubtedly contributes to a view among some litigants that proceeding to trial before a jury is a bad gamble.

18 F.** ***Increased Emphasis on Case Management and Settlement

Changes in the *Federal Rules of Civil Procedure* and in the judicial culture in the 1980s and 1990s have led to an increased emphasis on case management and settlement. This change in emphasis has also coincided with some of the most dramatic declines in civil trials, leading some to suppose that federal judges have seen their principal mandate as disposing of cases as soon as possible, rather than as trying cases. Professor Galanter's data show that there has been a marked increase in the percentage of cases terminated at the earliest stage of a judicial proceeding. Terminations during that phase have increased from 20% in 1962 to nearly 70% by 2002, and the largest increase in those statistics occurred in the mid-to late 1980s, coincident with the changes in rules and attitudes regarding case management.[64]

Those changed attitudes were reflected in a 1984 paper by the late Judge Robert Zampano, entitled *Crowded Dockets: The Changing Role of the Trial Judge*.[65] In this paper, which Jack Zeldes was kind enough to locate for me, Judge Zampano exhorted judges to

> use their prestige, their position, their skill and experience to guide civil litigants to compromise, not of their principles, but of their differences .... A conference devoted solely to settlement permits a judge the opportunity to weigh all relevant factors on both sides of the issues and to do justice by compromise .... Remember, trial

> resolution always has a disappointed and perhaps bitter loser; settlement generally has both sides satisfied, if not happy.[66]

As a consequence of an emphasis on settlement and early disposition rather than trial, many courts -- often as a result of experimentation under the Civil Justice Reform Act of 1990 -- began to offer, or in some instances require, court-annexed ADR as an integral component of the judicial dispute resolution process. During this period, the role of federal Magistrates also morphed into one that is more often than not focused largely on settlement. Some courts, including the District of Connecticut, also created Special Masters programs and ***19** appointed Parajudicial Officers, all for the purpose of shunting cases away from trial and toward consensual resolution.[67]

Based on the dramatic declines in trials, it appears that these efforts have succeeded. But, as I indicated before, not only have these efforts resulted in more settlements and therefore fewer trials, I believe that they have also have changed our legal culture. Today's lawyers and institutional litigants view trial-oriented litigation as only one approach to resolving disputes; compromise is often seen by this new generation of lawyers (whom some derisively call "litigators," not "trial lawyers") as producing better justice, with faster, fairer and longer-lasting results.[68]

I should note that quite a few scholars have long questioned this vision of the "Managerial Judge," as Professor Judith Resnik of the Yale Law School has termed it in her articles.[69] Also, Professor Owen Fiss in his 1984 *Yale Law Journal* article, *Against Settlement*, noted that while settlements may trim dockets, "justice may not be done."[70] Judith Resnik, and more recently Professors Miller, Molot and Yeazell, have suggested that increased judicial management and the emphasis on settlement and efficiency have actually undermined the values that our civil justice system is designed to reflect.[71] Professor Resnik thus challenges us with this question:

> The claim that "the more dispositions, the better," raises difficult valuation tasks; decision making must be assessed not only quantitatively, but also qualitatively. On any given day, ***20** are four judges who speak with parties to sixteen lawsuits and report that twelve of those cases ended without trial more "productive" than four judges who preside at four trials?[72]

For better or worse, the *Federal Rules of Civil Procedure* currently embrace the role of Managerial Judge, and each year's crop of newly confirmed District Judges is schooled in that role at the Federal Judicial Center's Judge Schools. Thus, the judge as promoter of settlement and efficient manager of cases is, at least for the moment, ascendant.

G. *Alternative Dispute Resolution ("ADR")*

Finally, any discussion of the decline in trials would be incomplete without a discussion of ADR, although, given the data on the declines in trials, it may be more appropriate these days to see the trial as an ADR method and treat private dispute settlement mechanisms, such as arbitration and private mediation, as the normal (not alternative) method of dispute resolution.[73] It is important to keep in mind, however, that all of the data that we have been discussing involve *filed* cases -- that is, cases that have been filed in courts, rather than directly before private ADR providers. While undoubtedly some of the cases that were filed in court were later dismissed or stayed because of arbitration agreements in the parties' contracts or because the parties chose to proceed with private mediation, I suspect that this group is likely to represent a rather small percentage of the overall caseload. Thus, the growth, if any, of private arbitration and mediation cannot explain what is actually happening in the court system itself.

Whether private ADR is keeping large numbers of cases that otherwise would be tried out of the judicial system is a different question and difficult to document since the private providers do not make their data generally available.[74] It does ***21** appear that the private providers have experienced increases in filings over the last decade. It is debatable, however, how large that growth has been. Thomas Stipanowich, president of the CPR Institute for Dispute Resolution, reports in a paper presented at the ABA Symposium and entitled *The Growth and Impact of "Alternative Dispute Resolution" and Conflict Management Systems*, that between 1993 and 2002 the American Arbitration Association's ("AAA") caseload increased 264% in annual filings.[75] However, most of that growth was due to administration of no-fault insurance cases in the Northeast. For the most part, Stipanowich concludes, the AAA data show only "slow and steady growth or stability in most categories of cases,"[76]

which is precisely how I would describe the growth that federal courts themselves experienced in their own caseloads during that period. Personally, I doubt that private ADR is responsible for siphoning off many otherwise triable cases from the federal courts' trial dockets.

Nevertheless, the available data on what actually happens in arbitrations are instructive as we consider why cases in the judicial system do not proceed to trial and verdict. At the request of the ABA, my former partner Jack Dunham of Wiggin & Dana and David Geronemus of JAMS comprehensively examined arbitrations and judicial proceedings in state and federal court involving thirty well-known franchisors. They presented the results of their analysis to the 2002 ABA Forum on Franchising.[77] The Dunham and Geronemus study documents two results that may strike you as surprising. First, they found that arbitrations were far more likely than lawsuits to proceed to final decision. They report that in excess of 75% of all franchise lawsuits settled without trial, whereas only about 40% of franchise arbitrations settled before decision.[78] That is, the participants in arbitration were ***22** far more likely than their counterparts in judicial cases to opt for a judgment rather than a settlement.[79] Second, franchisors were on average less successful in arbitrations than in lawsuits.[80] In trials in federal court, bench and jury, franchisors prevailed about 60% of the time, while during the same period franchisors won only about 33% of the arbitrations that proceeded to decision.[81]

Admittedly, this is just one study and is limited to a particular industry and type of dispute. However, the observed results of that study conform to my own experience in private practice; all but one of the arbitrations I had in private practice, none of which involved franchises, proceeded to final decision. Also, my institutional clients repeatedly told me that they tended to prevail less often on average in arbitrations than in judicial cases.

These observations suggest that it is not a preference for compromise over judgment, or even a fear of losing, that drives corporations to opt for arbitration over judicial proceedings and to prefer settlement over trial, whether bench or jury. Instead, the answer may be found in three features of our current judicial regime that Dunham and Geronemus note are generally (though not always) absent from the arbitral process: (1) lengthy and costly discovery and motion practice; (2) intensive case management coupled with an institutional emphasis on settlement; and (3) out-sized verdicts, particularly large punitive damage awards.[82]

In any event, we cannot begin to determine the true reasons litigants are turning away from trials until we conduct a lot more research into what is actually motivating parties. That work has yet to be done, and therefore, at this point, all we can do is guess. Of course, guesses do not usually make a solid basis on which to propose institutional change, and therefore, any institutional changes should await better data.

*23 III. THE IMPLICATIONS

Just as there are a variety of opinions on the causes of the decline in trials, so too there is a debate about whether the disappearance of trials is a negative development or not. Two camps appear to have staked out polar opposite views on the subject, which I would like to outline for your consideration. However, before I do, I want to emphasize that no one in this debate professes to believe that increased settlements are necessarily bad. As Judge Higginbotham puts it in his lament over the disappearance of trials: "Settlements in civil cases and pleas of guilty in criminal cases are good results. Very high percentages of civil and criminal cases have historically settled -- along a path to trial. It would be a mistake to assume that I do not see that circumstance as a public good."[83]

Nevertheless, Judge Higginbotham clearly sees the decline in trials as a negative development for our legal system. "Ultimately," he writes, "law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards -- to make them sufficiently clear that persons can abide by them in planning their affairs -- and never face the courthouse -- the ultimate settlement. Trials reduce disputes."[84] In Judge Higginbotham's view, "it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement."[85]

Professor Paul Butler of George Washington University Law School echoed Judge Higginbotham's view at the ABA Symposium. Professor Butler commented that "trials educate us, about each other and the law" and that "when trials disappear, there is a cultural impact as well as a legal one."[86] He pointed out that "[w]ith fewer trials, we lose some public stories and their official morals (i.e. verdicts). When high profile civil and criminal cases settle, this loss feels particularly acute .... [And t]he reduction in official stories makes us less ***24** certain about the law."[87] As Professor Butler explained to

the *New York Times*, "You could have 100 cases about race relations, but if you look at the O.J. Simpson trial, it was really a learning experience."[88] Of course, some might suggest that the only thing the public learned from the O.J. Simpson case was that trials are a farce.[89]

Chief Judge Young goes further than either Judge Higginbotham or Professor Butler. He believes that the decline of trials, particularly jury trials, is nothing short of a direct assault on our notion of participatory democracy and our shared democratic values. Thus, Chief Judge Young writes:

> When people recognize that they have been cut off from their opportunity to govern directly through citizen juries, the sense of government as community -- as a shared commonwealth -- is severely diminished. Jury service is the citizen's only direct experience of government at the federal level. Severing that shared bond, of course, leaves citizens with their right to vote but inevitably, as the government draws away from its citizenry, that right seems less valuable. It is not too much to say that, as our government is the ultimate teacher, its devaluation of direct citizen participation carries the implicit message that communitarian efforts are simply not worth very much in an age of individual self seeking.[90]

It would be a mistake to assume that all judges share the profound sense of loss and distress that Judges Higginbotham and Young articulate. Recently, Judge John Lungstrum, chair of the Committee on Court Administration and Case Management, remarked that "increased resolution of cases through means other than trial is entirely consistent with the goals of the Civil Justice Reform Act."[91] He also repeated an observation previously expressed by his predecessor, Judge D. Brock Hornby of Maine: "The federal judiciary's reputation has been based on the ability of judges to address difficult legal issues in a fair and impartial manner, rather than their ability -- or that of juries -- to resolve factual disputes ***25** through trial proceedings."[92]

Professor Lawrence Friedman of Stanford Law School apparently shares this view. At the ABA Symposium he sounded a contrarian view about the decline in trials, making two points. First, he points out, the "trial" was never the norm, or modal way, of resolving issues and solving problems in our legal system. Trials were always the exception, not the rule. Recall that only about 12% of all cases were tried in 1970. In a way, then, Professor Friedman suggests that the "vanishing trial" is an illusion, since there never was much to vanish.[93]

His second point is that the public does not need to get the "law" from the results of trials and does not need to learn about the role of law in our lives by serving on juries. Today, the public is inundated with information about "the law" from many sources -- via statutes, administrative agencies, television, the Internet, newspapers and the like. The view that our democracy depends on citizen jurors needing to come together to express the community's will through their verdicts is, Professor Friedman would argue, at best a quaint view, but one that, if it ever were true, is not much in touch with modern reality.[94]

Professor Friedman also points out that the populace is not likely to rally to the aid of those who support more trials. In fact, ask anyone on the street and you will be told that there is a litigation explosion that is of epidemic proportions in the United States and that there are far too many, not too few, trials. Many people -- judges, lawyers and members of the public -- also believe that trials are a waste of time and money and that (to paraphrase that oft-seen bumper sticker about fishing and work) a bad settlement is better than a good trial. In short, the public is unlikely to demand, or even want, more trials unless, as Professor Friedman puts it, they are of the "Judge Judy" variety.[95]

*26 IV. CONCLUSION

As mentioned at the outset, I believe we need more information than we currently have before we can determine the likely causes of the decline in trials, and we certainly need more information before we take undertake any major institutional changes to address that decline. In closing, therefore, I will mention just a few areas where I believe we need more information:

(1) We need to know more about why litigants settle cases. If parties are settling cases because they have negotiated a resolution that they believe is a sensible and just outcome, then no one would want to make changes that would discourage those settlements. However, if most litigants are settling cases because the cost of continuing with litigation is too high, the timetable to verdict is too long and the result at trial is too irrational, then settlements are an indictment of our judicial

system, and we need to take steps to address those concerns. At this point, we have only anecdotal information about settlements and cannot possibly draw conclusions one way or the other.

(2) We need a greater understanding of how many cases should go to trial. Was 12% a better rate of trial for our system of justice than 2%, and why? Was our law better developed when 12% of our cases were disposed of by trial?

We probably would all agree that adjudications of some kind are needed to allow the law to develop. If all cases are resolved in private arbitrations or by settlements, courts do not have the opportunity they need to develop the law in a sensible and systematic manner. I recall being in Sweden for a commercial arbitration in the mid-1980s and asking my Swedish colleagues how their courts had construed certain provisions of their commercial code. They gave me a puzzled look and said that there was *no* reported decisional law on their commercial code. When I asked why, they said that all commercial disputes were arbitrated in private and confidential arbitrations and therefore there was an "underground" of knowledgeable lawyers who knew how experienced arbitrators interpreted various provisions of the code, but there was no public body of decisional law on the subject.

***27** We obviously would not want that to occur here, but is that a real danger at this time in the United States? The federal courts are still trying nearly 5000 civil trials a year and the state courts thousands more. Add to that myriad summary judgment rulings and other pre-trial dispositions. Those adjudications would seem to be more than sufficient to allow parties to gain insights into the true value of their cases and to allow the law to develop in a meaningful fashion. Just look at the casebooks and you will see that we are not lacking in legal precedents despite the steady decline in trials over the last three decades. We need, therefore, to determine based on empirical, not anecdotal, data whether the decline in the number of trials has truly had any meaningful impact on the development of our laws.

(3) We need to take a closer look at the impact of efficient case management techniques on the willingness of parties to proceed to trials. It is not clear to me that good case management affects the rate of trials. Certainly, we have all appeared before judges who have made explicit or implicit threats to us when we have had the temerity to suggest that our clients were not interested in settlement. However, this kind of heavy-handed judicial conduct is the exception, not the norm, and even when it occurs, I doubt that such threats are taken seriously by experienced lawyers and clients. They are more apt to view that type of conduct as merely "part of the game."

In my experience, efficient case management arms the parties with the information they need to evaluate their case at an early stage, and while it is possible that it therefore leads to earlier settlements, if litigants are settling for the right reasons fully armed at an early stage of the case with the information they need to make an informed choice, it is not clear to me that there is a problem with good case management.

(4) Finally, the information we have on summary judgment is too insubstantial to allow us to draw any meaningful conclusions. It may be that summary judgment usage has increased, but we presumably do not want the alternative of convening jurors in cases where there is, in fact, no genuine issue of material fact and one side or the other is entitled to judgment as a matter of law, either on directed verdict or ***28** judgment as a matter of law. It is, therefore, not enough to know that summary judgment has increased; we also need to get some sense (perhaps by analyzing decisions or appeals of summary judgments as the Federal Judicial Center proposes) whether there is widespread *abuse* of summary judgment. That is, we need to have better data than that presented by Professor Miller in his recent article about whether trial judges are *improperly* granting summary judgment and why. We also need to see whether the rate of summary judgment is affected by the type of case. Perhaps there are simply more frivolous cases being filed today than in the past or perhaps parties seek summary judgment more often than in the past or are more sophisticated in presenting their arguments. We simply do not know and without that information, it is too premature to indict summary judgment or even propose fundamental changes in the summary judgment procedure.

Truth be told, we are unlikely to resolve this debate any time soon. However, it is a debate that needs to take place in Connecticut and beyond, since the disappearance of trials -- regardless of its cause -- has significant implications for the judiciary, the bar and for law schools as well. For example, if trials continue to disappear, one rightly might ask: whether law schools should be teaching more courses on settlement, mediation and case management than on the law of evidence; whether new courthouses need to be constructed with fewer courtrooms or more conference rooms; or whether law firms can or should train their younger lawyers to be trial lawyers.[96] These and other questions require our collective attention.

Footnotes

[a1] United States District Judge. District of Connecticut. This article was originally delivered as a speech to The Benchers, a group of lawyers, judges and academics, in New Haven on January 22, 2004. The author also delivered a shortened version of this speech at the Connecticut Bar Foundation's Annual Meeting in June 2005.

[1] *See* Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says,* N. Y. TIMES, Dec. 14, 2003, at A1 (hereinafter "Liptak").

[2] *Symposium to Address the Impact of "Vanishing Trials" on the Justice System,* ABA SECT. OF LIT. (Dec. 13-15, 2003). The articles published as a result of the ABA Symposium can be found in volume 1, Number 3 of the JOURNAL OF EMPIRICAL LEGAL STUDIES (Nov. 2004), a magnificent work that 1 commend to anyone interested in this subject.

[3] Liptak, *supra* note 1, at A1.

[4] William G. Young, *An Open Letter to U.S. District Judges*, 50 FEDERAL LAWYER 30 (July 2003) (hereinafter "Young").

[5] *Id*. at 33.

[6] Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1407 (2002) (hereinafter "Higginbotham").

[7] *See, e.g.*, Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (Nov. 2004) (hereinafter "Galanter").

[8] *See id*. at 459-60.

[9] Higginbotham, *supra* note 6, at 1408.

[10] *Id*.

[11] *Id*. at 1407.

[12] *See* Galanter, *supra* note 7, at 461.

[13] *Id*. at 464.

[14] *Id*. at 462-63. *See also* Higginbotham, *supra* note 6, at 1408-09.

[15] *See* Galanter, *supra* note 7, at 464.

[16] *Id*. at 521.

[17] Higginbotham, *supra* note 6, at 1408.

[18] Galanter, *supra* note 7, at 477-78.

[19] ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, DECREASING TRIAL RATES IN THE UNITED STATES DISTRICT COURTS 5 (Feb. 5, 2001).

[20] *Id*.

[21] Galanter, *supra* note 7, at 466.

[22] *Id*.

[23] *Id*. at 468.

[24] 11 U.S.C. § 523.

[25] Galanter, *supra* note 7, at 469-70.

[26] *Id*. at 493.

[27] Higginbotham, *supra* note 6, at 1410-11.

[28] Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts:* 1976-2002, 1 J. EMPIRICAL LEGAL STUD. 757-58 (Nov. 2004) (hereinafter "Ostrom"). *See also The Vanishing Trial: Implications for the Bench and Bar*, 4 CIVIL ACTION, A PUBLICATION OF THE NATIONAL CENTER FOR STATE COURTS HIGHLIGHTING ASPECTS OF ITS CIVIL JUSTICE REFORM INITIATIVE (Spring 2005) (hereinafter "CIVIL ACTION").

[29] *Ostrom*, supra note 28, at 757.

[30] *See, e.g.*, CIVIL ACTION, *supra* note 28, at 1.

[31] *Id*.

[32] Galanter, *supra* note 7, at 558-61.

[33] *See id*. at 486-89.

[34] *Id*. at 485.

[35] *See* Galanter, *supra* note 7, at 466-74; Higginbotham, *supra* note 6, at 1410-13.

[36] For example, in 1992, District Judge Jack Weinstein was quoted as saying that the increasing criminal caseload made it "very difficult for any judge to find the time to try civil cases." *See* Kenneth P. Nolan, *Weinstein on the Courts*, 18 LITIGATION, No. 3, at 24 (Spring 1992).

[37] *See* Galanter, *supra* note 7, at 500-02.

[38] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion, "Liability Crisis" and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982 (2003) (hereinafter "Miller").

[39] 475 U.S. 574 (1986).

[40] 477 U.S. 242 (1986).

41 477 U.S. 317 (1986).

42 Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

43 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, CHANGING NATURE OF CASE DISPOSITION IN FEDERAL DISTRICT COURT (2001).

44 *Id*. at D-5.

45 *See* JOE S. CECIL, DEAN P. MILETICH & GEORGE CORT, TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS (Federal Judicial Center, Nov. 2001).

46 *Id*. at 11.

47 Galanter, *supra* note 7, at 484 and n. 49. *See also* Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases* (July 2004), USC CLEO Research Paper No. C04-12, *available at* http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=570341 (last visited Feb. 16, 2006). Professor Hadfield argues that the AO data must be audited in order properly to assess whether "we are witnessing a fundamental shift out of public adjudication into private settlements or merely a shift in how and when judges decide cases." *Id*. at 1.

48 Miller, *supra* note 38, at 1049 n. 360 (summary judgment grants increased from 45% to 50% between 1985 and 1990 in the Eastern District of Pennsylvania and from 37% to 82 % in the District of Maryland). *See also* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004). Analyzing recent data from the Eastern District of Pennsylvania, Professor Burbank argues that "there is sufficiently reliable evidence to believe that the rate of case termination as a result of summary judgment rose substantially from 1960 to 2000." *Id*. at 591.

49 *See* Janet Bond Arterton, Remarks at the Meeting of the Westport Bar Association (Dec. 2, 2003) (stating that in 1998, 236 summary judgment motions were granted and 105 cases tried; whereas in 2002, 246 summary judgment motions were granted and 92 cases tried).

50 439 U.S. 322 (1978).

51 509 U.S. 579 (1993).

52 517 U.S. 370 (1996).

53 *See* Liptak, *supra* note 1, at A1.

54 Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 U.C.L.A. L. REV. 1935, 1942 (1997) (hereinafter "Syverud").

55 Higginbotham, *supra* note 6, at 1417.

56 *Id*. at 1419.

57 *Id*.

58 *Id*. at 1420.

59 *See* Syverud, *supra* note 54, at 1939.

60 *See* Michael E. Cobo, John F. Dienelt, Edward Wood Dunham, *The Jury Mystique: Winning Jury Trials in Franchise Cases*, ABA FORUM ON FRANCHISING (Oct. 2001).

[61] *See* Galanter, *supra* note 7, at 480.

[62] *Id*. at 518.

[63] *See, e.g.*, Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237 (1998).

[64] Galanter, *supra* note 7, at 481-84.

[65] Robert Zampano, *Crowded Dockets: The Changing Role of the Trial Judge*, a paper delivered to the Benchers, New Haven, CT (April 26, 1984).

[66] *Id*. at 13.

[67] *See* Judith Resnik, *Migrating, Morphing and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 789 (Nov. 2004) (hereinafter "Migrating") ("[T]he federal judiciary has in recent decades been in the forefront of the anti-adjudication movement."); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

[68] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, DECREASING TRIAL RATES IN UNITED STATES DISTRICT COURTS 14 (Feb. 2001).

[69] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (hereinafter "Resnik").

[70] Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1075 (1984).

[71] *See* Resnik, *supra* note 69, at 813-15; Miller, *supra* note 38; Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 U. VA. L. REV. 955 (1998); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 925 (2000); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631 (1994).

[72] Resnik, *supra* note 69, at 422.

[73] Professor Resnik suggested in a statement in the *New York Times* article that the rise in quasi-administrative tribunals in administrative agencies may also have contributed to the decline in trials, a subject that is beyond the scope of my remarks here. Liptak, *supra* note 1, at A-1; *see also* Migrating, *supra* note 67, at 798-802.

[74] Professor Jean Sternlight has long argued that the increased use of arbitration has led to a decline in civil trials. *See, e.g.*, Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, ROSCOE POUND INSTITUTE FORUM FOR STATE APPELLATE COURT JUDGES (July 19, 2003), *available at* http://www.roascorpound.org/new/updates/2003_ Forum.htm (last visited Feb. 16, 2006).

[75] *See* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 873 (Nov. 2004) (hereinafter "Stipanowich").

[76] *Id*.

[77] *See* Edward Wood Dunham & David M. Geronemus, *Franchise "Litigotiation": Understanding the Interplay of Litigation/Arbitration Outcomes and Settlement and Negotiation in the Resolutions of Franchise Disputes*, ABA FORUM ON FRANCHISING (Oct. 2002).

[78] *Id*. at 14.

[79] *Id*.

[80] *Id*. at 16.

[81] *Id*.

[82] *Id*. at 14. Dunham and Geronemus found that the median award against the losing franchisors in arbitrations was $74,500 whereas the median jury verdict against franchisors was $421,923. When franchisors prevailed in arbitrations they received damage awards averaging $23,300 and when they prevailed before juries, they received an average award of $285,000. *Id*. at 19.

[83] Higginbotham, *supra* note 6, at 1423.

[84] *Id*.

[85] *Id*.

[86] *See* Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 630 (Nov. 2004) (hereinafter "Butler"). *See also* Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon,* 1 J. EMPIRICAL LEGAL STUD. 973, 974 (Nov. 2004) ("Trials offer a range of benefits that may be jeopardized as their number spirals downward.").

[87] Butler, *supra* note 86, at 634.

[88] *See* Liptak, *supra* note 1, at A1.

[89] *See* Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004) (hereinafter "Friedman").

[90] Young, *supra* note 4, at 32.

[91] *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, CHALLENGES TO THE JUDICIARY'S ABILITY TO OBTAIN NEEDED RESOURCES 4 (2002).

[92] *Id*.

[93] *See* Friedman, *supra* note 89, at 693. *See also* AMERICAN COLLEGE OF TRIAL LAWYERS, THE "VANISHING TRIAL": THE COLLEGE, THE PROFESSION. THE CIVIL JUSTICE SYSTEM 2 (Oct. 2004) (hereinafter "AMERICAN COLLEGE OF TRIAL LAWYERS") ("The Committee's fundamental conclusion is that the sky is not falling.").

[94] Friedman, *supra* note 89, at 687-89.

[95] *Id*.

[96] For example, the ABA's Section of Litigation recently issued a detailed report outlining alternatives for training trial lawyers in this era of fewer and fewer trials. *See Report of the Task Force on Training the Trial Lawyer*, ABA SECT. OF LIT. (June 2003). *See also* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 93, at 24 ("Of particular concern is the shrinking number of trial opportunities for younger lawyers.").

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