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Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial

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Abstract: The current dearth of civil trials may result from two converging trends in civil practice: twentieth-century procedural reforms and associated changes in the organization and financing of legal practice. The procedural reforms required greater pre-trial investigation of facts. Pre-trial investigation often required litigants to make regular investments of substantial capital, access to which was facilitated by changes in the organization of plaintiffs' practices. Together, these procedural reforms and changes in practice structure provide a plausible explanation for the observed phenomenon of declining rate and number of civil trials.

“But the worst feature of American procedure is the lavish granting of new trials.”

Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*¹

Ninety eight years ago, Roscoe Pound delivered to an American Bar Association meeting an address on our legal system. In that address, which was still being celebrated by professional leaders fifty years later, Pound argued that popular dissatisfaction with the legal system could be cured by procedural reform, and he had a list of reforms in mind.² At the top of his list was a concern about trials. But his concern was the mirror image of the image of ours. He identified as the “worst feature” of the American legal

* © 2004 Stephen C. Yeazell, David G. Price & Dallas P. Price Professor of Law, UCLA School of Law. I am grateful to the Litigation Section of the ABA for the opportunity to reflect on the issues raised by Marc Galanter's stimulating paper as well as for the very interesting comments by the distinguished members of the Symposium. As always, I am greatly in debt to the superb reference services provided by the Hugh & Hazel Darling Law Library at UCLA and to its fine cadre of research assistants and librarians and to support provided by the Dean's Fund at UCLA School of Law. In thinking about the topic of this paper I have been greatly stimulated and assisted by the comments of Allen M. Katz, Esq., an experienced and thoughtful litigator, whose understanding of the dynamics of civil lawsuits have opened my eyes to a richer interplay of factors than I would otherwise have suspected, by conversations with Stephen Bainbridge, Kent Syverud, and the perceptive comments of an anonymous review for this *Journal*.

¹ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. OF A.B.A. 395, 413 (1906).

² *Proceedings in Commemoration of the Address*, 35 F.R.D. 241 (1964) (commemorating Pound's 1906 address at the 1964 Convention of the American Bar Association).

system the “lavish granting of new trials” by appellate courts. In the near-century since Pound’s pronouncements, we have moved to the opposite pole. Rather than worrying about repeated trials of the same case, we now convene a symposium to consider whether trial itself, to say nothing of repeated trials, is an endangered species, and what to do about it.³ I bring to this conversation both a word of hope and a word of caution. My principal argument is that we should take both the hope and the caution seriously, lest, at the start of the 22d century, our great-grandchildren be gathered to consider again how to cope with the deluge of trials that threatens the legal system.

The hope and the caution both spring from the same source: one plausible understanding of our situation lies in well-known features of the legal landscape that were intentionally put in place over half a century. Some of these changes involved procedural reforms that culminated half a century of bar debate and advocacy. Others came from broad transformations in the financial structure of the U.S. economy; still others involved the restructuring of the legal profession. In combination, these changes provide one explanation for the nearly complete privatization of fact investigation, and the concomitant disappearance of civil trials. Those changes have decreased the trial rate from about one in five civil cases at the start of the 20th century to about one in fifty civil cases at the start of the 21st century. Whether one thinks of the vanishing trial as a triumph of privatization or as an abdication of public and professional responsibility, it is important to consider this story of how we got here, because our present situation may flow from a whole system. Trial numbers and rates can be seen as the symptom of these changes, not their cause.

Nor need we view the symptoms as signs of a disease. The decline of civil trials is an interesting trend, and it is important that we understand the demography of litigation far better than we do; that makes this symposium an opportunity to be grasped. But it

³ Logically, of course, it is possible that we suffer from both phenomena: a dearth of civil trials and an appellate propensity to excessive reversal of those few trials that occur. See, Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 667-668. Over the last half century, two scholars have argued, without regard to the proportion of civil trials, that appellate courts are too quick to reverse jury verdicts. See Charles Alan Wright, *The Doubtful Omniscience of Appellate*

doesn't follow that a trial rate of 2% is a national crisis, or that we would be better off as a nation or a profession if we returned to the one-in-five rate that prevailed a few decades after Pound's polemic.⁴ Whether the decline of trials points to pathology or to a different form of homeostasis depends on what we want the civil litigation system to do and how we think it ought to be financed. Those questions, not just the trial rate, should be the focus of broad attention.

This paper offers an explanatory hypothesis--that the present state of civil trials results from the convergence of two developments:

- first, what we asked for--a century of procedural reform and changes in the legal profession incorporating the consensus of some very thoughtful people;
- second, what we paid for--a half century of evolution in the demography and economy of the bar.

Having got what we asked for and paid for, we are now soberly assessing the results. Such an assessment and any proposals for change will, be better if we understand more completely why we stand where we do today and, if we don't like the current state of affairs, whether we would like even less changes that might produce a higher trial rate.

I. Appreciating Galanter

A first approach to this topic requires that we appreciate the significant contribution Marc Galanter has made to our understanding. He has marshaled all the data, and in the process has demonstrated several points that bear underlining, if only because several of them diverge not only from popular wisdom but even from the understandings of generally well-informed observers.

First, Galanter presents good data in ways that do not jump too quickly from the descriptive to the normative; this is a great virtue. And, to the limited extent to which it is possible, he does not assume that the only data is the federal data, thus missing the

Courts, 41 MINN. L. REV. 751 (1957); Eric Schnapper, *Judges Against Juries--Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237.

98% of the cases tried in the states. One of the important things revealed by this state court data is that, while the state court trends run in the same direction as the federal data, the number and the proportion of state court trials are significantly higher than in federal courts. In the years for which Galanter has data, the state trial rate ranged from a high of 34% to a low of 14%--at all times maintaining a rate not only higher but higher by a multiple of the federal trial rate.⁵ I return to this point later because whether one thinks of the present federal trial rate as a pathology or an achievement, the state data offer a point of comparison and a basis for thinking about which features produce which results.

Second, Galanter runs his trial numbers not just against filings but against other relevant indices, including most notably those involving population and GDP, revealing that litigation rates are keeping pace with population and are lagging far behind economic growth, a point that has escaped some otherwise sophisticated observers. To reinforce Galanter's data, consider a very crude chart that tracks the comparison between population, civil filings, and gross domestic product in the U.S., using the much larger universe of state court filings as the yardstick:⁶

⁴ See Yeazell, *supra* note 3, at 633-35.

⁵ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts* 68 (Preliminary Version, October 24, 2003) (hereinafter Galanter).

⁶ Data are derived from EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT **PAGES** (Brian J. Ostrom et al. eds., 2001); **U.S. Census Bureau**.

These data tell us two things that bear on Galanter's argument. Crudely, they tell us that litigation is growing just slightly faster than population, emphasizing that a fall in trial rates does not come from a fall in litigation rates. More important, they tell us that civil litigation is growing much more slowly than economic activity. Because civil litigation

typically correlates strongly with economic development,⁷ it is important for those who design and operate civil litigation systems to understand that in this respect not only trials but civil filings are substantially lagging one obvious correlate. That lag has implications for the design of policy as well. For legislators wondering whether litigation is out of control, these two comparison points suggest not: measured either against population or economic activity, litigation rates are either holding steady or declining.

Finally, though less directly, Marc Galanter's data provides confirming evidence of the confluence of two long-term trends in civil litigation in the twentieth century. The numbers illustrate the effect of changes in procedural design and of changes in litigation finance. In procedural design, we have got what we wished for; in litigation finance we have got what we paid for.

II. Getting What We Asked For

The quotation from Roscoe Pound at the top of this paper captured not only his views of trial but in many respects the agenda of thoughtful procedural reformers in the twentieth century. Trials, especially in the common law tradition, are in many respects "wasteful:" they produce a victor, but at great cost to both sides and to the public. To quote a pair of more contemporary observers, "a trial is a failure."⁸ Moreover, at the start of the twentieth century trials often produced a victor on the basis of incomplete information about the historical facts underlying the dispute. In many respects the procedural agenda of the century just past has sought to change these features--which were flaws in the eyes of the reformers. And we have done so--so completely that we now worry about the results.

A. Procedural Reform in the Twentieth Century

⁷ Christian Wollschläger, EXPLORING GLOBAL LANDSCAPES OF LITIGATION RATES, in SOZIOLOGIE DES RECHTS: FESTSCHRIFT FÜR ERHARD BLANKENBURG ZUM 60. GEBURTSTAG 587-88 (Jürgen Brand & Dieter Stempel, eds. 1998).

⁸ Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

Writing fifteen years ago, Samuel Gross and Kent Syverud gracefully summarized the guiding principles of procedural reform in the twentieth century:

With some notable exceptions [most of whom, the authors noted, were academics], lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial. Much of our civil procedure is justified by the desire to promote settlement and avoid trial.⁹

Procedural reform in the twentieth century reflected this belief. It did so in four ways, all of which incorporate what one might call a Progressive version of procedure: the belief in facts rather than law, the belief in information rather than argument, and the belief in broad rather than narrow focus for disputing, and a belief in agreement rather than adjudicated conflict. The central procedural changes of the twentieth century reflected these beliefs. They diminished the role of pleading, greatly expanded the mechanisms of pretrial discovery and role of expert witnesses, and enabled broad joinder.

Each of these changes should have affected trial rates. By lowering pleading barriers, the designers of procedural rules raised the number of plausible filings. This is not a small point. Even if we had held all other aspects of the system constant, by relaxing pleading requirements we would have increased the number of filings relative to the number of cases with sufficient merit to reach trial--and thereby dropped the trial rate. One of the great merits of Galanter's data is that he shows that something more is happening: not just the proportion of cases but the absolute number of cases reaching trial has diminished, teaching us that we need to look further than pleading reforms for an explanation of the data.

The second part of the story is discovery. The drafters of the Federal Rules of Civil Procedure and the state legislators and rulemakers who followed the pattern established by the federal reforms all believed that it was better to uncover the truth, the whole truth--*before* trial-- and thus to diminish the effect of theatrics and of surprise at trial.¹⁰ Looking at U.S. civil process at the turn of the twentieth century, they concluded that it was not well adapted to the transformed conditions of social and economic life,

⁹ *Id.*

¹⁰ Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1665 (1998).

particularly in disputes where one of the parties was a bureaucratic institution, either private or public. And they were probably right. Once a society moves to a culture of record-keeping and complex organizations, sorting out disputed events and responsibilities will become more accurate but take longer. Unlike the civil code nations, the United States had not trained a cadre of elite bureaucrats whose job it was to sort out the facts of civil disputes. Even the elite members of its bar and bench operated within a framework that made it difficult or impossible to pull together substantial bodies of evidence, much of it in the hands of adversaries. That made trials of such cases hard to conduct and too likely to turn on advocates' tricks or surprise witnesses. Before discovery common law trials often denied the parties and the judiciary an opportunity without the pressures of trial to sort through alternative lines of evidence, consider their coherence and to arrive at a thoughtful conclusion about what it meant. Civil law systems put in the hands of the judge the decision about how much factual investigation will occur.¹¹ Contemporary common law process now enables the parties, and, to a lesser extent, the judge, to do the same sifting because discovery will have unearthed almost everything salient about the case—in addition, we should candidly admit, some things that are not particularly salient. Modern pretrial process was designed to make surprise at trial virtually impossible,¹² and it has largely done so. U.S. litigants have at their disposal an array of devices that, if properly deployed, enable the uncovering of astonishing amounts of information.

These devices have another effect that bears on the phenomenon of the vanishing trial: they place the power of investigation primarily in the hands of the lawyer. At the time Pound wrote, there were cases in which relevant, unprivileged evidence could be uncovered only by the use of a trial subpoena. As a result, there were surely some lawsuits in this era in which trial itself was being used for the purpose of discovery. It is hard to imagine such a case today: anything that could be introduced at trial (as well as a

¹¹ See KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW 37-107 (2003) (arguing that the placement of investigative authority in the hands of officials who lack the incentive to investigate yields inadequate factual bases for civil litigation in civil law systems).

¹² One can find cases in which relevant, unprivileged evidence that appeared shortly before trial is excluded on the grounds that in modern civil litigation one expects that both sides will know of all the evidence

much that cannot be introduced at trial) can be discovered beforehand. But when it is uncovered today, the uncovering occurs at the initiative and under the control of the parties' lawyers, who can at the same time begin to decide whether and how to settle. By privatizing the uncovering of historical facts we have placed new power in the hands of the parties, power they regularly employ to settle their cases without adjudication on the merits.

It is hard to argue with the reformers' goal: historical truth or something like it is an attractive aim, and lawyers' tricks and surprise are not the stuff on which one wants serious decisions to be made. One wants the parties to know beforehand about the prior disciplinary record of the physician accused of malpractice, as well as the hypochondriac tendencies of his patient, the plaintiff. One wants to know the state of the brakes of the defendant's car and of the epileptic seizures of the plaintiff. And this is the stuff of simple litigation. Such preparation is not merely desirable but essential to some cases. One cannot imagine the development of products liability law or securities litigation or antitrust without the kind of deep discovery permitted by contemporary pretrial discovery and the growth in the use of expert testimony. Maybe more important, civil litigation has emerged as a real, if often controversial, alternative to regulation in the modern economy.

A generation ago bar symposia like these were full of debates about the merits and the techniques of the then-still-new discovery system. Great thrashings about the existence and scope of work product protection, a new emphasis on the doctrines of evidentiary privilege (because they protected the otherwise discoverable), concerns about the conditions under which experts could be deposed, and the like filled professional and to a lesser extent academic literature. More recently, professional literature and symposia have focused on the use and abuse of expert testimony. The defense bar mounted an expensive and partially successful attack on the use of expert testimony. But even after *Daubert*¹³ and a well-orchestrated attack on "junk science," large numbers of experts, not just from the traditional professions, but in a range of fields from plant

before the trial begins. See, e.g., *Klonoski v. Mahlab*, 156 F.3d 255, 257 (1st Cir. 1998) ("We find that this constituted trial by ambush. We vacate the judgment below and remand for a new trial.").

¹³ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

security to accident reconstruction regularly produce reports, depositions, and testimony in a wide range of cases.¹⁴

Discovery and expert testimony have combined to create a fundamentally new possibility. They permit a properly financed lawyer to bore deeply into an adversary's files, to try out lines of questioning that might turn out to be a dead end, and to inspect documents, objects, while still shaping strategy and without being bound to offer them in evidence. No other legal system has to date attempted these on the scale characteristic of American litigation.¹⁵ The system, though essentially private and adversarial, can marshal facts in a manner that resembles an administrative investigation. I emphasize these points not because they show that modern discovery is a freak or monster, but because it helps us understand the decline in civil trials.

B. Settlement & Trial Dynamics in Modern U.S. Procedure

Paradoxically, discovery leads to a decline in trial because it allows litigants to explore, without the constraints of trial theories of liability or defense, factual avenues that would have been practically and tactically impossible at trial. In concept, modern discovery merely accelerated the time at which a party could be required to disclose information under oath, accelerated it from trial to an earlier period. Or so said *Hickman v. Taylor*,¹⁶ the leading Supreme Court case on the topic. But *Hickman* missed the point in this respect. Lawyers have for years been telling other lawyers never to ask a question of a trial witness to which the lawyer does not already know the answer. There are doubtless excellent tactical reasons for this advice. But discovery allows and encourages lawyers to do just that--to explore, tentatively, lines of inquiry that may later be abandoned as fruitless. Combined with easier pleading rules, this aspect of discovery means that more cases will survive to, but not beyond, discovery because a party "discovers" that his claim or defense is weaker than he thought. Again, however, we

¹⁴ See generally, DAVID A. SKLANSKY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 446-47 (2003).

¹⁵ HUANG, *supra* note 11, at 47-48 ("The continental treatment of evidence has led to the observation that it contains 'a considerable degree of tolerance for' or a 'relative indifference to' the incompleteness of the evidentiary materials received and considered by the court for fact-finding. The direct result of this tolerance or indifference is the reduced accuracy of fact-finding.").

¹⁶ 329 U.S. 495 (1947).

must recall that Galanter's data takes us beyond this point by demonstrating that not just the proportion but the absolute number of trials has declined. What does this have to do with discovery and experts?

Discovery and expert testimony have four effects relevant to our topic. First, they create some of the "complex" cases on which Galanter reports. I am enough of a post-modernist to believe that some (though surely not all) "complex litigation" is in the eye not of the beholder but the discoverer. There are few patterns of human interaction on which more light and therefore more nuances cannot be shed by deeper investigation. Discovery enables that investigation if the stakes warrant it. Expert testimony allows the fruits of that investigation to be screened by critics whose credentials make it difficult to brush aside. To that extent it may account for the somewhat greater length of the cases that do reach trial, a development Galanter documents.¹⁷ Another factor adding to the length of trial is modern joinder. If what one uncovers in discovery suggests that there is another party responsible for my injury, or if, as a defendant, one seeks to pass on all or part of that liability, joinder beckons.

Second, discovery and the availability of expert testimony are preconditions for some kinds of modern litigation: securities fraud and product liability provide two examples. Consider whether modern products liability could have developed in the absence of discovery and the broadened use of expert testimony, even if the substantive law were in place. Product liability law requires the plaintiff to demonstrate that existing engineering or science should have predicted the risk in question and that a reasonable change in design could have avoided the risk. As a practical matter, both demonstrations require something like modern discovery. In theory an expert without prior access to defendants' documents and deposition testimony could testify at trial; but the practical obstacles to such testimony being convincing to the trier of fact are slim. Comparing U.S. and European product liability regimes provides further substantiation of this point. My information suggests that the substantive regime of, say, German law is not dramatically

¹⁷ Galanter, *supra* note 5, at 22-24.

different from that of U.S. law.¹⁸ And the German judiciary is perfectly capable of digesting and comprehending expert testimony. What's missing is the combination of access to documents and witnesses on one hand, and the motivation and financing to assemble, mull, and synthesize the information thus provided.¹⁹

Third, discovery produces a great deal of information, some about one's own case and almost as much about the other side's case. It is not surprising that such information will sometimes produce converging estimates of the likely outcome of the trial (though Galanter usefully notes how badly even experienced lawyers often make these estimates--a point to which I shall return). On the basis of this information the parties will often settle. That point is important: modern discovery itself *produces* settlements, regardless of the judge's behavior or the availability of devices like early neutral evaluation and settlement conferences. Comparative data again illuminate, suggesting that in civil law systems--in which parties cannot force discovery--have trial rates ranging between 30% and 70%, manifold higher than those in any U.S. jurisdiction.²⁰ There are several possible explanations for this variance, but the existence of robust (and expensive) discovery in the U.S. must rank high among the possibilities.²¹ Discovery produces settlements because it produces information that can be introduced at trial and it produces information about what the other side can produce at trial. It enables a lawyer to make some estimate of the information that will come before the trier of fact. Those estimates need not be accurate ones; indeed, some studies suggest that even experienced persons are not very good estimators of case outcomes.²² All that is necessary is that the

¹⁸ See Gary Schwartz, *Product Liability & Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 28, 29-46 (Peter W. Huber & Robert E. Litan, eds. 1991).

¹⁹ A similar point exists in relation to securities litigation, at least in publicly traded companies. Once we are beyond the simplest forms of garden-variety fraud, the plaintiff's case will rest on auditors' reports, internal documents allowing the inference of scienter, and so on. Absent discovery, it simply would not be possible to produce an effective case if one had available only the information produced by trial subpoenas, without the ability to ladder and stage the production of information, ability created by the discovery regime. See, e.g., Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in a Global Economy*, 37 *IND. L. REV.* 141, 177 (20003).

²⁰ HUANG, *supra* note 11, at 81.

²¹ See *Id.* at 82-89 for a theoretical demonstration that discovery is a likely cause of the discrepancy.

²² See Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 *MICH. L. REV.* 751, 811 (1999) (reporting that the "awards our jurors actually gave tended to be smaller than the awards the judges and lawyers predicted they would give. One might expect the

estimates, however flawed, converge. In the absence of discovery the only way to gain some of this information was to go to trial. Otherwise put, in the world before 1938 trial was often the only real way to do discovery, and some of the trials in this earlier era can be seen as in-court efforts to seek information.²³ So, all other things being equal, extensive discovery will lower the trial rates because it produces information.

Fourth, discovery and expert testimony substantially increase costs and require continuing investment. At one level that point is unbearably obvious. I want, however, to argue the less obvious point that those costs may change both parties' calculations about the desirability of settlement and the risks of trial. U.S. litigation usually requires each side to bear its own litigation costs, including most notably discovery and expert witnesses. Insurance companies, who watch litigation costs closely, tell us that law is usually cheap while fact investigation and discovery are usually expensive. Typical retainer agreements for insurer-engaged counsel require the defense lawyer to seek permission from the carrier before taking a deposition, engaging an expert, or seeking any form of expensive discovery. On the plaintiffs' side experienced lawyers listening to a prospective clients' story of an injury will be mentally calculating the extent of investment--in experts, in fact investigation, in discovery--necessary to bring the case to a point where either trial or a credible discovery offer is possible.

These costs are not just a barrier to litigation--though they are certainly that. They also produce a game of competitive investment. Both parties are trying to "buy" victory by investing in discovery. Discovery may uncover information that will strengthen one's case. Discovery will likely uncover both strengths and weaknesses in the opponent's case. Discovery will almost certainly require a symmetrical investment

expertise of judges and lawyers to include accurate predictions of what jurors will do. . . . Systematic errors call for explanations. . . ."); Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns about the Nature & Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 289-91 (2001) (reaching a similar conclusion on the basis of less elaborately analyzed data, reporting "dramatic" differences in the estimates of insurance adjusters, lawyers, and similar persons).

²³ That phenomenon persisted for several decades after 1938, in part because the bar took some time to exploit fully the possibility of discovery and in part because there was a lag of some decades before all the states substantially adopted the "Federal" discovery regime. See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 29 B.C. L. REV. 691 (1998).

by one's adversary: depositions must be defended; interrogatories must be answered or properly objected to; experts require counter-experts and so on. These discovery and experts' costs mean that as the case progresses, the parties must regularly make decisions about additional investments, and must consider how various litigation events bear on the likely return of investments already made. Classical economic theory tells us that sunk costs should not influence decisions about whether to make further investments: the only thing that should matter, from the stance of cold rationality, is whether additional investment will yield gain.²⁴ Social psychologists tell us that many of us behave less rationally than this: that sunk costs often cause people to persist in investments beyond the point at which they should.²⁵ The phenomenon of the vanishing trial displays, I think, both principles at work.

I stress these costs because, although lawyers appreciate them well, some of the academic literature (including some written by me) fails completely to appreciate the role of discovery and expert testimony in producing the propensity to settle. Before discovery, the propensity to settle was largely a matter of balancing size and chance of victory against the size and likelihood of defeat at trial. But little was required by way of continuing pretrial investment, because little *could be* invested beforehand. Discovery and expert testimony changed that calculation: they not only enabled substantial, continuing pretrial investment but *required* it. And the staged character of discovery forced litigants regularly to confront the question of whether to continue to invest in the outcome of adjudication.

In making their investment decisions, litigants and lawyers must contend with two added uncertainties: first, the substantive law pushes trial outcomes away from smooth curves and toward bimodality; second, mean and median judgments differ substantially.²⁶

²⁴ See, e.g., Eric S. Dickson & Kenneth A. Shepsle, *Working and Shirking: Equilibrium in Public-Goods Games with Overlapping Generations of Players*, 17 J.L. ECON. & ORG. 285, 301 (2001) ("It is a central tenet of rational choice theory that individuals honor neither sunk costs nor sunk benefits in deciding on future courses of action.").

²⁵ See, e.g., J. KEITH MURNIGHAN, *BARGAINING GAMES: A NEW APPROACH TO STRATEGIC THINKING IN NEGOTIATIONS* 157-65 (1992).

²⁶ See generally Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996) [hereinafter Gross & Syverud, *Don't Try*].

Both factors complicate trial-or-settlement calculations. Bimodality is perhaps the most obvious point. In civil trials, adjudicators must first decide whether the defendant is liable; if the answer is no, the plaintiff recovers nothing. If the defendant is liable, the adjudicator must, in most cases, calculate damages.²⁷ In some cases, the range of those damages can be very large--for example, pain and suffering or punitive damage awards have a broad range.²⁸ These two factors push litigants' calculations about possible outcomes in opposite directions. The bimodality bias of the much of the substantive law creates a very substantial all-or-nothing risk. The range of damages allowable in many cases creates the opposite possibility--smoothing the curve of possible adjudicative outcomes.

We know something about the outcome of these opposing characteristics on actual verdicts. Several studies have confirmed the proposition that median verdicts hover around the \$40,000 mark, but that a very small right hand tail reflects the six-and seven-figure verdicts that make headlines and reputations.²⁹ One study of the entire universe of jury verdicts in California for two different years found that between two-thirds and three-quarters of all civil damages awarded came in five per cent of the verdicts.³⁰ As a group, plaintiffs and their lawyers will be investing in litigation with the hope they will prove successful at trial, and, if so, that their verdict will form part of the small right-hand tail that creates the spread between mean and median verdicts. As a group, defendants will be seeking either a total defense verdict or, failing that, a damage award in the median range. The prospect of settlement presents two possibilities. First and most obviously, it ends the need for continuing investment; the balance sheet can be closed. Second, and somewhat more subtly, it shifts control of the outcome into the lawyers' and parties' hands *and* presents the possibility of smoothing the curve of possible outcomes: negotiations can produce results along an even curve. Settlement thus

²⁷ The exception to this proposition comes in contract claims where damages are either liquidated or otherwise known, as with, for example, a promissory note.

²⁸ In the instance of punitives, the U.S. Supreme Court has presumptively limited punitive awards acceptable under the due process clause to less than ten times the amount of compensatory damages. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 424-26 (2003).

²⁹ Cite to Eisenberg, etc.

³⁰ Gross & Syverud, *Don't Try*, *supra* note 26, at 36.

reduces risk in two ways: it attacks both the uncertainty and the bimodality of legal judgments.

The attractions of these features of settlement deserve further exploration after an explanation of a second contributor to the decline in trials. Changing procedural rules and customs may, by themselves, have contributed to the changes reflected in Galanter's data. But they were likely accelerated by changes in the demography, economics, and regulation of the U.S. bar.

III. Getting What We Paid For

The preceding paragraphs, with their emphasis on symmetrical investment by the parties, imply a symmetrical system of litigation finance. Such a system is for many claims and for many parts of the bar now a reality. That symmetry has implications for trial rates. If the ability to invest in discovery and experts were systematically asymmetrical, available in practice only to the defense bar, I believe we would have less settlement and higher trial rates--as we did seventy-five years ago. Changes in litigation finance, in practice patterns, and, to a lesser extent, in professional regulation contribute to the phenomenon of the vanishing trial. An effort to understand--or to alter--the trial rate without reference to these features is therefore likely to fail. The sketch below cannot deeply document these changes. Fortunately most of the changes are uncontroverted. The task is rather to connect these familiar developments with their effect on trial rates.

A. Reconfiguring the Bar

Seventy-five years ago the plaintiff's and defense bars were systematically asymmetrical in resources. The plaintiffs' bar, if it could be dignified by such a name, consisted of under-capitalized and sometimes poorly educated lawyers who were widely accused of improperly soliciting clients, suborning perjury, and worse.³¹ More to the point of this exploration, they were systematically outgunned by the defense bar, usually

³¹ See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 40-50 (1976).

retained by insurers. Were there a serious question of investing in litigation--and there usually wasn't because the plaintiff lacked the resources to make such investment necessary--the insured defendant could bring substantial resources to bear, without plaintiff's being able to match them. Under these circumstances one can imagine three outcomes. One would be simple abandonment of the case by the plaintiff, unable to respond even to motions to dismiss; anecdotal evidence suggests such outcomes were common.³² Another, perhaps more likely would be the acceptance of an offer very heavily discounted by defendant's knowledge that the plaintiff lacked the financing (and perhaps the skill) to bring the case to trial. Again, anecdotes suggest that such outcomes occurred frequently, and still occur, to the extent that less-elite segments of the plaintiffs' bar are undercapitalized.³³

But in some cases--perhaps one out of five, if my historical data on the federal courts applies as well to the states--the case would be simple enough and the plaintiff's lawyer and client able to hang on long enough to bring the case to trial.³⁴ Trial had two substantial attractions for our hypothetical plaintiff. First, there might well be witnesses or documents he could obtain only by the use of a trial subpoena. Second, and probably more important, trial had a significant upside and virtually no downside. If defense settlement offers had been low, trial might be the only chance for a significant recovery. And a loss at trial though it would involve the costs of the lawyer's time, would not involve the loss of significant out-of-pocket investment because the plaintiff (or his lawyer) had made no such investments.

³² See, e.g., John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1596, 1604 (1993) ("Individuals and organizations with substantial resources can utilize the legal system because they can afford to pay legal costs and withstand the effects of delay. A party lacking substantial resources is at an obvious disadvantage. The disparity of resources between litigants may result in one party outspending the other and, as a result, affecting the result of the controversy... Defendants have the wealth, knowledge, and resources to investigate and prepare a case for trial. Thus, a severe structural imbalance exists between plaintiffs and defendants."); Yeazell, *supra* note 3, at 638. JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962). Keep this? I've been unable to locate support for the proposition. I can dig deeper into the book but it could take too long.

³³ See Sarah Parikh, *Professionalism & Its Discontents: A Study of Social Networks in the Plaintiffs' Personal Injury Bar* 84-85 (2001) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with author) (reporting on higher rate of pre-filing settlement by less elite members of the plaintiffs' bar) [hereinafter Parikh, *Professionalism*].

³⁴ Yeazell, *supra* note 3, at 633.

Today, the financing, and thus the strategy of trial and investment have changed in ways that render the adversaries more evenly matched. That symmetry allows more equal investments. More equal investment in litigation changes the dynamics of settlement. The staged character of litigation investment as discovery proceeds presents litigants with continuous decisions about whether to proceed or settle. And litigants want to think about those decisions. For example, when insurance carriers hire outside defense counsel, they typically insist on consultation and specific permission before counsel take steps that have significant financial implications (e.g., engagement of experts, taking of depositions). Because staged pretrial processes will require symmetrical investments, the parties must regularly and specifically confront the question of whether to settle or to continue to invest. Because continued investment depends on capacity, and capacity is likely to be the least well understood of the phenomena under discussion, it is worth brief elaboration.

The U.S. bar has famously grown in size, both in absolute numbers, and on a per capita basis. Just as important has been the change in the size of many of the practice groups. References to mega-firms with hundreds or thousands of lawyers are common parts of the literature and of our students' lives, particularly for those among us whose students and colleagues inhabit the "upper hemisphere" of the bar. To understand the vanishing trial, however, the 2000-lawyer firm is less significant than a more pervasive shift at the other end of practice. Until the most recent decades, most U.S. lawyers were solo practitioners,³⁵ a group that still comprises about a third of the bar. In the last two decades, however, for the first time more U.S. lawyers were practicing, not alone, but in at least small groups. It is important to stress the small size of these practice groups: there are far more U.S. lawyers practicing in groups of 5-12 than in groups with more than a hundred lawyers. Recent data from the largest bar in the U.S. give us a sketch of the present and some sense of the future. In 2001 only 35% of active members of the

³⁵ See RICHARD L. ABEL, *AMERICAN LAWYERS 300* (1989) (reporting on tabulation of lawyers listed in Martindale-Hubbell).

California bar reported themselves in solo practices.³⁶ And of all active lawyers in that state, almost 70% reported themselves in a practice group that included some other lawyers.³⁷ For our purposes the change from one to ten lawyers is more important than the change from fifty to two hundred lawyers.

Consider the effect of these changes, starting with the plaintiffs' bar because the changes here are greater and because they drive some of the defense bar shifts. Capitalization, diversification, and case selection are the keys to this change, and one of the keys to the dropping trial rate. As we have seen, modern litigation will often require significant investments that may not bear fruit for several years. A lawyer representing a plaintiff in an ordinary auto accident case, still the most common civil filing in the U.S., must count on retaining experts to testify concerning the extent of the plaintiff's injuries, including any long-range effects, perhaps about the causes of the accident, perhaps about municipal liability for road design or traffic management. Many of these experts will require retainers for their initial investigation or reports, more investments to depose them and their counterparts--and so on.

Bankrolling such a case (and this is emphatically a simple rather than a complex case) generally will require two things: a line of credit from a lender and several colleagues whose work diversifies the risk for the entire firm. Both phenomena are now common, and they reinforce each other. Banks finance law firms, and lenders will frequently advance more credit when the practice has depth (several lawyers) and diversity (a mix of cases).³⁸ Practice groups often purposely engage in a range of work, some of which may produce modest but predictable income, part of which can be used to invest in larger, less predictable cases.³⁹ Alternatively, the firm may specialize in personal injury litigation but have enough lawyers and cases to average risk across the "portfolio," so that there will be a predictable income stream. In either case, a practice

³⁶ Richard Hertz Consulting, *Final Report: California Bar Journal Survey* (Sept. 10, 2001), available at <http://calbar.ca.gov/calbar/pdfs/cbj/2001-CBJ-Survey-Summary.pdf>.

³⁷ *Id.*

³⁸ quote from CA Lawyer

³⁹ Herbert M. Kritzer, *The Wages of Risk: Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 303 (1998).

group enables capitalization deeper than that typical of the solo practitioner. That capitalization is critical, because it allows the plaintiffs' bar to meet the demands of the pretrial phase of litigation, to prepare a case deeply enough that the defense must take it seriously, and to reap the potential profits from intensive--and expensive--investigation and preparation.⁴⁰

One recent factor that requires capital investment in the narrow sense of the term but may reduce somewhat the individual case investment is the rise of digital technology. No self-respecting law practice can do without substantial information technology, which has several effects on the dynamics of litigation and settlement. First, technology may make the uncovering of information, particularly in informal investigation, faster and cheaper: various publicly available information that might once have taken days to locate can now be accessed in minutes through search engines and online availability. Second, some practitioners report that search engines and large on-line data bases may make available to both plaintiffs' and defendants' bars more complete information about settlement patterns and thus help anchor discussions in historical patterns. But, again, at least modest capital investment in the infrastructure of technology must occur before these benefits are available.

Besides capitalization, the system requires that there be a significant referral market in plaintiffs' claims, in which the lawyer initially consulted by the plaintiff has the means and an incentive to get the case to someone who can make the appropriate level of investment. Significant changes in the professional regulation have enabled such referrals to occur. Rules against fee-splitting and referral fees have long been unenforced. Professional regulators have today largely abandoned prohibitions on such

⁴⁰ A current controversy about the financial success of the plaintiffs' bar reinforces my point. The debate concedes the point central to my argument--that the plaintiffs' bar today is far better capitalized than in the past. The debate is between Prof. Brickman, who believes that the plaintiffs' bar is almost obscenely (and unethically) wealthy, and Prof. Kritzer, who contends that it is about as well off as the defense counterparts. Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. UNIV. L. Q. 653, 664 (2003) (disputing Kritzer's findings and arguing that many contingent fee lawyers earn unethically high contingent fees). But see Herbert M. Kritzer, *Estimating Effective Hourly Rates: Lester Brickman's Junk Science and Questionable Scholarship* (forthcoming; manuscript on file with author).

arrangements.⁴¹ As a consequence, recent studies of the bar indicate an active and well-functioning market in referrals, with claims moving up and down the ladder of the plaintiffs' bar to firms that are adequately capitalized to handle the claim in question.⁴² Compensation for such referrals comes both in the form of referral fees and, just as important, in a future stream of referrals--with the less-well-capitalized practices getting referrals of cases too small for the big fish and the high-end practice getting referrals of large-value, large-investment cases from small practices.

B. Settlement & Trial Dynamics in a Reconfigured Bar

This structure creates a climate of rational risk aversion and a slight preference for settlement in most cases. Once upon a time, the entire plaintiffs' bar had the same characteristics--very little capital and the ability to sort cases into only two categories: those that would be settled before filing and those they would try to take to trial. The decision to file suit indicated a predisposition to go to trial if they and their clients could hang on that long. Today, many members of this segment of the bar act more like the manager of a diversified stock fund with ladder portfolios. They will invest significant amounts in market research (client screening, referral, and pretrial investment), and construct "litigation portfolios" with a varying characteristics. Some will seek large number of small gains (settlements) and a much smaller number of cases in which they hope they have accomplished the litigation equivalent of buying Microsoft in 1985. Because these portfolios require continued investment decisions--shall we take another deposition? hire another expert? bring this motion?--these lawyers must continuously decide whether to invest more on the prospects and risks of adjudication or whether to control those risks through settlement. These plaintiffs behave more like large investors than did their predecessors. To put the point another way, the plaintiffs' bar, because of

⁴¹ Forty states have formally abandoned restrictions on referral fees, and experienced observers report that even where prohibitions persist they are rarely observed. See, e.g., Sara Parikh, *Plaintiffs' Practitioners: Competition and Cohesion in the Personal Injury Bar*, 14 RESEARCHING LAW: AN ABF UPDATE 3 (203) [hereinafter Parikh, *Plaintiffs' Practitioners*]; NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 238 (2d ed. 2000) (reporting that despite the prohibition against referral fees embodied in the old MODEL CODE OF PROF'L RESPONSIBILITY DR 2-107(A)(2) (1980), "the practice of referral fees appeared to be fairly widespread in the profession.").

⁴² See Parikh, Professionalism, *supra* note 33, at 88-89, summarized in part in Parikh, *Plaintiffs' Practitioners*, *supra* note 41, at 2.

its better capitalization, is now in the position to behave like the defendants, to which we now turn.

The defendants' bar has responded to the plaintiffs' side changes in interesting ways. As was the case seventy-five years ago, most of the defense work will be financed by liability insurers (or by self-insured defendants whose size will cause them to behave much like insurers). The most significant changes grow from the post-war expansion of credit. With this credit, the U.S. population has made two major investments—in housing and in automobiles. Two-thirds of U.S. households now own their housing, and the average U.S. household also owns a fraction more than two automobiles, also purchased on credit. Both investments are overwhelmingly backed by credit, and creditors have insisted on insurance to protect their investment; common prudence, insurance marketing, and, in many states, mandatory auto liability insurance laws have made liability insurance a standard part of such policies. This development, which has accompanied the great credit-linked expansion of the U.S. economy in the past half century, has created broad if sometimes shallow pool of insured defendants. This expansion of liability insurance, itself linked to the extension of consumer credit, has led to an expansion of the defendants' bar.

But with the expansion in this side of the bar has come a new generation of cost controls. So long as insurers could rely on the systematically asymmetric resources of plaintiffs and defendants, they had less need to supervise the expenditures of their retained defense lawyers. Those lawyers would not typically need to spend much, in part because there wasn't a lot to spend on in the days before pretrial discovery and the flowering of experts, and in part because just the threat of significant defense expenditures (coupled with the insurance resources that made such threats credible) would result in either a defense victory or a modest loss. That changed when the plaintiffs' bar recapitalized itself. Today, many plaintiffs' firms can match defense expenditures dollar for dollar (up to the point of diminishing rationality, an amount determined by the stakes of the case). Insurers have responded to this reality by imposing very tight cost controls. Not only lawyers' fees but also basic litigation decisions,

particularly those in the pretrial stage, are subject to carrier control. As already noted, many retainer letters from insurers require carrier permission to engage in significant discovery, to hire an expert, even to do legal research or to file motions beyond the required minimum. In most cases these controls, combined with the recapitalization of the plaintiffs' bar, mean that the parties have essentially equal resources. The insurer will, of course, have absolutely greater resources available to it, but the amounts at stake in the case will make it irrational to deploy those resources, except in the occasional strategic, "we'll-show-them-what-they-are-up-against" case.⁴³

These changes have altered the strategy of settlement, and thus contributed to the vanishing of trial. In a world in which the plaintiff's lawyer had made virtually no investment in pretrial investigation or discovery (perhaps because he could not afford any), trial, if he could hang on that long, was a rational choice: there was a very small chance of winning, but there was little chance of winning without it--and there was little need for continuing investment and the continuing re-evaluation that decision entails. In a world of significant pretrial investment--continuing investment made by both sides--settlement looks different.

C. The Dynamics Illustrated

Some numbers may help. Suppose the most common single form of lawsuit--an auto accident case. The plaintiff has sustained serious injuries in an intersection collision; if permanent, the injuries will require lifetime care, but that diagnosis is uncertain. At the outset of the case plaintiff's lawyer is uncertain about the case for liability: plaintiff and defendant tell different stories, the police report is inconclusive, and there are no known witnesses. The plaintiff's lawyer must make two decisions: whether the case is worthwhile with any level of investment and, if so, whether her practice group can handle it, given their level of capitalization and present case mix. If the answer to the first question is yes and the second no, the lawyer will need to find a

⁴³ The exception to this symmetry of resources is the bet-the-company case, in which the potential for massive liability from a repeated injury will cause the defendant rationally to make a much larger investment in the individual case than it would, by itself, warrant because of the fear of cascading liability

referral among her network of appropriate firms. Assuming either that the first firm can handle it or that it has been successfully referred, a series of investments will follow: investigators to uncover potential witnesses; in engineering experts to reconstruct the accident (to replace or bolster the incident witnesses), medical experts to estimate the likelihood of lifetime medical injuries, and actuaries to produce reliable estimates of lost wages and medical expenses. The total investment, exclusive of lawyers' time, is likely to run between \$75,000 and \$100,000, according to my sources.

Let us now turn to the defendant to see how the dynamics might operate. Suppose that defendant and the carrier conclude there is coverage. At a minimum that means the carrier is obliged to defend. An early question will be whether the policy limits are high enough to pay a substantial settlement. If not, the carrier may well make an early tender of the policy limits, to save itself litigation expenses and, equally important, to protect itself from the prospect of a subsequent suit for bad faith failure to settle--a claim that typically carries both compensatory damages (of the amount of the resulting judgment, even if it is larger than the policy limits) and punitives. Typically a plaintiff will accept such a settlement offer if it's clear that there are no non-insurance assets, and, according to some recent work, even if there are non-insurance assets.⁴⁴ But for purposes of exposition let us suppose that either the initial policy or an umbrella policy are large enough, and the initial assessment of liability and damages uncertain enough, that the carrier decides it must defend at least into a deeper stage of the litigation. At that point defendant must essentially match plaintiffs' investment decisions, except in the unlikely case it decides that plaintiff is investing foolishly. The defendant must thus make its own symmetrical investments in investigators, experts, and the like. Because the carrier is a bulk purchaser of such professional services, it may be able to obtain them at a slightly lower cost than the plaintiff. But the discount won't be enormous, so let us realistically suppose that the defendant must also make an investment in between \$60,000 and \$75,000 in experts and the like. Moreover, they must invest these amounts not all at

in similar follow-on cases. See, e.g., Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 210 (2001).

⁴⁴ See Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 314 (2001).

once, but in stages, and if they are rational, will consider at each stage whether the additional investment (which, we must recall, is an investment toward a return with a very high degree of variability) is worthwhile. Such a situation seems likely to lead many parties toward a decision to settle--even if we take account of what psychologists report is a normal human propensity to throw good money after bad.⁴⁵ At this point, the parties, between them have between \$130,000 and \$175,000 invested in the case, without regard to lawyers' time. But at this point we cannot ignore lawyers' time, because an expert must, at a minimum, produce a report to be disclosed to the other side (and reviewed by the adversary's lawyer) and submit to a deposition which will enable the adversary (and the proponent) to evaluate the strength and credibility of the expert's testimony. Each such deposition must be prepared and defended, and transcribed or recorded. We are, at this point, approaching the level of \$200,000 in joint costs, most of which are *not* in lawyers' time. And recall that those costs have been incurred in a case where the verdict could quite credibly be either \$0 or \$2,000,000--given the uncertainty about both liability and damages.

Suppose that plaintiff, an experienced and credible lawyer who is known by the carrier to be able to take cases to trial and to win with some regularity, approaches the carrier relatively early, say after both sides have invested something like \$30,000 in the case. From experience the defense lawyer will know that plaintiff's lawyer is prepared and able to invest another \$70,000--and that the carrier will have to match it--before incurring the even higher expenses of trial. The result of trial, of course, could be a ringing defense victory, but even that would end up costing more than \$100,000. Or trial could be a disaster, with \$2,000,000 in damages to be added to the \$100,000 in litigation expenses. A settlement of \$150,000 leaves everyone much better off: the carrier has assured that it won't be left with a very large bill, and will pay just \$50,000 more than it would pay in litigation expenses even in the even of total defense victory. Considering the possible exposure from a large verdict, this may look very good. To the plaintiff--and his lawyer--the same may be true. Granted that the \$30,000 and the lawyer's fee will

⁴⁵ One of the more striking forms of this human tendency comes in "auctions" in which ordinarily sane people will bid in excess of a given sum for the right to "win" that sum. See MURNIGHAN, *supra* note 25,

have to come off the top, they avoid the possibility of a large additional investment followed by a defense victory, which is the most common outcome of a personal injury trial.⁴⁶ Under these circumstances, trial has limited attractions and settlement many.

D. Two Limiting Cases?

But has this scenario explained too much, suggesting that there should be not just few but *no* trials? The most common solution to this paradox supposes that it occurs because the parties reach substantially different estimates of the trial outcome. Such a proposition is well understood, though accumulating data suggest that the phenomenon may be more widespread and more dramatic than typically suspected, with even experienced lawyers and judges making very poor estimates of outcomes.⁴⁷ Another possibility, one closer to our investigation, might involve parties who had made little investment in the pretrial stage. One study of a large sample of such “ordinary” claims found that they typically employed little discovery.⁴⁸ Under such conditions, the absence of the requirement to make continuing investments--and the attendant need to reevaluate-- might lead parties to behave differently about trial. In the absence of significant investment the defendant will have little incentive to make more than a nuisance offer and the plaintiff will have no need for continuing investment until the eve of trial. There is some evidence from which one can infer that this phenomenon is at work: the state cases go to trial at a higher rate than the federal cases. We know from other studies that federal litigation has, on average, higher stakes,⁴⁹ and such stakes are more likely to draw continuing investment, and, with the investment, the requirement that it be regularly re-evaluated. So one hypothesis for the difference in the state and federal trial rate is that the former “suffer” from less need for continuing investment and therefore less propensity by both parties to re-evaluate.

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⁴⁶ Gross & Syverud report that a slight majority of personal injury cases that go to trial result in a complete defense victory. Gross & Syverud, *Don't Try*, *supra* note 26, at 41-43.

⁴⁷ See note 22, *supra*.

⁴⁸ Costs of Ordinary Litigation [cite]

⁴⁹ Theodore Eisenberg et al., *Litigation outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 438 (1996).

One category of federal claims may also fit this profile, and it is a category where Galanter's data indicate a rising number of trials: civil rights litigation. The civil rights bar, my anecdotal evidence suggests, is less well capitalized than the plaintiffs' personal injury bar. They may typically be in smaller practice groups. The experience with Rule 11 sanctions in the 1980s (before the 1993 revisions) suggests that federal judges, at least, thought a substantial proportion of these claims were either without merit or, at a minimum, poorly presented.⁵⁰ I am entirely aware that some have suggested reasons for this experience other than the merits of these claims. My thesis is consistent with either view. I am suggesting that this segment of the plaintiffs' bar is behaving much more like the entire plaintiffs' bar did in the first half or three-quarters of the twentieth century: they are bringing large numbers of underinvested claims, some of which are strong, some of which are weak, and some of which would be strong if the bar had were sufficiently well-capitalized to make the requisite investment. Because there's only modest pretrial investment, the optimal plaintiffs' strategy is to fight and claw, hoping to reach the promised land of trial. And Galanter's data suggest that a number of these cases do reach that land--a higher proportion than of cases where, for other reasons, we suspect better-capitalized plaintiffs' lawyers.

The argument, then, is that the apparent exceptions to the low-trial hypothesis involve two sets of claims with a similar characteristic: relatively low levels of continuing investment. In the state claims this characteristic may flow from the nature of the claims themselves--many factually simple, with damage amounts too low to justify substantial discovery. In the civil rights cases, my hypothesis is that, while some of the cases might justify higher investment levels, other the lawyers bringing many of those claims have characteristics that make them avatars--throwbacks to an earlier era of civil litigation. If this is correct, an interesting question is why the bar in this area has not capitalized itself as well or elaborately as the rest of the plaintiffs' bar, in spite of the existence of fee-shifting statutes designed to attract claimants' lawyers to this area of practice.⁵¹ One reason may be the relative immaturity of these claims: several decades

⁵⁰ Burbank cite

⁵¹ See, e.g., 42 U.S.C. §1988(b).

old, civil rights claims are still relative newcomers on the block, and it may take somewhat longer for the plaintiffs' bar to figure out the right way to invest and prosecute them efficiently. Second, many of these claims are either uninsured or uninsurable, which makes judgments more difficult to collect at the back end of litigation, particularly against smaller employers. An insurance company may put up a big fight, but it is finally in the business of paying claims, and they will do so regularly and reliably (though not happily) when they lose. Tom Baker has taught us that many plaintiffs' lawyers do not relish the prospect of collecting from non-insurance assets.⁵² Third, many of the employment claims may be small: most back pay awards simply do not have enough zeros after them to justify the deep investment necessary to litigate them properly. Still, in the face of all these hypotheses, I am certain only that there is at least a small mystery: in theory, the existence of fee-shifting statutes should enable a group of competent and properly capitalized lawyers to assemble a sufficiently broad portfolio of claims to make a paying proposition of it. One of the many values of Galanter's data is that it points us to the right questions to investigate.

IV. Not Liking What We Got?

The title of this symposium is admirably non-judgmental. It neither assumes that a low trial rate represents Nirvana nor that it constitutes a national emergency. That is the right stance to take. But it is also worth examining some of the reasons why one might be concerned about such a trial rate and what one might do if one were. The interesting question is not whether the sky is falling but how best to assess this phenomenon in a thoughtful way, recognizing that trial rates are part of a larger system involving not just trial rules and rates but financing systems, risk pools, the demography of the legal profession, and even the incidence of home and automobile ownership. I begin by examining alternative and, I believe, equally plausible views of the vanishing trial, one in which it is a natural and desirable sign of the maturation of the procedural system and another in which it is a threat to a core political value.

A. What's Not to Like?

1. The Good?

⁵² See Baker, *supra* note 44.

Consider first the proposition that the glass is half full. This is a story of the largely successful privatization of civil justice, one that runs along the same lines as the virtual privatization of land title and registration through the institution of title insurance. Other contributions to this symposium have explored other forms of privatization--the perhaps expanded use of arbitration and other "private" procedural systems. Resort to such systems will reduce not only trial rates but also filing rates, since arbitrated cases will not be filed at all--except when one of the parties seeks to compel arbitration. The form of privatization on which I am focusing keeps the case within the legal system but moves the expenses that might once have been publicly borne onto the parties. The changes in bar structure and capitalization have created, for many of the most common claims, a system of claims-clearance that shifts most of the costs of dispute resolution away from the state to the disputing parties.

Moreover, as compared to 1925 or 1950, the plaintiffs' and defendants' bars are relatively evenly matched. (Indeed, if you listen to some segments of political opinion, the plaintiffs' bar overmatches the defense bar.) Both sides are able to invest in litigation in a rational way, with two results--the overall cost of litigation is higher, and the information and tactical weaponry available to the two sides are relatively even. That is an important achievement, one that, in principle, makes civil litigation an imaginable alternative to regulatory and administrative supervision of economic life. Put otherwise, those who support the deregulation of the economy should be pleased that there is a robust bar able to resort to civil litigation as an alternative to regulatory supervision.

That privatization enables the United States to support a high (though not, on a per capita basis, the highest)⁵³ level of civil litigation with a relatively low level of public investment in judicial officers. In the U.S. the state and federal systems combined employ about one judicial officer per 25,000 population; in Germany the figure is about one per 5,000. Neither system is inherently better, but if we wished to have a higher trial rate, it would be important to understand the extent of additional public resources that

such a change would require. As things stand, the privatization of costs combines with the high rate of settlement to keep most litigation costs private.

If one puts this point historically, one can see the legal system during the New Deal as faced with a choice. Like the national economy generally, it could have taken a road of regulatory bureaucratization, with much deeper investments in judges, and perhaps changes in procedural rules to give more responsibility for fact investigation to public rather than private agents. We did just that with the New Deal administrative state, and it continues to be the model in a number of areas of governmental activity. Modern procedural regimes in the U.S. have taken a different path. We have designed a system that enables probing investigation of facts in civil litigation accompanied by relatively little public expense or official involvement. That regime can produce unsightly instances of lawyers behaving as if they had spent an insufficient amount of time in kindergarten and large amounts of money wasted either in excessive discovery or in stonewalling. But the system also produces a comparatively astonishing amount of information at very low public cost. The private cost of the information and the information itself lead to a low trial rate. From one standpoint, all this is a remarkable accomplishment, even if it is an inadvertent one.

2. The Bad?

The glass may, however, be not half full but half empty. There's a traditional--and strong--argument that adjudication, particularly jury adjudication, is an important democratic value. It not only assures that the law will be applied in ways that are acceptable to ordinary citizens, but it also assures that the content of that law will not become inaccessible to those citizens. Any law that has to be presented to a jury cannot be comprehensible only to a professional elite: either simplification or creative misunderstanding by jurors will render it accessible to those of ordinary training and experience. That is not a small virtue in a diverse democracy. Moreover, there's a strong historical case to be made for law reform through jury lawmaking. In the Middle Ages jurors regularly acquitted in the face of overwhelming evidence of homicide--because the

⁵³ Wollschläger, *supra* note 7, at **PAGE** (reporting that Germany, Sweden, Israel and Austria have per capita litigation rates significantly higher than the United States). **I've requested the source but it hasn't**

only available penalty was capital and the circumstances suggested that was too severe a penalty for a death resulting from a drunken brawl.⁵⁴ Eventually, law capitulated to popular sentiment, with the graded system of criminal homicide as the result. Closer to our day, those of us old enough to remember the regime of contributory negligence understand that juries with some regularity disregarded the standard instruction that any amount of contributory negligence by the plaintiff defeated the claim entirely. Courts and legislatures eventually followed along with the regimes of comparative negligence that now prevail. The important thing about these changes is that they evolved from long experience of juries confronting facts that in which the common sense of justice departed from that dispensed by law--and law yielded. In a world where trials are increasingly rare, we lose some analogous opportunities for evolutionary lawmaking.

A second, quite different kind of objection flows from the discontinuity of the market we have created in claims. By privatizing fact investigation and the costs of disputing, we have created a market in which the parties can make competitive investments in litigation. But the apparatus of discovery and the pricing of experts have priced out of the litigation market a huge number of claims. Competent civil litigators will hesitate to bring small claims—with the definition of “small” varying with the extent of investment required. That means there will be many circumstances civil litigation system cannot handle a claim worth more than the annual income of the median U.S. household.⁵⁵ That’s not a small problem for a democratic society.

Finally, we are encountering a problem that Galanter’s paper nicely sketches: the dearth of good pricing information in a market that depends on accurate settlement prices. Rational settlement requires a system of shadow prices against which settlements can be measured. Reported verdicts and judgments will provide such a shadow, if there are enough verdicts and judgments, reliably reported, to give guidance to settlers. But for many jurisdictions the reports are incomplete and sometimes inaccurate, with both sides reporting outlier rather than ordinary outcomes. (Who wants to boast to a reporter that

arrived yet.

⁵⁴ THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 28-29 (1985).

she just achieved the median plaintiff's verdict for the jurisdiction?) Even worse, from a statistical and practitioner's point of view, there is some reason to believe that the cases reaching a jury are in some sense already outliers. The fine study of California jury verdicts in the 1990s by Gross & Syverud report that the lawyers involved in such trials to verdict *both* thought that there was some element of irrationality (always attributed to the other side) in the case's failure to settle.⁵⁶ Were that accurate and widespread, even a complete set of jury verdicts for the whole country wouldn't be sufficient for the accurate valuing of claims--because the tried cases would be significantly abnormal, if only because they were tried. We see further evidence of this information gap in the reported difficulty of experienced judges and lawyers in arriving at consistent and accurate values of cases. One recent review of proposals for "neutral evaluation" by mediators and lawyers rejected such proposals because of its conclusion, based on a review of the literature, that even those experienced in the litigation system reached wildly different predictions of actual case outcomes.⁵⁷

B. What To Do if We Don't Like It?

Suppose one were unhappy with the existing situation for any of the reasons suggested above. What could one do about it? The question is important, but not easy. Some fixes will not fix anything--assuming anything is broken, which is itself an open question. Other fixes will bring side effects that some might think worse than the disease, if that is what it is.

A tantalizing clue to some possible responses lies in the discrepancy between the trial rates in federal and state courts as the latter appear in the forthcoming study of Brad Ostrom and Shauna Strickland at the National Center for State courts.⁵⁸ Galanter's paper, true to its topic, stresses the ways in which the fragmentary state court data echoes the patterns found in federal litigation. This point is important. Just as important, however, for our purposes may be the *difference* between state and federal trial rates: the current

⁵⁵ Parikh, Professionalism, *supra* note 33, at 78-82 (reporting that Chicago practitioners regularly screen out low-value medical malpractice claims even when they believe that liability is fairly clear).

⁵⁶ Gross & Syverud, *Don't Try*, *supra* note 26, at 49.

⁵⁷ See note 22, *supra*.

state court civil trial rate is about nine times higher than that in the federal courts.⁵⁹ A researcher wants to know why. There are no obvious differences between procedural rules: most states use versions of the Federal Rules of Civil Procedure as their guide and even those who hew to Codes have largely adopted the major features of the Federal Rules. Though the bars practicing in the state and federal systems have slight differences, it isn't stark enough to account for these differences.

One possibility already suggested might have to do with systematic differences between stakes in state and federal civil litigation. If my argument coheres, higher stakes will yield higher continuing level of investment in discovery and correspondingly more regular re-evaluations of the decision to continue investing. Were state courts to have systematically lower stakes, and correspondingly lower levels of litigation investment, then one could imagine lower levels of risk aversion and correspondingly lower settlement rates. I have suggested above such a possibility--that fewer of the state cases require significant continuing pretrial investment and therefore fewer moments at which the parties must re-evaluate the decision to move down the path toward adjudication. One can suggest two further topics for further investigation. The Federal Judicial Center has found in federal courts in recent decades an increased rate of summary adjudication.⁶⁰ If state courts have proved more reluctant to take this path, one can imagine a slightly higher trial rate as a result. Very anecdotal information from my own jurisdiction suggests that state courts are slightly less willing than federal courts to grant summary judgment. Are state courts as a group less willing to grant summary adjudication? Notice that this difference, even if widespread, would not come close to accounting for the magnitude of the difference. A related inquiry would focus on judicial selection. State judiciaries are overwhelmingly subject to some form of election, and in these elections they must often depend on members of the bar for campaign funds. Has this circumstance led them to be more reluctant to end a case before trial? Both questions are suggested by the Center for State Court data, and it may well be that eyes more

⁵⁸ Galanter, *supra* note 5, at 67-69.

⁵⁹ *Id.* at 68 (according to Table 10 the trial rate in the sampled state courts has ranged from a high of 34% in 1976 to a low of 14% in 1995 and as of 2001 stood at 18%.

⁶⁰ *Id.* at Appendix C.

imaginative than mine will see other possibilities. Whatever the cause, the level of discrepancy between state and federal patterns strongly suggests the need for inquiry, particularly for those who are concerned about the current level of federal civil trials.

Sam Gross & Kent Syverud's work has suggested a useful framework for inquiry. If settlement is a way of reducing risk, any step that increases risk will produce lower trial rates. Conversely, risk-reducing changes will increase trial rates. We already produce astonishing (and sometimes astonishingly expensive) amounts of information; Gross & Syverud find, and I think correctly, that almost all cases that have any chance of settling will do so already.⁶¹ What, however, if one reduced the risk of trial outcomes? Gross & Syverud suggest, correctly I have argued, that settlement occurs because trial outcomes are too risky, too all-or-nothing with an enormous range of stakes, for the parties to accept those risks.⁶² If that is correct, the Supreme Court's 2003 ruling on punitive damages⁶³ may, if it reduces the range of punitive damage awards, lower the risk of trial (for defendants) and thus increase the proportion of trials. A defendant knowing it faces a maximum risk of punitives nine times the amount of compensatory damages (rather than the multiple of 145 struck down in *Campbell*) may be more willing to go to trial. One should not overstate this possibility; only about 7% of cases tried to judgment result in punitive damage awards.⁶⁴ State-law caps on pain and suffering awards, now a feature of some medical malpractice statutes, may have the same effect, though again only in the tiny proportion of cases alleging medical malpractice.

A similar effect flows from some forms of settlement, which, paradoxically, encourage trials. Gross & Syverud offer the example of high-low agreements, which put a floor and ceiling on payments, thus reducing uncertainty for both sides and allowing them to take the risk, the limited risk, of trial. One finds an analogous phenomenon in the partial or sliding-scale settlement. Suppose a multi-defendant case. If plaintiff settles with one defendant, he has guaranteed himself that even a complete defense victory at trial will not be a disaster, and thus increased both his financial ability and his willingness

⁶¹ Gross & Syverud, *Don't Try*, *supra* note 26, at 60.

⁶² *Id.* at 61-62,

⁶³ *State Farm Mut. Auto Ins. v. Campbell*, 538 U.S. 408 (2003) (holding presumptively unconstitutional punitive damage awards more than nine times the amount of compensatory damages).

to go to trial. A variation on this theme is the sliding-scale agreement (unlawful in some states) that guarantees plaintiff some amount but allows the settling defendant to reduce that payment by some or all of the recovery at trial against the remaining defendants. Again, by eliminating the risk of a completely bad outcome at trial, the plaintiff has increased his willingness to undergo the risk of trial. One could imagine plaintiff's-side analogues to the Supreme Court's multiplier formula in *Campbell*, which would establish minimum amounts of pain and suffering (assuming a liability award), or a stronger statutory form that would establish tables for various injuries: by decreasing uncertainty, such steps would increase trial rates.

All of the variations sketched in the preceding two paragraphs decrease the range of trial outcomes and thus increase the potential rate of trials. A similar result might flow from a decrease in the size of the need for continuing investment. If my argument is correct, the aversion to trial results not only from uncertainty about outcome but also from the need to make continuing investments in the uncertain outcome. If that is correct, any changes that decrease the amount of such costs or the regularity of their occurrence has the potential for increasing parties' propensity to gamble on trial: less is at stake, and the human propensity to let sunk costs ride may cause litigants to hold on for trial. Just as in the days before discovery, a party with a one time, low, sunk-cost investment in a given case may have greater willingness to take a chance on trial outcomes. Such effects can result from developments entirely outside the procedural system. Some experienced civil practitioners suggest that digital technology may (once the technology is acquired) reduce some research and discovery costs.⁶⁵ If that is correct, one can imagine an effect on trial rates. Other sources tell a quite different story about technology, in which increased costs of conducting discovery in large digital environments drive the costs of discovery up rather than down--and thus would, according to my model of settlement dynamics--further decrease the rate of trials.⁶⁶ From a long-range perspective it matters less which happens that that we understand that changes exogenous to the procedural

⁶⁴ Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633 (1997).

⁶⁵ Conversation with Allen M. Katz, Esq., **AFFILIATION**, in Los Angeles, Cal. (Mar. **DATE** 2004).

system--changes ranging from the availability of credit to the creation of the digital technology-- may affect trial rates.

C. Asking the Right Question

Let me turn, finally, to a different kind of concern--not with trial rates but with the underlying information produced by and about civil litigation. If there is a problem with the phenomena reported by Galanter, it may not be the trial rate but the absence of data that serve the same information function as trials. Trials produce not only resolutions of specific disputes, but also, in the aggregate, information about patterns of resolutions. With enough trials, we have a range of values for a broken leg or a severed limb or consequential losses from a failure to deliver software. Those ranges should affect the settlement of other cases. Settlements deprive us of such information, and thus threaten to cannibalize their own legitimacy. If we live in a culture of settlement, it is important that we have sufficient information about settlement patterns to enable litigants to make rational judgments and to have some assurance that a particular settlement has a reasonable relation to other, similar ones. At present we lack this information. If one is concerned about this question, as Galanter suggests we should be, what's needed is something like a NASDAQ market quote system for settlements, in which reports of claim types are grouped and settlement figures reported. Such figures would vary substantially with the facts of each claim, and a system that went into significant detail would be impracticable, but even a crude form would yield substantially more information than most practitioners now enjoy. Such information now exists, but it is scattered and typically confidential. Insurers and very large self-insurers have it. So do plaintiffs' lawyers in the aggregate. But for reasons of strategic advantage and client attraction none of these holders presently has a motive to reveal this data; indeed, they have substantial incentives to conceal it.

One could, however, imagine conditioning access to the civil litigation system on an obligation to report settlement terms. (To allay concerns about confidentiality, one

⁶⁶ See, e.g., *Report on Meeting of the Advisory Committee on Federal Rules of Civil Procedure*, Email communication from Prof. Thomas Rowe, AFFILIATION, on Civil Procedure Listserv (Apr. DATE 2004)

might agree to release the terms only in an aggregated form (“auto accident, broken leg” “product liability, severe burns and lifetime care,” with identifying characteristics deleted.) It would be difficult and perhaps expensive to design such a national data bank, and there is no obvious payor, unless support for such a collection system were added as an additional dollar for each civil filing. But I echo Galanter in suggesting that the absence of such information costs plaintiffs and defendants alike, in the form of inefficiency (where perfectly sensible settlement proposals are rejected because of inaccurate information about “usual” settlements in the area in question) and injustice (where defendants pay aberrationally high or plaintiffs accept aberrationally low amounts). It may be that effort to collect and disseminate good settlement data would produce at lower cost and with less disruption some of the features of an increased rate of civil trials.

* * * *

Civil litigation is both a system of public justice and a market for claims. Some of the debate surrounding civil trials occurs because observers insist that we must choose between a justice system and a market. That choice may be attractive in some academic circles, but it’s not likely to occur in any real world that I can imagine. As a result, the real world choices will involve making the market work in a way that serves justice as nearly as may be and makes the justice system work in a way that does not destroy or distort the market. That is not an easy task, but it is the right one to contemplate.