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# Worlds in a Small Room

*Christopher Honeyman\**

In the lead article of this symposium, Marc Galanter points out that steeply declining trial rates hold true across a variety of trial genres, including state and federal courts, criminal and civil matters, and even federal administrative agencies' own trial equivalents. This brief essay will explore a new setting in which to examine Galanter's thesis.

As Galanter notes, the statistics of state agency case handling are not only highly fragmented, they are often poorly documented. The variety of these agencies and their circumstances suggest, however, that some might reward Vanishing Trial study for reasons related to each such agency's idiosyncratic circumstances. This follows from the fact that the variety makes it at least theoretically possible to find an agency in which one or more of the overlapping variables in the Vanishing Trial court-based discussion is missing. The Wisconsin Employment Relations Commission (WERC), the agency here described, is a good starting point. As a result of its unique structure and circumstances, it is at least arguable that all five "stories" of the Vanishing Trial are there conspicuous mostly for their absence. It thus might serve as a sort of temporary benchmark—temporary because it should immediately be disclosed that it is not possible to do full justice here to 40 years of statistics, and because more undoubtedly remains to be discovered even about this one agency.

In Madison, Wisconsin, State Street—closed as it is to private cars—serves as a metaphor of the impasse between theory and practice. At one end lies the University of Wisconsin, and at the other end lies the state government and the business center of the city. During most of the 40 years addressed in Galanter's research, the small state agency I am using as a sample for the Vanishing Trial stories was less than a mile away from Galanter's office.

Galanter lists five "stories" which might explain the Vanishing Trial phenomenon: convergence, displacement, assimilation, transformation, and evolution. Each of these stories, for its own reasons, looks a bit different through the prism of the agency experience described in this article. But the purpose is not to challenge any of Galanter's five stories. In fact, one modest form of support for the five stories is that when, in given circumstances, it is defensible to find that none of the stories is applicable to a given set of data, and when the data show not only a significantly higher trial rate than the courts but a much slower rate of decrease, taken together these factors suggest that the five stories may not be far off the mark. This in turn suggests that other small shops scattered throughout the

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United States, adroitly selected, might allow for a comparison of one or another of the five stories in a way that would allow their associated phenomena to be isolated, at least to some degree.

The WERC has a number of features salient for the immediate purpose. Since its creation in the 1930s, it has been generally regarded as among the most competent agencies in its field. It is the *only* such agency which has always offered the full range of neutral services through the same professional staff. Each member of the staff is cross-trained, typically serving as a mediator, an arbitrator, and an administrative law judge with some regularity. This resulted in a micro-culture within labor-management relations, in which Wisconsin parties for decades have been accustomed to a certain fluidity in the character of a case filed with the WERC. When parties are trained by repeat-player experience,<sup>1</sup> once an administrative law proceeding has commenced, not to expect to see “just” an administrative law judge and a trial-like process, interesting possibilities develop both for case handling and for study.

I should note that I write here not so much as a student of conflict resolution, which I am, but as a former staff member of the WERC, in which I served hundreds of times in each of its various professional capacities over nearly two decades. It was routine throughout that period,<sup>2</sup> before it,<sup>3</sup> and in the almost-decade since<sup>4</sup> for there to be a stalwart effort at mediation of any administrative law proceeding begun at the agency. Also, it was not unknown for a case to mutate in a fashion wholly consonant with the idea that a dispute resolution system which intends actually to serve the public should “fit the forum to the fuss.” For example, Commission-appointed administrative law judges (ALJs)<sup>5</sup> have also, from time to time, accepted the “transformation” of a case begun as a form of litigation into an arbitration, in which the agency accepts the complaining party’s withdrawal of the administrative law matter and appoints an arbitrator—sometimes, even the same individual, and on the spot.

At the WERC, the bulk of the case-by-case departures away from trial-like settings have always been toward mediation. The previously noted cross-training, along with the widespread perception that the agency’s staff was among the best within the United States, means that a number of circumstances which have attended other fora since the 1962 beginning of Galanter’s more detailed statistical study were, in this particular setting, “present at the creation.” Furthermore, the economics of the agency and the labor economics of its staff members (who almost always carried relatively high caseloads, and were not paid extra for doing or making more work) combined to ensure that any opening, provided by parties who might allow a staff member appointed as an administrative law judge to change hats and serve as a mediator, would be enthusiastically taken up. While the talents and skills of the staff members varied,<sup>6</sup> every staff member received

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1. The parties that appear before the WERC are, to a very high degree, repeat players.

2. From observation and experience.

3. By anecdote and tradition.

4. This was confirmed by the agency’s chair, Judy Neumann, and its General Counsel, Peter Davis.

5. Known as hearing examiners in Wisconsin parlance, but I will use the more widely familiar term here.

6. See Christopher Honeyman, *Five Elements of Mediation*, NEGOT. J., Apr. 1988; Christopher Honeyman, *On Evaluating Mediators*, NEGOT. J., Jan. 1990 (containing detailed discussions of these variations and of efforts made to improve the quality of mediation service to the parties).

regular practice as a mediator. For many years, “mediator” was actually the job title in which they were employed, regardless of their arbitration and ALJ functions. Since there is a plethora of evidence that skills of mediators in court settings also vary widely, there is no basis to believe that the skills of the average WERC mediator have been in any way deficient compared to the average mediator available to the parties in state or federal court, and indeed some reason exists to believe the opposite.

Upon delving into the statistics compiled by the agency over 40 years, it is interesting to discover that the trial rate at all times has exceeded the rate in the federal courts, though the trend was for many years in the same direction.<sup>7</sup> I have examined the agency’s annual and biennial reports from 1962 through 2005 (all years described here are fiscal, and end June 30).<sup>8</sup> Except for relatively recent ones, the case files themselves were routinely buried in archives or destroyed, making the agency’s statistical reports the primary source material available.<sup>9</sup>

Admittedly, these reports pose some difficulties in a multi-decade comparison. This is partly because the types of numbers deemed worth reporting to the governor or state legislature, and the ways in which those numbers were compiled, varied considerably over time.<sup>10</sup> In particular, it is impossible from the reported data to match the definition of “trial” closely to that used in the federal courts. The exception is for a single biennial period (1973-75) in which the reporting officials thought to break out settlements and withdrawals of formal complaints (i.e., administrative law proceedings, as distinguished from the agency’s non-legal services such as arbitration and mediation) that were achieved before hearing as opposed to during the hearing.<sup>11</sup> During that one biennial period, about half of the settlements and withdrawals of complaints took place during the hearing.<sup>12</sup> This almost certainly reflects vigorous mediation efforts by the administrative law judge upon arrival at the hearing, unless something about those two years was sharply different from my own observations and experience there, which began about three years after the close of that period. In the brief statistics summary which follows, I have joined those categories for the two years in which they can be distinguished, in order to make those years comparable to the rest of the 43-year period covered.

For purposes of this essay, not only is the definition of “trial” an administrative law hearing (similar to the federal agencies Galanter discusses), but “tried” means a case in which a decision on the merits actually was issued by the trier of fact, the ALJ.

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7. Source: Annual and biennial reports of the WERC to the Governor and Legislature of Wisconsin, 1962 through 2005. Wisconsin Employment Relations Commission.

8. *Id.*

9. *Id.*

10. *Id.*

11. WERC Biennial Report for 1973-75.

12. *Id.*

Compilation of Settlement Rates<sup>13</sup>

Case Type	Ce Settled	Ce TRIED	Cw Settled	Cw TRIED	MP Settled	MP TRIED	PP(S) Settled	PP(S) TRIED	Line Totals
<b>Closed cases by annual or biennial report, by type</b>									
1962-63	19	24			2	2			47
1963-64	24	25	2	1					52
1964-65	33	18	3	1	2	2			59
1965-66	35	26	3	1	3	5			73
1969-70	20	22	4	2	4	4	0	2	58
1970-72	(1970-71, no report found; 1971-72, no useful numbers)								
1972-73	34	36	3	5	56	27	4	0	165
1973-75	74	42	included in CE number		125	86	4	1	332
<b>1962-75 TOTAL</b>	<b>239</b>	<b>193</b>	<b>15</b>	<b>10</b>	<b>192</b>	<b>126</b>	<b>8</b>	<b>3</b>	<b>786</b>
1975-77 **	48	29	2	3	156	99	7	9	353
1977-79	60	24	4	0	153	81	9	6	337
1979-81	61	35	2	1	150	59	10	9	327
1981-83	34	30	3	0	134	66	8	10	285
1983-85	38	15	1	1	208	65	12	5	345
<b>1975-85 TOTAL</b>	<b>241</b>	<b>133</b>	<b>12</b>	<b>5</b>	<b>801</b>	<b>370</b>	<b>46</b>	<b>39</b>	<b>1647</b>
1985-87	27	11	1	5	194	28	15	2	278
1987-89	15	6	3	3	184	62	14	0	287
1989-91	27	9	1	1	229	30	8	5	310
1991-93	10	6	1	0	177	44	20	3	261
1993-95	17	3	3	0	244	23	*	*	290
<b>1985-95 TOTAL</b>	<b>96</b>	<b>35</b>	<b>9</b>	<b>4</b>	<b>1028</b>	<b>187</b>	<b>57</b>	<b>10</b>	<b>1426</b>
1995-97	14	7	4	0	203	60	33	6	327
1997-99	13	2	4	1	179	74	22	8	303
1999-2001	8	6	0	2	159	41	22	12	250
2001-03	12	6	*	*	178	37	9	1	243
2003-05	0	0	*	*	121	35	11	5	172
<b>1995-2005 TOTAL</b>	<b>47</b>	<b>21</b>	<b>8</b>	<b>3</b>	<b>840</b>	<b>247</b>	<b>97</b>	<b>32</b>	<b>1295</b>
*Reported numbers here do not discriminate between dismissals on the merits and per adjustment or withdrawal and therefore are omitted.									
**Totals are not directly comparable to numbers above. After 1977 different "primary allegations" are broken out separately, and it is possible that sometimes more than one allegation was deemed "primary." Based on personal experience I have made the assumption that cases settled did not, on average, include more or fewer such "primary allegations" than cases decided.									

Figure 1

I will summarize the key findings here. For reasons discussed below, I have chosen to split the 43-year period involved into terms of roughly a decade, which not only allows the aggregate caseload of a relatively small agency (which never rose to a size above two dozen professional staff, and is now smaller) to add up to statistically useful numbers, but also smooths out variations which occur with some regularity for a year or two at a time because of the "pattern bargaining"

13. Figure 1 shows a compilation of settlement rates, in periods corresponding to the agency's annual or biennial reports. In most years, the agency adopted a biennial format; in certain years, however, annual reports were filed. Ce is the agency's code for complaint cases filed by individuals or unions against private sector employers; Cw means complaints by employers or individuals against private sector unions; MP means complaints by anyone against a municipal sector employer or union; PP(S) covers all complaints against the employer or a union concerning any covered variety of State of Wisconsin employment.

characteristic of public-sector unions under the kind of statutory scheme which governed Wisconsin public-sector labor relations during most of this period.<sup>14</sup>

Thus from 1962 to 1975,<sup>15</sup> the agency closed a total of 786 administrative law (“complaint”) cases, of which 42.2 percent resulted in a decision at least at the ALJ level, with the remainder being settled either before or during hearing.<sup>16</sup> From 1975 to 1985, because of a rapid expansion resulting from legislative changes which gave public-sector unions the right to engage in arbitration on a broad level, the caseload jumped to 1,647 complaint cases in that decade.<sup>17</sup> The trial rate, however, dropped to 33.2 percent.<sup>18</sup> From 1985 to 1995, the caseload eased somewhat, to 1426 complaint cases, and the trial rate dropped sharply, to 16.5 percent.<sup>19</sup> But in the final decade of this series, 1995 to 2005, the caseload was again slightly lower, at 1295 complaint cases, while the trial rate rebounded somewhat, to 23.3 percent.<sup>20</sup>

These trial rates are remarkably larger than the numbers being compiled in federal court for the corresponding decades. That is particularly remarkable when one takes into account the automatic availability of a trained mediator, in effect, on the spot at every administrative law hearing the WERC has ever held. Parties, however, are often reluctant to utilize a decision-maker “to the hilt” as a mediator. The degree to which an ethical professional neutral restrains himself or herself from zealous mediation is also significant, due to conflicts between the two hats the person involved is inevitably wearing.<sup>21</sup> For a considerable period after about 1984, the agency undertook specific efforts to try to ameliorate this concern by appointing its most successful mediators (or rotating a small panel of them) to attempt mediation in every new complaint case. This had two effects material to this discussion.

First, it highly insulated the assigned ALJ from getting too far into a mediation, in order to avoid triggering a conflict that might result in the ALJ withdraw-

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14. In general terms, it is a commonplace among WERC mediators, though not necessarily the subject of scholarship, that package final offer interest arbitration, as a mechanism for resolving impasses in bargaining, is extraordinarily effective at preventing public-sector strikes, but at some cost to creativity—essentially because the typical statutory scheme under which it is enacted demands that extensive comparisons be made by the arbitrator to other similarly situated bargaining units. This typically creates a whole chain of activity by the parties in an effort to structure their proposals around “defensible” criteria. The result, in a nutshell, is that unions and employers under such a statutory scheme tend to engage in bargaining that is significantly affected by regional patterns. The pull and haul of the bargaining process leads to a degree of “patterned” complaint-case activity as well. The whys and wherefores, however, are too complex for a short essay.

15. Usable statistics, coincidentally to Galanter’s federal court data, began in 1962 for the WERC, and I have allowed the initial “decade” to run to 13 years because there were some years during that time when no report appears to have been made to the governor and legislature and the data have been lost for all practical purposes.

16. See *supra* fig.1.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. The most obvious example is that a caucus, a tool used routinely by mediators in labor-management disputes, is off-limits to an ALJ-mediator who is not willing immediately to recuse herself, because of the obvious *ex parte* problem it creates.

ing, causing the case to be reassigned.<sup>22</sup> The staff member assigned solely to explore the mediation possibilities of the case, and barred from discussing the case with the assigned ALJ, suffered no such inhibitions. This may have raised the settlement rates and lowered the trial rates accordingly. The skill differences among WERC staff members are also significant.<sup>23</sup> It was well known to the repeat-player parties, as well as within the agency, that despite cross-training and cross-experience, some staff members were more oriented toward the formal work and others toward mediation. As a matter of ordinary management, those deemed stronger at mediation were normally assigned higher percentages of their respective caseloads in mediation-type work than those staff members who were seen as stronger at decision-writing. Two possible effects resulted. First, as noted above, a few staff members who were known as particularly indomitable mediators were assigned circa 1984 to every incoming complaint case for a mediation effort, even before the case was assigned to an ALJ (this arrangement continued, in essential character, though at times with a single mediator or with other changes in the individuals involved, well into the 1990s).<sup>24</sup> This coincided with a sharp drop in the trial rate.

Second, beginning around the mid to late 1990s, the assigned staff members (or sometimes, member—see fn. 24) began to get significantly overloaded as a result of popularity in other mediation work. The agency then began to spread the complaint-case mediation work around a more varied selection of staff members, not all of whom greeted this assignment with consistent enthusiasm. Other exigencies have resulted in the pattern of these assignments appearing not particularly consistent since; but the trend seems to have roughly coincided with the start of a rise in the trial rate which continued thereafter. While the data reviewed here are nowhere near sufficient to establish causation, they do suggest the *possibility* that most or all of the entire drop in trial rate from roughly 1985 through the following decade might be due to the first administrative change, with most or all of the rise in the trial rate thereafter due to the second such change, or set of changes. Still, there is nothing about these administrative changes that would explain a more significant phenomenon: a much higher trial rate overall than is experienced in the same respective decade in federal court. Comparisons to some of the “five stories,” however, may explain this overall higher trial rate.

It is possible that arbitrary selection of which years to count as a “decade” might have affected, at the least, the perceived trajectory across those decades. As a check, the figures were recalculated using a different starting year. Beginning with a decade defined as 1969 to 1979 (because the biennial reports are filed in odd-numbered years) generates a case total for the first decade of 1245 complaint

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22. It was not, however, a “pure” separation, since there continued to be cases in which the assigned mediator was not able to work out a deal but in which a renewed mediation effort by the ALJ was welcomed, or even solicited, by the parties.

23. See Honeyman, 1988 and 1990, *supra* note 6.

24. Several former colleagues recall this sequence in similar general terms, but with greater or lesser variations as to dates and personnel involved. The case records, meanwhile, are somewhat obscure as to this type of assignment. I am indebted to Coleen Burns, Bill Houlihan and David Shaw, and particularly to Rick McLaughlin for pointing out that practice in assigning cases was never quite as neat as the ostensible principle of the day. For all these reasons, all conclusions related to this type of assignment should be taken with a good helping of salt.

cases, with a 38.4 percent trial rate.<sup>25</sup> 1979 to 1989 generates 1522 complaint cases, with a 26.8 percent trial rate; and 1989 to 1999 generates 1491 complaint cases, with an 18.9 percent trial rate.<sup>26</sup> These numbers are generally consonant with the previous definition of the decades involved.

One alternative explanation for the overall higher trial rates is that Wisconsin municipal labor disputes were often more tense than state employee and private sector labor disputes (though all three generated significant numbers of complaint cases for the WERC, because of its broad jurisdiction). Virtually throughout the last three decades of the period discussed, something about those cases, and in particular their tendency toward pattern bargaining, might vary sharply from experience with the other groups. For this reason, a numbers series was generated that excludes municipal cases. In the 1962 to 1975 period, there were 468 complaint cases affecting employers and unions in the private sector, the State of Wisconsin itself and its public-sector unions, with a 44.0 percent trial rate.<sup>27</sup> From 1975 to 1985, there were 476 cases in this category, with a 37.2 percent trial rate.<sup>28</sup> From 1985 to 1995, the total dropped sharply, to 211 cases, with a 23.2 percent trial rate; and from 1995 to 2005, there were 208 total cases, with a 26.9 percent trial rate.<sup>29</sup> Again, the exclusion of the single largest category of cases turns out to make very little difference in the trial rate in each decade examined.

As a final check of the consistency of these numbers, the WERC's longtime General Counsel Peter Davis has kindly made available to me his personal tracking of numbers of ALJ decisions issued year by year since 1984.<sup>30</sup>

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25. See *supra* Fig.1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Summary from Peter Davis, WERC General Counsel, Dec. 2005 (on file with author).



*ALJ Decisions Issued*<sup>31</sup>*By year*

1984-85	32
1985-86	29
1986-87	22
1987-89	44
1988-89	27
1989-90	32
1990-91	36
1991-92	31
1992-93	37
1993-94	20
1994-95	37
1995-96	20
1996-97	37
1997-98	47
1998-99	27
1999-2000	22
2000-01	25
2001-02	28
2002-03	16
2003-04	24
2004-05	23
Decisions include decisions granting motions to dismiss, but not decisions denying such motions	

*Figure 2*

Aggregated over the two decades since, his data shows 347 decisions issued from 1984 to 1995, and 269 decisions issued from 1995 to 2005.<sup>32</sup> Allowing for the fact that the earlier period is one year longer, the average in the first decade is about 12 percent higher than the second decade, which is not entirely consistent with the numbers used above. I am advised that this series, however, includes all decisions by ALJs granting motions to dismiss, while the annual and biennial reports' statistics discussed above tabulate complaints dismissed "on the merits" but do not permit some other distinctions, such as between cases dismissed only after an actual hearing and those dismissed based on a prehearing motion. Motion practice was never a large part of a WERC ALJ's work year, but successful motions to dismiss may have been frequent enough to explain the apparent disparity.

## FACTORS UNIQUE TO THE SETTING

Consistent with practice elsewhere in the United States, Wisconsin private-sector unions have suffered a substantial loss in membership, especially when considered as a proportion of the rising overall work force during the relevant period.<sup>33</sup> The private sector complaint cases dropped drastically from 1962 to 2005, though it is beyond the scope of this essay to examine whether the reason is

31. *Id.* (compilation of summary from Peter Davis, WERC General Counsel).

32. *Id.*

33. See U.S. Bureau of Labor Statistics, *Union Members in 2005*, available at <ftp://ftp.bls.gov/pub/news.release/union2.txt> (last visited June 1, 2006.)

related more to increasing sophistication in the private sector labor and management bar, as well as their clients, or to the drop in numbers of organized units.<sup>34</sup> There were also, of course, enormous changes in the public sector. As this data series began, Wisconsin passed its first statute allowing full-scale collective bargaining in police and fire bargaining units, and over the first quadrant of the numbers series primarily discussed here (1962 to 1975), bargaining rights were extended to all municipal employees, including the numerous and quite militant schoolteachers' unions (Wisconsin operates public education through more than 400 local school boards, allowing for a plethora of bargaining units).<sup>35</sup>

The following decade, 1975 to 1985, saw a rapid increase in public-sector organization, partly because of the 1977 passage of legislation allowing either party in a typical municipal bargaining unit (i.e., including teacher units, and with exceptions too narrow to matter here) to compel the other to arbitrate unresolved terms of a new contract, which allowed even rural public-sector unions to organize and press their claims effectively.<sup>36</sup> 1985 to 1995 saw the beginning of a re-trenchment in which public-sector employers effectively pressed for changes in the interest-arbitration and school finance statutes to reduce what they saw as excessively generous contracts resulting from excessive union power. And 1995 to 2005 has seen more of the same.

Thus, for varying reasons, in each of these decades one or the other party in the municipal sector typically perceived a deficiency in its relative power at the bargaining table. This might logically be seen as a significant temptation for these politically sophisticated parties to file "strategic" administrative law proceedings in an effort to obtain leverage. There existed a perception during this time at the WERC that many of the complaint cases we saw were motivated (on either one or both sides) as much by strategic conduct at or away from the bargaining table as by the actual legal claims made. This may, in part, explain the relatively high trial rate throughout my time there.

Finally, the agency's longstanding accommodation of parties' political reality experienced significant growth in usage starting in the late 1990s. As long as anyone can remember, it has often been perceived by one party or another as necessary to file a formal complaint.<sup>37</sup> Thereafter, however, it was often then mutually convenient to both parties to agree *sotto voce* to defer actually trying the case indefinitely, in hopes of an eventual settlement on broader matters in which it would become a mere bargaining chip.<sup>38</sup> Thus a certain number of cases was held "in limbo" by mutual agreement of the parties on any given date. The number apparently increased enough in and since the late 1990s to contribute notably to the declining number of ALJ decisions issued in the last years covered in Tables 1 and 2.<sup>39</sup>

The relative costs involved are influential, no doubt, compared to trying a case in federal or state court. Even anecdotal information as to billing rates, and amount of time invested in preparing a typical complaint case before the WERC,

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34. *Id.*

35. Sec. 111.70, Wis. Stats.

36. Sec. 111.70(4)cm.6, Wis. Stats.

37. Interview with WERC General Counsel Peter Davis (Dec., 2005).

38. *Id.*

39. *Id.*

reveals that it was a common observation that far from investing tens or hundreds of thousands of dollars in discovery (discovery was essentially disallowed under WERC policy), a number of parties were served by counsel who were retained on stringent economic terms and tended, if anything, to under-prepare. Furthermore, because of the desirability of public-sector labor law clients, to law firms on the management side who hope for other and more lucrative business from the municipality, and because Wisconsinites are famous for being able to “guard a dollar” in evaluating public-sector bids as well as in private life, pricing tends to be keen on the management side. On the union side, the prevailing wages of union members, the declining power of unions in the private sector, and what many union-side attorneys see as a commitment to a cause, have long combined to keep union-side lawyers’ pricing relatively low, compared to what many parties in federal court would expect to pay for a similar level of talent and complexity of case in some other domain.

#### CONCLUSION: DO THE “FIVE STORIES” OF THE VANISHING TRIAL TELL A DIFFERENT STORY HERE?

What, if anything, does this unusual set of experiences tell us about Galanter’s five Vanishing Trial stories? Although the data assembled here are not sufficient to say anything conclusive, this experience and these numbers are offered more as an illustration, to suggest that other such stories may be awaiting study in holes and corners throughout the dispute resolution universe, such that *together* they might be very revealing. For now, within the miniature but surprisingly consistent world of practice represented by the WERC, a few rough conclusions seem defensible on at least an “eyeball” basis.

It seems that the convergence story is inapposite, and not simply because it starts with the concept of the jury, which plainly does not apply here. The remaining aspect of convergence, as used by Galanter, encompasses “a more investigative and managerial judicial role,” but that has really not changed significantly throughout this period, in the unique circumstances of the WERC.

The displacement story, meanwhile, is itself already relocated, so that the starting point is an administrative tribunal, not a trial in a courtroom by a judge.<sup>40</sup> Yet the remainder of the displacement story, which presumably maps the relocation of the main effort in a case from a trial-like setting such as an ALJ’s hearing into mediation or perhaps arbitration, is notable for the degree to which it has not changed over the 40-plus years covered by the data here: trial rates have dropped by about half, but that is in contrast with the far steeper decline in the courts that Galanter has pointed out. To the extent the displacement story in court relates to the rapidly increasing costs of trial, there may be something to be drawn from a comparison of the relatively low drop in trial rate at the WERC, in conjunction with the strongly suspected (relatively) low increase in the costs of such proceed-

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40. It is worth noting here, however, that a unique feature of Wisconsin labor law is parallel jurisdiction by the courts. It has long been legally possible to bring a complaint case before a court instead of the WERC. But almost no one does. Thus, for that purpose, the “displacement” happened even long before the starting point of the data series here.

ings, to the much steeper rise in costs of court trials conjoined with the much faster (and more consistent) rate of decrease in the trial rate.

The assimilation story, similarly, is present at the WERC from the beginning: in this “small room” the ALJ-cum-arbitrator-cum-mediator has been a fixture throughout, and Galanter’s notion that “law mingles with other forms of knowledge” is entirely consonant with the notion, at least a hundred years of age, that handling labor disputes demands a significant level of knowledge of “the law of the shop” as well as specialized understanding of the politics of collective bargaining, and also of industrial practice. These forms of knowledge explain nothing about the drop in the trial rate from 1962 onwards, since they have come along with every assigned member of the WERC staff in every case, for decades before the data series used here. But their continuous presence, in conjunction with the small relative size of that drop compared to the courts’ experience, may, conversely, serve as a backhanded indication that there is something to the assimilation story.

The transformation story applies for similar reasons: when every member of the WERC staff can safely be described as favoring a decisional process that is “negotiative, informal, participative and interactive”—even before the data series began—there is little or no transformation since 1962. Any degree of improved sophistication of practice is dwarfed by the comparative changes in the courts described by Galanter and others in this symposium.

That leaves the evolution story. And certainly, WERC practice over the decades has had its own form of evolution. In particular, there is a strong argument that the parties who face off against each other in this particular forum are remarkably stable both in their basic complement—the Police Department of the City of Milwaukee is not likely to go out of business or to be taken over by a competitor, and the unions that are active today in Wisconsin are largely either the same or reconfigurations of those that existed at least by the early 1970s, if not before—and also, significantly, in the personnel who represent them. In this latter respect, it is worth noting that anecdotally, there appears to have been a generation of professionals of about the same age hired—whether by unions, by employers, by law firms specializing in public-sector labor law, or as neutrals—over a relatively short period of time in the late 1970s and early 1980s, to handle the burgeoning caseload as public-sector unions acquired power. This peer group, in a state not characterized by particularly high levels of job mobility as compared to elsewhere in the United States, has gradually acquired both increasing skill and sophistication at their respective substantive roles, and great familiarity with each other as people, both of which are trends which probably tend to support process pluralism, development of trust at least among the professionals involved, and other improved capacities which are likely to reduce the need actually to try the case that came up today before an ALJ tomorrow.

But it is unnecessary to press such speculation too far. It is sufficient here merely to note two forms of “bottom line.” In the more immediate, the WERC’s experience suggests that when *all five* Vanishing Trial stories are either inapplicable or “present at the beginning,” the absolute numbers of trials both start and remain higher. This is a form of “deviant case analysis,” but it ends up supporting

the broad outlines of the Vanishing Trial metastory.<sup>41</sup> At longer range, that experience provides a signpost to potentially fruitful future research. It suggests that the small rooms of our field are numerous enough that others, with different structures and circumstances, may have developed a great deal of useful data too. Diligent scholarship should be able to unearth some with points of similarity and points of difference both to the one noted here, and to the federal and state courts which started the Vanishing Trial discussion. It seems to me that only such scholarship can hope even to approach that isolation of the individual “stories” which is necessary if we are to understand which story is most prevalent and most powerful under what real-world circumstances. I look forward to seeing what emerges when scholars find ways to overlay the experience and data from a greater range of these miniature worlds onto each other.

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41. I am indebted to John Lande for pointing out the “deviant case analysis” aspect.