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gone

TRIALS CONTINUE TO DECLINE IN
FEDERAL AND STATE COURTS.
DOES IT MATTER?

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JUDICATURE

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Trials, particularly jury trials, once played a central role in the American legal system.¹ No longer.² While trial remains a theoretical possibility in every case, the reality is quite different. Trials occur rarely, typically only in the most intractable disputes.³ The pronounced disappearance of trials seems to have largely escaped the attention of Hollywood,⁴ the literary community,⁵ and the mainstream media,⁶ but this development is well known to judges,⁷ other court personnel,⁸ litigators,⁹ and academics.¹⁰ However, even those “in the know” often do not appreciate just how rare trials have become.

This article documents and quantifies the continuing disappearance of trials. It confirms that today a trial is very much the exception, rather than the rule, regardless of jurisdiction (federal or state), type of case (criminal or civil), type of trial (bench or jury), or type of claim (contract, tort, etc.).¹¹ The article also outlines the principal reasons why trials have diminished and some of the resulting consequences. Although trials are not likely to disappear altogether, they seem virtually certain to remain on the endangered list for years, and perhaps forever, primarily because Supreme Court decisions have made case disposition by motion more likely, and parties in both civil and criminal cases are increasingly drawn to what they perceive to be readily available, less expensive, and more attractive alternatives. ▶

DIMINISHING TRIALS ARE NOT A NEW PHENOMENON. To the contrary, there has been a “century-long decline in the portion of cases terminated by trial” and a more than “twenty-five year decline in the absolute number of civil trials.”¹² When the Federal Rules of Civil Procedure were first promulgated in 1938, approximately 20 percent of all civil cases were resolved by trial.¹³ By 1962, trials still accounted for roughly 12 percent of all civil dispositions in federal court.¹⁴ But 40 years later, the rate of disposition by trial in civil cases had fallen to less than 2 percent, even as the total number of civil dispositions grew dramatically.¹⁵ Today, approximately 1 percent of all civil cases filed in federal court are resolved by trial — the jury trial disposition rate is approximately 0.7 percent, and the bench trial disposition rate is even lower.¹⁶ The absolute number of civil trials in district courts is lower today than it was at any time in the last 55 years (the period for which comprehensive data are available). It is not surprising, therefore, that astute commentators believe civil trials in federal court are “approaching extinction.”¹⁷

The pattern in federal criminal cases is similar, although not quite as pronounced. By the end of World War II, plea bargains or dismissals resolved approximately 80 percent of all criminal cases in the federal courts, and trials accounted for the remaining 20 percent.¹⁸ The percentage stayed roughly the same until the early 1980s. However, following passage of the federal sentencing guidelines in the mid-1980s, the percentage of criminal cases resolved by trial significantly declined. By 2000, it was just 6 percent, and by 2010, the rate of disposition by trial in criminal cases was less than 3 percent.¹⁹ Today, trials only occur in approximately 2 percent of federal crim-

inal cases.²⁰ As Judge William Young of the U.S. District Court for the District of Massachusetts explains: “Today, our federal criminal justice system is all about plea bargaining. Trials — and, thus, juries — are largely extraneous.”²¹

Of course, many more cases are filed, and ultimately resolved, in state courts.²² But, if anything, there is even less likelihood of a case proceeding to trial in state court than in federal court.²³ One study found that by 2002, civil cases were resolved by juries in state court less than 1 percent of the time.²⁴ The comparable number for criminal cases was 1.3 percent.²⁵ The rates are even lower today.²⁶ Primarily due to foreclosure cases growing out the mortgage crisis, bench trials remain common in a few state courts, but rarely occur in others.²⁷

WHILE IT IS “BEYOND DISPUTE” that trials occur less and less frequently,²⁸ accurately measuring the extent of the decline is not a simple task.²⁹ The relevant data are neither uniform nor comprehensive, especially at the state court level. Definitional issues abound, starting with the most basic: What is a trial? The Administrative Office of the United States Courts, which compiles federal judicial statistics, defines a “trial” as “a contested proceeding where evidence is introduced,” thereby including all hearings on temporary restraining orders, hearings on preliminary injunctions, hearings on contested motions, and other contested proceedings in which

evidence is introduced.³⁰ This evidence-based formulation, which certainly conflicts with the popular understanding of the term,³¹ expands the number of trials exponentially because a single case can actually give rise to multiple trials.³² This only makes that much more striking the paucity of reported trials measured in this manner.³³ Likewise, in many state court data compilations, a trial is deemed to occur whenever a jury is impaneled, regardless of whether the jury reaches a verdict.³⁴ This practice also tends to inflate the number of trials that are reported. In all events, data on trials

APPENDIX 1
NUMBER OF JURY TRIALS COMPLETED
BY CALENDAR YEAR IN U.S. DISTRICT COURTS
(2000 - 2015)

YEAR	CIVIL JURY	CRIMINAL JURY	TOTAL JURY TRIALS
2000	3,404	3,489	6,893
2001	2,980	3,358	6,338
2002	2,650	3,232	5,882
2003	2,603	3,500	6,103
2004	2,411	3,774	6,185
2005	2,312	3,768	6,080
2006	2,097	3,366	5,463
2007	2,269	3,213	5,482
2008	2,175	3,150	5,325
2009	2,138	3,052	5,190
2010	2,154	2,928	5,082
2011	2,083	2,727	4,810
2012	2,136	2,558	4,694
2013	2,025	2,492	4,517
2014	1,922	2,220	4,142
2015	1,882	1,807	3,689
2016	1,758	1,889	3,647

ANNUAL REPORTS OF THE A.O., TABLE T-1

need to be reviewed with care, qualified as appropriate, and interpreted carefully. We make every attempt to do so here.

FEDERAL COURTS

Between 1938 and 2009, “there was a decline in the percentage of civil cases

going to trial of over 90%.”³⁵ There has also been an enormous decline in the absolute number of trials.³⁶ In 1962, there were 50,320 total civil case dispositions — 5,802, approximately 12 percent, were by trial.³⁷ There were also 33,110 criminal defendants whose cases were resolved that year — 5,097, approximately 15 percent, were by trial.³⁸

The high watermark for civil trials occurred in 1985. That year, federal courts resolved 268,070 civil cases, more than five times the number disposed of in 1962, and there were 12,529 trials (6,276 bench trials and 6,253 jury trials).³⁹ In criminal cases, 1990 was the most active year, when there were 7,874 trials (6,181 jury trials and 1,693 bench trials) in a universe consisting of 56,519 defendants.⁴⁰ There has been a continuing decline in both the percentage and the absolute number of trials in more recent years.

Recent National Data

There are a number of different metrics pertaining to trials in the federal district courts. One metric focuses on civil and criminal trials completed per year, where a trial includes any hearing or proceeding in which evidence is introduced. There were 20,581 such trials in federal district courts in 1997, 15,830 in 2005 and 11,754 in 2016.⁴¹ Thus, by this measure, trials diminished by approximately 43 percent in just under 20 years.

But many of the trials were not case dispositive (i.e., they did not involve liability or guilt determinations). Jury trials constituting liability or guilt determinations show a much larger decrease over time. For example, there were 4,765 civil jury trials on the merits in 1990 and 1,758 such cases in 2016, representing a decrease of more than 60 percent.⁴² Similarly, there were 5,061 criminal jury trials resolving guilt or innocence in 1990 but only 1,889 such

trials in 2016, a decrease of 63 percent.⁴³ The statistics for the last 16 years are set forth in Appendix 1 (previous page). Even during this more abbreviated period, the number of civil jury trials on the issue of liability decreased by 48 percent,⁴⁴ and the number of criminal jury trials on the issue of guilt decreased by 46 percent, such that the total “on the merits” jury trials in federal court decreased by 47 percent.⁴⁵

Another federal court trial metric examines civil and criminal case termination based on the stage at which resolution occurs. For example, in 1990, a total of 213,429 civil cases were terminated, and 9,236 cases (4.3 percent) were ended “during or after trial” (4,783 by jury and 4,480 nonjury).⁴⁶ In 2016, by contrast, 271,302 civil cases were terminated, but only 2,781 cases (1 percent) ended “during or after trial” (1,965 jury and 816 nonjury).⁴⁷ Measured this way, the absolute decrease in trials was 70 percent. Similar reductions occurred in criminal cases.⁴⁸

Still another measure of trial activity is the total number of juries picked to serve in civil and criminal cases in the federal district courts. That number has declined, markedly and quite steadily, as shown in Appendix 2 (at left). In 1996, a total of 10,338 juries were selected, but in 2016 the total was just 3,887. Thus, during a 20-year period, the number of juries picked in federal courts decreased by 63 percent.⁴⁹

Given this decrease in trials, it is hardly surprising that the number of trials per district court judge also diminished significantly over time. In 1962, there were, on average, 21 merits trials in civil cases (10 jury/11 bench) per district court judgeship each year.⁵⁰ By 1985, the number of merits trials per district court judgeship increased to 24 (12 jury/12 bench).⁵¹ But, thereafter, the number of merits trials per district

**APPENDIX 2
NUMBER OF JURIES SELECTED IN
U.S. DISTRICT COURTS BY YEAR
(1996 - 2015)**

YEAR	TOTAL JURIES SELECTED
1996	10,338
1997	9,771
1998	9,390
1999	8,750
2000	8,161
2001	7,340
2002	6,967
2003	6,906
2004	6,925
2005	6,839
2006	6,193
2007	6,039
2008	6,050
2009	5,378
2010	5,332
2011	5,565
2012	4,899
2013	4,656
2014	4,278
2015	4,149
2016	3,887

court judgeship began to decline rapidly such that, by 2006, there were half as many merits trials per judgeship as in 1962.⁵² By 2015, the average number of merits trials per district court judgeship per year was just 4 (3 jury and 1 nonjury).⁵³ This is not to suggest that district court judges were working less over the years. To the contrary, as discussed *infra*, available evidence indicates that the average hours worked by a district court judge increased substantially during this time period. The statistics plainly show the judicial time was not spent trying cases.

As trials per judge diminished, so did the amount of time judges spent on the bench.⁵⁴ In 1980, the mean total hours on the bench per active district court judgeship was 790. In 2013, the mean total hours on the bench per district court judgeship was 430, less than two hours per day, a reduction of 46 percent.⁵⁵ There were some district courts averaging fewer than 200 courtroom hours per judgeship per year, less than one hour per day.⁵⁶ The mean time on the bench has continued to decrease, even as the overall workload in the district courts has continued to increase.⁵⁷ Once again, what has changed is the nature of the work performed by the courts, as more cases are decided by motion and as judges spend more time managing existing caseloads.⁵⁸

The nature of the civil cases being tried has also changed. Professors Marc Galanter and Angela Frozema report that in 1962, more than 50 percent of all trials involved tort claims, and 20 percent involved contract claims. By 2016, less than 12 percent of the trials involved tort claims, and contract claims

comprised 18 percent. Conversely, civil rights cases accounted for less than 1 percent of the trials in 1968, but they constituted more than 30 percent of the trials in 2010, and 27 percent of the trials in 2016. Prisoners' petitions have

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also increased significantly over time as a percentage of trials and now represent a material share of all trials.⁵⁹

Activity in the Southern District of New York and the Eastern District of New York

With 28 approved judgeships, the Southern District of New York (SDNY) is one of the two largest districts in the federal judiciary. Historically, it has been one of the busiest courts and has been known for handling many important and high-profile civil and criminal cases.⁶⁰ While not as large, the Eastern

District of New York (EDNY), with 15 approved judgeships, enjoys a similar, well-earned reputation. Both courts benefit from a hard-working group of senior judges (there are 15 in the SDNY and 14 in the EDNY) who add experience, depth, and capacity to each district.⁶¹ Given their size and stature, these districts serve as a helpful case study in observing the national trend of decreasing trials at a local level.

Consistent with the national data, there has been a significant decrease in the number of trials completed in both the EDNY and the SDNY as measured using the evidence-based standard (see Appendix 3, next page).⁶² Once again, many of these “trials” are not liability or guilt determinations. As depicted in Appendix 4 (available online at <http://judicialstudies.duke.edu/judicature>), jury trials that do reflect liability or guilt outcomes show a much more pronounced decrease over time. Thus, the data capturing completed trial activity on the merits in the EDNY and SDNY are consistent with national trends.⁶³ For example, in 1999, there were 224 jury trials completed in the EDNY (130 civil and 94 criminal) and 292 jury trials completed on the merits in the SDNY (181 civil and 111 criminal). Slightly more than 15 years later, in 2015, there were just 98 jury trials completed in the EDNY (57 civil and 41 criminal) and 131 jury trials completed in the SDNY (76 civil and 55 criminal),⁶⁴ representing a decline of 56 percent in the EDNY and 55 percent in the SDNY from 1999 to 2015. In 2016, it was much the same story — 90 jury trials were completed in the EDNY, and 129 jury trials were completed in the SDNY.

The number of juries selected in the EDNY and the SDNY also confirms the diminishing trials occurring in these venues. In 1998, there were 232 juries selected in the EDNY (15.5 per judgeship) and 375 juries selected in the SDNY (13.4 per judgeship). By 2005, the figures were 184 (12.3 per

judgeship) and 234 (8.4 per judgeship), respectively.⁶⁵ The data for more recent years, shown in Appendix 5 below, indicate a continuing decline: In 2015, there were 127 juries selected in the EDNY (8.5 per judgeship) and 152 in the SDNY (5.4 per judgeship). In 2016, the numbers were down again: 123 juries (8.2 per judgeship) selected in the EDNY and 140 (five per judgeship) in the SDNY. Note, however, that the per-judge calculations exclude the trial contributions made by senior judges. Assuming (conservatively) that senior judges try cases at the minimum level of activity to which they must commit (i.e., one quarter of a normal schedule), the number of jury trials per active judge diminishes even more given the number of senior judges in each district.⁶⁶ Judicial vacancies could also impact the calculations.

While the number of trials continues to decline, the EDNY judges and the SDNY judges averaged 706 and 645 hours on the bench each year, respectively.⁶⁷ These are among the highest totals in the country.⁶⁸ Indeed, the district court judges in the Second

Circuit have more on-bench time than the district courts in any other circuit by a large margin.⁶⁹

The state court database — which only goes back a few years, unlike the federal data — shows that in 2015, 21 states, representing a significant portion of the country, reported data on total civil dispositions in courts of general jurisdiction, including the number of jury trials and bench trials.⁷⁰ Pennsylvania reported the highest civil jury trial disposition rate at 0.53 percent. Other large states reported low civil jury trial rates, including California (0.21 percent), Texas (0.47 percent), Florida (0.18 percent), and New Jersey (0.12 percent). These outcomes were consistent with results from prior years. In 2014, Alabama reported that 1.53 percent of civil dispositions were resolved in jury trials, and all other reporting states had lower civil jury trial rates. In 2013, 20 states reported civil disposition data in courts of general jurisdiction. No state had a civil jury trial rate higher than 0.62 percent (Nebraska), and fully 18 states reported jury trial rates of equal to or less than 0.55 percent, including Pennsylvania (0.55 percent), Texas (0.47 percent), Michigan (0.47 percent), Ohio (0.38 percent), Florida (0.20 percent), and California (0.18 percent). In 2012, 20 states reported civil disposition data. Only New York, separately discussed below, had a civil jury trial rate greater than 1 percent.⁷¹

Civil bench trials are also declining, except in those states still experiencing the effects of the mortgage crisis. For example, in 2015, in states such as Pennsylvania (1.5 percent), New Jersey (0.95 percent), and Connecticut (0.36 percent), the civil bench trial rates were low; but in states such as Florida (10.05 percent), California (11.92 percent), and Texas (14.34 percent) the rates were much higher, reflecting significant real estate foreclosure activity.

In criminal cases, the jury trial rates for four large states (California, Florida, Pennsylvania, and Texas) during the last

**APPENDIX 3
COMPLETED TRIALS IN THE
EDNY AND SDNY IN SELECTED YEARS**

YEAR	EDNY	SDNY
1997	551	742
2000	502	528
2005	240	433
2010	326	268
2011	353	267
2012	290	449
2013	275	385
2014	252	432
2015	251	382
2016	239	424

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**APPENDIX 5
NUMBER OF JURIES PER ACTIVE DISTRICT COURT JUDGE
IN THE EDNY AND SDNY PER YEAR (2010-2015)**

YEAR	EDNY JURIES / PER ACTIVE JUDGE	SDNY JURIES / PER ACTIVE JUDGE
2010	150 / 10	182 / 6.5
2011	150 / 10	177 / 6.3
2012	157 / 10.5	160 / 5.7
2013	147 / 9.8	141 / 5
2014	133 / 8.9	177 / 6.3
2015	127 / 8.5	152 / 5.4
2016	123 / 8.2	140 / 5

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STATE COURTS

The data concerning state court trial activity are neither as comprehensive nor as current and consistent as the federal court data. The leading resource for state court data is the National Center for State Courts.

four years are set forth in Appendix 6 (at right). The jury trial disposition rate was less than 2 percent in all four states and less than 1 percent in California. Trials in felony cases typically occur more frequently than in cases involving misdemeanors, which is consistent with research suggesting that cases involving larger potential penalties are less likely to be resolved through plea bargaining.⁷²

New York State

In 2012, the most recent year for which comprehensive civil case statistics are available, the general jurisdiction courts of New York disposed of 177,457 civil cases.⁷³ Slightly more than 2,000 of these cases were tried to a jury, representing 1.15 percent of all civil dispositions. There were also 1,430 bench trials, representing 0.8 percent of all civil dispositions. Although tort cases accounted for 36 percent of the total civil dispositions, they represented 84 percent of the cases tried to a jury (1,724 out of 2,048). Still, the jury trial rate for tort cases as a group was slightly less than 3 percent. Medical malpractice suits had the highest jury trial rate (5.9 percent), 277 jury trials out of 4,160 total dispositions.⁷⁴

The data for criminal cases in New York are both more current and complete than the data for civil cases in New York. But, once again, as depicted in Appendix 7 (next page), a picture of limited trial activity emerges with the jury trial disposition rate hovering around 3 percent or less. Consistent with other states, a slightly higher trial rate occurs in felony cases. Unlike most states, where criminal trials outnumber civil trials, there are significantly more civil trials than criminal trials in New York. In both civil and criminal cases, the trial rates in New York remain meaningfully higher than in the surrounding states of Connecticut and New Jersey, as

set forth in Appendix 8 (available online at <http://judicialstudies.duke.edu/judicature>). This differential arises in part by differences in case mix between New York and Connecticut and New Jersey.

CAUSES AND EFFECTS

There are many reasons why trials have declined to the extent described here. We outline some of those reasons below,

drawing heavily on prior work done by a number of leading academics and members of the judiciary.

With respect to civil trials, Yale Law School Professor John Langbein contends that litigants “no longer go to trial because they no longer need to.”⁷⁵ He believes, as do others,⁷⁶ that modern procedural rules have played a crucial role in rendering trials “obsolete” such that “pretrial civil procedure

**APPENDIX 6
CRIMINAL DISPOSITIONS AND JURY TRIALS
IN THE GENERAL JURISDICTION COURTS OF SELECTED STATES (2012-2015)**

YEAR	TOTAL CRIM. DISPOSITIONS	NUMBER OF JURY TRIALS	JURY TRIAL %
CALIFORNIA			
2015	982,595	7,679	0.78%
2014	997,288	8,267	0.83%
2013	981,264	8,176	0.83%
2012	1,016,505	7,789	0.77%
FLORIDA			
2015	166,456	3,054	1.83%
2014	176,258	3,163	1.79%
2013	184,195	3,436	1.87%
2012	187,305	3,406	1.82%
TEXAS			
2015	268,439	2,605	0.97%
2014	264,431	2,495	0.94%
2013	267,202	2,782	1.04%
2012	269,278	3,034	1.13%
PENNSYLVANIA			
2015	162,748	1,970	1.17%
2014	173,414	2,047	1.18%
2013	173,327	2,173	1.25%
2012	169,549	2,449	1.44%

has become nontrial civil procedure.”⁷⁷ Langbein believes that the expansive discovery provisions in the Federal Rules, and the emphasis on judicial case management and settlement contained in Rule 16 and elsewhere “have had the effect of displacing trial in most cases, causing ever more cases to be resolved in the pretrial process, either by settlement or by pretrial adjudication.”⁷⁸ Indeed, “precisely because discovery allows such far-reaching disclosure of the strengths and weaknesses of each side’s case, discovery often has the effect of facilitating settlement.”⁷⁹ This last conclusion is consistent with research demonstrating that predictability of outcome and cost have a great deal to do with whether a civil case settles.⁸⁰ Settlement is much more likely if both sides have similar expectations concerning the probability of liability and the amount of damages.⁸¹ To the extent that expansive discovery leads to greater

knowledge and predictability, it will normally facilitate settlement, particularly when judges have been directed by rule to encourage such outcomes.

Decisions rendered by the Supreme Court interpreting key provisions of the Federal Rules of Civil Procedure have almost universally tended to militate against the growth of trials. Many commentators identify 1986 as a pivotal year, because that is when the Supreme Court issued three decisions signaling that disposition by summary judgment should be more available than in the past.⁸² The message was clearly heard by the lower courts, as dispositions by summary judgment increased significantly thereafter.⁸³ Today, a case is much more likely to be disposed of by summary judgment than by trial.⁸⁴ “Because the very purpose of summary judgment is to avoid unnecessary trials, one need not be a trained logician to conclude that an increase in the avail-

ability of summary judgment will naturally have a corresponding negative impact on the number of trials.”⁸⁵

The Court’s summary judgment decisions were followed, several decades later, by multiple decisions that seemed to raise the pleading standards needed to state a viable civil claim, thus signaling greater receptivity to motions to dismiss.⁸⁶ That message was also heard — dispositions by motions to dismiss are now much more likely than dispositions by trial.⁸⁷ Some argue that the Supreme Court’s decisions assigning courts a more active gatekeeper role regarding experts have also tended to reduce trials.⁸⁸

Moreover, expansive discovery under the Federal Rules became expensive discovery, especially following the advent of email and other electronic documents, which also motivates parties to settle rather than try cases, particularly in commercial disputes.⁸⁹ Expansive discovery often leads to delays that also increase the likelihood of settlement by reducing the stakes (and hence value) of a case.⁹⁰

In recent years, many consumer contracts have been drafted in ways that seek to eliminate the right to trial or class treatment.⁹¹ Once again, the Supreme Court has been quite receptive to these efforts.⁹² Even if that were not so, there can be little doubt that the small size of many disputes, and the prohibitive costs of hiring a lawyer to handle those disputes, have contributed to the decline of trials. The number of *pro se* litigants has increased dramatically in recent years. As Judge Jed Rakoff of the SDNY observes, many litigants cannot afford a lawyer.⁹³ And *pro se* litigants are among the least likely to proceed to trial, presumably because they lack an understanding of how to try a case.⁹⁴

The availability of alternative dispute resolution, and its embrace by the courts, also has played a very significant

APPENDIX 7
NUMBER OF CRIMINAL DISPOSITIONS AND TRIALS IN NEW YORK STATE
GENERAL JURISDICTION COURTS (2012 - 2015)

ALL TRIALS

YEAR	TOTAL CRIM. DISP	NO. OF JURY TRIALS	JURY TRIAL %	NO. OF BENCH TRIALS	BENCH TRIAL %
2015	47,274	1,381	2.92	395	0.84
2014	50,205	1,508	3.0	369	0.73
2013	56,741	1,687	2.97	422	0.74
2012	86,786	1,686	1.97	648	0.75

FELONY TRIALS ONLY

YEAR	TOTAL CRIM. DISP	NO. OF JURY TRIALS	JURY TRIAL %	NO. OF BENCH TRIALS	BENCH TRIAL %
2015	43,498	1,371	3.2	365	0.8
2014	46,331	1,495	3.2	348	0.8
2013	50,140	1,674	3.3	371	0.7
2012	49,417	1,645	3.3	411	0.8

role in the diminishing trial phenomenon.⁹⁵ ADR gained traction just as the judiciary was being encouraged, by rule and otherwise, to become more involved in managing cases and controlling dockets. Inevitably, “managing cases” seems to translate into pushing settlements or other nonlitigated case resolutions.⁹⁶

Also relevant to the disappearance of trials is the longstanding distrust of juries, particularly among corporate defendants.⁹⁷ Vanderbilt Law Professor Amanda Rose has suggested that in complex trials “the size of the potential liability, combined with the uncertainty of outcome, make trial simply too great a risk from the viewpoint of corporate defendants and those that advise them.”⁹⁸ Indeed, of the more than 4,300 securities class actions filed since 1995, only 15 (less than three-tenths of one percent) have been tried to judgment.⁹⁹

The prospect of punitive damages also leads defendants, especially corporations, to avoid trials.¹⁰⁰ The outcome in *Pennzoil v. Texaco* made very clear to management and shareholders the dangers of “rolling the dice” in a large case with a punitive damages claim. In *Pennzoil*, a Texas state court jury returned a verdict that was “twenty-five times greater than [trial counsel’s] likely ‘worst case scenario’ and five times greater than [counsel’s] estimated ‘complete runaway.’”¹⁰¹ The need to bond the judgment forced the bankruptcy of one of the largest oil companies in the world and the loss of billions of dollars in shareholder value, even though the judgment was ultimately settled for a fraction of the original amount. But the lessons of that

case, particularly for inside and outside counsel, will not be soon forgotten.

It is also important to recall that the completion of a trial does not necessarily conclude a case. Furthermore, cases that go to trial are much more likely to

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be appealed than those disposed of by other means.¹⁰² So, if finality is important to a party, trial is not the preferred way to proceed.

There is a “self-perpetuating” and “self-fulfilling” feature to the disappearing trial.¹⁰³ University of Wisconsin Law Professor Marc Galanter describes this phenomenon: “As lawyers who ascend into decision-making positions have less trial experience, the discomfort and risk of trials looms large in their decisions. Judges, too, accumulate less

experience and, in many cases, less appetite for trials.”¹⁰⁴

Thus, in a real sense, the more trials disappear, the less likely it is that they will reappear in the future¹⁰⁵ absent some sort of systemic change.¹⁰⁶ While there are certainly improvements that can be made to the trial process, thereby making it marginally more attractive,¹⁰⁷ those changes seem unlikely to alter the prevailing landscape in a meaningful way. While changing the Rules of Civil Procedure might reverse the trend towards dispositions by motion, it would not deter those otherwise preferring to settle rather than proceed to trial.

Many of the reasons trials have diminished in civil cases apply equally to criminal cases (e.g., cost considerations, risk elimination). But one cause unique to criminal cases is the introduction of sentencing guidelines and the rise of prosecutorial discretion. In the federal courts, these guidelines explicitly offer an incentive to avoid trial in the form of an offense level reduction for “acceptance of responsibility.” Moreover, busy prosecutors are often willing, as part of the plea negotiating process, to agree to guideline levels lower than would otherwise be the case. Judge Young reports that sentences following convictions at trial are five times larger than sentences received by those who plead guilty pursuant to a cooperation agreement with the government.¹⁰⁸ This disparity strongly motivates many criminal defendants to “cop a plea.”¹⁰⁹

DOES IT MATTER?

Some have suggested that the “disappearance of the American trial presents

a major crisis for the legal profession.”¹¹⁰ But this assessment seems overstated. To be sure, the continuing disappearance of trials impacts those who actually try cases, aspire to do so, or provide trial support. However, that impact does not affect a significant percentage of the profession (and has not for quite some time, given the long-term trends).¹¹¹ While the lack of trials also poses questions about courthouse resource allocations, those sorts of issues can be addressed with greater planning.¹¹²

And, it is important to remember that while trials may be diminishing, the right to trial is not being eliminated, nor could it be, under the Sixth and Seventh amendments to the Constitution. The option of trial remains available to those who wish to make use of it (and who have not otherwise bargained it away, contractually or as part of a plea deal). Increasingly, though, litigants are choosing not to pursue a trial for many of the reasons mentioned above.

Some have suggested that trials, especially jury trials, perform a valuable role in a democracy, allowing for direct citizen participation and decisionmaking.¹¹³ For example, Northwestern Law Professor Robert Burns argues that the reduction in trials reduces “the space for effective speech,” eliminates a source of public information, and abandons “an important vehicle for citizen self-governance.”¹¹⁴ Even accepting all that, does anyone seriously believe that parties who do not want to go to trial should be forced to do so in order to promote greater democracy? And, while there may be some citizens who will be genuinely disappointed if they do not get a chance to serve on a jury, they may well be a distinct minority.¹¹⁵

Another weighty concern is how the disappearance of trials impacts the development of the law itself. There are several aspects to this issue. First, there

is the danger that law developed only through motions “will be arid, divorced from the full factual content that has in the past given our law life and the capacity to grow.”¹¹⁶ Of course, conceding that the law may develop differently does not necessarily mean it will be less worthy in a qualitative sense. And once again, can the remedy really be to compel parties to pursue a path they otherwise are not inclined to follow? Second, the diminishing number of trials will no doubt produce less law relating to the types of issues that arise at trial. This, in turn, may lead to greater uncertainty about trial outcomes and substantive law.¹¹⁷ To the risk-averse who walk corporate hallways, such a development might promote more, rather than fewer, settlements. Third, the lack of trials also means there are fewer actual verdicts to serve as markers or data points for valuing claims.¹¹⁸ But, once again,



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this is not a new development. Cases increasingly have been settled based on a “settlement market,” rather than on actual verdicts. Whether such an approach produces optimal resolutions is a different (and far more complicated) question.¹¹⁹ Ultimately, parties decide whether, and to what extent, trials are worth pursuing compared to other types of disposition. In almost all cases, disputes are now resolved without resorting to trial because that is what the parties prefer based on economic and other considerations. And that seems unlikely to change any time soon.

This article, along with additional data, may be found on Judicature’s website at judicialstudies.duke.edu/judicature.

¹ Trials were at one time “the central institution of the law.” Robert P. Burns, *What Will We Lose If the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575, 578 (2011) [hereinafter Burns, *What Will We Lose*]. This unique status is evident in the text of the Constitution and the rules governing civil and criminal procedure. Indeed, “the entire structure of civil procedure has been built up as a path to an adversary trial.” Robert P. Burns, *Advocacy in the Era of the Vanishing Trial*, 61 U. KAN. L. REV. 893, 895 (2013) [hereinafter Burns, *Advocacy*].

² MARC GALANTER & ANGELA FROZENA, POUND CIVIL JUSTICE INST., *THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS* 23 (2011) (stating that civil trial is “approaching extinction”); Burns, *What Will We Lose*, *supra* note 1, at 576 (arguing that “death” of trial “is not too strong a word”); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142 (2002) (noting that “civil trial has all but disappeared”).

³ *Civil Jury Trials in State and Federal Courts*, 6 Nat’l Ctr. St. Cts. 1, 1 (2007). Cases that are not voluntarily dismissed or resolved by motion are typically settled, when all parties “believe[] the value of doing so is superior to that of available alternatives.” Stephen M. Bundy, *Commentary on “Understanding Pennzoil v. Texaco”: Rational Bargaining and Agency* ▶

- Problems*, 75 VA. L. REV. 335, 337 (1989). Settlement is “the civil analogue of plea bargaining.” Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). In civil cases, trials are most likely to occur when (1) the cost of trial is not large, (2) crucial facts remain uncertain, (3) the applicable law and standards of conduct are unclear or (4) at least one of the parties wants to secure a litigated judgment. Bundy, *supra*, at 338. Criminal cases are most likely to go to trial where there is a significant disagreement over the probability of convictions and when potential penalties are severe. William Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 75 (1971).
- ⁴ It is ironic that “the trial shrinks institutionally at a time when law and legal institutions play a larger role in public consciousness — not least in the form of news coverage and fictional depictions of trials in television, movies and books.” Galanter & Frozena, *supra* note 2, at 27. While there are many memorable films about trials such as *To Kill a Mockingbird*, *12 Angry Men*, and *My Cousin Vinny*, television writers and producers seem particularly enamored with trials. In addition to the enduring *Law and Order*, where more trials occur each season than most federal judges will preside over in a decade (*see infra*), new fictional shows in which trials play a prominent role include: *Chicago Justice*, *The Good Friend*, *How to Get Away with Murder*, *Doubt*, and the aptly-named, *Bull*.
- ⁵ Trials remain a frequent focus in literary fiction. Examples include *The Fix* by David Baldacci, *Testimony* by Scott Turow, and *Runaway Jury* by John Grisham.
- ⁶ While many publications appear oblivious to the disappearance of trials, some have identified and commented on the trend. *See, e.g.*, Benjamin Weiser, *Trial by Jury, A Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html?mcubz=0&r=0>. The trade press is more aware of the issue. *See* Erin Coe, *Can the Legal Industry Keep Trial Advocacy Alive?*, LAW360 (Mar. 13, 2017), <https://www.law360.com/articles/899956>. Media coverage of those trials that do occur is often extensive, especially high profile criminal cases and civil cases in which plaintiffs secure large judgments. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1267 (2005); *see generally* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237.
- ⁷ Recently retired Southern District of New York District Judge Shira Scheindlin observed that “trials are way, way down” and described the 27-story, 974,000-square-foot Moynihan courthouse in Manhattan as “quite dead.” Debra Cassens Weiss, *Criminal Trials Have Become So Scarce That Federal Judge Had Only One in His 4 Years on the Bench*, A.B.A. J. (Aug. 11, 2016). Many federal judges have written extensively about the decrease in trials, including Jed S. Rakoff, Royal Furgeson, William S. Young, Patrick Higginbotham, Mark Bennett, and Patricia Wald. Those judges who worry the most about the disappearance of trials tend to be among the biggest supporters of the work done by juries. *See, e.g.*, Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY’S L.J. 795, 798–811 (2009).
- ⁸ One court reporter in the Southern District of New York reports being unable to send her children to camp due to a lack of trial activity. Weiser, *supra* note 6.
- ⁹ Trial lawyer Stephen Susman is particularly committed to this topic, underwriting the Civil Jury Project at The New York University School of Law. Debra Cassens Weiss, *NYU Law School Will Research Decline in Civil Jury Trials with \$2M Gift*, A.B.A. J. (July 29, 2015). He despairs about the “empty hallways and dark courtrooms in most courthouses in the country.” Stephen D. Susman, “Disappearing Civil Trials,” Address at 35th Annual Conference of American Society of Trial Consultants (May 20, 2016), at 8.
- ¹⁰ While there are many distinguished academics who have written about diminishing trials, many of whom are cited here, the most prolific author is undoubtedly Professor Marc Galanter who, alone and with others, has made major contributions to the field.
- ¹¹ This is not to say, of course, that differences do not exist. For example, criminal defendants remain more likely to proceed to trial than civil defendants. In federal court, there are more jury trials than bench trials, but the opposite is true in many state courts. In both federal and state courts, tort claims are more likely to go to trial than contract claims.
- ¹² GALANTER & FROZENA, *supra* note 2, at 2.
- ¹³ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 464 (2004).
- ¹⁴ GALANTER & FROZENA, *supra* note 2, at 4, fig.2.
- ¹⁵ Galanter, *supra* note 13, at 461.
- ¹⁶ Figures on the number of trials are derived from Table C-4 of the Annual Reports of the Administrative Office of the U.S. Courts [hereinafter, Annual Reports of the A.O.].
- ¹⁷ GALANTER & FROZENA, *supra* note 2, at 23.
- ¹⁸ Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014). <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.
- ¹⁹ *Id.*
- ²⁰ Annual Reports of the A.O., tbl.D-4.
- ²¹ William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 76 (2006).
- ²² Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7, 9 (estimating that 98 percent of trials take place in state courts); Brian J. Ostrum et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 757 (2004) (finding state courts of general jurisdiction resolve 28 times as many civil cases and 82 times as many criminal cases as in the federal courts).
- ²³ *See, e.g.*, Jed S. Rakoff, *Why You Won't Get Your Day In Court*, N.Y. REV. BOOKS (Nov. 24, 2016) <http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/> (noting that “fewer than 1 percent” of state court cases go to trial).
- ²⁴ Galanter, *supra* note 13, at 507, tbl.4.
- ²⁵ *Id.* at 512 tbl.7.
- ²⁶ Ostrum et al., *supra* note 22, at 768.
- ²⁷ *Id.* at 771–72.
- ²⁸ *See* Susman, *supra* note 9, at 5.
- ²⁹ *See* Galanter, *supra* note 22, at 7–8 n.1; *see generally* Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials,”* 62 DEPAUL L. REV. 415 (2013).
- ³⁰ Kritzer, *supra* note 29, at 423.
- ³¹ Commentators have called this definition a “linguistic sleight of hand,” emphasizing that it overstates the number of “actual trials” by “as much as one-third.” Jordan M. Singer & William G. Young, *Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012*, 118 PENN ST. L. REV. 243, 254–55 (2013).
- ³² For example, a civil case might have both a “Daubert” trial and a merits trial. Similarly, a criminal case might have a motion to suppress

trial, a liability trial, and a sentencing trial.

³³ Another problem with the federal statistics is a lack of consistency and continuity in how terms are defined and what they measure.

³⁴ Galanter, *supra* note 22, at 7 n.1.

³⁵ Burns, *What Will We Lose*, *supra* note 1, at 577.

³⁶ There are comprehensive, readily available data concerning federal court dispositions beginning in 1962. Much of the historical data were assembled by Professor Galanter as part of the Vanishing Trials Project of the ABA Litigation Section. They can be found in various tables and appendices included in *The Vanishing Trial*, *supra* note 13.

³⁷ There were more bench trials (3,037) than jury trials (2,765). This pattern continued until 1987 when, for the first time, jury trials exceeded bench trials. Today, civil jury trials occur twice as frequently as bench trials, which have constituted less than 1 percent of total civil dispositions every year since 1998. The growth of alternate dispute resolution providers, many of whom include well respected former judges who can be consensually selected by the parties, likely impacted the continuing demand for bench trials.

³⁸ There were more jury trials (2,710) than bench trials (2,387) in criminal cases; this has been true in each successive year, although the differential has grown over time.

³⁹ Galanter, *supra* note 13, at 532 tbl.A-1, 534 tbl.A-2.

⁴⁰ *Id.*, at 554, tbl.A-17.

⁴¹ Annual Reports of the A.O., tbl.T-1 (9/30/97, 9/30/05, 9/30/16).

⁴² *Id.* at tbls.T-1 & T-4.

⁴³ *Id.* at tbls.T-1 & T-4.

⁴⁴ *Id.* at tbl.T-1.

⁴⁵ *Id.* at tbl.T-1.

⁴⁶ *Id.* at tbl.C-4.

⁴⁷ *Id.* at tbl.C-4.

⁴⁸ *Id.* at tbl.D-4. For example, in 2002 the cases of 78,835 criminal defendants were resolved. A jury trial occurred in 2,671 of the cases (3.4 percent). In 2016 the cases of 77,318 criminal defendants were resolved. A jury trial occurred in 1,627 cases (2.1 percent). The absolute decrease in criminal trials during this shorter period was 39 percent.

⁴⁹ Due to mid-trial settlement, an unknown number of those juries did not end up ever reaching a verdict.

⁵⁰ Susman, *supra* note 9, at 5.

⁵¹ *Id.*

⁵² *Id.* at 6.

⁵³ *Id.* There are also far fewer lengthy trials than in the past. For example, in 1990 there were 195 federal trials that lasted at least 20 days. In 2016, there were just 48 trials that lasted 20 days or longer, a 75 percent decrease. Similar decreases were observed for trials lasting 10 to 19 days (636 versus 284, 55 percent decrease) and those lasting 4 to 9 days (4086 versus 1777, 57 percent decrease). Annual Reports of the A.O., tbl.T-2.

⁵⁴ Singer & Young, *supra* note 31, at 258–78.

⁵⁵ *Id.* at 259. Between 2008 and 2013, district court judges “spent less than two hours a day on average in the courtroom, or about 423 hours of open court proceedings per active district judge.” Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2935 (2015) (quotation omitted). The most active district, the Eastern District of California, reported 736 hours per district court judge per year.

⁵⁶ Singer & Young, *supra* note 31, at 247.

⁵⁷ These trial statistics are inflated because they do not reflect the contribution of senior judges who play an important and increasing role in the district courts. In 1980, there were only 80 senior judges, one for every 4.8 active judges. Since 1990 the number of senior district court judges has increased by 97 percent. In 2002, there were 285 senior judges, one for every 2.2 active judges. In 2015, there were 319 senior judges, one for every 2.1 active judges. In 13 districts, senior judges outnumber active judges, and as a group they represent 30 percent of total trial court capacity. Annual Reports of the A.O., tbl.1.1.

⁵⁸ Many judges regret being “in chambers all day long.” Weiser, *supra* note 6.

⁵⁹ See GALANTER & FROZENA, *supra* note 2, at 11. In 2016, prisoner petitions were 13 percent of all civil trials. See Annual Reports of the A.O., tbl.C-4.

⁶⁰ See, e.g., Sindhu Sundar, ‘Judicial Emergencies’ Near Breaking Point As Nominees Languish In Congress, LAW360.com (Nov. 28, 2016) (“SDNY bench . . . work[s] 10-hour-a-day schedules for 6 1/2 days a week”).

⁶¹ Indeed, at one-time senior judges in the EDNY carried higher caseloads than the active judges. Hon. Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Misunderstandings*, 92 CORNELL L. REV. 533, 540 (2007).

⁶² See Appendix 3. Although the overall trend is evident, there is significant year-to-year variability in data, especially in the SDNY, with this particular metric.

⁶³ If anything, these districts appear to have experienced an even greater reduction in trials than the national average. One judge in the SDNY reports presiding over only one criminal trial in four years. Weiser, *supra* note 6.

⁶⁴ Annual Reports of the A.O., tbl.T-1. During the period 2010–2014, there were more civil jury trials conducted every year in the EDNY than the SDNY. Likewise, during the period 2009–2011, there were more criminal jury trials conducted every year in the EDNY than in the SDNY.

⁶⁵ Annual Reports of the A.O., tbl.J-2.

⁶⁶ See Annual Reports of the A.O., tbl.J-2. Nationwide, senior judges appear to reduce their workloads by 50 percent. Block, *supra* note 61, at 545. But, in the EDNY, senior judges have carried a greater share of cases than active judges during some reporting periods. *Id.* at 540.

⁶⁷ Singer & Young, *supra* note 31, at 263 tbl.2.

⁶⁸ Once again, these figures are somewhat overstated because they fail to account for the efforts of senior judges, many of whom remain fully engaged despite having assumed a new status. See *supra* note 31.

⁶⁹ Singer & Young, *supra* note 31, at 266, tbl.3 (providing that the judges in the Second Circuit record an average of 612.53 hours and the judges in the next highest circuit, the Seventh Circuit, average 476.07 hours).

⁷⁰ Eighty percent of the plaintiffs in civil cases are individuals. Fifty percent of the defendants in civil cases are individuals.

⁷¹ Roughly 60 percent of all state court trials involve tort claims, and 90 percent of these trials are decided by juries. The prevalence of jury trials is particularly pronounced in employment discrimination (91 percent) and medical malpractice (99 percent) cases. Plaintiffs’ tendency to prefer jury trials is somewhat surprising given that they actually prevail more often in bench trials (66 percent) than jury trials (53 percent). Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts*, 2005, BUREAU JUST. STAT. SPECIAL REP. 2 (Oct. 2008) (rev. Apr. 9, 2009), <https://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf>. A partial explanation may be found in the fact that, on average, juries give larger awards in all types of cases. *Id.*

- ⁷² See Landes, *supra* note 3, at 99.
- ⁷³ See National Center for State Courts, *2012 Civil Caseloads – Trial Courts*, http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro (last visited Nov. 10, 2017).
- ⁷⁴ More recent data on total civil dispositions are not available. However, the data for tort cases in 2013, 2014, and 2015 indicate jury trial rates of 2.7 percent, 3 percent, and 2.5 percent, respectively.
- ⁷⁵ John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569 (2012).
- ⁷⁶ See, e.g., 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).
- ⁷⁷ Langbein, *supra* note 75, at 526. Thus, the rules of procedure provide a path to a trial that almost never occurs.
- ⁷⁸ *Id.*
- ⁷⁹ *Id.* at 548; accord Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295, 295 (1989) (“[R]ules and procedures used inside the court [affect] bargains reached outside the court[.]”).
- ⁸⁰ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 3–6 (1984) (well developed law promotes settlement). Conversely, “an increase in uncertainty is likely to reduce the probability of a settlement.” Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 421 (1973).
- ⁸¹ See, e.g., Landes, *supra* note 3, at 101.
- ⁸² See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).
- ⁸³ See, e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 527 (1991) (“The Supreme Court’s 1986 trilogy of summary judgment cases is widely viewed as having made summary judgment more readily available . . .”); Burns, *What Will We Lose*, *supra* note 1, at 577 (citing study of six district courts that found that “in 1975 twice as many civil cases were resolved after trial than by summary judgment; by 2000 . . . three times as many cases were resolved by summary judgment than by trial”).
- ⁸⁴ *Id.*
- ⁸⁵ Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1335 (2005); accord Miller, *supra* note 76. According to one study, when summary judgment motions are denied, 25 percent of the cases settle within a month and 40 percent settle within 90 days. Singer & Young, *supra* note 31, at 277.
- ⁸⁶ See *Asbcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
- ⁸⁷ See Annual Reports of the A.O., tbl.C-4; see also Miller, *supra* note 76, at 984.
- ⁸⁸ Hon. Jennifer Walker Elrod, *Is The Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH. L. REV. 303, 318 (2012).
- ⁸⁹ John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 556, 564 (2010) (noting that the drafters of the Federal Rules in 1938 believed that liberal pretrial discovery would “reduce litigation costs” but that electronic discovery “significantly increased the volume and cost of discovery”); Rakoff, *supra* note 23.
- ⁹⁰ Posner, *supra* note 80, at 420.
- ⁹¹ See generally Resnick, *supra* note 55; Young *supra* note 21, at 77–78.
- ⁹² In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court upheld arbitration clauses in consumer contracts waiving the right to bring class action claims. The case has been widely criticized by academics and members of the judiciary. See, e.g., Resnick, *supra* note 55.
- ⁹³ Rakoff, *supra* note 23.
- ⁹⁴ Judge Rakoff reports that “today as many as two thirds of all individual civil litigants in state trial courts are representing themselves, without a lawyer.” Rakoff, *supra* note 23.
- ⁹⁵ See generally Resnick, *supra* note 55.
- ⁹⁶ Judge Mark W. Bennett has suggested that “federal trial court judges place far too much pressure far too often on litigants and lawyers to settle their cases,” thereby resulting in the “vanishing civil jury trial.” See Hon. Mark W. Bennett, *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 308 (2005).
- ⁹⁷ Elrod, *supra* note 88, at 318. There continues to be much debate about the competence of juries. See, e.g., Amanda M. Rose, *The “Reasonable Investor” of Federal Securities Law: Insights from Tort Law’s “Reasonable Person” & Suggested Reforms* 13 (Vanderbilt Law Research Paper No. 17-05, 2016) (arguing that “lay juries are poorly equipped to judge the reasonableness of conduct [in certain types of cases] because they lack relevant personal experiences or background social norms upon which to draw”). Studies have shown that “judges agree with jury verdicts roughly 75% to 80% of the time.” Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 63, 64 (2011); see also Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171 (2005). But, research also “finds that juries treat corporate actors differently” by “setting higher standards for corporate and professional behavior.” Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 227 (2008); see also Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 414, 427–29 (Jennifer Arlen ed., 2013). That may be why many law firm engagement agreements specify alternative dispute resolution rather than resolution in court, much less by a jury.
- ⁹⁸ Rose, *supra* note 97, at 34 n.131. In large cases, “small differences in the parties’ expected outcomes produce large disparities in the expected value of the claim.” Bundy, *supra* note 3, at 338. A number of courts have observed that granting class certification in cases involving large potential damages creates a situation where defendants must “stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.” *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).
- ⁹⁹ Of course, “stakes in securities class actions are dramatically higher than the stakes in traditional tort cases.” Rose, *supra* note 97, at 46.
- ¹⁰⁰ While the Supreme Court has clarified the law relating to punitive damage in some respects, the Court has declined to provide specific constitutional limitations or to establish any sort of formula for determining permissible punitive damages. See, e.g., *State Farm Mut. Ins. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). The Court has stated, however, that “single-digit multipliers are more likely to comport with due process” and that “when compensatory damages are substantial, then a lesser ratio” may be more appropriate. *State Farm*, 538 U.S. at 425.

¹⁰¹Bundy, *supra* note 3, at 343.

¹⁰²Cases that do proceed to trial are appealed at four times the rate of cases terminated without trial. Galanter, *supra* note 13, at 505.

¹⁰³Burns, *Advocacy*, *supra* note 1, at 893 (identifying as a “cause[] for the death of the trial” the “sharp decline in trial skills among bar members and the resulting aversion to bringing cases to trial”).

¹⁰⁴GALANTER & FROZENA, *supra* note 2, at 23.

¹⁰⁵See Bennett, *supra* note 96, at 307 (“What does it say about trial practice that many partners in litigation practices of small, mid-sized, and large law firms haven’t actually tried a jury trial in years?”).

¹⁰⁶Burns suggests that “[u]ltimately, appellate courts, trial courts and legislatures will decide whether to take the steps necessary to preserve the trial.” Burns, *Advocacy*, *supra* note 2, at 899. But this is true only in part. While courts and legislatures may fashion rules to make trials more likely (for example, by making motions for summary judgment less likely to be granted), they cannot compel parties to try cases that they otherwise want to settle or resolve by a plea.

¹⁰⁷Judge Bennett, and others, have described a number of these initiatives. See Hon. Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: WWJW—What Would Jurors Want?—A Federal Trial Judge’s View*, 38 ARIZ. ST. L.J. 481 (2016); see also Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995).

¹⁰⁸Young, *supra* note 21, at 74.

¹⁰⁹“Trials are the system’s Potemkin village, a piece of pretty scenery for display on Court TV while real cases, and lives, are disposed of more casually off-camera.” William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 817 (2006).

¹¹⁰Burns, *What Will We Lose*, *supra* note 1, at 575.

¹¹¹Given the limited number of trials that actually occur, it is puzzling that law schools and law firms continue to devote so many resources to teaching trial advocacy. As one veteran trial lawyer aptly observed, teaching trial advocacy has become like “teaching dinosaur hunting.” Susman, *supra* note 9, at 1.

¹¹²For example, if judges are on the bench less than two hours a day, and trials occur so infrequently, how many courtrooms are necessary and what technology should be placed in those courtrooms?

¹¹³Young, *supra* note 21, at 70; see also Hon. Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002).

¹¹⁴Burns, *What Will We Lose*, *supra* note 2, at 589.

¹¹⁵Very few people actually want to serve on juries, especially if a case seems likely to be lengthy. According to the National Center for State Courts, approximately 9 percent of the people summoned to serve on juries in state court fail to appear. Johnny Edwards, *Judges: This Time, We’re Serious About Jury Duty Crackdown*, ATLANTA J. CONST. (May 2, 2012), <http://www.ajc.com/news/local/judges-this-time-serious-about-jury-duty-crackdown/K8tyKEFgMdCns568s5MEVJ/>.

¹¹⁶Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 590, 624–26 (2004). Deciding cases on motion rather than following trial “pulls the actual decision in the case away from the reality of what has occurred.” Burns, *Advocacy*, *supra* note 1, at 902. Judge

Wald observed almost 20 years ago that “[f]ederal jurisprudence is largely the product of summary judgment” Hon. Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998).

¹¹⁷Rose, *supra* note 97, at 56 (expressing concern that excessive settlement would “stunt the development of clarifying precedent” of substantive law).

¹¹⁸Normally, a system “in which settlement is the dominant mode of dispute resolution, relies on the results of the adjudicatory processes of trial and appeal to produce precedents which serve as guides to settlement.” Kevin C. McMunigal, *The Cost of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 856 (1990); see also Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

¹¹⁹For example, Professor Janet Cooper Alexander contends that the settlement amounts in securities class actions have little to do with the actual merits of the claims. See generally Alexander, *supra* note 83.

