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‘A grin without a cat’: Civil Trials in the Federal Courts[♦]Marc Galanter[♦] and Angela Frozena[♥]

...and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!'¹

The recent data on federal civil trials can be summed up in two stories: *no news* and *big news*.² The *no news* story is that the trend lines regarding trials are unchanged. The *big news* story is that the civil trial is approaching extinction. Let's look at the data first, then at some of their implications.

1. More and More Less and Less

There are two components to the major trend lines about trials. First, the century-long decline in the *portion* of cases terminated by trial; second, the 25 year decline in the *absolute number* of civil trials. Let us start with the latter:

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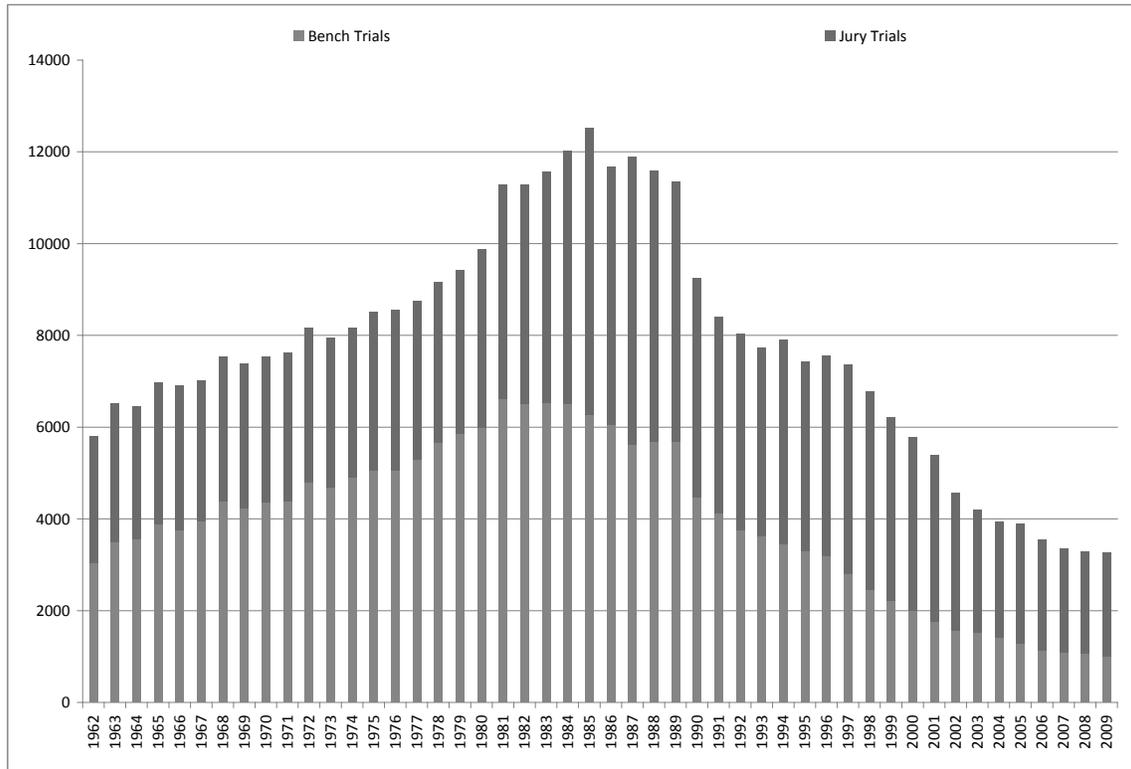
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¹ Lewis Carroll, *Alice in Wonderland* (1867), chap. 6.

² In this paper we review data on civil trials in the federal courts. So far as we can tell, much the same story of continued absolute and percentage decline of trials could be told about federal criminal cases and about civil cases in the state courts. MORE?

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Fig 1. Number of civil trials, U.S. district courts, by bench or jury, 1962-2009



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The absolute number of civil trials continues to decline.³ In 2009 there were just 3271 trials commenced in the district courts.⁴ This is roughly half the number of trials commenced ten years earlier (6228 in 1999). It is 44% less than the number of trials (5802) in 1962, when there were about one fifth of the total number of cases terminated in the district court.⁵ In other words, the ratio of trial to filings is about one-twelfth what it was in 1962.

The count of trials displayed in Figure 1 is, in two separate ways, a very generous count of trials. First, it is based on a very broad definition of trial as “a contested proceeding before a jury or court at which evidence is introduced,”⁶ a standard that allows more than one trial in a given case. Second, the “during and after” number includes all cases that reach the trial stage, not just those that complete it. Figures for the

³ Note on the apparent jump in 2006 and 2007 due to misreporting of aggregate cases in Middle District of Louisiana..

⁴ This is the long-standing count in Table C-4 of cases that terminate “during or after trial.” In Table T-1 (which has been published since _____) there is an additional column added to Jury and Nonjury trials “On the Issue” in computing the total of civil trials. That additional column is “Motions, Injunctions, and Other” which is explained in a note as “contested hearing on motions for preliminary injunctions, temporary restraining orders, evidence or other matters not resulting in a final judgment or verdict..” The count of these Motions, etc has been rising in the most recent years, both absolutely and as a percentage of the total trials reported in T-1.

Year	Jury Trials on Issue	Nonjury Trials on Issue	Total Jury and nonjury (TJN)	Motions, Injunctions and Other (MIO)	Grand Total including MIO (GT)	MIO as % of Grand Total	MIO as % of TJN	
2009	2138	1026	3144	2145	5309	40.4	68.2	
2008	2175	1069	3244	2039	5283	38.6	62.9	
2007	2269	1118	3387	2213	5600	39.5	65.3	
2006	2097	1114	3211	1910	5121	37.3	59.5	
2005	2312	1375	3687	1607	5294	30.1	43.6	
2004	2411	1386	3797	1695	5492	30.9	42.3	
2003	2603	1433	4036	1794	5830	30.8	44.4	
2002	2650	1469	4119	1896	6015	31.5	46.0	
2001	2980	1490	4470	2043	6513	31.4	45.7	
2000	3404	1730	5134	2799	7933	37.5	54.5	
1999	3795	1929	5724	2808	8532	32.9	49.0	
1998	4125	2148	6273	3076	9349	32.9	49.0	
1997	4491	2380	6871	3284	10,155	32.3	47.8	

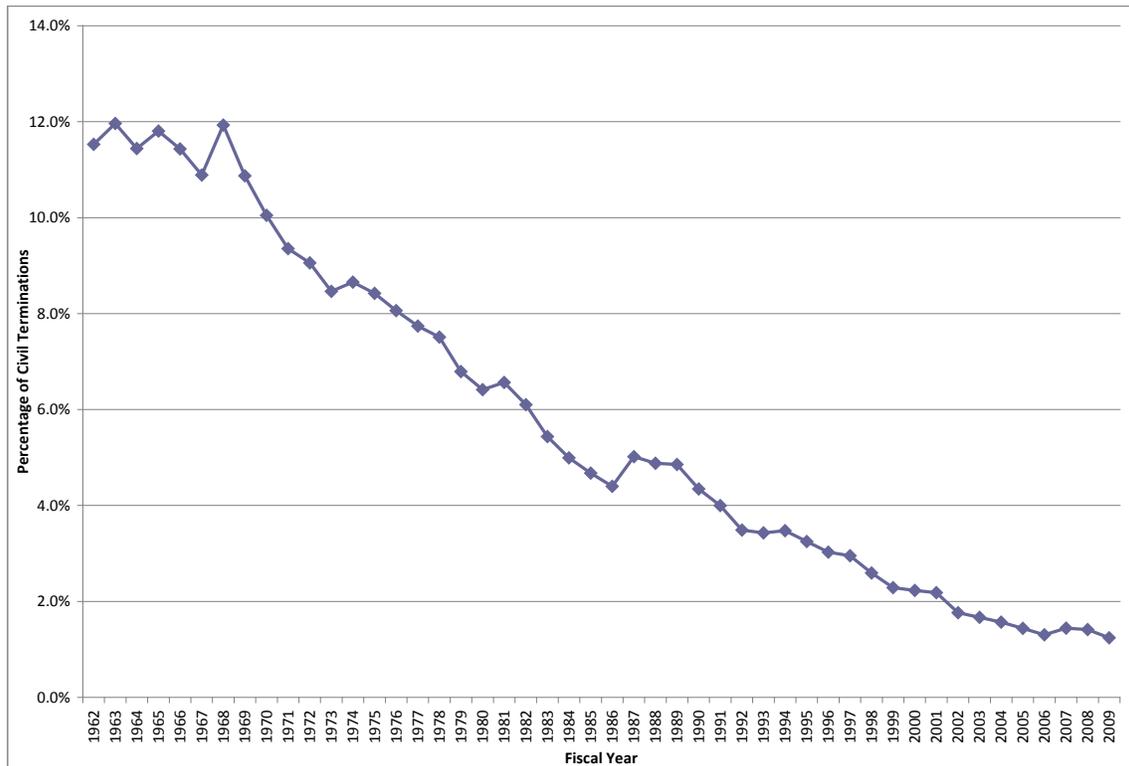
⁶ AO Form JS-10

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years up to 2002 indicated that nearly one-fifth of such cases were resolved during trial.⁷
TO BE UPDATED.

When we move from the absolute number of trials to the percentage of cases that eventuate in trial, the trend looks like this:

Fig 2. Percentage of civil cases terminated during or after trial, US District Courts, 1962-2010



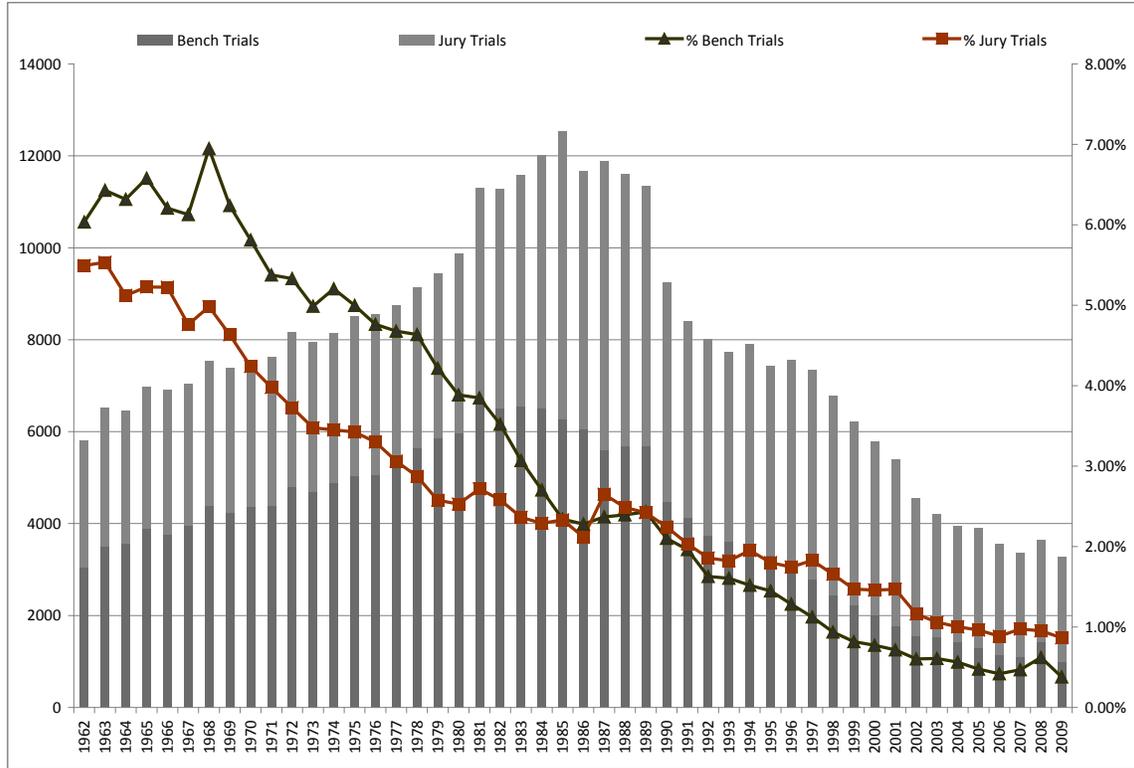
The steady decline depicted in Figure 2 is a continuation of a much longer decline of trials as a portion of terminations in both state and federal courts.⁸ Both bench and jury trials have declined, but the decline of bench trials has been steeper. There were more bench trials than jury trials in every year before 1987. But the ratio of bench to jury files has been falling steadily, so that by 2009, there were 2138 jury trials but only 1.026 bench trials. In 2009 there were 41% as many jury trials as there were twenty-five years earlier, in 1984. But there were only 15% as many bench trials. [

⁷ Galanter, *The Vanishing Trial*, 1 J. Empirical Legal Studies 459, 462 Fig. 3. (2004) [Hereafter, VT]

⁸ Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stanford L. Rev. 1255, 1257-59 (2005) [Hereafter HYD]

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Fig 3. Jury and bench civil trials, US district courts, 1962-2009

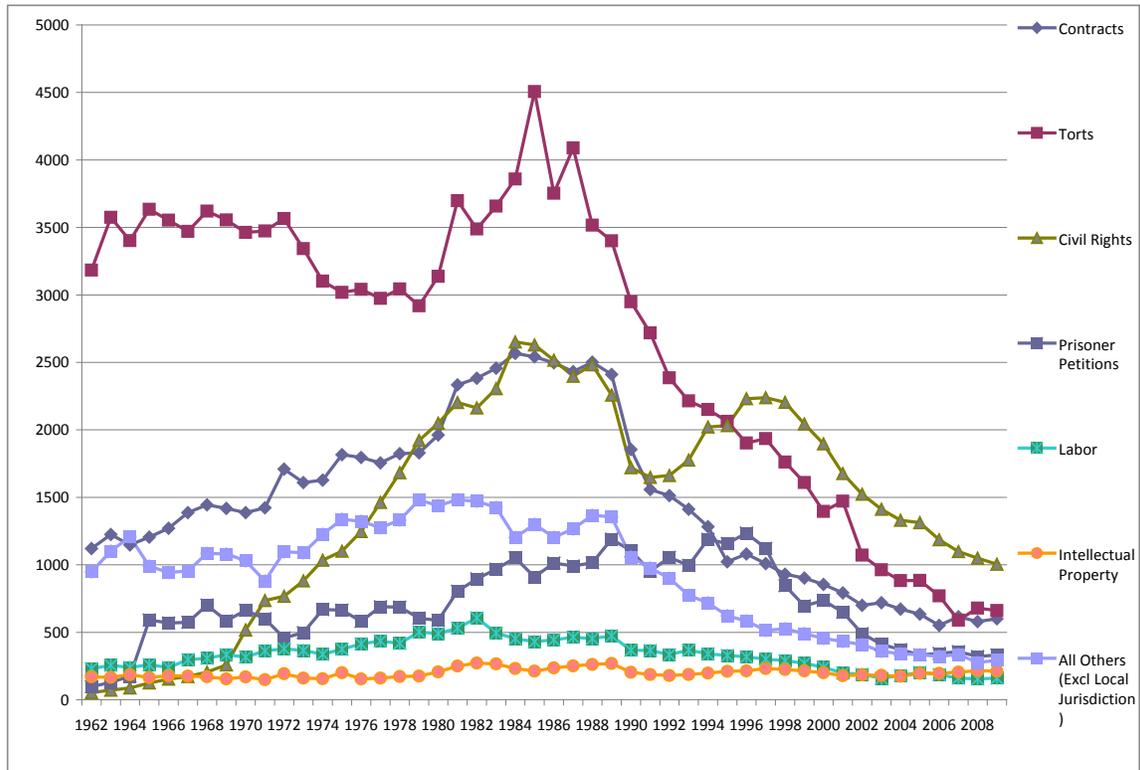


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The decline of trials is quite general and not confined to cases of any particular type. Since the mid-

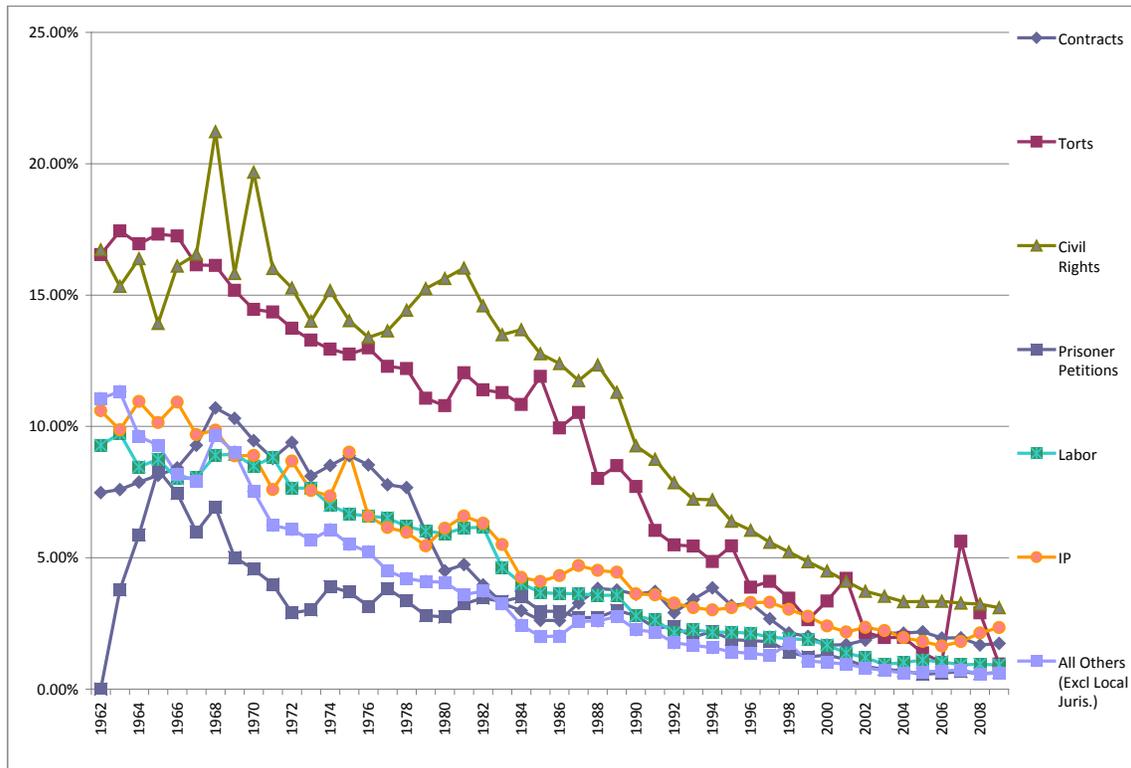
1980s, the number of trials has fallen in every major category.

Figure 4. Number of civil trials, U.S. District courts, by major categories of cases



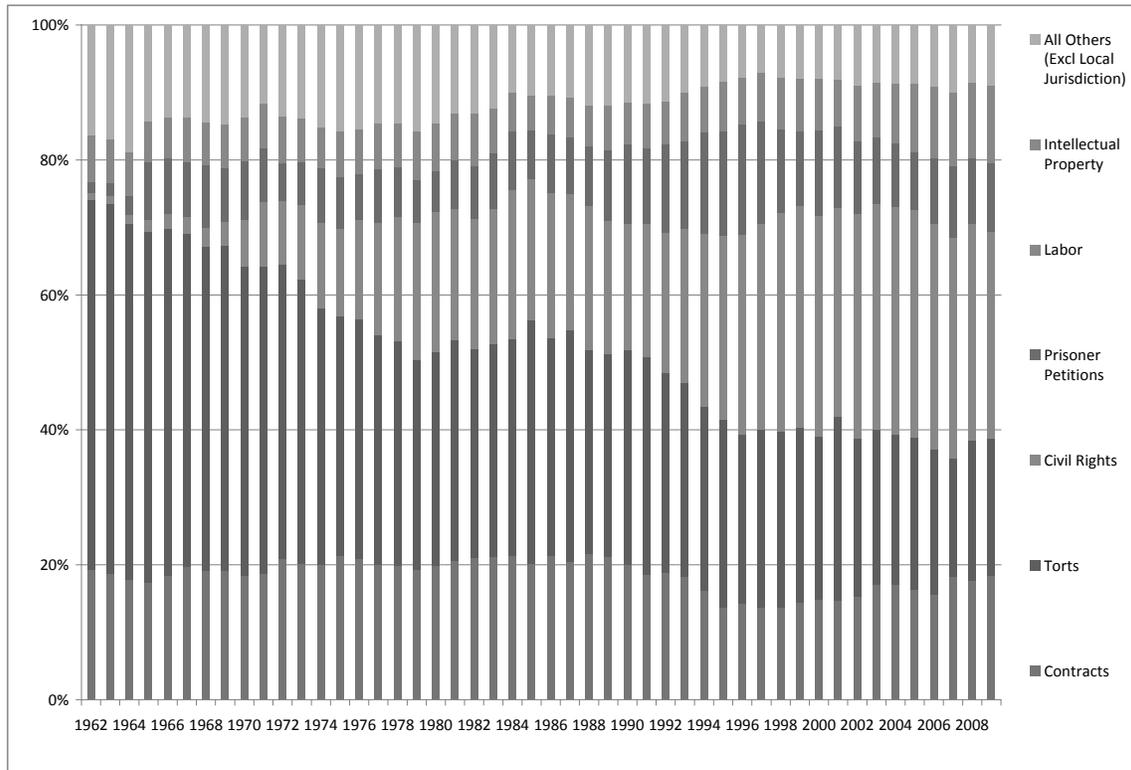
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Figure 5 Percentage of civil cases that reach trial in each major case category, US District Courts, 1962-2009



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

Figure 6 Makeup of trials by major case category, US District Courts, 1962-2009



[This Section to be completed later]

[[Length of Trials:
Has the length of trials changed with the composition of trials?

Figure 7. Something that shows number of trials by days

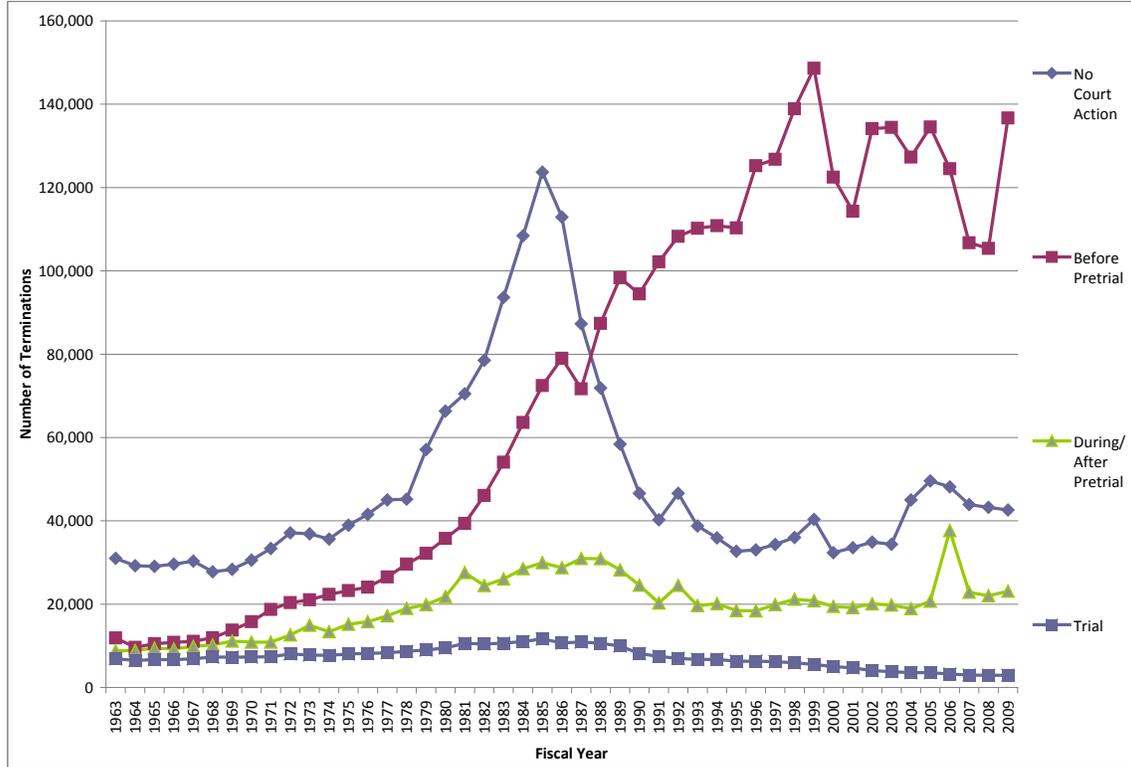
The decline of trials might be thought to reflect that cases are settling earlier.]]

Fig. 8 Length of time from filing to disposition, US District Courts, 1962-2010

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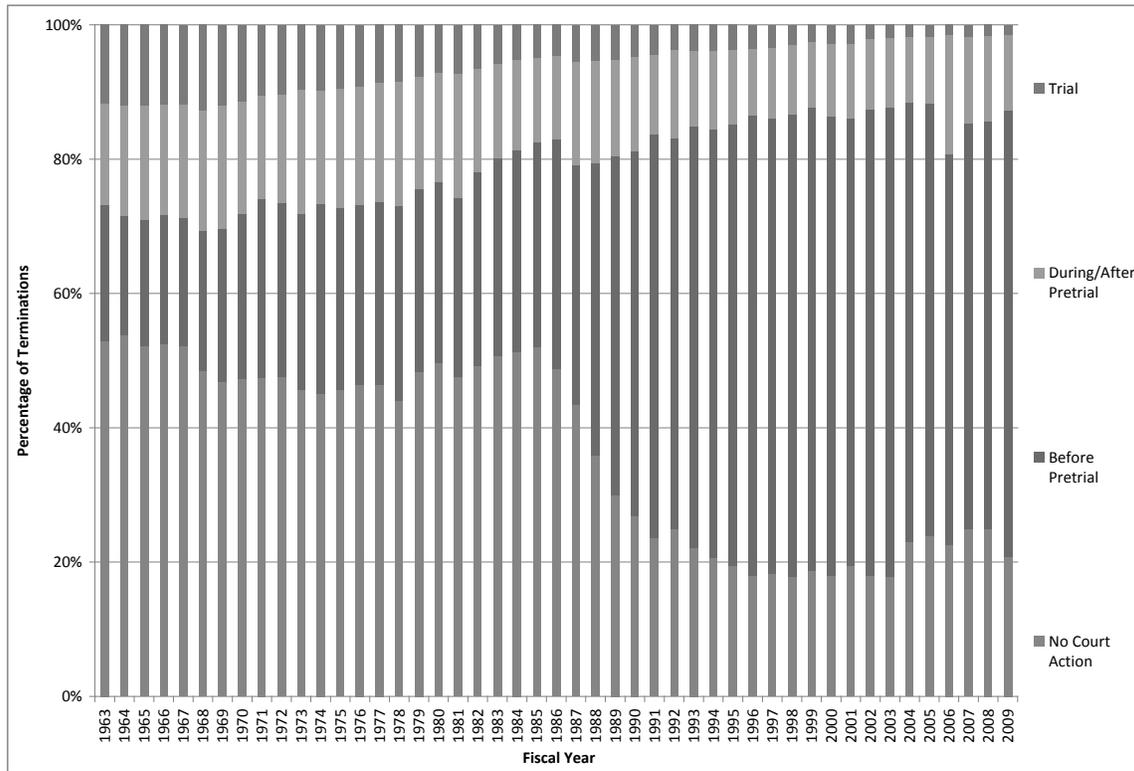
While fewer cases reach the trial stage, the portion terminating without court action has shrunk dramatically. The portion reaching pre-trial is relatively steady. The great majority of cases terminate in the “Before Pretrial” stage.

Fig. 9 Number of cases terminated at each stage, US District Courts, 1962-2010



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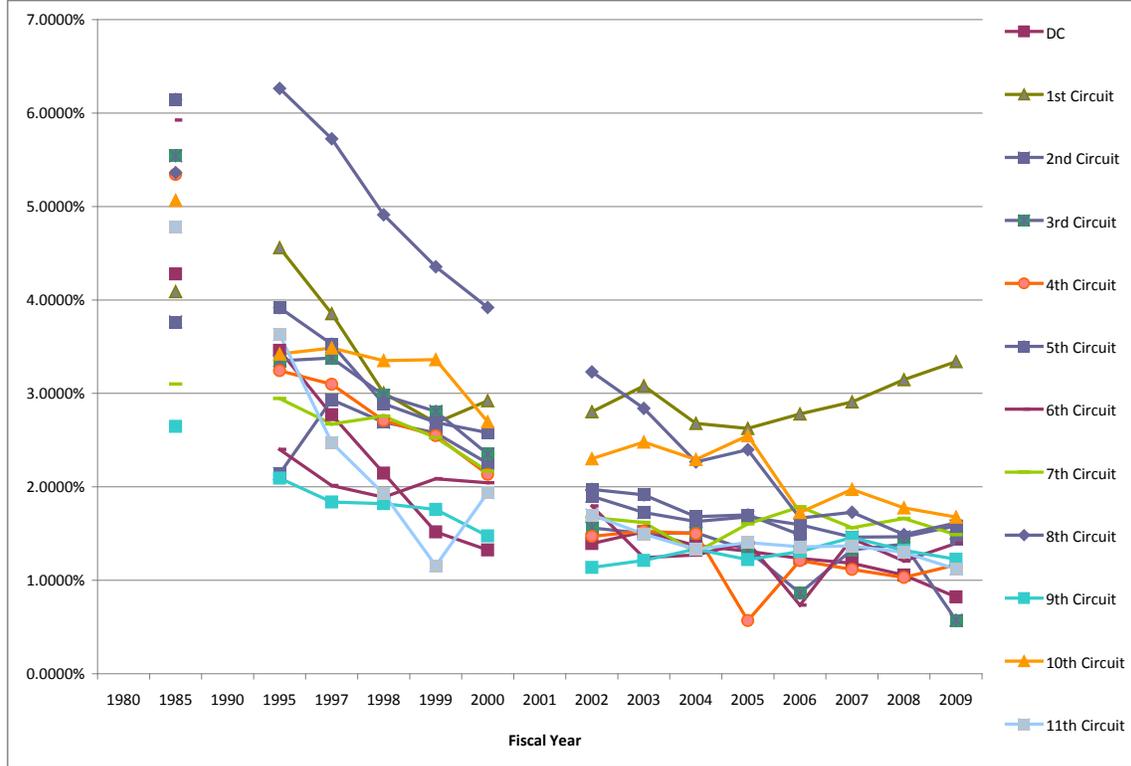
Fig. 10 Percentage of cases terminated at each stage, US District Courts, 1962-2010



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The decline is more precipitous in some places than in others. But as Figure 11 indicates, the decline is quite general.

Fig 11. Percentage of Civil Case Terminations During or After Trial, US District Courts, 1980-2009



[More here on the district level]

So that's the *no news* story of continued decline.

2. The Road to Extinction?

What about the *big news* story that the federal civil trial is approaching extinction? Apart from the continuing long-term decline in the *percentage* of cases that reach trial (see Figure 2), we see an *absolute* decline that has been proceeding without interruption for about a quarter century (Figure 1). Although the rates of decline vary from one case type to another, decline is general. There is no major category of cases that is exempt (Figure 5). We think it is fair to say that decline has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties.

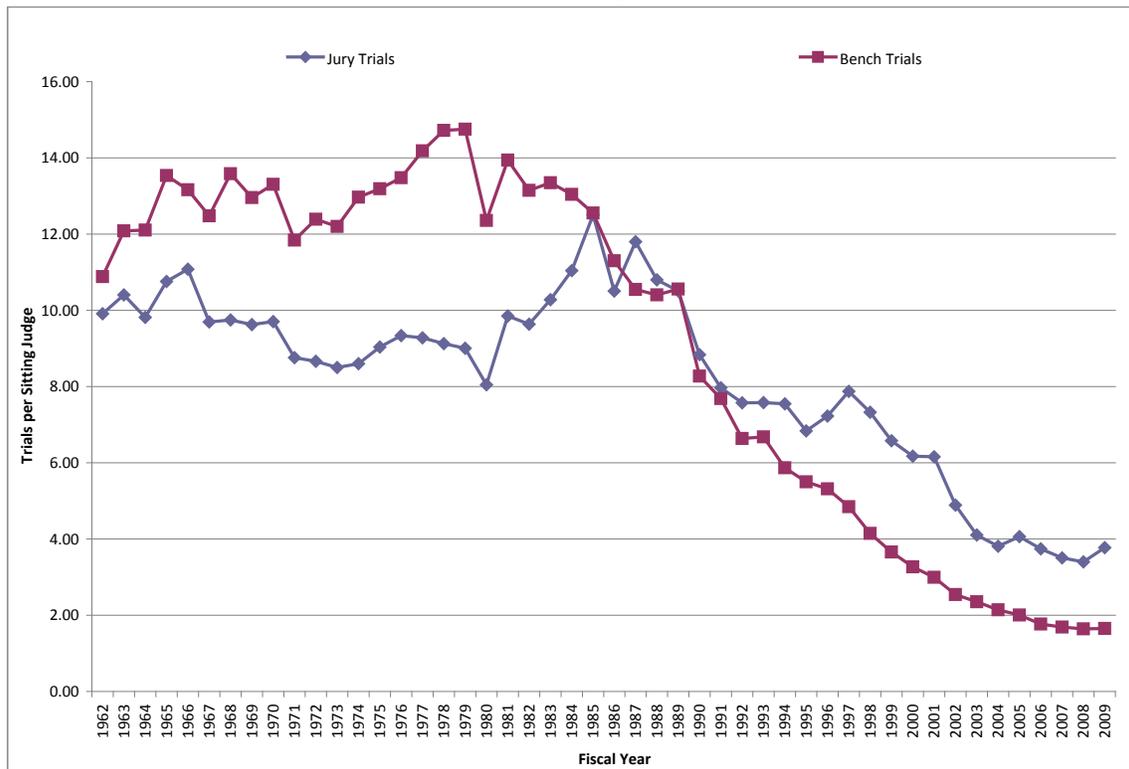
The decline is accompanied by an ideology that explains and promotes it to judges, administrators, lawyers, clients, and policy-makers. Some of the expressions of this ideology are: that the role of judges is to manage and resolve disputes; that

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adjudication is only one—and not always the optimal-- way to do that; that trials are expensive and wasteful; that that ordinarily disputes are preferably resolved by mutual concessions; that settlement benefits parties and the courts themselves; that outsourcing disputes to ADR institutions benefits courts without detriment to parties, and so forth. The trial-avoidance justified by this wisdom is seen to fit the interest of judges in keeping abreast of dockets and the interests of lawyers-- both corporate lawyers who can minimize the risk of loss that might discredit them with clients and plaintiffs lawyers who want to avoid the pro-defendant tilt of the appellate process.⁹

The decline is self-reinforcing. There are fewer lawyers with extensive trial experience and new lawyers have fewer opportunities to gain such experience (hence, the rise of the simulated trial industry, NITA). As the lawyers who rise into decision-making positions have less trial experience, the discomfort and risk of trials looms larger in their decisions. Judges, too, accumulate less trial experience and, in many cases, less appetite for trials.

Fig. 12 Number of civil trials, bench and jury, per sitting judge, US district courts, 1962-2009

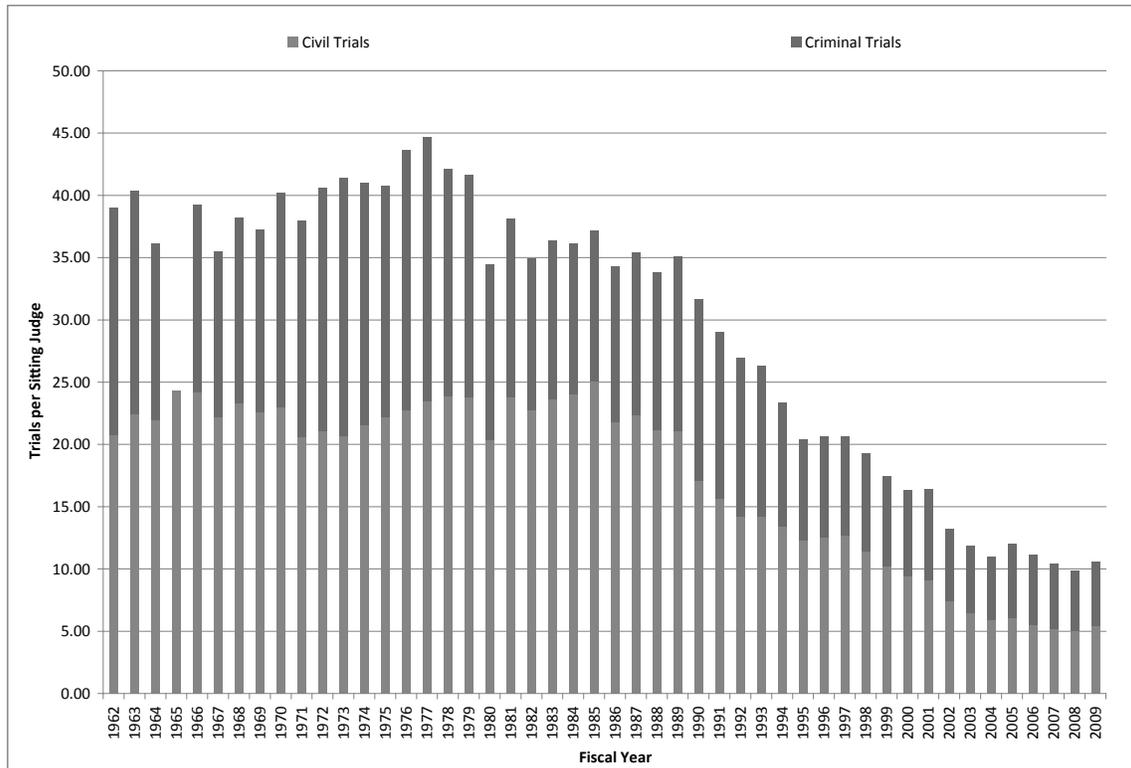


⁹ Clermont and Eisenberg, "Plaintiphobia in the Appellate Courts: Civil Rights Really Do differ from Negotiable Instruments," 2002 U. Ill. L. Rev. 947 (2002); Eisenberg, "Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes," 1 J. Empirical Legal Studies 659 (2004)

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Tables 12 and 13 display the decline in judicial trial experience. Figure 12 overstates the number of civil cases tried by sitting Article III judges. There are two other groups of judges that preside over civil cases, senior judges and magistrate judges. In 2008, there were 324 senior judges with assigned staff (Judicial Facts and Figures [JFF] table 1.1). They provided “assistance to courts” in some 69,492 terminations (JFF table 6.6), that is in 19.3% of all terminations, civil and criminal. If we assume that their assistance included conducting a proportionate share of trials, the number of trials conducted by the 651 active Article III judges in that year would be reduced from 3244 to something like 2625. In addition, magistrate judges conducted some 524 trials in that 2008 year (JFF Table 4.12). A note to JFF Table 6.4 tells us “All trials conducted by magistrate judges are excluded.” This is a puzzle, for we can’t discover where these magistrate trials are counted, although presumably these cases are included somewhere in the count of terminations. Since Table C-4 counts terminations by the stage at which they occurred, is it possible that these magistrate trial terminations are counted as terminations at an earlier stage?

Fig. 13 Number of trials, civil and criminal, per sitting judge, U.S. District Courts, 1962-2009

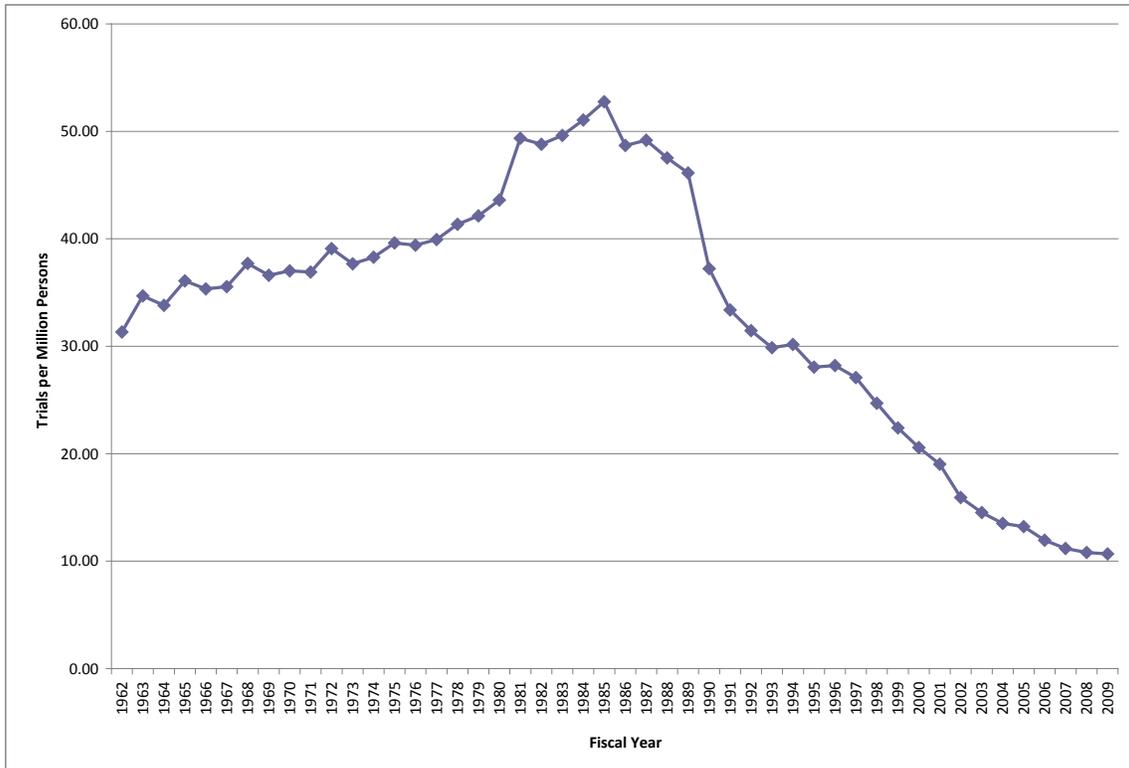


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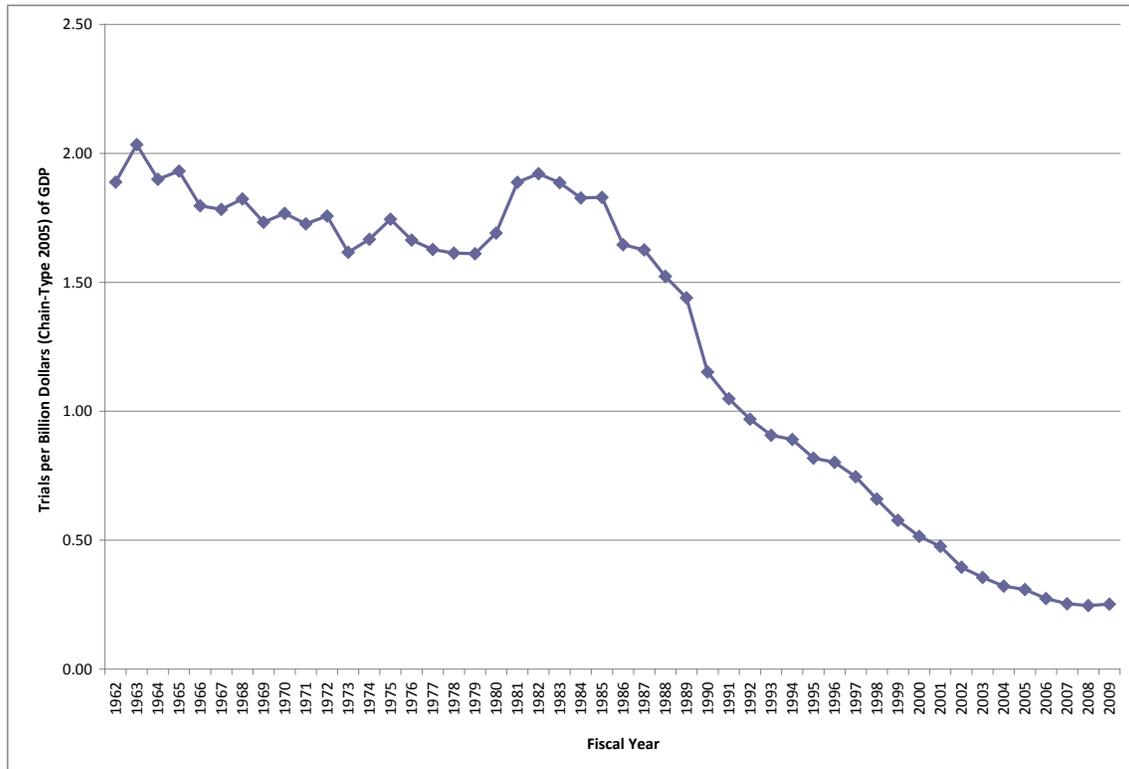
3. What difference does fewer trials make?

While the number of trials shrinks, the legal system as a whole continues to grow larger on many dimensions. There are more lawyers, more laws and regulations, more enforcement activity, and more expenditure on law. While these dimensions of legality more than “keep up” with the size of the economy and the society, the trial does not. There are fewer trials per capita (Figure 14) and fewer trials for each unit of GDP (Figures 15). Each of these measures began to decline in the 1980s, when the absolute number of trials began to fall.

Fig. 14 Federal Civil Trials per million population



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Fig. 15 Federal Civil Trials per \$ billion GDP

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. Legends about increased litigiousness, a ‘litigation explosion,’ irrational juries and monster awards gained wide currency in the years surrounding the decline in the number of jury trials. The combination of media attention to trials and folklore about litigation seems to have concealed the shrinkage of trials from the wider public. Public perception of legal institutions is increasingly through the media rather than through personal experience. Contrary to real life the population of trials in the media, reportorial and fictional, has not declined to a fraction of its former size. Exposure to media trials, overwhelmingly criminal rather than civil, may have actually increased. So cultural expectations of definitive adjudication are reinforced at the same time that it is diminished in real life. Judges continue to make decisions; with juries present less frequently and with the intensified management of cases, judges’ range of decision has broadened. Their role as gatekeepers is enlarged, especially by the elaboration of summary judgment (which now accounts for far more terminations than trials). This broad discretionary power is now

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further enlarged by by Twombly¹⁰ and Iqbal's¹¹ elevation of judicial surmise at the filing stage.¹²

In a setting in which trust in government is low courts have managed to deflect most of the anti-government sentiment. As judges' work shifts away from adjudication toward administration and case management, it remains to be seen how will this affect public regard for them. To the extent that they are perceived as just another part of the government, instrumentally pursuing policies, they may jeopardize the aura that they have so far maintained.¹³ To what extent is that aura generated by the trial as an institution? The trial, unlike dismissals and negotiated settlements, is a site of deep accountability in which the leeways and reciprocities of most social settings are unavailable. It's an empirical question how much members of the public regard judicial proceedings, especially trials, as fundamentally different from politics/administration.

The trend lines seem to be pushing real world (but not media) trials close to the vanishing point. The media trials are the lagging smile of the trial cat. I am not suggesting that it is fated to extinction. After all, Alice's cat reappears. I leave it to you to imagine a turnaround if you would like one. My guess is that it would take a major impact from outside the system to restore a regime of trials. In the meanwhile we may get no better guidance than from a further exchange of Alice and the Cat.

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to,” said the Cat.

“I don't much care where –” said Alice.

“Then it doesn't matter which way you go,” said the Cat.

“– so long as I get somewhere,” Alice added as an explanation.

“Oh, you're sure to do that,” said the Cat, “if you only walk long enough.”

¹⁰ Bell Atlantic Corp. v. Twombly, 125 S. Ct. 1955 (2007)

¹¹ Ashcroft v. Iqbal, 125 S. Ct. 1939 (2009)

¹² Suja A. Thomas, *The New Summary Judgment Motion: the Motion to Dismiss under Iqbal and Twombly*, 14 Lewis and Clark L. Rev. 15 (2010). Query: Does it matter if an increasing portion of authoritative precedent is declared in published opinions that arise not from actual trials where facts are determined, but from determinations of whether there should be a trial based on hypothesized facts?

¹³ Query whether the legitimacy of the trial courts is derivative from the court(s) at the top of the hierarchy? Or vice versa?