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Robert M. Ackerman

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Vanishing Trial, Vanishing Community?

The Potential Effect of the Vanishing Trial on America's Social Capital

Robert M. Ackerman*

This essay considers the communitarian implications of the vanishing trial phenomenon. Its language is tentative, because while we now have—thanks to Marc Galanter and his associates—a great deal of useful data on the vanishing trial, we have only some hints regarding its causes, and an even less concrete notion of its likely consequences.¹ The empirical data unearthed by Professor Galanter and others has debunked a number of myths regarding the litigiousness of our society and the extent to which the courts are employed to resolve disputes. Given the care that has been invested in this research, it would be reckless to jump prematurely to conclusions regarding its implications, for example, by stating that the vanishing trial is but further evidence of the decline in America's social capital. But the diminishing opportunity for Americans to convene publicly and formally in a trial setting nevertheless has disturbing implications for communitarians, which we ought not ignore. In particular, we should be concerned about developments that remove law and legal institutions from broad participation by the citizenry and concentrate them in the hands of an educated elite. I therefore hope the reader will allow me to indulge in some semi-educated guesses.

I. SOME BACKGROUND ON COMMUNITARIANISM

Communitarianism is an emerging movement that tries to strike a healthy balance between the assertion of individual rights and the needs of the community at large. The movement's founder, sociologist Amitai Etzioni, has described communitarianism as nothing less than "a social movement aim[ed] at shoring up the moral, social, and political environment."² To the extent there has been a litigation explosion—or, in light of Galanter's debunking, to the extent there is a *per-*

*. Professor of Law, The Dickinson School of Law of The Pennsylvania State University. B.A., Colgate University; J.D., Harvard Law School. The author would like to thank Nathaniel Kuratomi and Valerie Jackson for their research assistance and Nancy Welsh and Janis Ackerman for their helpful comments.

1. Professor Burbank observes, "We know enough to suspect strongly that the vanishing trials phenomenon in federal civil cases is a polycentric problem, and if that is true, causal inference, which 'hinges on untested assumptions about the relationship between observed and unobserved variables,' is hard enough within one system. Adding (or failing to notice) relevant variables from other systems is a recipe for confusion." Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 571, 577 (2004) (quoting Donald P. Green & Alan S. Gerber, *The Underprovision of Experiments in Political Science*, 589 ANNALS 94, 98 (2003)).

2. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 247 (1993).

ception that Americans are overly litigious—communitarians might join those who complain that an overemphasis on the claims of individuals places too great a demand on society. Etzioni reminds us that “each newly minted right generates a claim on someone.”³ But communitarians also assert that with rights come responsibilities, which might imply concomitant legal obligations. For example, some communitarians question the law’s reluctance to impose a duty to rescue and suggest the need for Good Samaritan laws requiring that one render aid to one’s neighbor.⁴ The balance between individual liberties and broader community needs is an ongoing concern in communitarian discourse, as demonstrated on a national level by the continuing debate over the Patriot Act.⁵

In his highly acclaimed book, *Bowling Alone*, political scientist Robert Putnam documented and lamented a decline in America’s social capital.⁶ The book traced how reduced participation in civic organizations, social clubs, charitable organizations and even bowling leagues has diminished America’s store of social capital and with it, the nation’s civic connectedness. Putnam saw social capital—the connections between individuals that build social networks—as critical to the norms of reciprocity and trustworthiness that allow us to function as a civil society.⁷ In a subsequent article, I suggested that dispute resolution institutions and processes can enhance community and build social capital. “The array of devices, public and private, for the pacific resolution of conflict can be consciously employed to enhance social participation and strengthen a sense of community, while maintaining respect for individual autonomy.”⁸ While others have identified the litigiousness of American society as a major culprit in the overindulgence of individual rights, I have suggested that even adversarial dispute resolution processes, such as litigation and arbitration, can be mechanisms through which individuals can invoke procedural and substantive societal norms and thereby build social capital. Courtroom procedure becomes a common language through which a secular society honors its democratic heritage and applies its values (in particular, that of fundamental fairness) to human transactions. Lawyers, and the rituals they observe, can be critical players in this process. “Whether negotiating or litigating, lawyers at their best use the bonding social capital of the profession—formed through the acculturation of law school and practice, and commonly accepted norms of behavior—to create bridging social capital between their clients and among members of the community who observe the litigation process.”⁹ These behaviors may occur outside as well as inside the courtroom. For example, the collaborative law movement, in which lawyers and clients undergoing divorce

3. *Id.* at 5-6.

4. See, e.g., Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 660-63 (1995); Mary Ann Glendon, *Does the United States Need “Good Samaritan” Laws?*, 1 RESPONSIVE COMMUNITY 9 (1991).

5. See AMITAI ETZIONI, *HOW PATRIOTIC IS THE PATRIOT ACT? FREEDOM VERSUS SECURITY IN THE AGE OF TERRORISM* (2004).

6. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

7. *Id.* at 19-20.

8. Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 29 (2002) [hereinafter Ackerman, *Disputing Together*].

9. *Id.* at 32. Putnam describes “bonding” (or exclusive) social capital as that which looks inward and cements homogenous groups and “bridging” (or inclusive) social capital as that which is outward looking and encompasses people across diverse social cleavages. PUTNAM, *supra* note 6, at 22.

participate in an open exchange of information and four-way conversations in order to resolve matters in a civil, cooperative fashion, is a good manifestation of a dispute resolution process reflecting communitarian principles.¹⁰

In general, dispute resolution processes that provide opportunity for civil discourse, for a respectful airing of grievances and attention to rights, and for meaningful participation by disputants and others in the community, are likely to build social capital and with it furnish the “glue” that is essential to community.¹¹ As I have suggested elsewhere, “resort to litigation . . . involves an affirmation of community,” a willingness to subject oneself to the community’s standards and procedures and “cede a degree of autonomy in the interest of community cohesion.”¹² Because the trial is the most visible and public of dispute resolution processes, a reduction in its use may be cause for concern among communitarians. If, as Putnam asserts, participation in community activities is an important barometer of national health, then the opportunity to participate (as a litigant, a juror, or an observer) in a public, legally binding dispute resolution process is an important measure of the health of our democracy.

II. ACCESS TO JUSTICE

The available data presents an incomplete picture as to why trials are in decline. Researchers who understand the empirical data far better than I do remain unsure as to whether, for example, the decline in civil trials in the federal courts is attributable primarily to more settlements, more private adjudications (e.g., arbitration), or more non-trial adjudications in the courts (i.e., dismissal on the pleadings, summary judgment, etc.).¹³ But we do know this much: in the state and (more so) federal courts, in both civil and criminal cases, there are fewer trials occurring, not just as a percentage of dispositions, but on an absolute basis. At the very least, this means that whatever other opportunities have been created for people to resolve their disputes, fewer such disputes are being resolved through a trial on the merits in a public forum.

One concern stemming from the vanishing trial phenomenon is that disputants may not have sufficient opportunity for the type of hearing that will address their legitimate concerns for procedural justice. The procedural justice literature indicates that disputants’ perceptions of justice are enhanced to the extent they perceive (1) that they have had opportunity for voice, (2) that a third party considered their views, concerns, and evidence, (3) that they were treated in a dignified, respectful manner in a dignified procedure, and (4) that the decision-maker was

10. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315 (2003).

11. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 93-117 (1988). See also Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 209-10 (2005) [hereinafter Ackerman, *Victim Compensation Fund*]; Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?*, 79 WASH. U. L.Q. 787, 820 (2001).

12. Ackerman, *Disputing Together*, *supra* note 8, at 55-56.

13. See, e.g., Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004). It is difficult, for example, to determine whether a court record indicating termination of a case without a judgment necessarily means that a settlement has occurred. *Id.* at 707.

even-handed and attempted to be fair.¹⁴ To be sure, a trial is not the only forum through which one can obtain this treatment, but it does carry with it many of the procedural protections designed to insure it. In addition, to many Americans, “the formalities of a court trial—the flag, the black robes, the ritual—remind those present that the occasion calls for the higher, ‘public’ values, rather than the lesser values embraced during moments of formality and intimacy.”¹⁵ To the extent we are concerned about the public’s willingness to invest in the building of social capital, the *perception* of fairness is very much a part of the reality.¹⁶ If people do not perceive that they have access to justice, meaningful citizen participation will decline and there will be less public “buy-in.” Soon we will all be bowling alone.

We should therefore question whether the vanishing trial reflects a reduction in access to justice, because of the tendency of the courts to dispose of cases prematurely through summary judgment.¹⁷ There are often good reasons for summary judgment and other early dismissal procedures. In fact, elsewhere I have suggested categories of cases that beg for such treatment.¹⁸ But to the extent a disposition toward summary judgment represents a lack of judicial resources, judicial impatience, or an excess of “factual carving,” it is a legitimate cause for concern.¹⁹ Again, however, the data is inconclusive. The data is also inconclusive regarding whether vanishing trials are a consequence of diminishing judicial resources. We know from Galanter’s data that the number of federal judges more than doubled from 1962 to 2002, but *filings* per sitting judge also more than doubled during that period.²⁰ However, the supply of other personnel and resources available to the federal judiciary has more than kept pace with the number of filings. A chicken-or-egg question emerges: Have federal judges directed the work

14. See LIND & TYLER, Welsh, and Ackerman, *Victim Compensation Fund*, *supra* note 11.

15. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388 (1985). See also E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953 (1990) (describing empirical study of litigants who found arbitration and adjudication to dignify their concerns).

16. Stephan Landsman notes, “The Supreme Court has famously remarked that ‘justice must satisfy the appearance of justice.’ Implicit in this declaration is the notion that even the fairest and most appropriate results are likely to provoke suspicion and resistance if arrived at by means that fail to satisfy litigant and societal expectations of due process.” Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. EMPIRICAL LEGAL STUD. 973, 976 (quoting *Offut v. U.S.*, 348 U.S. 11, 14 (1954)).

17. On the criminal justice side, we might inquire as to whether the need to plea-bargain in light of limited judicial resources has denied the people, as well as the criminally accused, their day in court. If serious criminals are “getting off easy” because of lack of trial time, this should be a cause for public concern. Actually, though, there is reason to believe that criminal defense counsel, for reasons of their own, may strike bad deals for their clients, thereby balancing out the overall effect. See Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205 (1999). Either way, it is not a pretty picture.

18. Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 674-77 (1995) [hereinafter Ackerman, *Tort Law*].

19. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?* 1 J. EMPIRICAL LEGAL STUD. 591, 624-26 (2004) (describing “factual carving” as “a process that does not require more of the whole but sees less in the parts by subjecting the nonmovant’s evidence to piece-by-piece analysis.”).

20. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 500-01 (2004) [hereinafter Galanter, *Vanishing Trial*].

to where the resources lie (clerks, special masters and ADR administrators), or have these resources grown to accommodate the natural flow of work toward non-trial dispositions? Has the priority given to criminal trials siphoned resources from the civil side of the courtroom, lengthening time to disposition and thereby encouraging civil litigants (especially plaintiffs) to resolve their cases outside of a trial setting?²¹ And, in the state courts (where most of the work is done), has a shortage of resources resulted in judges giving short shrift to meritorious claims?²² Information that might help us answer these questions remains more anecdotal than empirical, and generalizations (especially as to the conduct of the state courts) will be difficult and perhaps imprudent.

III. THE PUBLIC PERCEPTION OF TRIALS

Historically in America, the trial has played a far less prominent role statistically than it has played in people's minds.²³ Trials have never been the dominant vehicle for dispute resolution in America, but they have long loomed large—larger than their statistical significance might suggest—in American popular culture. Prior to the advent of mass communications, public trials were a major form of entertainment.²⁴ Today, they remain so, aided by *Court TV* and dramatizations in motion pictures and television programs in which the trial remains the culminating event. Because the maintenance of the social fabric depends, in large part, on public perceptions of access and fairness, the portrayal of legal processes in the popular culture is a matter of legitimate concern. Lawyers, judges, and legal academicians have produced enough material for us to know what *we* think about the courts and the justice system, but we should also be concerned about what the *public* sees and hears about trials and other disputing mechanisms.

That perception is sometimes at odds with reality. In a recent article, *Legal Negotiation in Popular Culture*, Professor Carrie Menkel-Meadow explains:

Depictions of legal negotiations in modern popular culture have tended to focus on dramatic court room and trial scenes where drama is easily cre-

21. Some of the data would appear to suggest that this is the case. See Shari Seidman Diamond & Jessica Bina, *Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637, 645, 649-50 (2004). Galanter's data would suggest otherwise, as it indicates a 30 percent shrinkage in federal criminal trials from 1962 to 2002. Galanter, *Vanishing Trial*, *supra* note 20, at 493. But Diamond and Bina suggest that the growing criminal caseload (as distinguished from the number of criminal *trials*) may nevertheless demand a substantial amount of federal judicial time.

22. There is good reason to believe that in several of the states, funding for the judiciary has been uneven at best and inadequate at worst. See, e.g., California Chief Justice Ronald M. George, *State of the Judiciary*, Mar. 23, 2004, available at <http://www.courtinfo.ca.gov/reference/soj0304.htm> (last visited May 1, 2006) ("reductions in court budgets have adversely affected the lives of many Californians and threaten to render the administration of justice uneven and inadequate across our state"); First Draft Consolidation Plan from County Court to County Municipal Court, available at http://www.clerk.co.montgomery.oh.us/county_court/consolidation.pdf (last visited Dec. 28, 2005) (recommending court consolidation in light of reduced funding). *But see* National Center for State Courts, *Survey of Judicial Salaries*, Vol. 30, No. 1 (Apr. 1, 2005) (showing average 3.0 percent annual increase in salaries of state court judges from 1992-2005).

23. See generally Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004).

24. *Id.* at 700.

ated in the confrontations of the adversary system, with dramatic cross examinations, stirring closing argument and that moment of highest drama—the verdict... [M]uch of what constitutes legal activity is actually ignored in popular culture—there are relatively few scenes of lawyer-client interviews, few scenes of document drafting, deposition taking or library research and surprisingly few depictions of legal transaction negotiations.²⁵

As Menkel-Meadow observes, depictions of actual negotiations in motion pictures and on television tend to be superficial, portraying negotiations either as dramatic standoffs or power plays “taken from the pages of the popular psychology books.”²⁶ There are few depictions of protracted or integrative negotiations, and fewer still of the difficult, time-consuming, meticulous work of client interviewing, investigation, informal discovery, and file development that encompasses most of the work that we call “litigation.” An exception to this phenomenon is the film *Erin Brockovich*, based on the real-life efforts of a paralegal whose law firm represented a large group of plaintiffs claiming injuries from industrial pollution in their community of Hinkley, California. Teachers of negotiation often refer to one of the film’s two negotiation scenes, in which Ms. Brockovich “quietly informs her adversaries that the water they are drinking at the negotiation conference is from their own contaminated wells.”²⁷ However, for those concerned about the vanishing trial and its consequences, another scene is of greater interest. That scene depicts a meeting in a community center between approximately one hundred Hinkley plaintiffs and their lawyer, Ed Masry (Brockovich’s employer). As Masry urges his clients to agree to arbitration in order to resolve the hundreds of claims outstanding, the following dialogue occurs:

MASRY: Binding arbitration isn’t all that different from a trial. It’s overseen by a judge; evidence is presented in much the same way.

VOICE FROM AUDIENCE: And then a jury decides?

MASRY: Oh, no, sorry. I forgot to mention that there’s no jury in binding arbitration. (Much grumbling in audience.) No jury and no appeal.

ANOTHER VOICE FROM AUDIENCE: What option do we have if we don’t like the result?

MASRY: Well, you have none. The judge’s decision is final. (More grumbling from audience.) But we don’t anticipate that being a problem. As I already told you, it’s definitely between \$50 and \$400 million.

25. See Carrie Menkel-Meadow, *Legal Negotiation in Popular Culture: What Are We Bargaining For?* in LAW AND POPULAR CULTURE 583, 603 (Michael Freeman ed., 2005).

26. *Id.* at 592.

27. *Id.*

ANOTHER AUDIENCE MEMBER: So which? There's a big difference there.

MASRY: I wouldn't like to speculate at this point.

ANOTHER AUDIENCE MEMBER: How does it get divided?

MAN IN AUDIENCE: My medical bills started two years ago, before some of the other people here.

WOMAN IN AUDIENCE: My daughter has been in and out of hospitals for a lot more than his; it shouldn't matter when it started.

MASRY: People listen, please. Please—The point we have to address tonight is getting everyone to agree that binding arbitration is preferable to a trial that could go on for ten years before you see any money.

MALE VOICE IN AUDIENCE: Maybe some of us want to wait ten years.

MASRY (as people get up to leave): Everyone has to agree or no one has a chance. Those of you who are about to leave, I'd like you to keep this date in mind—1978. That's the year of the Love Canal controversy and those people are still waiting for their money. Think about where you'll be in fifteen or twenty years. (People begin to sit back down.) Now look, everyone, is this a big decision? Absolutely. But I do not believe, and I wouldn't say this otherwise, I do not believe this is a sellout. This is the best shot of getting everyone some money now. You and I both know, there are people in this room who can't afford to wait, to take that chance. Are you going to make them wait?²⁸

What is wrong here? Not the lawyer, who makes a convincing case for a pragmatic, communitarian course of action which, in his judgment, is his clients' best option under the circumstances. (As Brockovich assures Masry at the conclusion of the meeting, "You did good.") Not the clients, who ultimately make the pragmatic, communitarian choice to look out for their neighbors (as well as themselves) and agree to arbitration.

The problem is a system of litigation that forces them into that choice. It is not that arbitration is inherently bad, particularly as applied to the circumstances of this case. Arbitration certainly has its attributes: the special expertise of an arbitrator dealing with complex, scientific evidence, the likelihood of more consistent results among similar claims, and the privacy the arbitration process affords might even be viewed as advantageous to the Hinkley plaintiffs. But it is not these attributes that compel attorney Masry to urge his clients into arbitration. Rather, he steers them away from the courtroom and toward arbitration because of the time that will be consumed in getting to trial. This is odd, in a way; if trials

28. ERIN BROCKOVICH (Universal Studios 2000).

are vanishing, there should be sufficient courtroom resources to handle this case in a timely manner. Something in the process must be broken—either the resources available to this particular court, or the court’s internal allocation of resources, or aspects of civil procedure that allow the defendant to lengthen the time to trial notwithstanding the availability of a judge and courtroom. The Hinkley plaintiffs seem to take comfort in aspects of the trial system unavailable in arbitration, such as a jury and the correction of error through appeal. They reluctantly decide to forego these protections, because they can ill-afford the queuing costs of trial.

Galanter observes:

Settlements entail ‘bargaining in the shadow of the law,’ so the influence of legal doctrine is present, but is thoroughly mixed with considerations of expense, delay, publicity and confidentiality, the state of the evidence, the availability and attractiveness of witnesses, and a host of other contingencies that lie beyond the substantive rules of law. It is ‘the law’ in its broad sense of process that casts the shadow, not merely its doctrinal core.²⁹

The very structure of alternative mechanisms is often the result of bargaining in the shadow of the law. So while arbitration may be a reasonable alternative—perhaps even a preferable alternative in the case portrayed in *Erin Brockovich*—defects in the litigation process nevertheless create endowments that shape alternative processes such as arbitration. The parties contract for the process, but the contract is a product of the constraints imposed by the realities of the trial process. In another scene from the film, Brockovich is told that normally 70% of claimants must agree to proceed to arbitration in order for the defendant to participate, but the defendant in this matter is insisting on 90% participation. Both defendant and plaintiffs recognize that the queuing time to trial is a detriment to the plaintiffs and gives the defendant additional leverage in shaping the arbitration process. The deck remains stacked in favor of the defendant, even as the parties pursue alternatives to trial.

Whatever utility the alternative process may have, the forced choice imposed on the plaintiffs is hardly conducive to the building of social capital. The societal “buy-in” through which we agree to abandon violent self-help remedies and adhere to the disputing practices of the community is missing from a system in which disputants face a stacked deck in the very processes that are supposed to provide redress for serious harms to them and their families. People pay their taxes, recite the *Pledge*, send their children to school, and serve in the nation’s armed forces, all in exchange for a minimal expectation of due process and fundamental rights.³⁰ When they find the system wanting, community is shattered.³¹ Citizens withdraw into rebellious out-groups, or disengage altogether.

29. Galanter, *Vanishing Trial*, *supra* note 20, at 525-26.

30. Philip Selznick says, “Civic virtue becomes empty symbolism if unsupported by the continuities of social life. People must have the *resources* that make character possible and participation effective.” [emphasis added]. Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 456 (1987).

31. Fortunately, a semblance of community was preserved in Hinkley. ERIN BROCKOVICH (Universal Studios 2000). Faced with a difficult choice, the Hinkley plaintiffs chose a course of action that

IV. TRIAL AS COMMUNITY EVENT

It is not just obstacles to the effective participation of *litigants* that should cause concern among communitarians. The vanishing trial phenomenon suggests diminishing opportunities for people to observe trials in their communities, thereby eroding a mainstay of American democratic life.

Paul Butler is among the many to observe that “[t]he concept of citizen-jurors resolving civil and criminal trials was viewed by the framers as an important part of American democracy.”³² In my town and in many others, the trial takes place, quite literally, in the public square.³³ While other events in the courthouse attract little notice, usually once a year a trial (almost invariably a criminal one) attracts enough public attention to be played out for several days in the local newspaper and to be discussed on loading docks and at water coolers. There is a degree of voyeurism in this, but the event involves a level of public discourse normally reserved for presidential elections and the Superbowl. Other trials in our courthouse garner less attention, but there is a sense within the community that the courthouse is there, it is there for us, that important business gets transacted there, and it is the peoples’ business.³⁴

It is, however, less the people’s courthouse than it used to be. Thanks to Osama bin Laden and his associates, armed police now guard a high-tech security screening device through which one must pass, not just to reach the courtroom, but to gain entrance to other county offices for the transaction of routine business. Here, as in the federal courthouse in nearby Harrisburg, there is none of the old county fair, Chattaqua-type atmosphere; all is austere, quiet, and solemn. And, if our locality correlates with both state and national statistics, there are fewer trials to see.

would provide the most relief to the largest number of their neighbors in the shortest period of time. *Id.* The arbitration produced one of the largest aggregate mass pollution awards in history and community was preserved on a micro-level as well. *Id.* Near the end of the film, when Brockovich visits a client to inform her of her large arbitration award, she brings her boyfriend along. *Id.* During the course of the litigation, the boyfriend had been giving up his modest pleasures to perform babysitting and other chores so that Erin could pursue the Hinkley case. *Id.* “I want to show you what you’ve helped to do,” she tells him now, enjoying a shared triumph while acknowledging that community begins at home. *Id.*

32. Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 630 (2004).

33. In the traditional Pennsylvania town square, the courthouse remains a dominant feature. In my town, Carlisle, there are two such courthouses on the south side of the square. The Old Courthouse, with columns bearing shell marks left by Jeb Stuart’s Confederate cavalry during the Gettysburg campaign in 1863, is matched by a “New” Courthouse across the street, built in the 1950s. The square is completed, on its north side, by two Revolutionary War-era churches, replete with historical markers designating where George Washington worshipped and where Ben Franklin negotiated a treaty with American Indians. Other monuments honor the war dead and Carlisle’s Native American athlete-hero, Jim Thorpe. To the extent that trials are “official forums for story telling,” stories are told in the courts of Cumberland County, Pennsylvania in the midst of iconic markers of American history. *See* Butler, *supra* note 32, at 634.

34. Galanter observes elsewhere in this issue that “the trial is a site of ‘deep accountability’ where facts are exposed and responsibility assessed, a place where the ordinary politics of personal interaction are suspended, the fictions that shield us from embarrassment and moral judgment are stripped away.” Marc Galanter, *A World Without Trials*, 2006 J. DISP. RESOL. 7 [hereinafter Galanter, *World*]. It is the public accountability inherent in the trial process that most distinguishes it from private adjudication mechanisms such as arbitration.

There are, of course, plenty of opportunities to observe trial on television. One of the coarser examples is furnished by Judge Judy, who presides over what masquerades as a small claims court on daytime television.³⁵ Judge Judy's principal attraction appears to be her rudeness. Her barbed insults to the hapless litigants who approach her each day bear a closer resemblance to the heavier side of Don Rickles than to the demeanor of any judge I have seen.³⁶ Judge Joseph Wapner of *The People's Court* provided a slightly milder, more courtly version of smalls claim procedures, but on the entertainment continuum, I suspect that Judge Judy is designed in any event to compete more with the mayhem of *Jerry Springer* (another lawyer-turned-entertainer) than with dignified courtroom drama.³⁷

I hope most viewers understand that Judge Judy is designed more as an amusement than as a genuine depiction of courtroom procedure, but I cannot help but fear that the image of hapless litigants getting hectorated and slapped around by a judge is the portrait that many Americans have of the courtroom.³⁸ If that is the case, it is no wonder people fear court.

Alternatively, the popular image of the courtroom may be formed by the celebrity trials served up on television. The trials of O.J. Simpson, Scott Peterson, and Michael Jackson are hardly representative of the quotidian affairs of the American courthouse. They are televised nationally precisely *because* they are unusual; they are the man-bites-dog cases that attract public attention because they are ghoulish or involve well-heeled celebrities who can afford dream teams of attorneys. Yet these trials, due to their very availability and prominence, become heuristics for a much larger class of courtroom events.³⁹ A century ago, people would head down to the county courthouse and get a glimpse of reality. Trials often served as entertainment, but like the Chhattaqua, it was entertainment in the form of citizenship education. Now people sit, not as a community in the courthouse, but alone in their family rooms, voyeurs at a circus. We do not even have our neighbors sitting alongside us to confirm our impression that we are watching a freak show.

Galanter has noted that a large number of "trial-like events" occur outside the courtroom—before administrative tribunals, in arbitration proceedings, in internal dispute processing mechanisms provided by various organizations, and the like—so that we may not be seeing so much a diminishment of trials, but their relocation.⁴⁰ Some of these mechanisms may be healthy and even conducive to the enhancement of social capital. However, they lack the public participation and accountability of a trial. Galanter's metaphor likening the migration of trials from

35. Judge Judy is known to her mail carrier as Judy Sheindlin.

36. For a more detailed and colorful description of Judge Judy, see Friedman, *supra* note 23, at 701-02.

37. One might say that Springer is to constructive group facilitation as Judge Judy is to dignified and respectful courtroom decorum. Said Judge Wapner about Judge Judy, "She is not portraying a judge as I view a judge should act. She's discourteous, and she's abrasive. She's not slightly insulting—she's insulting in capital letters!" Available at NNDB website, <http://www.nndb.com/people/744/000022678/> (last visited Dec. 24, 2005).

38. It is the criminal court, not the civil court, that tends to be portrayed in a more dignified manner in televised dramas such as *Law and Order*.

39. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 6-9 (1999).

40. Galanter, *World*, *supra* note 34.

the courtroom to the changing urban landscape (in which much of the activity leaves the inner city) is particularly appropriate here.⁴¹ Just as our civic values suggest a need to preserve the urban core, the same values furnish ample reason to preserve the public trial.

V. JURY SERVICE: AN EXPERIENCE IN COLLABORATIVE DECISION-MAKING

Finally, the vanishing trial reduces the opportunity for citizens to participate as jurors. Galanter's data suggests that in the state courts (for which the data is less comprehensive, but where most of the action is), jury trials have declined at an even more precipitous rate than bench trials.⁴² The opposite seems to be true in the federal courts, although there has been a significant decline in the absolute number of jury trials in both venues.⁴³

Jury service provides an exceptional opportunity for participatory citizenship. Alexis de Tocqueville regarded the jury as a "political institution," educating citizens in the responsibilities of democracy.⁴⁴ Even more than voting (usually a solitary affair), jury service requires that one listen and watch closely, deliberate with one's neighbors, and make a collective decision that has a direct impact on one or more members of the community.⁴⁵ Jeffrey Abramson states, "No other institution of government rivals the jury in placing power so directly in the hands of citizens."⁴⁶ The special role of jurors as representatives of their fellow citizens in a democratic process alone suggests a worthwhile function for this institution. But Abramson goes on to say:

I will argue for an alternative view of the jury, a vision that defends the jury as a deliberative rather than a representative body. Deliberation is a lost virtue in modern democracies; only the jury still regularly calls upon ordinary citizens to engage each other in a face-to-face process of debate. No group can win that debate simply by outvoting others; under the traditional requirement of unanimity, power flows to arguments that persuade against group lines and speak to a justice common to persons drawn from different walks of life. By history and design, voting is a secondary ac-

41. *Id.*

42. Galanter, *Vanishing Trial*, *supra* note 20, at 508.

43. *Id.* at 465-66.

44. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 291 (Phillips Bradley trans., 1848) (1945); see also Landsman, *supra* note 16, at 974; Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 *CHI.-KENT L. REV.* 909, 920 (2003).

45. In most states, voting is a solitary affair, undertaken in a curtained booth, but it nevertheless requires a public appearance. Not so in Oregon, where I had the privilege to live for a few years. Oregon voters exercise the franchise by mail-in ballot. The dramatic tug of the voting booth lever is replaced by a less ceremonious trip to the mailbox. The ballot is usually a long one, due to the numerous referenda added to the ballot by citizen petition. See *Redirected Democracy: An Evaluation of the Initiative Process*, 34 *WILLAMETTE L. REV.* 391 (1998). Instead of undertaking a journey to the polling place, Oregon families can be seen gathering around the kitchen table, discussing the merits of a score of ballot measures. This furnishes an excellent opportunity for the creation of bonding social capital. But the jury, gathering in a diverse citizenry to deliberate together, furnishes a better opportunity to create bridging social capital.

46. JEFFREY ABRAMSON, *WE THE JURY* 1 (1994).

tivity for jurors, deferred until persons can express a view of the evidence that is educated by how the evidence appears to others.⁴⁷

To the extent juries can actually behave, or even attempt to behave, in the manner Abramson describes, they represent the communitarian ideal. Interaction, accountability, responsibility, and engagement are hallmarks of good jury conduct. Participation is active and genuine, not passive or superficial. A juror may not vote merely on a whim; rather, she must justify her vote, consider the arguments of others, and weigh actual evidence, using the law and, ultimately, her conscience as her guide. Jury service demands engagement across group boundaries and respectful attention to the views of others. In short, it creates an extraordinary opportunity for the building of bridging social capital.⁴⁸

As Putnam has noted, occasions for this type of constructive engagement have become increasingly rare in America. We should therefore nurture the concept of jury service, not only for the good it does for the trial process (and the litigants who use it), but for the good it does for the community at large. Diminishing opportunity for first-hand participation in the justice system isolates us from our fellow citizens, creates alienation from the workings of government, and causes citizens to view the justice system with suspicion. Justice becomes "them," not "us." The justice system becomes a vicarious experience, not a participatory one, and the concept of justice becomes more an abstraction and less a reality.

Diminishing public participation in the justice system also allows the courts to be depicted as elitist and undemocratic.⁴⁹ A fair amount of political demagoguery attends these claims, often made by members of the legislative and executive branches of government in the wake of an appellate court's exercise of its constitutional power.⁵⁰ There is, nevertheless, an element of truth to the charge. To the extent that courthouses are depopulated by citizen-jurors, who are replaced by judges and clerks, and to the extent that decision-making becomes mechanical and technical, devoid of the human touch, the judicial branch of government becomes more remote and less democratic.⁵¹ While those of us who have made law our

47. *Id.* at 8.

48. Professor Marder relates:

Most citizens who serve as jurors have a positive experience. This may be because jurors know that the verdict they reach will have great significance to the parties before them. Or this may be because jurors generally take their responsibility seriously and believe they have done the best job they could. In either case, jury duty usually teaches positive lessons about participating in a democracy.

Marder, *supra* note 43, at 921.

49. See, e.g., Phillip Kennicott, *Judge Not: In the Court of Public Opinion, the Bench is in the Hot Seat*, WASH. POST., May 17, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/16/AR2005051601392.html> (last visited Dec. 28, 2005).

50. Recent examples of this phenomenon are found in characterizations of the Massachusetts Supreme Court's 2003 ruling on gay marriages. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

51. Those inclined to the mechanical application of law to facts might take caution in Professor Selznick's call for reason in the form of prudence or practical wisdom:

In the governance of human affairs, reason is flexible, substantive, and circumstantial. It applies general principles in a spirit of restraint and with respect for the values at stake in particular situations. Reason recoils from mechanical, rule-bound, or ideological thinking. There is no head-

calling may prefer the professionalism of judges, magistrates, special masters and clerks to the unpredictable and even arbitrary decisions of juries, we disparage the jury at our peril. Adherence to, and execution of, the law is dependent upon the buy-in of the citizenry and the social capital created through public participation in legal institutions. Lose that, and we might lose it all.

At one time, the courts were called the “least dangerous branch” of our government.⁵² They are now probably the least popular branch of government. At least on the state level, where resources available to the courts have been uneven at best and paltry at worst, it would appear that courts are victims of unfunded mandates.⁵³ Certainly the legislative and administrative branches of federal and state government continue to enact volumes of statutes and regulations that the courts are called upon to interpret and enforce.⁵⁴ Courts must grapple with an increasing volume of law, especially on the federal level (although it appears from Galanter’s data that federal courts are not victims of unfunded mandates, as their funding has kept pace with federal funding generally).⁵⁵ So there is more law and a larger federal legal bureaucracy, but fewer trials.

As the amount of law has increased geometrically, the volume of legal commentary has increased exponentially.⁵⁶ It is the rare law school that does not now boast at least two student-refereed law journals, which have little trouble filling their pages with the prodigious output of legal academicians. There are fewer trials, which means there are fewer opportunities for ordinary citizens to influence the affairs of the courts first-hand. However, there are more judicial opinions, statutes, and regulations, and still more commentary on these primary sources. Law has become more and more the domain of judges and intellectuals, and less the property of the masses. We bowl alone in our ivory towers.

VI. NOT TO SHED A TEAR FOR THE TRIAL BAR . . .

Among those consequences of the vanishing trial that we need not lament are the diminishing opportunities for the trial bar to demonstrate its skills. Quite contrary to the unfair and unflattering manner in which it has recently been portrayed in the popular literature, the trial bar serves several socially useful functions: it provides meaningful access to relief for those who are aggrieved and vigorous defense to those who are accused of wrongdoing; it serves the public interest as a privately-based regulatory mechanism, policing conduct; it also serves as a medium through which the abstractions of the law become meaningful to the citizenry-at-large. But we need not lament the fact that fewer trials mean fewer op-

long leap from thought to action, from rule to fact. In Oakeshott’s image, there is no pursuit of virtue “as the crow flies.”

Selznick, *supra* note 30, at 459-60 (citing M. OAKESHOTT, *RATIONALISM IN POLITICS* 69 (1962)).

52. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

53. See Judith Resnick, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 793 (2004) (suggesting that state courts lack the resources available to federal courts).

54. “There are more federal regulatory statutes, more agencies, more staff, more enforcement expenditures, and more rules.” Galanter, *Vanishing Trial*, *supra* note 20, at 529.

55. *Id.* at 501, 505 Figure 31.

56. *Id.* at 529. “[T]here is more legal flesh and less bones to give it shape.” *Id.* at 530.

portunities for trial lawyers to hone their skills.⁵⁷ Most every law school now has courses in trial advocacy, and a cottage industry (most visibly represented by the National Institute for Trial Advocacy) has emerged so that practicing lawyers may embellish their skills. There are now more opportunities than ever for trial lawyers to practice their skills, as they prepare for a diminishing number of real trials.

Several years ago, an alumnus of the law school that is kind enough to employ me wrote a missive in our state bar journal, provocatively entitled *I Hate Settlements*.⁵⁸ The article suggested that the test of a trial, for both lawyers and their clients, was superior to virtually any settlement. Fortunately, the polemic drew an onslaught of criticism, chiefly from trial lawyers, who recognized that people do not engage in disputes in order to afford their lawyers the opportunity to strut their stuff in court. Particularly in private matters involving private parties, disputants have the right, and are likely to have a preference, for resolving disputes on their own terms. In many cases, a single “correct” determination as to liability and damages is an elusive concept; far better for the parties to such disputes to strike their own deals than to substitute the judgment of strangers in the name of justice. I share Professor Resnick’s concern that “[t]he anti-trial movement is a part of a more general effort toward privatization of conflicts in which consensualism, based on contracts, triumphs over regulatory constitutionalism.”⁵⁹ I am also concerned about a misallocation of legal resources, based largely on wealth. But I do not think we should put people through the trauma of a trial—and the time-consuming, expensive, gut-wrenching process that ordinarily precedes it—just so that their lawyers can show off or polish their skills.

VII. HOPE FOR THE FUTURE

All is not bleak. Trials are not the only dispute resolution devices available for the building of social capital. Jury service is not the only outlet for collaborative, responsible decision-making. Submission of one’s dispute to decision through trial is not the sole opportunity for voice or a respectful hearing. There are a number of vehicles through which civil discourse can occur in the public square. In my earlier article, *Disputing Together*, I cited a number of ways in which dispute resolution processes, including arbitration and mediation as well as trial, can be used to build social capital and enhance community. Arbitration is often employed by intermediate communities (such as employers and unions, trade groups, and religious organizations) as a means of maintaining their internal equilibrium by resolving disputes through the use of their own ground rules.⁶⁰ Mediation at its best is a collaborative process requiring that the parties engage one another in discussion, recognize each others’ legitimate interests, and take responsibility for the outcome.⁶¹ To the extent disputants are availing themselves

57. *But cf.* Landsman, *supra* note 16, at 973 (lamenting the erosion of forensic skills as “lawyers are given precious few opportunities to practice the arts of the courtroom”).

58. Charles W. Rubendall II, *I Hate Settlements: A Defense Lawyer’s Lament*, 10 PA. LAWYER NO. 7, at 13 (1988). Coincidentally, the article appeared immediately before another piece extolling the Dickinson School of Law Mediation Center.

59. Resnick, *supra* note 52, at 813.

60. Ackerman, *Disputing Together*, *supra* note 8, at 68.

61. *Id.* at 71-78.

of alternative processes (or to be in alignment with our forum, *appropriate* processes) rather than trial, such processes have the potential for participation, procedural justice, and personal responsibility valued by communitarians.

Galanter's data on the vanishing trial must be viewed against an historical background in which "trial is and always was an exceptional event with very limited aims."⁶² The principal aim was, and is, the adjudication of disputes, not the building of social capital. Even the little adjustments people make for each other on a daily basis—refunding the purchase price of a defective product, ceding the right-of-way to another motorist at an intersection, saying "pardon me" after bumping into another person in a grocery store aisle—may have a greater cumulative effect on the accretion of social capital than a year's worth of trials. More serious adjustments—an acknowledgment of fault for an accident, the rewriting of a contract that has proved onerous on one party, the rehiring of a victim of employment discrimination (along with a change in personnel policies)—require that one undertake responsibility for one's behavior, rather than defaulting to another decision-maker. Trial involves submission to those in authority; the willingness to do so, rather than engaging in violent self-help, is certainly a step toward a civil society. But autonomous decision-making in which one recognizes the legitimate interests of others and therefore cedes ground, alters one's conduct or changes one's world view requires that one personally take responsibility for the common good—a significantly greater investment in social capital.

To the extent vanishing trials mean fewer opportunities for public discourse and problem-solving, we should nurture and encourage other opportunities for engagement. Community dialogues initiated by the Public Conversations Project,⁶³ Search for Common Ground,⁶⁴ and other conveners can promote civil discourse and involve citizens in collaborative problem-solving for the betterment of their communities. Even as we retreat from the public square and into our own homes, the Internet is a potentially powerful tool for public engagement that transcends geographic obstacles. As a caveat, though, we once thought this true of television. That medium, however, seems to have failed to realize its potential for the creation of social capital. Also, I remain uncertain about the extent to which community is bound up with geography and requires a physical, rather than merely a virtual presence. Academicians must open up institutions of higher education as places of public discourse and civil engagement regarding the issues of the day. We dare not abdicate this function to a lowest common denominator of discourse, consisting of the Jerry Springers and Judge Judys, not to mention the Rush Limbaughs and Michael Moores.⁶⁵

Most importantly, we cannot capitulate to the routine and allow the dilution of dispute resolution processes—trial and its alternatives—into mere caricatures

62. Thomas Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 847 (2004).

63. Available at <http://www.publicconversations.org/pcp/index.asp> (last visited Dec. 30, 2005).

64. Available at <http://www.sfcg.org/> (last visited Dec. 30, 2005).

65. Several years ago, Judge Harry Edwards lamented the growing disjunction between legal academia and practicing lawyers. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). The gap between legal academicians and society at large forms an even greater chasm. Scholarship is largely a solitary endeavor. But we can move outside our libraries and offices and engage the citizenry, so when our tree falls in the forest (and is converted into paper for our books and articles), it makes a sound.

of themselves, superficial exercises in which the participants go through the motions but never really engage.⁶⁶ It is a fine thing for disputants to choose arbitration as their dispute resolution mechanism because it allows them to design procedures that promote participation and problem-solving in a manner that reflects community values and mores. It is quite another for them to opt into the same process because the litigation system gives them no other choice (as did the Hinkley plaintiffs) or because the fine print in some consumer contract forced them to do so (as is so often the case under the system of “arbitration by ambush” now prevalent in certain industries).⁶⁷ It is a fine thing for people to participate in mediation because (to borrow terms from Professors Bush and Folger) it provides opportunities for empowerment and recognition,⁶⁸ along with creative problem-solving; it is quite another for a process bearing the same name to subject participants to browbeating and coercion at the hands of a mediator intent on obtaining a settlement in order to preserve her “track record.”⁶⁹ It is a fine thing for the courts to be available to try cases on the merits when only a test based on legal norms will suffice; it is quite another to allow the trial process to be eroded through motions practice that honors form rather than substance, prematurely disposing of cases before the merits can be reached. It is not enough to promote ADR because it is better than the misery of trial. Better for us to make the trial experience less miserable, less time-consuming, and more user-friendly, while at the same time investigating the possibility that other dispute resolution paradigms may be more suitable to address the conflict at hand.

It is gross overstatement to contend that “a trial is a failure” or that “a bad settlement is better than a good trial.”⁷⁰ It is equally unreasonable to regard trial as universally superior to any other disposition. The trial, and in particular, the jury trial, remains important in America because it is one of the few public rituals in a diverse, secular society in which all adult citizens can engage, and in which public participation has significant consequences. As Putnam is quick to point out, active engagement in public affairs is critical to the enhancement of social capital. In this sense, more is better.

66. See *Dispute Resolution and the Capitulation to the Routine: Is There a Way Out?*, 108 PENN ST. L. REV. 1, 348 (2003).

67. See Ackerman, *Disputing Together*, *supra* note 8, at 68-69; Jean R. Sternlight, *Steps Need to be Taken to Prevent Unfairness to Employees, Consumers*, DISP RESOL. MAG., Fall 1998; but see Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695 (providing an economic argument in favor of such provisions).

68. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

69. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 7-14 (2001).

70. 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).