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## Introduction to Vanishing Trial Symposium

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# JOURNAL OF DISPUTE RESOLUTION

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## SYMPOSIUM

### Introduction to Vanishing Trial Symposium

John Lande\*

Professor Marc Galanter has done it again. He has stimulated a very important discussion about a phenomenon that is generally known as the “vanishing trial,”<sup>1</sup> which raises fundamental questions about the nature of the legal world and the changes it is undergoing. For a symposium in December 2003 sponsored by the ABA Litigation Section, Galanter canvassed a mass of data on trends in trials and related phenomena.<sup>2</sup> Most of that study described trial court patterns, primarily in the federal trial courts in the U.S. but also trends in other forums, including state court trials, administrative agency hearings, and alternative dispute resolution (ADR) processes. He reported a general reduction in the rate and, in some contexts, the number of trials. The most dramatic decline involved a reduction of the civil trial rate in the federal courts from 11.5 percent in 1962 to 1.8 percent in 2002.<sup>3</sup> He concluded that article by sketching out some theories about the causes and consequences of these trends.<sup>4</sup> This study was the lead article in a symposium in the *Journal of Empirical Legal Studies*.<sup>5</sup> Like Galanter’s lead article, many of the other papers in that symposium focused on analyzing civil trial court phenomena, especially in the federal courts.<sup>6</sup> A symposium in the *Stanford Law Review* also concentrated on federal court litigation trends, especially focusing on class actions and mass claims resolution facilities, as well as mandatory ADR processes.<sup>7</sup> A symposium in *Dispute Resolution Magazine* provided an overview of trends in use of trial and ADR and discussed associated problems and benefits.<sup>8</sup>

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1. At last count, there were 135 publications in the Westlaw “journal and law review” database that include the term “vanishing trial.”

2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

3. *Id.* at 462-63.

4. *Id.* at 515-31.

5. See Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. v (2004).

6. *Id.*

7. See Symposium, *The Civil Trial: Adaptation and Alternatives*, 57 STAN. L. REV. 1251 (2005).

8. See Symposium, *The Vanishing Trial*, DISP. RESOL. MAG., Summer 2004, at 3.

This symposium in the *Journal of Dispute Resolution* takes the next step. It includes some analysis of trial court phenomena in the U.S. and expands the focus with greater emphasis on (1) investigation of trial trends outside U.S. courts, (2) explanations of the causes of changing trial patterns, (3) speculations about possible effects of changing litigation patterns, and (4) recommendations to improve the operation of the legal system.

On September 12, 2005, Professor Galanter gave the Annual Distinguished Alternative Dispute Resolution Lecture at the University of Missouri-Columbia School of Law, where he presented his article, *A World Without Trials?*, the lead article in this symposium.<sup>9</sup> This review and elaborates the portrait of trial court patterns in U.S. courts.<sup>10</sup> Galanter shows a general pattern of declining trial rates in recent decades with a particularly “precipitous decline” in the last two decades.<sup>11</sup> He relates this precipitous decline to a combination of factors, including what he describes as a “jaundiced view” of the law promoted by some business, political, and legal elites.<sup>12</sup> The heart of this article presents five “stories” that might explain the vanishing trial. These stories tell of changes in judicial role shifting from adjudicator to include more managerial responsibilities, migration of citizens’ disputes to forums other than courts, incorporation of trial-like processes in organizations, and transformation and evolution of legal processes to be more informal and negotiative.<sup>13</sup>

Margo Schlanger’s essay provides a brief overview of empirical knowledge about patterns of trials, especially federal civil trials, and identifies general areas needing more research, including confirmation of reported trends, finer grain analyses of trial patterns (disaggregated by factors such as geography and type of dispute), better understanding of non-trial outcomes, and patterns of transformation of some disputes into lawsuits and trials.<sup>14</sup> She also collects and catalogs the hypotheses offered to explain reductions in the number and rates of trials as well as data, reports, and articles on American trial trends.<sup>15</sup>

Two articles in this symposium describe quite different trial patterns in two European countries. Robert Dingwall and Emilie Cloatre analyze civil litigation in England and Wales, painting a picture of declining civil trial rates.<sup>16</sup> They argue that this decline results from successive governments’ belief that civil justice is essentially a private matter between individuals and not, therefore, a proper object for state subsidies. As a result, politicians, influenced by their economic advisers, have reduced government funding in real terms and encouraged more private decision-making.<sup>17</sup> On the other hand, Bert Niemeijer and Carolien Klein Haarhuis report that the number of civil trials *increased* in recent years in the

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9. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7.

10. *Id.*

11. *Id.* at 6.

12. *Id.* at 20.

13. *Id.* at 23-33.

14. Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RESOL. 35.

15. *Id.*

16. Robert Dingwall & Emilie Cloatre, *Vanishing Trials? An English Perspective*, 2006 J. DISP. RESOL. 51.

17. *Id.*

Netherlands.<sup>18</sup> They present three types of explanations: first, socio-economic developments increasing the number of problems that might result in court filings; second, socio-cultural developments such as the shift from a legal culture of ‘informal pragmatism’ to more formal ways of dispute resolution; and third, policy-induced changes such as enhanced court system management designed to promote access, efficiency, and capacity.<sup>19</sup>

Two other articles describe adjudication patterns outside domestic court context. Christopher Honeyman analyzes the experience of the Wisconsin Employment Relations Commission (WERC), which provides mediation, arbitration, and administrative adjudication of labor-management disputes.<sup>20</sup> Reviewing data for the period since 1962, he reports that the adjudication rate was consistently much higher than in the federal courts—a form of backhanded support for Galanter’s thesis, since virtually all of the recent pressures on federal and state courts’ litigants are reduced, if not entirely absent, in this setting.<sup>21</sup> He suggests that fluctuations in trial rates may have been related to changes peculiar to the Commission, such as a period when cases were assigned for mediation to a WERC employee who was especially skilled at mediation, as well as changes in the legal and political environment of labor disputes in that state.<sup>22</sup> Andrea Schneider reports a trend of increasing use of trials (or trial-like proceedings) in international economic, human rights, and border disputes.<sup>23</sup> She defines judicialization in international disputes as use of third-party forums (including courts, tribunals, standing bodies, and arbitration panels) and distinguishes it from diplomatic negotiation.<sup>24</sup> She points to judicialized dispute resolution in proceedings of the World Trade Organization, North American Free Trade Agreement adjudication processes, European Court of Justice, European Court of Human Rights, InterAmerican Court of Human Rights, Law of the Sea Tribunal, and International Court of Justice.<sup>25</sup> She suggests that this trend reflects parties’ desires for greater voice, control, and democracy.<sup>26</sup>

Another pair of articles focuses on possible explanations for declining trial rates in the U.S. Lisa Blomgren Bingham reviews the development of Western epistemological theory and observes a trend of decreasing public confidence in knowledge as “truth.”<sup>27</sup> She suggests that contemporary lack of confidence in a single truth may undermine confidence in trials as dispute resolution mechanisms and motivate disputants to use ADR processes that provide a better fit with current views about what people can believe.<sup>28</sup> Dennis Drasco writes about a trend of increasing public access to court records due to electronic filing and rules strongly

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18. Bert Niemeijer & Carolien Klein Haarhuis, *Vanishing or Increasing Trials in the Netherlands?*, 2006 J. DISP. RESOL. 71.

19. *Id.*

20. Christopher Honeyman, *Worlds in a Small Room*, 2006 J. DISP. RESOL. 107.

21. *Id.* at 109.

22. *Id.* at 111-12.

23. Andrea Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119.

24. *Id.*

25. *Id.* at 120-25.

26. *Id.* at 127.

27. Lisa Blomgren Bingham, *When We Hold No Truths to be Self-Evident: Truth, Belief, Trust, and the Decline in Trials*, 2006 J. DISP. RESOL. 131.

28. *Id.*

favoring disclosure.<sup>29</sup> He argues that greater potential disclosure of sensitive information could contribute to lawyers' and litigants' decisions to avoid litigation to protect confidentiality of that information.<sup>30</sup>

Two articles discuss potential consequences of the "vanishing trial" (or of the same forces causing reduction in the number of trials). Robert Ackerman argues that trials, especially jury trials, are public rituals with special public significance as community events that call on citizen-jurors to engage in collaborative decisionmaking.<sup>31</sup> Drawing on communitarian theory, he expresses concern that the reduction in trials reduces social capital, i.e., interpersonal connections that build community.<sup>32</sup> Elizabeth Thornburg sketches out a possible scenario that she calls "designer trials," in which contracting parties tightly regulate litigation and trial procedures, sharply restricting the courts' discretion.<sup>33</sup> She worries that stronger parties could draft contracts restricting litigation procedures to take advantage of weaker parties and undermine the public value produced by the courts.<sup>34</sup>

Finally, two articles offer recommendations to address problems related to reductions in trials. Based in part on data from federal district court clerks, John Lande identifies potential benefits and problems related to reduced trial rates.<sup>35</sup> He analyzes possible strategies for dealing with these problems, including protection of litigants' right to go to trial, development of settlement databases, modifications of courthouse design, reform of legal education, increasing satisfaction of judges' concerns, and refinement of courts' roles.<sup>36</sup> Julie Macfarlane and John Manwaring describe a "skills audit" in Ontario, Canada to identify skills needed by practicing lawyers.<sup>37</sup> The audit indicates that lawyers need skills in effectively maintaining relationships with clients, handling disputes and transactions, legal research and writing, managing time, and integrating professionalism and ethics into practice.<sup>38</sup> Based on this audit, the authors offer recommendations for legal education to teach skills in addition to those needed for trial advocacy.<sup>39</sup>

This symposium shows that "vanishing trial" phenomena touch an extremely broad range of issues including transformations of society, courts, dispute resolution procedures, and even the nature of knowledge. These phenomena relate to decisions by litigants in particular cases, court systems, national policy, and international relations. This subject is too large and complex for any symposium to analyze fully, especially at this early stage of analysis. This symposium makes an important contribution to this study, with theories and evidence about the exist-

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29. Dennis J. Drasco, *Public Access to Information in Civil Litigation vs. Litigant's Demand for Privacy: Is the "Vanishing Trial" an Avoidable Consequence?* 2006 J. DISP. RESOL. 155.

30. *Id.*

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

32. *Id.*

33. Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181.

34. *Id.*

35. John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213.

36. *Id.* at 232-51.

37. Julie Macfarlane & John Manwaring, *Reconciling Professional Legal Education with the Evolving (Trial-less) Reality of Legal Practice*, 2006 J. DISP. RESOL. 253.

38. *Id.* at 259-64.

39. *Id.* at 264-68.

tence, nature, and extent of reductions in trials and similar proceedings. It elaborates a range of theories about possible causes including changes in the number of problems that might be taken to court, transformations of legal and other institutions, governmental policy and administrative decisions, shifts in legal culture, ideological campaigns of powerful elites, interests of litigants, and epistemological beliefs. It highlights the jeopardy of certain public interests, including risks to community and increased exploitation of “have-nots” by “haves” in society. It also offers some hope with possible strategies to deal with problems, including changes in courts’ role and operation, legal education, and collection and dissemination of information about settlement. We are indebted to Marc Galanter for initiating and continuing this inquiry.

