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The Decline of Trials in a Legalizing Society

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Lecture

THE SEEGERS LECTURE

THE DECLINE OF TRIALS IN A LEGALIZING SOCIETY

Marc Galanter*

ABSTRACT

Outcomes determined by trials have been a steadily declining portion of case dispositions in American courts for more than half a century; and for the past quarter century, trials in those courts have been declining in absolute numbers. Although there are differences in detail, the trend line is clear – the trial is declining as the thing – indeed the central, defining, characteristic thing that our courts do. The departure of trials is mourned by some judges, practitioners, and academics but is celebrated by others. The rarity of trials remains hidden from many by their robust media presence. This Article juxtaposes the decline of trials to changes in the role and shape of law in American society and to the continuing increase of laws, regulations, lawyers, and litigation.

I. INTRODUCTION

As an observer of the American legal scene, I am struck by how much it has changed since I got out of law school more than half a century ago. Do not worry – I am not going to harangue you about how things were better in the good old days. I would like to take this opportunity to examine some prominent changes in our legal system. As we attend to our daily round, we may live through immense changes and fail to see how dramatic they are. Arriving at a place that was literally unimaginable

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a few decades earlier, we may reflect on how limited is our ability to envision the future.

I begin with a puzzle. We can observe what appears to be a pervasive legalization of American life.¹ I recognize that “legalization” is an ambiguous term. It is one of those curious words—like sanction—that have meanings that seem contradictory.

Legalization can mean something is no longer illegal—in other words, an activity is “legalized” when it is removed from being sanctioned, punished, or forbidden by law (e.g., legalization of marijuana, abortion, or interracial marriage). But, “legalization” can also mean subjecting something to *more* legal regulation, for example, child care, or, prospectively, marijuana. As its use is decriminalized, a whole new set of regulations will emerge about its production, adulteration, sale, use by minors, use by drivers, and so forth. The net result, we might expect, will not be less regulation, but more—though hopefully less violent, destructive, and costly than the earlier regulatory regime. Similarly same-sex marriage is becoming legalized in both senses. It is no longer forbidden, but it promises to be increasingly regulated—not least in opening the door to same-sex divorce, an expedient that will entail navigating more regulation rather than just moving out.²

In addition to some dramatic instances of legalization in the first (permission) sense, our society is becoming legalized in the second (regulation) sense.³ There are more rules, more lawyers, and more spending on the legal. Indeed, if we take the presence of lawyers and the spending on them as rough indicators of legalization, we may chart a dramatic legalization of American society over the past half-century.⁴ It is not that legalization began only in the last fifty years, but just to focus on a convenient chunk, I propose to get at the matter by comparing some features of the current legal scene with their precursors of twenty-five years ago and twenty-five years before that. I take 2010 (which for convenience I am declaring to be the present for the purposes of this

¹ See David L. Chambers, *The “Legalization” of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J. L. REFORM 805, 805 (1984–1985) (explaining multiple meanings of the term).

² See SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 86–87 (2009) (detailing the decline in regulation forbidding public display of what was thought to be gruesome disabilities). Can something be legalized in sense one but not in sense two? Yes, when the state withdraws from forbidding something, without imposing new regulations on it, as in the abandonment of bans on interracial marriage.

³ See Chambers, *supra* note 1, at 805 (defining legislation and the two definitions referenced above).

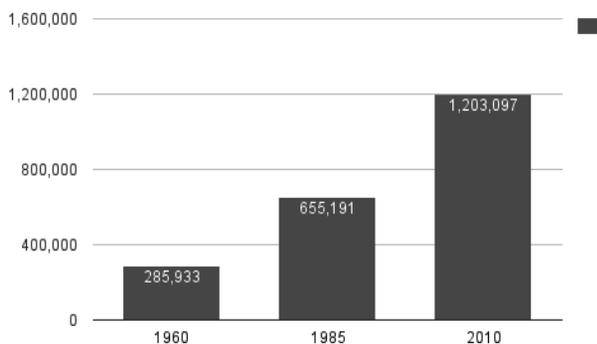
⁴ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 482 (2004) (showing evidence of the legalization of society).

Article) and look twenty-five years earlier to 1985 and twenty-five years before that to 1960. To trace these connections, I present, in summary form, some data about changes in legal institutions and their setting. I hope, by this exercise, to suggest the change in scale, structure, and texture of the legal world, and to provide some sense of the direction and pace of change. Then, I speculate about possible connections between those changes and the decline of trials. Of course, changes in the frequency of trials began before 1960, but the changes since then are sufficiently dramatic that I hope you indulge me in this foreshortening.⁵

II. THE CHANGING LEGAL SETTING

How can we measure the presence of regulation? A useful first approximation is to count the lawyers.⁶ We find a very significant increase in the number of lawyers over the course of our period. Even fifty years ago, the United States had more lawyers per capita than any other country.⁷ Since then, lawyers and their ratio to national populations have increased just about everywhere, which suggests that the legalization we

Fig. 1- Number of Lawyers, 1960, 1985, 2010



⁵ Federal court data from 1961 onward is readily comparable with current data and this commends 1961 as a convenient place to begin observations.

⁶ In some societies, this might not be as useful an indicator of legalization because of large numbers of nominal lawyers who are not occupationally engaged in legal work. However, in the United States the correlation between bar membership and legal work is sufficiently strong to provide a useful indicator.

⁷ See Marc Galanter, *More Lawyers Than People: The Global Multiplication of Legal Professionals*, in RICHARD ABEL ET AL., *THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE* 72 (Scott Cummings ed. 2011) [hereinafter *Global Multiplication*] (demonstrating that the United States had the most lawyers than any other country).

find in the United States is not peculiar or unusual, but very much the way things are heading more generally.

The number of lawyers has grown faster than the population. In 1960, there was one lawyer for every 631 persons in the United States.⁸ That increased to one lawyer for every 363 persons in 1985 and one for every 258 in 2010.⁹ Over this fifty-year period, the presence of lawyers grew about two and a half times as fast as the underlying population.

Moreover, when we talk about the presence of lawyers, we have to consider the changing technologies they wield. A lawyer practicing in 1900 would have found little that was strange or baffling in the technology of a 1960 law office. That 1960 office was not notably different from an office at the beginning of the twentieth century when elevators, telephones, and stenography had transformed the law office from an all-male preserve, in which partners were outnumbered by troops of messengers and copyists.¹⁰ By 1900, vastly multiplied shelves of printed material (copious law reports, digests, citators, and legal encyclopedias) displaced less systematic resorts to researching and finding cases and treatises.¹¹ A time traveling visitor from the early twentieth century would have found little that was surprising in the law office of 1960.

This long period of technological calm ended abruptly with an unbroken and mushrooming succession of innovations—photocopying, facsimile machines, office computers, CD-ROMs, online data services, overnight delivery, e-mail, cell phones, laptops, smart phones, access to the World Wide Web, “the Cloud” —bringing changes in the legal practice, like electronic filing and electronic discovery, as well as nationwide and worldwide firms.

These new technologies enable these more numerous lawyers to produce more product—whatever it is that lawyers produce.¹² Some part of their product consists of dealing with regulation—producing it, analyzing it, invoking it, conforming to it, and working around it. Thus, it seems fair to assume the increase in the number of lawyers signifies, and in part results from, the presence of more regulatory activity.

Unsurprisingly, spending on legal services, which is basically spending on lawyers, consumes a larger portion of our swelling national

⁸ See *id.* at 73 (presenting an example of the lawyer data).

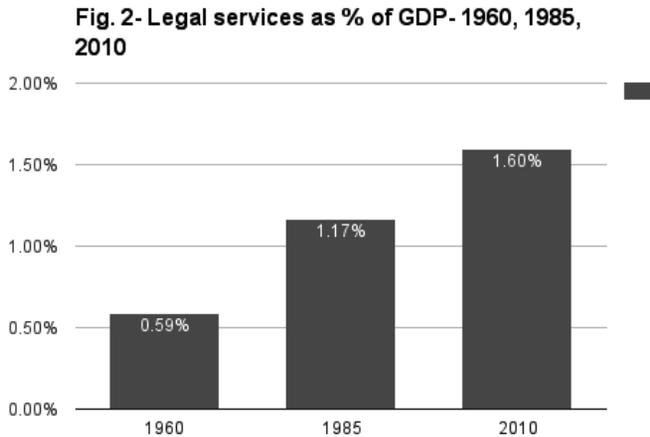
⁹ See *id.* (providing an instance of the lawyer data from 2010).

¹⁰ See MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 7-8 (1991) (describing the transformation of law offices).

¹¹ See *id.* at 8-9 (transforming the new tools and style of legal research).

¹² See *id.* at 7 (addressing the increase in lawyer productivity).

product, doubling from 0.59% in 1960 to 1.17% in 1985 and continuing its vigorous growth to 1.60% by 2010, as shown in Figure 2.¹³

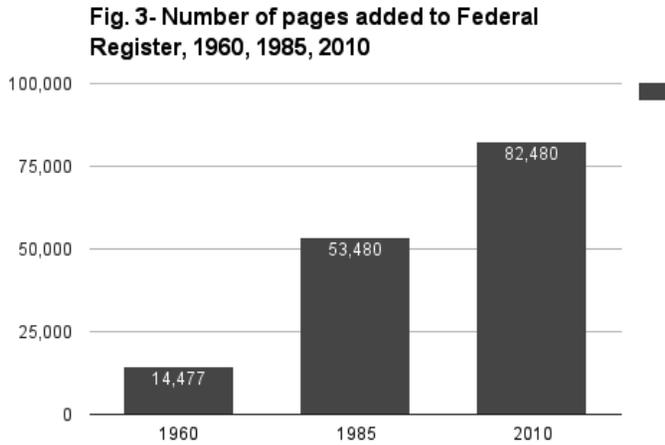


The legalization suggested by these “lawyer” measures are confirmed by a comparable increase in the quantity of federal regulations deposited in the federal register.¹⁴ The 82,000 pages added in 2010 was almost six times the number of pages added back in 1960.¹⁵ This growth was displayed under all administrations. The Federal Register is used as a convenient indicator – not a measure – of the span of the regulatory sea in which all these lawyers are swimming.

¹³ See Bureau of Econ. Analysis: *Gross-Domestic-Product-(GDP)-By-Industry Data: Value Added*, U.S. DEP’T OF COM. (2016), http://www.bea.gov/industry/gdpbyind_data.htm [<https://perma.cc/7K5R-9HUS>] (attributing the increase of lawyers to the increase of regulatory activities); see also GALANTER & PALAY, *supra* note 10, at 40 (providing the data on the legal services increase).

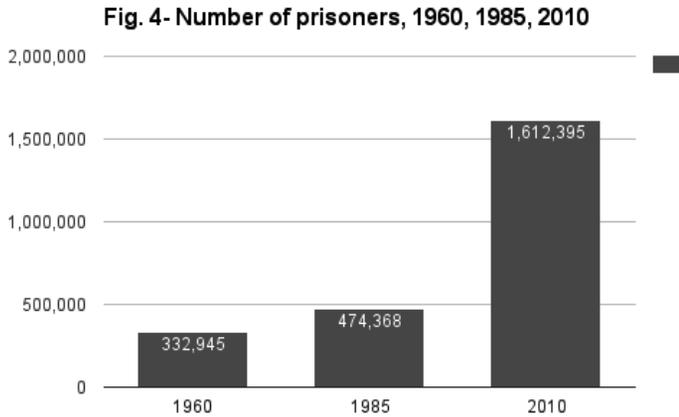
¹⁴ See GALANTER & PALAY, *supra* note 10, at 40–41 (concluding that legal services continue to increase with regulations and services provided).

¹⁵ See *Federal Register Pages Published 1936–2015*, U.S. OFF. OF FED. REG. (2015), <https://www.federalregister.gov/uploads/2016/05/pagesPublished2015.pdf> [<https://perma.cc/Q2DS-VV7T>].



Finally, as a rough measure of the presence of rules, investment in enforcement activity, and coercive deployment of legal sanctions, Figure 4 shows the number of persons confined in prison or jail in each of our years, rising from some 332,000 in 1960 to 474,000 in 1985, surging to a staggering 1.6 million in 2010—an increase of even greater scale than the massive increases in lawyers and expenditures on law.¹⁶

¹⁶ See Office of Justice Programs, *Key Statistics: Prisoners*, BUREAU OF JUST. STATS. (2014), <http://www.bjs.gov/index.cfm?ty=kfdetail&iid=488> [<https://perma.cc/Z3QL-BVCZ>] (explaining the increase of prison and jail inmates); see also *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUST. POL'Y INST. (2000), http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf [<https://perma.cc/K5K7-8YEG>] (demonstrating the increase of prisoners under state and federal jurisdiction).



III. THE DECLINE AND DISPLACEMENT OF THE TRIAL

So we have lawyers and rules—and prisoners—all present in greatly increased quantities. At the same time, one emblematic, and supposedly central legal institution—the trial—is *not* present in increased quantity. Instead, its presence is shrinking. Back in 1936, not long before the enactment of the Federal Rules of Civil Procedure, around eighteen percent of all civil cases in the federal courts ended up in trial.¹⁷ In 1963, some twenty-five years after enactment of the federal rules, 11.5 percent of the civil cases disposed of in the federal courts reached trial.¹⁸ Now, trials are just a bit more than one percent of civil cases.¹⁹

A similar decline started a few years later on the criminal side.²⁰ The percentage of convicted persons whose conviction involved a trial fell dramatically after 1980, as shown in Figure 5.²¹ Litigation data from the

¹⁷ See Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 n.3 (1994) (providing civil trial rates over time).

¹⁸ See Galanter, *supra* note 4, at 459 (showing the decrease of trials after the federal rules were created). The Administrative Office of the federal courts counts as a trial “a contested proceeding at which evidence is introduced.” *Id.* at 461. In classifying terminations, the record-keeping category is cases terminated “during or after trial.” *Id.* at 475. Thus, the reported number of trials includes a considerable fraction that settle during trial. The definition of trial in the state courts is more varied, so the numbers are not strictly comparable. *Id.* at 475–76.

¹⁹ See *id.* at 492 (presenting the current civil trial statistics).

²⁰ See *id.* at 493, 495 n.70 (explaining that there was also a decrease of criminal trials).

²¹ See Galanter, *supra* note 4, at 493, 495 n.70 (addressing that the Sentencing Reform Act affected the amount of criminal trials).

state courts are less abundant and less readily comparable. The first reliable figures, for a large contingent of states, are from the mid-1970s.²² The National Center for State Courts assembled data on civil trials in the general jurisdiction courts of twenty-two states from 1976–2002.²³ During that period of rising caseloads, the number of jury trials decreased by thirty-two percent, and bench trials (which were far more numerous) decreased by seven percent.²⁴ Subsequently, the Center was able to assemble data for fifteen states for the period 1976–2009.²⁵ These figures also show a declining portion of trials, both jury and bench, of comparable magnitude to that in the federal courts.²⁶

In state courts and federal courts, there has been a long, slow, but steady decline in the *percentage* of cases that were tried.²⁷ While virtually everything else in the legal system continues to grow, the number of trials is shrinking not just as a *percentage* of dispositions, but since the mid-1980s, shrinking *absolutely*, as well.²⁸ How can we reconcile the dramatic decline of trials with the increases of laws, regulations, lawyers, spending on law, and imposition of punishment?²⁹ This decline is not reflected in popular culture where the trial remains a robust presence.³⁰

That the occurrence of trials has undergone a severe decline is now widely known—at least in legal circles. To summarize roughly: trials

²² See Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 758 (2004) (demonstrating the beginning of record collections).

²³ See *id.* at 756, 760 (comparing the data collection process from state versus federal court).

²⁴ See *id.* at 769.

²⁵ See Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers*, VOIR DIRE 22, 28 n.2 (2013), http://www.ncsc.org/sitecore/content/microsites/civil-justice-initiative/home/~/_/media/1393b815d5d547ca8690d1b0ee596431.ashx [<https://perma.cc/PPF4-VY3U>] (generalizing data over a period of time).

²⁶ See Ostrom et al., *supra* note 22, at 764 (addressing the general decrease of trials throughout the nation).

²⁷ See *id.* at 769 (explaining that bench trials consistently declined).

²⁸ See Galanter, *supra* note 4, at 516 (examining the decline of cases that go to trial).

²⁹ See *id.* at 459 (presenting that the decline, noted earlier by several observers, was identified as a major concern by the Conference on the Vanishing Trial, sponsored by the Litigation Section of the American Bar Association (“ABA”), held in San Francisco, California, in December 2003). The studies presented at that conference can be found in Volume 1, No. 3 of the *Journal of Empirical Legal Studies*, dated November 2004. See generally Yeazell, *supra* note 17, at 633 (identifying observers who discerned the vanishing trial phenomenon *avant le lettre*); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1997) (showing the decrease in trials and the increase in settlements); Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 S. M.U. L. REV. 1045, 1045 (2002) (generalizing the decline of trials in the United States); Hope Viner Sanborn, *The Vanishing Trial*, 88 A.B.A. J. 24, 26 (2002) (citing to Galanter's research and the conclusion that trials are decreasing even at the state level).

³⁰ See David Ray Papke, *The American Courtroom Trial: Pop Culture, Courthouse Realities, and the Dream World of Justice*, 40 S. TEX. L. REV. 919, 926 (1999) (commenting on the numerous depictions of trials in television shows).

have been a steadily declining portion of dispositions for more than half a century. For the past quarter century, trials have also been declining in absolute numbers. There are differences in detail from place to place, court to court, and topic to topic. But, if we step back, the general trend line is apparent: the trial, once the central, defining, characteristic thing that our courts do, is diminishing. The departure of trials is mourned by many: judges, practitioners, and academics.³¹ Yet, the same turn away from trials to alternative processes is celebrated by other academics.³² Judges advise us to submit to the inevitable.³³ Practitioners and parties, voting with their feet so to speak, have increasingly avoided the trial mode.³⁴ The diminution of trials remains something of a shock, since the trial is close to the symbolic core of our legal system.³⁵ It is enshrined in everyday expressions (“the jury is still out on that,” “a jury of one’s peers,” “one’s day in court”) and widespread lay expectations.³⁶ The rarity of trials, now something like one percent of dispositions in federal courts and similarly diminished in state courts, remains hidden from the wider public by news reports, Judge Judy, and fictional portrayals of trials in the media.³⁷ The trend lines, as far as they can be discerned, are on a continuing downward course, although the absolute decline is getting smaller and less regular because there is not that much space for further decline.³⁸

The general dimensions of the decline are displayed in the following graphs:

³¹ See generally ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 88 (2009) (analyzing the decline of trials); William J. Young, *An Open Letter to the U.S. District Judges*, 50 *FED. LAW.* 30, 31 (2003) (stating the decline of civil and criminal trials in state and federal courts); Higginbotham, *supra* note 29, at 1045 (commenting on the decrease of trials); David J. Beck, *A Civil Justice System with No Trials*, *TEX. B.J.* 1073, 1073 (2003) (discussing the decrease of trials throughout the United States); Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 *J. EMPIRICAL LEGAL STUD.* 973, 973 (2004) (suggesting that the lack of jury trials will have significant impacts in our legal system).

³² See generally D. Brock Hornby, *The Business of the U.S. District Courts*, 10 *GREEN BAG* 453, 459 (2007) (addressing the alternatives from court); Blake D. Morant, *The Declining Prevalence of Trials as a Dispute Resolution Device: Implications for the Academy*, 38 *WM. MITCHELL L. REV.* 1123, 1125 (2012) (presenting reasons why settlements are beneficial).

³³ See Hornby, *supra* note 32, at 455 (articulating the encouragement of settlement); see also Morant, *supra* note 32, at 1127 (suggesting that settlement conferences can be useful to settle disputes).

³⁴ See Hornby, *supra* note 32, at 455 (concluding that many litigants choose settlements over trials).

³⁵ See Morant, *supra* note 32, at 1128–29 (generalizing why trials have not become as frequently used).

³⁶ See Hornby, *supra* note 32, at 455 (acknowledging that some litigants still want juries).

³⁷ See Galanter & Palay, *supra* note 10, at 518 (stating that many citizens are unaware of the low percentage of trials).

³⁸ *Id.* at 459.

Fig. 5-Civil and Criminal Trial Rates in U.S. District Courts, 1962–2012

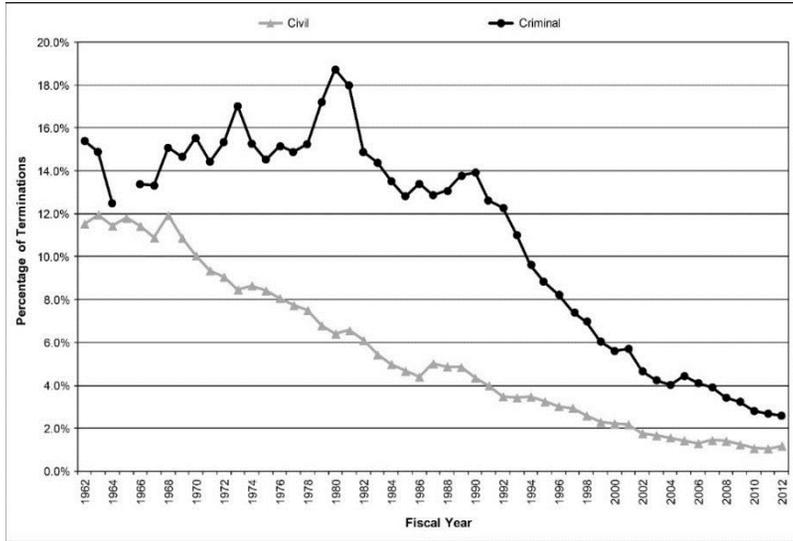
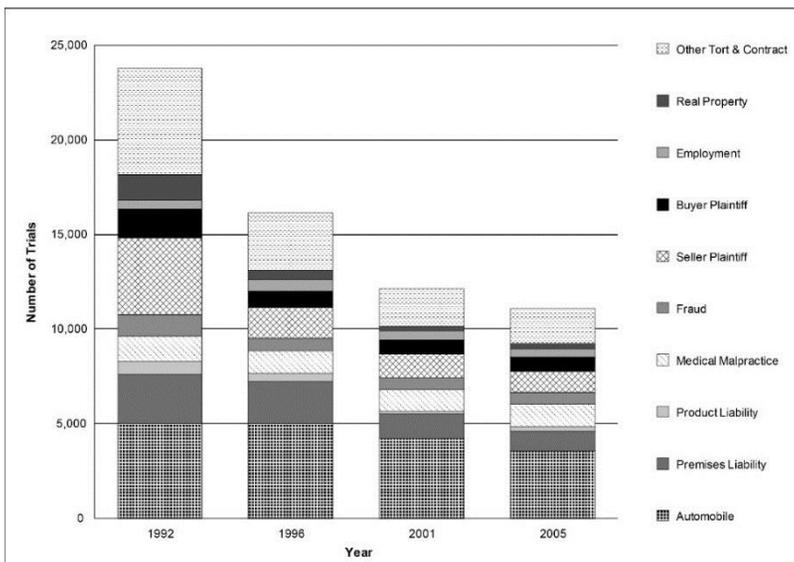


Fig. 6-Number of Civil Trials in Courts of General Jurisdiction in Sample of Seventy-Five Most Populous Counties



These figures represent the decline. There are differences in timing and scale from court to court, but the cumulative evidence of a similar

diminishment of trials suggests they are manifestations of the same, or comparable, underlying factors.

I would like to mention one more time series of trials that, so far as I am aware, is the longest available run of comparable data about trials. Peter Murray assembled figures on civil trials in the Massachusetts courts at five year intervals from 1925 to 2000.³⁹ Back in 1925, each of the thirty-two Massachusetts Superior Court judges conducted an average of ninety-four trials.⁴⁰ These were trials that went to verdict, not just trials that began, which is presumably a larger number (I mention this because the federal count is of trials *begun*). By 2000, those thirty-two Massachusetts Superior Court judges had grown to eighty-two.⁴¹ The average number of trials conducted by each of these eighty-two judges was seven.⁴² Where there were over 3000 (3022) trials 75 years earlier, there are now some 571 trials.⁴³ When we adjust for population growth, the contrast is even more striking.⁴⁴ The population of Massachusetts grew from roughly 4 million in 1925 to roughly 6 million in 2000; the frequency of trials per 100,000 residents dropped from 75 to 9.⁴⁵

Murray's data not only displays the dramatic change in the output of the courts, but points to how different the job of the contemporary judge is, compared to his or her predecessors.⁴⁶ "The jury trial activity," Murray observes:

that was the daily routine of judges in the first quarter of the 20th century has become rather exceptional for their counterparts at the beginning of the 21st century. . . . [B]y comparison with previous generations, lawyers and judges of today are living a legal culture in which trial by jury is more a legend than a reality.⁴⁷

I want to emphasize what this long-term decline of trials is not. It does not mark a decline of legal regulation; nor does it mark a decline in resort to law by claimants or rulers; nor does it mark a decrease in conflict and

³⁹ See Peter L. Murray, *The Disappearing Massachusetts Civil Jury Trial*, 83 MASS. L. REV. 51, 53, 55 (2004) (listing the number of jury trials in Massachusetts from 1925 to 2000).

⁴⁰ *Id.* at 55.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 53.

⁴⁴ See *id.* at 58 (commenting that civil trials, due to a decrease in jury duty participation, have ceased to be a major part of civic life of Massachusetts citizens).

⁴⁵ Murray, *supra* note 39, at 58.

⁴⁶ See *id.* at 56 (noting that work as a trial judge differs markedly from the beginning of Murray's data set to the present).

⁴⁷ *Id.* at 56, 60.

contest.⁴⁸ On the contrary, we see more regulation, more claiming, and more contest.⁴⁹ For example, the legalization of marijuana and the policing of child care each brings in its train a whole new set of regulations and enforcement practices, and perhaps new frontiers of liability. But we may well get all those “mores” without getting more trials in our courts.⁵⁰

Before we examine the wider setting of this decline of court trials, recall that in addition to trials in governmental institutions, like courts, there are a considerably larger number of trial-like proceedings located in other governmental institutions that are not part of the judicial branch.⁵¹ At the federal level, these range from Immigration Courts to the Board of Veterans Appeals to the Social Security Administration.⁵² In 2010, when the federal courts held trials in fewer than 14,000 cases, the Immigration Courts heard 122,465 cases with representation and 164,742 without, the Board of Veterans Appeals heard over 13,000 cases, and the Social Security Administration’s Office of Disability Adjudication and Review heard over 700,000.⁵³ There is a lot of adjudication going on, but it occurs in institutions that enjoy a less distinguished ceremonial pedigree than courts—absent the robes, elevated benches, honorific titles, deferential retainers, and the distinctive etiquette that distinguishes a court from more pedestrian decision-making bodies.⁵⁴ These boards, commissions, tribunals, “*Office ofs*,” and some even called courts, enjoy none of the institutional charisma that attaches to “real” courts, staffed by ceremonially complete enrobed judges (who are a shrinking portion of the total number of government judges, and an even smaller fraction of all who play the role of third-party).⁵⁵ This includes the growing band of

⁴⁸ See Scott Brister, *Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 191-92 (2005) (describing a rise in legal, non-courtroom proceedings); Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473, 474 (2002) (attributing the rise of trial to administrative law, based on the history of the New Deal and the rise of administrative agencies that exercised trial functions to administer growing regulatory regimes).

⁴⁹ See Levy & Shapiro, *supra* note 48, at 476-77 (discussing the rise of regulatory bodies that exercise court-like functions).

⁵⁰ See Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials,”* 62 DEPAUL L. REV. 415, 441 (2012) (removing trials is one of the many cost-saving measures).

⁵¹ See *id.* at 427 (providing that the federal system denotes as trial any “contested hearing where evidence is presented”).

⁵² See *id.* at 428 (articulating the various administrative agencies that conduct trials).

⁵³ *Id.* at 428.

⁵⁴ *Id.* at 436-37; see also Oscar G. Chase & Jonathon Thong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J.L. & HUMAN. 221, 222 (2012) (stating that the robes and courtroom are imposing to amplify the authority of judgment).

⁵⁵ See Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. & SOC’Y REV. 941, 982 (1999) (describing the

arbitrators, mediators, and other “neutrals” as well, and the decision-makers that preside in an array of forums within institutions from universities to organized sports.⁵⁶

Trends in the occurrence of trials—if that is what we wish to call them—in these “non-capital-C-court” settings remain largely unexplored.⁵⁷ There is little reason to assume there is a caseload shrinkage comparable to that in the “real” courts.⁵⁸ It is quite possible that the caseload, power, and finality of some or many of these forums is growing.⁵⁹ Yet, whatever is happening in them remains largely invisible, not only to the wider public, but to all but a tiny fraction of the legal community.⁶⁰ Indeed, their low visibility is part of their appeal to certain users.⁶¹ Typically, there is no audience at these “trials” and media reports are few.⁶² Again, beyond these less august and less visible areas of litigation in governmental forums, there is adjudication in arbitrations and in a variety of private courts/tribunals.⁶³ This whole sector of legal activity, governmental and non-governmental, enjoys very little public

proliferation of dispute resolution forums, which do not vindicate formal rights as a traditional court does); Owen McGivern, *The Decline of the Judiciary*, 61 N.Y. ST. B.J. 14, 16 (1989) (considering the loss of judicial importance and replacement of judges with technocrats).

⁵⁶ See Edelman & Suchman, *supra* note 55, at 982 (articulating the limitations of arbitration forums that limit the aggrieved’s power, replacing vindication of rights with protection of the organization); McGivern, *supra* note 55, at 16 (exploring the rise of administrative technocrats displacing judges).

⁵⁷ See generally Levy & Shapiro, *supra* note 48, at 476 (reflecting on administrative bodies reducing the number of cases brought to court, and raising the question of the number of disputes that are siphoned off from the judicial system to alternative fora).

⁵⁸ See *id.* at 476–77 (outlining that administrative agencies have superior capacity to address specialized matters than the courts).

⁵⁹ See Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field*, 3 PEPP. DISP. RESOL. 111, 129 (2002) (indicating a growth in ADR); see also Levy & Shapiro, *supra* note 48, at 476–77 (providing that administrative agencies can relieve the caseload of the judicial system).

⁶⁰ See Edelman & Suchman, *supra* note 55, at 982 (remarking on the invisibility of administrative non-court proceedings).

⁶¹ See *id.* at 973 (discussing the example of private security as something that can constrain political rights while it remains invisible to societal watchdogs guarding against such encroachment); see also Victor G. Rosenblum, *Low Visibility Decision-Making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 ADMIN. L. REV. 19, 19 (1965) (displaying a lack of visibility to the public as a threat to democracy).

⁶² See Edelman & Suchman, *supra* note 55, at 973 (remarking on invisibility to civil liberties watchdog organizations).

⁶³ See *supra* note 55; see also Judith Resnik, *Whither and Whether Adjudication?*, 86 B. U. L. REV. 1101, 1137 (2006) (relating the lack of media presence at alternative tribunals and ADR proceedings).

visibility or academic scrutiny.⁶⁴ I think it is fair to say that these trials rarely figure in any public discourse about legal norms or practices.

IV. STORIES OF CHANGE

In brief, the story is that trials in our courts have declined, while society and its economy, the legal profession, and virtually all things legal, continue to grow.⁶⁵ I do not propose to argue whether we should celebrate or deplore the decline and diffusion of the trial. It would, I think, be surprising if this one element of our legal system has undergone profound change all by itself while everything else in the legal world went on as before.⁶⁶ My goal here is to see what other changes are occurring and to ask how the decline of trials is related to these other developments. How is the decline connected, specifically, to changes in the judiciary and the legal profession, and more generally, to changes in the shape and role of law in our society?

Let me briefly point to a few of the changes in the legal profession. As noted earlier, there is striking growth in numbers of lawyers.⁶⁷ Lawyers, not all of them, but many more than earlier, are practicing in much larger units, in firms that are organized in a pyramid of partners and associates, although that is now undergoing dramatic change.⁶⁸ The profession is increasingly stratified, with those who represent individuals practicing in smaller units with less income and less prestige than those who represent corporate or governmental entities—and it is the latter who are consuming an ever-growing share of the legal service pie.⁶⁹

What else has changed that might explain, or be explained by, the decline/demise of court trials? There are a number of competing but intertwined stories. Each has its adherents on the bench and in the academy, although in the heat of the moment's demands, actors may switch from one to another. Here is my list of frequently proffered

⁶⁴ See Edelman & Suchman, *supra* note 55, at 982 (remarking less visible dispute resolutions forums).

⁶⁵ See *supra* Figures 1–6 (illustrating an increase in lawyers and legal services while civil and criminal trials decrease).

⁶⁶ See Gillian K. Hadfield, *Where Have all the Trials Gone – Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 729–33 (2004) (describing the drop in federal civil trials).

⁶⁷ See *supra* Figure 1 (showing growth in the number of lawyers).

⁶⁸ See Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. 1867, 1926 (2008) (noting changes in the major law firm structure); Milton C. Regan, *Taking Law Firms Seriously*, 16 GEO. J. LEGAL ETHICS 155, 157 (2002) (providing the rise of larger firms).

⁶⁹ See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 315–320 (2005) (articulating the increasing stratification of lawyers).

accounts of the change: (A) the “better technology of fact finding” story; (B) the “changing judicial ideology” story (i.e., our job is settlement); (C) the “avoiding judicial overreach” story (i.e., let’s not exceed our role/competence); (D) the “fighting frivolous cases” story; and (E) the “ADR is better” story.

A. *The “Better Technology of Fact-Finding” Story*

Professor John Langbein argues that the common law trial is a weak and costly fact-finding device.⁷⁰ Once extensive discovery became available, it effectively displaced the inefficient and expensive trial. This appealing explanation encounters a number of puzzles, some more challenging than others. Why is the trial-suppressing effect of discovery continuing to increase after almost eighty years?⁷¹ How does it work in the majority of cases in which there is little or no discovery?⁷² Why have some matters proven increasingly resistant to the lure of settlement?

For example, medical malpractice trials seem to flourish less because of the problem of obtaining information, rather than because of the high stakes for doctors.⁷³ And why do automobile accidents remain the most trial-prone case type (see Figure 6 above) in spite of the typical sharing of information?⁷⁴ And how can we account for the comparable decrease of trials in other common law jurisdictions like England and Australia less favored with generous provisions for pre-trial discovery?⁷⁵

B. *The Changing Judicial Ideology Story*

Another take on the demise of trials is that it results from a marked change in the ideology of judges.⁷⁶ Between 1960 and 1985, during our first period, there was a pronounced shift in the judicial view of the

⁷⁰ See John Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L. J. 522, 526 (2012) (arguing that the Federal Rules of Civil Procedure, which enable generous discovery, resulted in increased settlement, displacing the trial).

⁷¹ See *supra* Figures 5–6 (showing a constant decrease in civil trials).

⁷² See Langbein, *supra* note 70, at 547 (citing multiple authors to show that a majority of cases engage in little discovery).

⁷³ See David A. Hyman & Charles Silver, *Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?*, 87 CHI. KENT L. REV. 163, 195 (2012) (stating medical malpractice suits are risky, even though doctors tend to win).

⁷⁴ See *supra* Figure 6 (illustrating that the rate of trials related to automobile injuries remains high compared to other subject matter areas).

⁷⁵ See Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales*, 62 L. & CONTEMP. PROBS. 7, 13 (1999) (noting the decline of civil trials in England and Wales); see also Murray, *supra* note 39, at 55–61 (providing the decline of civil trials in Australia and Canada).

⁷⁶ See Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1267 (2010) (referring to the rise of the managerial judge as a change of judicial ideology).

function of courts.⁷⁷ There were always some judges who were known for pressuring parties to settle.⁷⁸ But the generally accepted view was that settlement was “a desirable by-product” of the push toward trial.⁷⁹

In the federal district courts in the 1960s, almost half the cases filed went away without any judicial action, presumably settled on their own or abandoned.⁸⁰ However, increasingly, judges saw settlement as more than a by-product of their efforts to move cases toward trial, but as close to the heart of their job description.⁸¹ By the late 1970s, a benign and approving view of negotiation was the received wisdom among many prominent judges.⁸² Chief Judge Hubert Will of the Northern District of Illinois, a favorite speaker at the Federal Judicial Center’s workshop for new judges counseled that “[o]ne of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.”⁸³ The next two stories converge on the goals of curbing excessive litigation and judicial overreach.

C. Recoil Against Demands for an Inappropriately Enlarged Judicial Role

In a third story, courts regard themselves as overwhelmed by requests for action beyond their competence and proper scope. An example would be the recoil from such an enlarged judicial role promoted by Chief Justice Warren Burger in the 1970s with the support of a significant segment of

⁷⁷ See *id.* (noting the Resnik dating of the start of the managerial judge phenomenon).

⁷⁸ See Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353, 386 (2015) (commenting on coercive procedural tactics within a judge’s discretion which can coerce a settlement); Marc Galanter, “. . . A Settlement Judge, Not a Trial Judge:” *Judicial Mediation in the United States*, 12 J.L. & SOC’Y 1, 5 (1985) [hereinafter Galanter, *Judicial Mediation*] (recounting two examples of judges forcing a settlement based on their position and knowledge of the parties’ offers); Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 261 (1986) [hereinafter Galanter, *Judge as Mediator*] (noting settlement is the default position for judges).

⁷⁹ Galanter, *Judge as Mediator*, *supra* note 78, at 261.

⁸⁰ See Galanter, *Judicial Mediation*, *supra* note 78, at 1–4 (noting the low percentage of cases going to trial); see also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 37 (1983) (noting the large number of filings resulting in few trials and the low number of judge terminated lawsuits).

⁸¹ See Galanter, *Judicial Mediation*, *supra* note 78, at 2 (recounting the change of how views of settlement changed).

⁸² See *id.* (charting the view that arranging settlements was the accepted job of a judge in the pre-trial phase of litigation).

⁸³ Hubert L. Will, *The Role of the Judge in the Settlement Process*, 75 F.D.R. 89, 89 (1976).

the legal elite.⁸⁴ Concerned that too much was being asked of the courts, the Chief Justice launched an exercise to institute a “better way” to resolve disputes—a way that involved less legal contest and fewer trials.⁸⁵

D. The “Fighting Frivolous Cases” Story

A different version of “asking too much of the courts” flourished in conservative quarters. The “battle against frivolous cases” story centers around the victimization of defendants or potential defendants, by claims seen as frivolous, cumulating in a litigation explosion in which predatory lawyers, supine or misguided judges, and biased juries give excessive awards to undeserving claimants.⁸⁶ This perspective is dramatized, and fossilized, in a continuing campaign by the United States Chamber of Commerce to identify and publicize “judicial hellholes.”⁸⁷ This effort reflects widespread sentiment in the business community. John Lande found that “almost three quarters of the [business] executives (70%) [that he interviewed] thought that more than half of such cases [were] so frivolous” that they should never have been brought.⁸⁸

E. The “ADR is Better” Story

Another strand in this recoil against litigation was the rise of Alternative Dispute Resolution (“ADR”); a set of practices earlier thought appropriate for resolving small cases or disputes within circles of those who repeatedly dealt with one another was transformed into a battery of techniques for extending access to justice, and for some proponents, an

⁸⁴ See Marc Galanter, *The Turn against Law: The Recoil against Expanding Accountability*, 81 TEX. L. REV. 285, 293 (2002) [hereinafter Galanter, *Expanding Accountability*] (recounting that Chief Justice Warren Burger and others recoiled against a high level of litigation).

⁸⁵ See Warren E. Burger, *Isn't There a Better Way*, 68 A.B.A. J. 274, 276 (1982) (noting a “better way” to deal with mushrooming caseloads).

⁸⁶ See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717, 717 (1998) (naming the disillusionment of the justice system a jaundiced view); see generally Simon H. Rifkind, *Are We Asking Too Much of Our Courts*, 15 JUDGES' J. 43 (1976) (discussing excessive demands on courts); Erin Schiller & Jeffrey A. Wertkin, Note, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909, 930 (2000) (commenting on the problem of frivolous lawsuits).

⁸⁷ See Thornburg, *supra* note 76, at 1097–98 (noting the U.S. Chamber of Commerce's views on litigation); but see Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 970 (2009) (detailing the U.S. Chamber of Commerce's faulty methodology).

⁸⁸ John Lande, *Failing Faith in Litigation—A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 26 (1998).

elixir for delivering results superior to trial.⁸⁹ The institutionalization of this perspective is neatly marked by the changing name of the ABA body, created in 1977 as the Special Committee on Resolution of Minor Disputes, which in 1987 became the Standing Committee on Dispute Resolution and finally, in 1993, the Section on Dispute Resolution.⁹⁰

Starting in the 1970s, ADR gained new visibility and respectability.⁹¹ Professor Frank Sander's presentation to Chief Justice Burger's Pound Conference in 1976 marks the arrival of ADR as a favored project of the legal establishment.⁹² Support from the Ford and Hewlett Foundations and promotion by President Jimmy Carter's Department of Justice was soon followed by the emergence of ADR practitioners as a group claiming professional status.⁹³ The movement of ADR from periphery to center was accompanied by a growing acceptance that there should be a variety of institutions to handle disputes in different modalities—an idea that reached its apotheosis in the project of the “multi-door courthouse,” which would, it was claimed, “match the forum to the fuss.”⁹⁴

But beneath the rhetoric of voluntarism, agreement was in many instances forced on claimants, frequently with provisions that reduced the potential for systemic relief, rather than individual redress.⁹⁵ In response, lawyers frequently approach such provisions tactically, not as liberation from adversary combat, but as a different field of battle.⁹⁶

⁸⁹ See Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115, 120–21 (2010) [hereinafter Galanter, *Social Capability*] (describing claims that would extend access to justice).

⁹⁰ See Jack Watson, *ADR in Georgia*, 30 GA. ST. B. J. 74, 75 (1993) (illustrating the history of the ABA committee and the dates of the various name changes).

⁹¹ See Galanter, *Expanding Accountability*, *supra* note 84, at 289–91 (recounting Alternative Dispute Resolution's (“ADR's”) other support); Thomas O. Main, *ADR: The New Equity*, 74 U. CIN. L. REV. 329, 334–36 (2005) (recalling the history of Chief Justice Burger's Pound Conference and the major speech given by Professor Sander regarding ADR).

⁹² See Main, *supra* note 91, at 334–36.

⁹³ See Galanter, *Expanding Accountability*, *supra* note 84, at 289–91 (recounting ADR's gain in respectability); see also Galanter, *Social Culpability*, *supra* note 90, at 120–21 (describing the promise of ADR).

⁹⁴ See generally Frank A. E. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 49 (1994) (discussing a wide palate of ADR options).

⁹⁵ See Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin*, 1993 J. DISP. RESOL. 1, 1 (1993) (noting the involuntary ADR problem with coercion); Rodney S. Webb, *Court-Annexed “ADR” – A Dissent*, 70 N.D. L. REV. 229, 232 (1994) (highlighting the flaws in ADR, especially problems of power relationships and unequal power).

⁹⁶ Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON D. 477, 529 (2012) (noting the movement of adversarial views from courtrooms to ADR processes, creating a dystopian hunger game rather than living up to the more utopian views of ADR).

V. CONCLUSION: A NEW ERA?

The changes we observe are striking in view of the extraordinary prominence of courts in American life and with our reliance on litigation as an instrument of governance.⁹⁷ Courts enjoy a special legitimacy that seems resistant to widespread appreciation that they are inescapably political institutions. What we see is not less regard for courts or less recourse to courts—but a shift in their mode of operation. Trials have fallen away, but more cases are processed in court. In place of the trial there is an array of negotiated outcomes. Where the court does impose an outcome, it is more likely to be a summary judgment or the result of low visibility (and typically unreviewable) procedural rulings.

Trial is largely relegated to less prestigious administrative and private forums—away from the courts with all their symbolic trappings, institutional charisma, and public visibility. These non-court trials have little or no public visibility. If some of these proceedings have some demonstration effect going forward, there is likely to be little in the way of addition to the publicly accessible body of precedent or learning.

For claims remaining in the courts, the prospects for trial are on a downward spiral, as lawyers, unaccustomed to its demands and risks, prefer the safety of settlement with the added attraction of being able to tell the client when a good outcome was achieved.

At the same time, there is no reason to think that the outpouring of new rules will abate. As regulation proliferates, so do discretion and pockets of uncertainty. Parties who can afford to invest in favorable legal outcomes will continue to do so. Winning is still the name of the game, as the late Melvin Belli used to say, but winning these days hardly ever involves a trial. Trials will surely remain with us, but whether they will regain their centrality to the judicial process remains to be seen.

⁹⁷ See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.*, PRINCETON U. PRESS (2010) (relying on private litigation to effectuate policy); Robert A. Kagan, *Adversarial Legalism and American Government: The American Way of Law*, HARV. U. PRESS (2001) (discussing the prevalence of litigation as tool of governance in United States).

