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The Vanishing Trial:
An Examination of Trials and Related Matters in Federal and State Courts*
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Over the past generation or more, the legal world has been growing vigorously. On almost any measure--the number of lawyers, the amount spent on law, the amount of authoritative legal material, the size of the legal literature, the prominence of law in public consciousness--law has flourished and grown. It seems curious then to find a contrary pattern in one central legal phenomenon, indeed one that lies at the very heart of our image of our system--trials.

In the federal courts, the percentage of civil cases reaching trial has fallen from 11% in 1962 to 1.8% in 2002. In spite of a five-fold increase in case terminations, the absolute number of civil trials was 20% lower in 2002 than it was 40 years earlier. There was a major shift in the subject matter of trials from a majority of tort cases to a majority of civil rights and prisoner cases. On the criminal side, some 15% of criminal defendants were tried in 1962, but less than 5% in 2002. Again, in spite of rising numbers of defendants, the absolute number of trials was 30% lower in 2002 than in 1962.

In state courts, the data is less comprehensive, but the overall trends appear comparable. In both civil and criminal cases, the percentage of dispositions by trial has fell from 1976-2001. In states for which data was available over this period, jury trials fell from 2% of civil dispositions to 1% and from 15% to 5% of criminal dispositions. The absolute number of jury trials has been falling: in the courts of general jurisdiction in 22 states, there were 25,452 jury trials in 1976 and 18,923 jury trials in 2001, a 28% drop.

As trials diminish we find in their place increases in settlements, in disposition by summary judgment, and in diversion into Alternative Dispute Resolution.

The causes of this movement away from trials are multiple and it is difficult to specify the contribution of each. But the data enables us to discount several of the candidates that may come to mind. The fall in trials does not reflect a decline in the filing of cases. In the federal courts civil filings increased by a factor of five while trials fell by some 20%. Nor are there fewer cases of the sorts that are most trial prone (torts and civil rights, in the federal courts). The decline in trials seems to affect every category of cases. The decline of civil trials is not associated with an increase in criminal trials, although several developments in the criminal law (speedy trial acts, sentencing guidelines) may demand more judicial attention. Nor does the decline represent the

constraints of a diminished stock of court resources. In most cases, the amount of court involvement is greater than it was. There are more cases filed per federal sitting federal district judge than were faced by their predecessors of forty years ago, but today?s judges are supplemented by a greater array of auxiliaries. Expenditures on the federal courts have grown faster than their caseloads.

The more robust explanations seem to include increases in cost and risk that discourage parties from proceeding to trial, institutional changes in procedure that encourage such avoidance, and a corresponding shift in the ideology of judges, who increasingly view their role as dispute resolvers rather than adjudicators. These may in turn reflect fundamental changes in the organization of legal services and the way that legal professionals and parties view the legal process.

The consequences of the decline in trials are even more difficult to fathom than its causes. A central feature of the common law process (and of popular understanding of it) is shrinking while the legal system is expanding along every other dimension. The number of disputes increases and the amount of legal doctrine proliferates, but they are connected by means other than trial. If most outcomes reflect ?bargaining in the shadow of the law,? it appears that the portion of the shadow cast by formal adjudication may be shrinking.