ARTICLE

THE CONSEQUENCES OF THE VANISHING TRIAL: DOES ANYONE REALLY CARE?

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TABLE OF CONTENTS

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"Does anybody really know what time it is? Does anybody really care?"

—Chicago[1]

I. INTRODUCTION

Why has the jury trial been called "the glory of the English Law"?[2] Why did the framers of our federal[3] and Texas[4] constitutions enshrine the right to trial by jury? Why do each of our fifty states guarantee, by constitution or statute, the right to trial by jury?[5] These questions were answered centuries ago by the renowned British legal scholar Blackstone:

> [A] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it.[6]

II. THE VALUE OF THE JURY

Blackstone's comments are just as true today. The jury stands alone—or at least apart from other politically driven government participants—as the repository of the people's voice. The jury serves as a check on the power of the arbitrary judge, and it expresses community values in its decisions. The jury

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1. CHICAGO, *Does Anybody Really Know What Time It Is?*, *on* THE CHICAGO TRANSIT AUTHORITY (Rhino Records 2002) (1969).

2. 3 WILLIAM BLACKSTONE, COMMENTARIES *379.

3. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." U.S. CONST. amend. VII.

4. The Texas Constitution guarantees the right as follows:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided that the Legislature may provide for temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of trial by jury.

TEX. CONST. art. I, § 15.

5. *See* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1040 n.11 (1999).

6. BLACKSTONE, *supra* note 2, at *380.

checks the judge "much as the legislature was to check the executive, the House to check the Senate, and the states to check the national government."[7] A jury's decision reflects community values in the resolution of issues, "such as whether a party's actions were reasonable, whether a product's social utility exceeds its risk, . . . whether a breach of contract should be excused, or whether a police officer's use of force was excessive."[8] Moreover, jurors evaluate the evidence based on their life experiences in the community and decide which witnesses they believe and which party's story is more consistent with their experiences as members of the community.[9]

We, therefore, try to carefully select jurors based on their lack of interest in the outcome, their freedom from personal bias or feelings, and their ability to decide the case before them on its merits without regard to political agenda or personal gain. The absence of motivation to engage in result-oriented decisionmaking is one of the most powerful arguments in favor of the jury system. Further, the shared decisionmaking responsibility and freedom from individual repercussions permit jurors to make difficult and sometimes unpopular decisions that would be politically perilous for other governmental participants. The trial of John Peter Zenger, considered to be one of the first acts of jury nullification, comes immediately to mind.[10]

The jury system usually produces just and fair results, not only because the jurors are less susceptible to pressures that may affect other governmental participants, but also because they bring to the decisionmaking process many qualities that make them truly representative of the conscience of the community: gender, ethnic, political, and philosophical diversity; fresh perspective; collective wisdom; a breadth of attitudes and experience; and a lack of professional legal training that might predispose them to certain results.

Finally, the jury system provides an important forum for parties who have little or no access to private dispute resolution. Without an accessible dispute resolution system, individuals, especially poor and minority litigants, may find themselves with no practical avenue to enforce rights or redress grievances. The disenfranchisement of these individuals contributes to their

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7. Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183 (quoting Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1174 (1995)) (internal quotation marks omitted).

8. *Id.* at 184.

9. *Id.*

10. *Zenger, John Peter, Trial*, *in* 10 GALE ENCYCLOPEDIA OF AMERICAN LAW 491, 492 (3d ed. 2011).

disaffection, making them less likely to view themselves as members of society and more likely to believe that they are outsiders with no stake in the system. A government that creates rights owes to its citizens the opportunity to enforce them; otherwise, these rights could become meaningless.

III. THE OVERALL DECLINE IN TRIALS

The jury trial is one of the earliest and most respected rights of man (and later, woman). Historians believe that judgment by one's peers began in feudal societies.[11] In England, the right was memorialized in the Magna Carta in 1215.[12] And as colonists traveled across the Atlantic Ocean to New England, so did the right to a jury trial. In New England, at the height of colonial unrest, the British government attempted to thwart this right by establishing certain courts without juries.[13] This attempted evasion of the sacred right to a jury trial is considered by many to be a contributing factor in the American Revolution.[14]

So, if the jury trial was historically viewed as vital to our democratic form of government, surely that view persists today? Wrong. The steady erosion of the American jury trial is our dirty little secret. A majority of the American public might be surprised to learn that there is indisputable statistical evidence that the number of jury trials is, and has been, sharply declining, both in absolute and relative terms.[15] But attorneys know the truth all too well. As the number of lawyers continues to increase, the number of trials is decreasing.[16] Fewer and fewer attorneys see the inside of a courtroom or experience the thrill of selecting a jury.

Further, what has anecdotally been experienced by many practicing trial attorneys has now been empirically proven. Professor Marc Galanter of the University of Wisconsin performed a key empirical study on the vanishing jury trial. And as Professor Galanter documented, the number of trials has been declining now

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11. Sam Sparks & George Butts, *Disappearing Juries and Jury Verdicts*, 39 TEX. TECH L. REV. 289, 290 (2007).

12. *Id.*; Duncan v. Louisiana, 391 U.S. 145, 151 (1968).

13. *See* Sparks & Butts, *supra* note 11 at 290–92.

14. *Id.* at 292.

15. Professor Marc Galanter has extensively researched this area; for his detailed discussion of this point see Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7.

16. *See* U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK: 2010–2011 LIBRARY EDITION 260 (2010) (noting that while the number of active attorneys is growing, alternatives to litigation—and attorneys—are increasing).

for three decades in courts across the country.[17] But what is truly startling is that the disappearance of trials holds true *both* for state and federal courts, for *all* regions of the country, for jury *and* non-jury cases, and for *all* categories of civil and criminal cases.[18]

When the federal rules of civil procedure were enacted in 1938, about 18% of civil cases were resolved by trial in federal court. By 1962, that percentage had dropped to about 12%. Today, it is less than 2%. The federal courts tried *fewer* cases in 2003 than they did in 1962, while disposing of over five times as many civil cases and over twice as many criminal cases.[19] To some extent, "[t]he increased efficiency in case dispositions is undoubtedly attributable to the addition of 534 magistrate judges, technological improvements, and better case management techniques."[20] But that is not the complete answer.

Until fairly recently, the so-called "vanishing trial" went unnoticed, even though the steady decline in the trial of civil cases had been in progress for decades. But rising caseloads meant that the absolute number of trials was stable or even increasing into the 1980s, so little attention was paid to what was actually happening. In the past twenty years, however, the pattern changed. The long-term decline in the number of trials *accelerated*, producing a dramatic drop in the absolute number of trials. Most of the decline in federal civil trials has occurred since 1985—a remarkable 64% drop.[21] But the decline in the number of cases tried is not due to a reduction in case filings. To the contrary, both civil case filings and dispositions have actually increased five-fold in the federal courts during the same time that the number of trials—both the rate of trials as well as the absolute number of trials—has diminished substantially.[22]

Nor is the decline confined to our federal courts. It also includes state courts, which conduct far more of the nation's judicial business than federal courts. In the twelve months spanning from April 1, 2006, to March 31, 2007, there were approximately 278,000 civil filings in federal courts.[23] Meanwhile,

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17. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 3 J. EMPIRICAL LEGAL STUD. 459 (2004).

18. Galanter, *supra* note 15, at 7–11.

19. This drop occurred from 1985–2002. Galanter, *supra* note 17, at 460–61, 464, 492.

20. Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 165 (2005) (footnote omitted).

21. *Id*.

22. Galanter, *supra* note 17, at 460–61, 485.

23. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. at tbl.C (2007), *available at* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2007/tables/C00Mar07.pdf.

there were 7.9 million civil case filings in state courts in the same year, excluding cases filed in courts of limited jurisdiction such as probate courts or family law courts.[24] What about Texas? Historically, Texas state courts have had a similar experience. For instance, from 1986 to 2008, civil jury trials in Texas state courts fell 60%.[25] Remarkably, this past year, only 0.4% of civil cases were resolved by a jury or a directed verdict in Texas courts, an amount lower than the national average.[26]

What does all this mean? It means that, despite its historical importance and value, we are slowly, but surely, losing this precious institution. James Madison, the drafter of the Seventh Amendment, would be puzzled by how we allowed this to happen, given his view that "[t]rial 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."[27] Over 200 years later, in a July 2003 letter to his fellow judges, U.S. District Judge William G. Young invoked Alexis de Tocqueville to lament that "[t]he American jury system is withering away," and that without jury trials, the courts' "status as the grassroots guardians of constitutional values is threatened as never before."[28] Much like Madison, Judge Young believes that "[t]he jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial," and he warned, "History will not judge kindly that generation of jurists that allows this 'purest example of democracy in action,' this 'stunning experiment in direct popular rule' [—the civil jury—] to wither away."[29]

Fifth Circuit Judge Patrick Higginbotham described the decline of trials as one of the most significant changes in the

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24. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2007 STATE COURT CASELOADS 2 (2009), *available at* http://www.ncsconline.org/d_research/csp/2007B_files/EWSC-2007-v21-online.pdf.

25. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2008, at 38 (2008), *available at* http://courts.state.tx.us/pubs/ar2008/AR08.pdf; Hecht, *supra* note 20, at 169, 187 app. B.

26. This is for the fiscal year ending August 31, 2009. OFFICE OF COURT ADMIN., ANNUAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2009, at 41 (2009), *available at* http://www.courts.state.tx.us/pubs/ar2009/AR09.pdf [hereinafter 2009 TEXAS JUDICIARY REPORT]; *see* U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS app. at tbl.C-4 (2009), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C04Mar09.pdf. The 0.4% calculation excluded all "show cause" motions filed in family law matters. 2009 TEXAS JUDICIARY REPORT, *supra*, at 41 n.3.

27. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005).

28. William G. Young, *An Open Letter to U.S. District Judges*, FED. LAW., July 2003, at 30.

29. *Id.* at 31, 34 (footnotes omitted).

American judicial system since the Nation's founding. He views the disappearance of trials as "a change in [the] very architecture" of our judicial system, a system for resolving disputes that, he notes, has largely remained constant for over 200 years.[30] Similarly, Texas Supreme Court Justice Nathan Hecht explains that "it's a detriment if we lose the development of the common law through cases and appeals that have been the [basis of the] rule of law in this country since its founding."[31]

To be sure, some commentators have suggested that the diminution in the number of jury trials is a positive development, or even a sign of a welcome evolution to a "kinder, gentler" system of dispute resolution.[32] Yet, in my view, the right to a jury trial confers important societal and individual benefits, and it is a right that should be relinquished only knowingly and voluntarily—not gradually and quietly. It is, after all, a right explicitly recognized no fewer than three times in our Constitution, one of our nation's most sacred documents.[33]

IV. IS THERE A DIMINISHMENT OF TRIALS, OR MERELY A RE-LOCATION?

Plainly, the data shows that there has been a marked decrease in trials, both jury and non-jury, and in both federal and state courts. Why is that happening? Are disputes simply being resolved elsewhere? Perhaps a few additional data points will provide some guidance.

A. Administrative Resolution

In 2001, the U.S. government had 1,370 Administrative Law Judges (ALJs)—more than twice the number of Article III judges. Those ALJs disposed of thousands of disputes. For example, "[t]he ALJs in the Social Security Administration disposed of about 465,000 cases, immigration judges another 215,000, the Board of Veterans Appeals 31,000, and the Equal Employment Opportunity Commission 9,400—a total of more than 720,000 proceedings."[34] Although it is unclear how many of these administrative proceedings are "trials" in the traditional sense,

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30. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1407 (2002).

31. Michael Orey, *The Vanishing Trial*, BUS. WK., Apr. 30, 2007, at 38, 39 (alteration in original).

32. *See, e.g.*, Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 109 (2010).

33. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amends. VI, VII.

34. Galanter, *supra* note 15, at 25.

what is clear is that more disputes are now being resolved *outside* our judicial system than inside it.[35] Whether that is a good or bad result raises policy issues left for another day.

Texas has experienced this same phenomenon—the shifting of disputes traditionally resolved in the courtroom to administrative resolution. Let me give one example. In 1989, substantive changes to the Texas workers' compensation laws essentially mandated the administrative resolution of workers' compensation claims. Those cases were the most frequent category of civil cases tried before 1989. To be more precise, in 1986, 430 workers' compensation cases were disposed of by jury trial in Texas. By 2004, the number of workers' compensation jury trials had been reduced to twenty-four.[36]

B. Arbitration

It is beyond question that arbitration has siphoned off a large number of cases from our judicial system. A recent empirical study of arbitration clauses in contracts of publicly-held companies is instructive as to the perceived benefits of arbitration:

> Arbitration is often said to be cheaper than litigation. It can be completed more quickly, it can lower risks, it can involve limited discovery, it avoids the risk of overly generous awards handed out by judges and juries, and it can be used in large class actions.[37]

The Author's research also identified the perceived, and well-known, disadvantages of arbitration:

> Aside from adjudication costs, some regard arbitration as potentially inferior to litigation. The parties must pay the arbitrators; if the chosen form of arbitration involves two party-selected arbitrators and a neutral one, this means paying three highly compensated professionals. Judges and juries, in contrast, are paid by the government. A trial usually has a definite beginning and end, and in the case of jury trials, the process is compressed because of the need to maintain an empanelled jury. A party's legal fees in arbitration are not necessarily lower than they are in litigation. Nor are arbitrations necessarily quicker than trials. Arbitration proceedings are subject to the schedule of the arbitrator. Proceedings can be interrupted for months

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35. *Id.*

36. Hecht, *supra* note 20, at 177.

37. Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 336–37 (2007) (footnotes omitted).

> at a time, only to be reconvened at significant cost to the parties. Unlike judges or juries, the arbitrator, whether paid hourly or daily, has short-term economic incentives to prolong the proceedings. Further, if an arbitrator issues an award that is not supported by the evidence, it may be difficult or impossible to correct the error. The potential lack of effective appellate review makes arbitration risky relative to litigation.[38]

Perhaps as a result of the perceived disadvantages of arbitration, the empirical study concluded that only about 11% of domestic contracts actually contained mandatory arbitration clauses, and most of those were in employment, credit commitments, security and trust agreements, pooling and service agreements, and licensing contracts.[39] "[I]f an arbitration clause is absent from an agreement, it is reasonable to infer that the parties either preferred litigation" or at least were indifferent as to the choice between arbitration and litigation.[40] On the other hand, arbitration is "the preferred mechanism for resolving international disputes."[41]

Despite the existing concern about the disadvantages of arbitration, the arbitration of disputes has increased markedly during the last twenty years. On a regular basis, millions of Americans, wittingly or unwittingly, enter into agreements to waive their right to go to court. As a result, the American Arbitration Association's (AAA) caseload almost quadrupled between 1994 and 2002 to more than 230,000 cases.[42] In a June 2008 press release, the AAA reported that its commercial caseload rose 46% in 2007, increasing from 14,211 in 2006 to 20,711.[43] The AAA's total caseload rose another 8% between 2007 and 2008.[44] And as of August 2009, the caseload had already increased another 12%.[45] Cases filed with the International Centre for Dispute Resolution (ICDR) were up 6% in 2007, increasing from 586 in 2006 to 621 in 2007, and by 2008, there

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38. *Id.* at 339–40 (footnotes omitted).

39. *Id.* at 345, 367.

40. *Id.* at 341.

41. *Id.* at 341–42 (quoting Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 499 (2006)).

42. Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution*," 1 J. EMPIRICAL LEGAL STUD. 843, 872 (2004).

43. Press Release, Am. Arbitration Ass'n, AAA's Commercial Caseload Up 46 Percent in 2007 (June 16, 2008) [hereinafter AAA 2007 Press Release].

44. Press Release, Am. Arbitration Ass'n, AAA's 2008 Caseload Up 8 Percent (Apr. 20, 2009) [hereinafter AAA 2008 Press Release].

45. Am. Arbitration Ass'n, *Commercial Case Filings Show Growth*, 1 COM. BULL. (Nov. 2009), http://www.adr.org/sp.asp?id=36852.

had been more than 700 cases filed with the ICDR.[46] The number of mediation cases filed with the AAA are rising as well.[47] In addition, JAMS, a well known dispute resolution organization, now handles at least 10,000 cases per year.[48] Historically, many of these arbitrated disputes would have been resolved in our civil judicial system. Today, they are not.

V. WHY IS THIS DECLINE HAPPENING?

For various reasons, many of the users of our civil justice system, especially the business community, have lost confidence in the capacity of judges and jurors to dispense justice fairly and efficiently. And even when those users do participate in our system, they want more control over the process. In other words, if the users don't provide their own private system of justice, such as mandatory arbitration, they seek to control the judicial system by contractual provisions that limit jurisdiction, venue, discovery, damages, and even the right to a jury trial.

The high cost of litigation is certainly a major factor in the decision by many to opt out of our judicial system. It is well accepted that the most costly aspect of civil litigation today is discovery.[49] Professor Kent Syverud explained the major reasons potential users of our judicial system are dissatisfied:

> Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it. . . . *We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle*.[50]

The potentially enormous cost of e-discovery has escalated the cost of litigation even more. Because businesses, large and small, have budgets, the business people logically conclude that there must be a better way to resolve disputes than what our judicial system currently provides.

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46. AAA 2007 Press Release, *supra* note 43; AAA 2008 Press Release, *supra* note 44.

47. *See* AAA 2007 Press Release, *supra* note 43.

48. ABOUT JAMS, http://www.jamsadr.com/aboutus_overview/ (last visited Jan. 27, 2010).

49. *See* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT 1–2 (2009), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008 [hereinafter FINAL REPORT ON JOINT PROJECT 2009].

50. Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942 (1997) (emphasis added).

To be sure, there are multiple reasons for the decline in jury trials.[51] The increase in granting summary judgments in federal courts has had an effect. Does summary judgment accomplish the intended result of washing unmeritorious cases out of the system, or are people being effectively denied their day in court? Some commentators argue that the decline in trials in federal courts is, at least in part, attributable to the 1986 trilogy of Supreme Court decisions that encouraged federal judges to use summary judgments to dispose of civil cases.[52] Judge Patricia Wald of the U.S. Court of Appeals for the District of Columbia made the same point in 1998.[53] In Texas state courts, however, the data actually indicates a *decrease* in the rate of case dispositions by summary judgment since 1986—until recently.[54] On the other hand, summary judgment dispositions have clearly increased in federal court. In fact, a recent book entitled *The Death of the American Trial* noted, "[i]n 1975 twice as many cases were resolved by trial as by summary judgment; in 2000, three times as many cases were resolved by summary judgment as by trial."[55]

Plainly, tort reform and other legislation, which limit causes of action, or "cap" damages, also have had a serious effect on the filings of cases as well as on their disposition. In addition, the Private Securities Litigation Reform Act's scienter requirements[56] have allowed an increasing number of securities cases to be resolved without trial. Changes in the law of offensive and defensive use of collateral estoppel over the last three decades—exemplified by decisions such as the U.S. Supreme Court's decision in *Parklane Hosiery Co. v. Shore*[57]—have also allowed courts to dispose of cases short of trial. And the Supreme Court's decisions in *Daubert*,[58] *Markman*,[59]

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51. *See* AM. COLL. OF TRIAL LAWYERS, THE "VANISHING TRIAL": THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM 10–23 (2004), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=57.

52. *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 *passim* (2003).

53. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1914–15 (1998).

54. Hecht, *supra* note 20, at 179.

55. ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 84 (2009).

56. 15 U.S.C. § 78u-4(b)(2) (2006).

57. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

58. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (establishing stringent criteria for allowing expert testimony).

59. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (providing for court construction of patent terms).

Twombly,[60] and *Iqbal*[61] have given courts new tools and incentives to dispose of cases in advance of trial.

Finally, and perhaps most troubling, is the belief of Professor Judith Resnick of Yale Law School that the "federal judiciary has adopted an anti-adjudication and pro-settlement agenda."[62] Case management is no doubt critical in handling a trial docket, but in the eyes of many it has created the impression that a trial is a failure of the system. Simply put, some judges would rather not try a lawsuit, and they go to great lengths to avoid it.

VI. LONG TERM CONSEQUENCES

We have seen the short-term consequences of the vanishing trial: decreased participation by the public; a sharp reduction in trial expenses; and for attorneys, fewer trials provide fewer occasions for counsel to form a solid basis for the predictability so necessary to provide advice for clients on which to act.[63] But what are the long-term consequences? If we continue on our current path, we can look to the civil justice systems of other countries to see what our future might hold. Many of these systems use civil codes in place of judicially developed common law; in short, they have little use for our adversarial system.

It is not hyperbole to say that the most serious problem, however, is not the decrease in the number of trials per se, but the *consequences* of the decline and the resulting impact on our social institutions and individual rights. It would be easy to dismiss the phenomenon of the vanishing jury trial as simply the self-interested lamentations of trial lawyers looking to preserve their way of life. But that begs the fundamental question: Do we want a judicial system of the type to which we are being inexorably pushed?

The direction we are currently heading will result in the reshaping of our judicial system. If we have fewer jury trials, for example, we don't need as many trial judges or courtrooms. If we have fewer jury trials, we will likely have fewer appeals, and

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60. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (increasing the pleading requirements necessary to survive a motion to dismiss).

61. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (following, and arguably extending, the increased pleading requirements of *Twombly*).

62. Judith Resnick, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 995 (2000).

63. For a discussion of the obligation of lawyers to inform their clients of their lack of jury trial experience, see Tracy Walters McCormack & Christopher John Bodnar, *Honesty Is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155 (2010).

therefore, we will need fewer appellate judges. Fewer appeals mean even less development of the common law and that, in turn, means diminished outcome predictability available to assist lawyers in advising their clients.

Perhaps most serious of all, fewer jury trials will produce an even more dramatic decline in the public's participation in our justice system. Jury service requires participation across social groups. It creates an opportunity for the building of "social capital."[64] We need the public to participate in our justice system, yet we are moving in the opposite direction. Juries in Texas civil district courts rendered 1,642 verdicts in 2005.[65] Since then, this number has decreased more than 30%; in 2009, only 1,126 jury verdicts were rendered.[66] Moreover, the voir dire examination of jury panels in civil cases in Texas dropped as well. Between the 2004–2005 and the 2008–2009 time periods, the number of jury panels examined fell by more than 20%.[67] This phenomenon is not solely attributable to fewer cases or more efficient dispositions of cases. In 2005, (not counting family law cases) 0.46% of the civil law cases in Texas's district courts were tried by a jury.[68] In 2009, only 0.36% of these civil cases resulted in a jury verdict.[69] Consequently, with the decrease in the number of jury trials in civil cases, we are excluding from the judicial process the very people we need—the public—to support a strong and independent judiciary, one of the fundamental underpinnings of our democracy. "The [jury] system has served many purposes, but its enduring purpose has been to secure a greater measure of trust in judicial institutions."[70]

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64. Robert M. Ackerman, *Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America's Social Capital*, 2006 J. DISP. RESOL. 165, 176.

65. OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2005, at 38 (2005), *available at* http://www.courts.state.tx.us/pubs/AR2005/AR05.pdf [hereinafter 2005 TEXAS JUDICIARY REPORT].

66. *Compare* 2009 TEXAS JUDICIARY REPORT, *supra* note 26, at 45, *with* 2005 TEXAS JUDICIARY REPORT, *supra* note 65, at 38.

67. *Compare* 2005 TEXAS JUDICIARY REPORT, *supra* note 65, at 38, *with* 2009 TEXAS JUDICIARY REPORT, *supra* note 26, at 45.

68. This number represents the percentage of civil cases disposed of in 2005 that were disposed by jury verdict or directed verdict, but excluding show cause motions in family law matters. 2005 TEXAS JUDICIARY REPORT, *supra* note 65, at 38.

69. This number represents the percentage of civil cases disposed of in 2009 that were disposed by jury verdict or directed verdict, but excluding show cause motions in family law matters. 2009 TEXAS JUDICIARY REPORT, *supra* note 26, at 45.

70. Paul D. Carrington, *The Civil Jury and American Democracy*, 13 DUKE J. COMP. & INT'L L. 79, 93 (2003). The jury has even been referred to as "the safety value of the legal system." *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1435 (1997).

VII. IS ANYTHING BEING DONE TO SAVE THE JURY TRIAL?

The problem is well established: there are fewer trials. But is anything being done to remedy this problem? Should there be? Judge Higginbotham strongly criticizes the direction in which we are heading. He writes:

> Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.[71]

Similarly, the Honorable William Young, a U.S. District Court Judge in the District of Massachusetts, encourages his judicial brethren to try to remedy this problem. Judge Young writes, "I have argued that federal trial judges ought to spend their days doing what the Constitution demands and the public expects: trying federal cases (and to a jury, wherever the Constitution so commands)."[72] Judge Young warns against a future without what he calls the "purest form of democracy known to humankind," the jury trial.[73]

Judges are not the only officers of the court who are concerned. Recently, in 2009, two well-known organizations joined forces to study the ailing civil justice system and to propose solutions to the ever-growing problems of modern trials.[74] The two organizations focused on remedying what is perceived to be one of the specific causes of the vanishing jury trial—the cost and extent of discovery. After much discussion and debate, the organizations recommended a set of standards be put in place to alleviate some of the expense and time of discovery, the proposed Principles.[75] Although the Principles are merely discussion points at this time, they represent something much more significant, the acknowledgment that something must be done.

But we must do more. At the very least, the public must be made aware that it is slowly but surely losing a precious right

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71. Higginbotham, *supra* note 30, at 1423.

72. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 89 (2006).

73. Judge William G. Young, Speech at Judicial Luncheon at the Florida Bar's Annual Convention in Orlando (June 28, 2007), *available at* http://www.bostonbar.org/pub/speeches/young_june07.pdf.

74. FINAL REPORT ON JOINT PROJECT 2009, supra note 49, at 1.

75. *Id.* at 3.

that our Founding Fathers fought to embrace and preserve—the right to a jury trial. This necessarily involves a massive educational effort. Hopefully, once the public becomes aware of the steady erosion of this precious right, there will be a clamor for the current situation to be reversed.

VIII. CONCLUSION

In summary, if we continue on our current path, our judicial branch will look far different twenty-five years from now than it does today. Since jury verdicts, even controversial ones, usually have greater acceptance among the general public than single judge decisions, the consequences of our losing the jury trial posits an important public policy issue that we must address—and address quickly.