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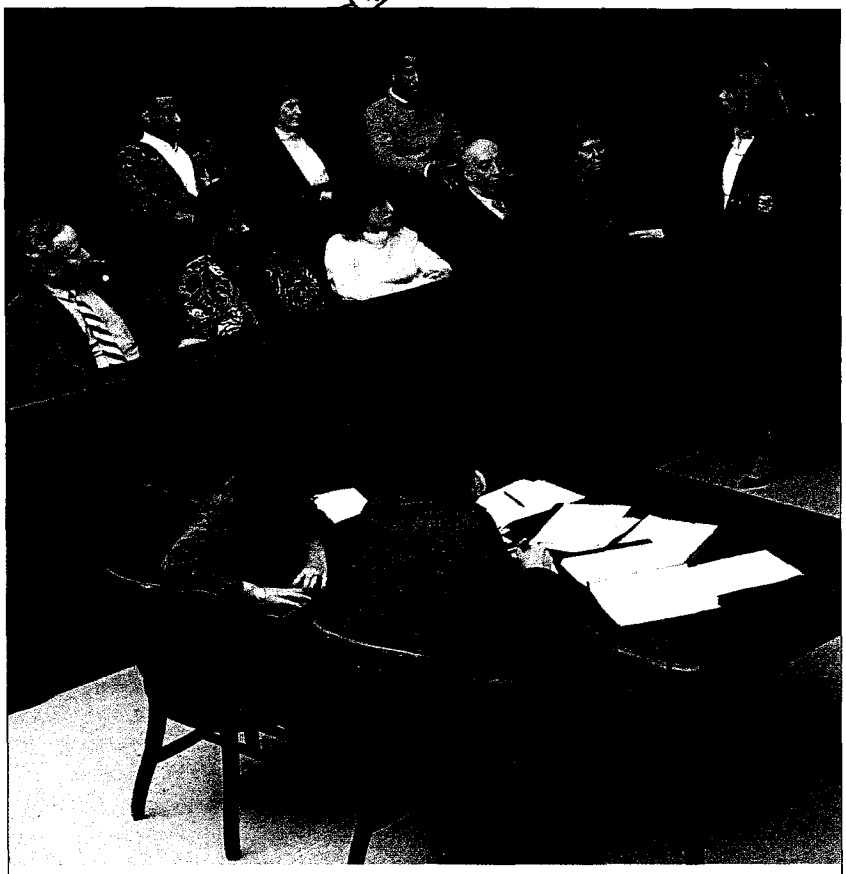

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Judges' views on vanishing civil trials

The prevalence of trials as a means for resolving civil cases has declined dramatically in recent years in both federal and state courts.[1] This is the startling conclusion of groundbreaking work spearheaded by University of Wisconsin Law School Professor Marc Galanter who has identified and described "the vanishing trial" phenomenon.[2]

Here are some thought-provoking statistics concerning the decline in civil trials (current as of 2002 data):

- In federal court, case dispositions increased from about 50,000 in 1962 to more than 250,000 in 2002; yet after peaking at over 12,000 trials in 1985, the number of trials declined to about 4,500 in 2002, which is less than the 5,800 civil cases that were tried in 1962. Thus, the proportion of federal civil cases resolved by trial declined from 11.5 percent in 1962 to 1.8 percent in 2002. Of the cases that went to trial in 1962 about half (47.7 percent) were jury trials; of the cases that went to trial in 2002, about two-thirds (65.8 percent) were jury trials.
- In state courts, the data are more fragmentary, but the same trend is apparent. A study of trial courts of general jurisdiction in 21 states and the District of Columbia that contain 58 percent of the U. S. population covering the years 1976 to 2002 found that the portion of civil cases reaching jury trial declined from 1.8 percent of dispositions to 0.6 percent; and bench trial dispositions fell from 34.3 percent to 15.2 percent.[3] This means that the absolute number of jury trials was one-third less in 2002 than in 1976, and the absolute number of bench trials was down by 6.6 percent during that period.

The importance of "the vanishing trial" phenomenon caused *Judicature* to seek the insights of three experienced trial judges (one federal and two state) as to whether this trend is apparent to them, and if so, what they diagnose as its causes.

Mark W. Bennett

> The jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government. Rome, Sparta and Carthage fell because they did not know it, let not England and America fall because they threw it away.
>
> —Charles S. May[1]

The recent dramatic decline in civil jury trials in federal court certainly would have been of concern to Charles May and ought to be a matter of grave and urgent concern for lawyers, litigants, federal judges, and citizens. This precipitous and shocking drop in civil jury trials is even more startling because the number of authorized Article III judges in the district courts has more than doubled during the same period, from 307 in 1962 to 665 in 2002.[2] As my colleague, Judge William G. Young, has eloquently written, "The American jury system is withering away. This is the most profound change

1. A decrease in criminal trials has also occurred, but is somewhat less pronounced. The forces at work may be considerably different, however, between civil and criminal cases. This exchange of views will focus solely on civil cases.
2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL. STUD. 459 (2004).
3. Brian J. Ostrom, et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL. STUD. 755 (2004).

1. Charles S. May, Commencement Address to the University of Michigan Law School (Mar. 1875), in J.W. Donovan, MODERN JURY TRIALS AND ADVOCATES, 165-90 (2d rev. ed., New York, Banks & Brothers, 1882).
2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 500 (2004).

the nub of the problem: Litigation has become far too expensive, and, as a result, lawyers try far fewer cases. With a dramatically diminishing civil jury trial bar, the determination of the value of cases is often left to ADR "neutrals," some of whom are non-lawyers and many of whom have never tried a case. We now find ourselves in an ever faster downward spiral, in which inexperienced "trial" lawyers settle cases in ADR with no real experience from which to gauge the value that a jury would place on their case. Inexperience breeds fear and, thus, the fear of going to trial puts added pressure on the downward spiral of fewer trials. Add to this mix the fact that federal trial court judges place far too much pressure far too often on litigants and lawyers to settle their cases, and the result is this extraordinary crisis: the vanishing civil jury trial.

As a collective legal community, we need to find thoughtful ways to dramatically reduce the cost of discovery and summary judgment. We also need to streamline the process for getting civil cases to trial. While I am not suggesting eliminating all discovery, raising the bar to obtain summary judgment and returning to "trial by ambush," such a scheme might have some appeal over our present system. Federal trial court judges need to cease pressuring litigants and lawyers to settle. No litigants should ever feel that their trial judge was not willing and eager to try their case. I am confident that if federal trial court judges put as much energy into creative thinking about speedier, less expensive civil jury trials, in a more "user friendly" trial environment, as they have into pressuring litigants to settle, we could restore the right to trial by jury to its historic place in the Bill of Rights. Failure to do so will spawn drastic consequences, including the withering away of the trial bar as we know it and the loss of opportunities for hundreds of thousands of potential civil trial jurors to serve their nation.

The decline of civil trial by jury in federal court is tragic and the loss of this "stunning experiment in direct popular rule"[10] would be catastrophic for the nation. As Justice George Sutherland observed, "[T]he saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."[11] I believe that there is still time; the question is, will we stretch forth a saving hand?

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10. William G. Young, *America's Civil Juries . . . going, going, Gone?* 4 LEGAL NETWORK NEWS NO.2, 1 (1998) (summarizing De Tocqueville's view of American civil juries, citing Alexis De Tocqueville, DEMOCRACY IN AMERICA 337-339 (Schocken 1st ed. 1961))

11. *Associated Press v. NLRB*, 301 U.S. 103, 141, 57 S. Ct. 650, 81 L .Ed. 953 (1937) (Sutherland, J., dissenting).

Margaret H. Downie

The civil trial vanished long ago in many state courts. Maricopa County (Arizona) Superior Court is no exception. As a court serving the fourth most populous county in the nation,[1] our statistics reflect that the civil trial is a relatively rare phenomenon:

	New filings	*Trials*	*Filings per trial*	*Trial rate*
FY2000	31,258	452	69.2	1.4%
FY2001	28,052	366	76.6	1.3%
FY2002	31,188	375	83.2	1.2%
FY2003	35,956	357	100.7	1.0%
FY2004	37,422	394	95.0	1.1%

As the numbers in the table indicate, the civil trial rate (including both bench and jury trials) has ranged from a "high" of 1.4 percent of all civil filings to a low of 1 percent over the past five years. Reliable statistical information from prior years is not readily available. Anecdotally, though, senior judges on our bench report a noticeable decline in civil trials over the past 20 years. Interestingly, most do not bemoan this trend.

Our court's experience is not atypical. Nor is it limited to civil trials. Our criminal trial rate has dropped even more precipitously during the same time period.[2] The focus for this issue is the civil trial, but there seems to be a "bigger picture" to explore. Perhaps there are more global explanations for why fewer cases of *any* type are going to trial these days.

Reasons for the decline in civil trials have been explored and well-articulated by others. Enhanced use of ADR is no doubt a significant factor. While some question the wisdom of this shift, Arizona's highest court has actively fostered the evolution of ADR in the civil arena.[3] We also require court-sponsored arbitration of civil cases involving monetary claims for $50,000 or less.[4]

Additionally, like most jurisdictions, our courts have expressed a strong public policy favoring the enforcement of agreements to arbitrate. Arbitration clauses have become ubiquitous in consumer contracts and other

1. *See* http://www.census.gov/popest/countries/CO-EST2004-08.html.

2. For example, in fiscal year 1999, 3.8% of our criminal cases went to trial. In fiscal year 2004, that rate was 1.4%. Our bench of approximately 135 judicial officers is departmentalized. Thus, unlike the federal courts, the drop in civil trials cannot be linked to any demands of balancing a contemporaneous criminal docket.

3. *See, e.g.*, Rule16(g), Ariz.R.Civ.P. (parties must personally confer and report to the court about ADR and settlement options within 90 days of the first defendant's appearance in a civil case). Another example of the emphasis on ADR is the Supreme Court of Arizona's recent Administrative Order No. 2005-32. It imposes an affirmative duty on the presiding judge of each county to, "Identify and develop programs that provide alternative methods for the resolution of civil disputes to which actions may be referred pursuant to the authority conferred by Rule 16(g) of the Arizona Rules of Civil Procedure . . ."

4. *See* A.R.S. § 12-133; Rule 72, *et seq.*, Ariz.R.Civ.P.; Rule 3.10, Maricopa County Local Rules. In fiscal year 2003, 13.68% of all new civil cases were assigned to compulsory arbitration.

in our jurisprudence in the history of the Republic."[3] More than 200 years ago James Madison observed, "Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[4] If Madison is correct, given the passage of the Seventh Amendment in 1789, how did we get into this precarious predicament in just a few short years? More importantly, what needs to be done to breathe new life into trial by jury?

The list of culprits in the legal literature allegedly responsible for the vanishing civil jury trial is surprisingly long, but includes "the usual suspects." For example, a poll of the leadership of the American College of Trial Lawyers produced the following representative list, in the order most frequently mentioned: Increased use of ADR, rising litigation costs, rising stakes/amounts at issue, increasing use of summary judgment, uncertainty of outcome, judges' views of their role as case managers, mandatory sentencing guidelines, stricter requirements for expert evidence post-*Daubert*, lack of trial experience among judges, tort reform, lack of judicial resources, and external market constraints.[5] Space limitations permit comment on only a few of these "suspects."

First, I have never been a huge proponent of ADR—especially court-mandated ADR—and I believe it has become the civil jury trial's number one enemy. While ADR has many splendid qualities, it is, in my view, the single greatest cause of the addition of trial lawyers to the endangered species list. Trial strategy and refinement of jury trial skills are quickly becoming relics of a bygone era. The atrophy of trial advocacy skills among experienced trial lawyers and the inability of inexperienced lawyers to gain invaluable trial experience virtually ensures that there will be no next generation of trial lawyers as we know them. Indeed, lawyers now describe themselves as "litigators" rather than "trial lawyers,"[6] and an ABA study recently noted "that a growing number of lawyers who describe themselves as litigators have scant, if any, actual trial experience."[7] This change in nomenclature reflects a paradigm shift away from trial by jury towards expensive "litigating," often with the aim of ultimately resolving the dispute through ADR rather than by jury trial. While it is true that trial by jury has never been the primary method for resolving civil litigation, ADR has hastened its demise.

ADR is, in my view, the single greatest cause of the the addition of trial lawyers to the endangered species list.

Mark W. Bennett

Second, massive pre-trial discovery has become the financial lifeblood of "litigators." I wonder if the enormous cost of this pre-trial discovery actually scares off litigants from going to trial? Are the litigants then pressured into ADR by their "litigators," who are often scared to go to trial, having spent so much of their clients' money, but possessing so little current trial experience? Might this explain the phenomenon, which I am sure all experienced trial court judges observe: tough-talking, take-no-prisoners "litigators" who suddenly cave in and settle as the trial date approaches? 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?

Third, I think that the trend away from jury trials toward a new focus on expensive discovery and summary judgment has been fueled by the complicity of federal trial and appellate judges. The rise of summary judgment as a means of trial avoidance has been made easier by the U.S. Supreme Court's trilogy of decisions in 1986, so that summary judgment is now the Holy Grail of "litigators." In my view, trial and appellate judges engage in the daily ritual of docket control by uttering too frequently the incantation, "We find no material question of fact."[8] Indeed, while we all hear so much about the so-called "litigation explosion," it is interesting to note that from 1962 to 2002, civil trials in federal courts per million persons in the United States fell by 49 percent.[9] What does it say about judges' attitudes toward trials that the average federal district court judge last year had only 19 trials (and that includes criminal cases—another phony whipping boy for the decline in civil trials)?

At the risk of being blunt and overly simplistic, here is

3. William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 31 (2003).
4. 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789).
5. American College of Trial Lawyers, THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM (October 2004).
6. John H. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 LITIG. 5, 6 (1978).
7. Stephanie Francis Ward, *No Place Like Court, Shrinking Trial Dockets Reduce Learning Opportunities for Young Litigators*, 89 A.B.A. J. 62 (2003).
8. *Kampouris v. The Saint Louis Symphony Society*, 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, Chief Judge, sitting by designation, dissenting) (lamenting the overuse of summary judgment and the erosion of the right to trial by jury).
9. Administrative Office of the U.S. Courts, ANNUAL REPORT Table C-4 (1962-2002).

types of private agreements. Civil judges report granting an increasing number of motions to enforce such agreements—contributing to the declining trial rate.

At the same time we have attempted to divert more cases into ADR our court has made affirmative efforts to attract other types of civil "customers." The complex civil litigation pilot program is one example. Adopted by the Supreme Court of Arizona in 2002,[5] it is an experimental program in Maricopa County designed to more effectively manage and expedite complex civil cases. One rationale for the program is to keep cases in state court that might otherwise be removed to federal court. The pilot program is still relatively new, and it is unclear whether these complex cases will ultimately proceed to trial in larger proportions than civil cases overall.

Anecdotally, our civil judges report that they are trying longer, more complex cases today than in years past. Class actions and large construction defect cases historically settled short of trial. That trend appears to be changing. In Maricopa County, we have had several such cases go to lengthy jury trials recently. Perhaps jury verdicts were necessary in order for lawyers and parties to have a better sense of the "going rate" for some of these complex cases in newer areas of law. It will be interesting to see whether this trend continues. These cases have been enormously expensive to litigate and try. The verdicts to date have been relatively modest.

Some have opined that increasing civil dockets are at least partially to blame for the decrease in trials. That explanation has a certain common sense appeal, if not empirical support. After all, if a judge has more cases to manage and decide, his or her trial availability should theoretically decrease. On the other hand, our jurisdiction has been committed to delivering firm trial dates in civil cases for more than a decade. While it is challenging to meet this commitment as case filings mount, it is still the local culture and expectation that cases will go to trial on the first scheduled date and within general time parameters requested by the parties. Moreover, as the statistics in the table reflect, our trial rate has remained relatively unchanged, notwithstanding the influx of new filings and the absence of any additional civil judges.

Among some there is rather substantial judicial ennui about the notion of the vanishing civil trial. And from a purely pragmatic perspective, why *should* judges care? If there is not sufficient demand for our product (i.e., civil trials), and if the marketplace is providing an acceptable alternative, why wring our hands and yearn for the "good old days?" Maybe the better mousetrap has arrived. Trial judges certainly have enough work to stay busy without being in trial more.

Setting aside the perspective of expediency, there are some legitimate, systemic reasons for concern—many of which my colleagues have articulated. One commonly-cited "downside," though, rings hollow in my experience. At least in Arizona, the common law is developing at an ever-increasing rate, despite the relative dearth of civil trials.

The only point of true consensus seems to be that the civil trial is vanishing. The jury is still out on whether to embrace or mourn this trend.

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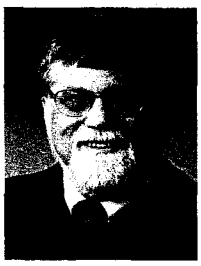
5. *See* Supreme Court of Arizona Administrative Order No. 2002-107.

Larry C. Zervos



At a recent convention, Al Sobel, the director of the American Judicature Society, and I discussed the persistent decrease in the number of civil jury trials in federal courts and most state courts. At the time, I questioned whether a declining rate exists in my state, and if it does, I wondered if that would be a bad thing.

After I returned home I gathered the best information I could about civil jury trial rates in Alaska.[1] The cases I reviewed ended between July of 1986 and June of 2004. The number of cases tried to a jury fluctuated over the years in a relatively constant range until 2002. Starting in 2002 and continuing for the next two years, the number of trials decreased each year. But over the 19 years I surveyed, there was at least one other three-year period with consecutive declines in the number of trials. So the jury is still out about whether the decline in the number of trials that started in 2002 will continue.

But my review did yield one consistent factor. For all 19 years, only a small percentage of the civil cases filed actually ended up before a jury.[2] The reasons so few cases go to trial seem obvious. My colleagues and I push settlement early and often. We make ourselves available to conduct settlement conferences for each other, and we have a talented group of retired judges who successfully mediate the most difficult cases.

In addition, of course, there is a strong financial incentive to settle. A settled case avoids the high cost of getting a case to trial. Also, in Alaska, because of the broad two-way fee-shifting rules, a settled case avoids the risk of an adverse judgment on the merits and the risk that the loser may face a large debt to cover a portion of the winner's attorney's fees.[3]

These factors have always driven decisions about whether to go to trial. But it seems to me that the cost to get a case to trial is demanding more attention today

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1. Alaska Court System Ann. Rep. (1986-2005).

2. Although it was clear that the percentages were low, the exact percentage of civil cases that reached a jury each year was not so clear. But my best estimate based on the data is that only about 1.1% to 3.5% of those cases that could go before a jury actually did so.

3. Alaska R. Civ. P. 82 ("Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.")

attitudes concerning capital punishment, but doubts as to process may affect our willingness to rely so heavily on criminal sanctions.

Overall, however, Tonry may be too optimistic about the changes he foresees as part of the cyclical nature of our crime policies. For example, in support of his view that "monolithic anticriminal views are breaking down," he cites a federal appeals court decision striking down California's three-strikes provision as applied to a shoplifter. But that decision has since been reversed by the Supreme Court in a ruling that will make it almost impossible for a court to find any legislative sentencing scheme to be unconstitutionally disproportionate.

In Tonry's view, any meaningful change will require introspection, institutional change, and remediation. I am skeptical that we will engage in an introspective process, which would require the public and politicians to separate out their emotional and political reactions to crime and to pay more attention to fairness and proportionality. Our experience is decidedly to the contrary. I also believe that any hope of restructuring governmental and judicial agencies—for example, to create a career path for prosecutors and judges as career civil servants to reflect Western European criminal justice institutions—is doomed from the start.

However, Tonry does provide workable and thoughtful remedial measures, including "safety valve" laws permitting release of certain inmates after 10 years of incarceration, the repeal or serious reform of three-strikes and mandatory minimum laws, sentencing guidelines informed by the principle of the least severe punishment necessary to achieve crime prevention, and the requirement of impact statements for any new sentencing proposals with respect to financial resources, length of sentences, and racial and gender impact. These are sensible and necessary steps. But more is needed. The war on drugs becomes more indefensible each passing day. Criminalization of drugs causes far more harm than good, and criminal justice reforms that leave the essential structure of current drug law enforcement standing will be insufficient.

Michael Tonry makes an essential contribution to the continuing debate on crime and justice. One can only hope that he is right about the cyclical nature of criminal justice policies. If so, the time is ripe for change.

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Judges' views, from page 309

than it has in the past. Damage caps keep falling under tort reform,[4] but according to the lawyers I talked to costs keep rising. To address these changes, courts may need to revise the procedural rules to further limit discovery options, lessen the need for and reduce the number of experts, and shorten the time before trial.

Beside this cost issue and the focus on settlement, there is another problem that influences the number of cases going to trial: Lawyers have always been cautious about juries, but that caution has turned to distrust. Plaintiffs' lawyers believe that the media coverage about tort reform has affected the people who sit on juries. They believe prospective jurors think most personal injury cases are akin to the hot coffee case and that plaintiffs' lawyers are greedy and dishonest. Lawyers fret that jurors will worry about the effect of a verdict on their doctor's ability to stay in business or on their insurance premiums.

Defense lawyers distrust juries too. They agonize over the potential for a run-away jury. They believe jurors will overreact and base their verdict on emotion or other factors they cannot control. They worry that one day it will be their case that will end up in the headlines and become the topic for hand wringing by insurance industry experts and legal commentators.

But in my view these concerns do not take into account the common sense decision making exhibited by the vast majority of juries, and they do not accurately depict what happens at trial. I have watched experienced lawyers address these concerns during voir dire and capably put them to rest. Also, while the risk of a run-away jury always exists, it does not seem to be a large risk. In fact, a preliminary study of an Alaska database that included the results for civil cases that ended between 1997 and 1999 found that although there were some differences, "judgment amounts in tort verdict cases and settlement amounts in the database resembled each other strongly."[5]

These factors, and others, have worked to keep the percentage of civil cases that go to a jury low. If it turns out that the number of trials is declining in Alaska we will have to look for the reasons. But I think the decline, if there is one, will not be precipitous or much of a problem as long as it is not based on an unfair bargaining advantage. After all, there will always be some trials. Trials are the backstop that sets up settlement in every case filed. Most cases would not settle without an approaching trial date, and when all efforts at resolution fail, as it surely will in some cases, the jury will be there to resolve the case.

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4. Alaska Stat. § 09.17.010 describes the limits for noneconomic damages and Alaska Stat. § 09.17.020 describes the limits on punitive damages. This year, in a bill awaiting the governor's action, the legislature limited claims brought against health care providers. SB 67, 24th Leg., 1st Sess. (Alaska 2005).

5. Alaska Judicial Council, *An Analysis of Civil Case Data Collected from September 1997-May 1999* at 6 (February 2000).