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The Importance of Preserving and Revitalizing the Jury Trial

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Editor's Note: The following is a speech transcript delivered at the National Jury Summit in Chicago, June 23-24, 2011. Professor Burns is the author of the books, "The Theory of the Trial" and "The Death of the American Trial." Themed as "The Jury Trial of the 21st Century," the National Jury Summit was a call to action that featured goal oriented sessions on the best practices for jury innovations, reforms to improve access to jury trials, technological advancements in courtroom presentation, and assessment of the public perception of the jury trial.

Numerous studies, including a recent one conducted for the American Board of Trial Advocates, have demonstrated that there is overwhelming support for the jury trial among Americans. And yet, there is an alarming downward trend occurring in the nation's civil courts.

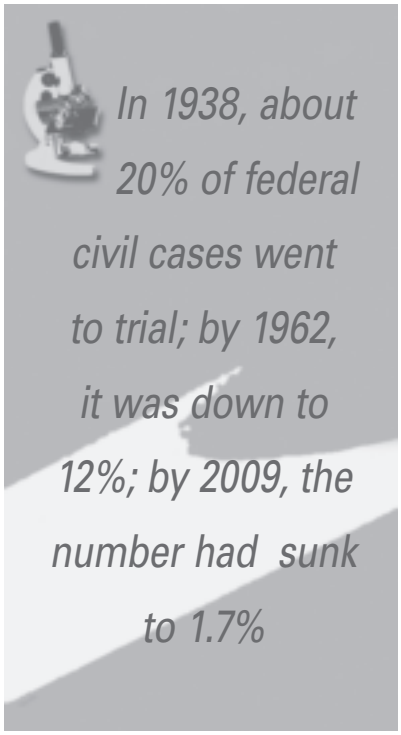
ABOTA, in collaboration with the National Center for State Courts, has advocated changes that will improve the system's ongoing quality and relevancy.

Summit speakers were chosen because they have backed up their research with action and are dedicated to the preservation and improvement of the jury trial.

I am privileged to preach to this choir about the central place the jury trial holds for us. One distinguished constitutional scholar has written that the jury trial is at the very center of the Bill of Rights. Not just the Fifth, Sixth and Seventh amendments, but in one way or another, all of the Bill of Rights.

Introduction

I am always a little daunted to present in 45 minutes the argument of a couple books – most recently *The Death of the American Trial*, which took me 15 years to write and which contain several hundred pages of text. And always a little dispirited to realize that I can.



My focus was on the meaning of the trial's death for us. It was an appeal, not an explanation. The trial is one of our great cultural achievements. It stands in a rich tradition, and is admired (though critically) by those in a position to know: lawyers, most judges and the social scientists who have studied the trial carefully.

Its loss would wound our legal order and democracy seriously. Judge William Dwyer put it this way: "[T]he jury trial is the canary in the mineshaft of our democracy. If citizens lose interest and ability to do justice in court, a general loss of democratic governance will follow. If the trial dies it would [not] be by a tyrant's ax, but a long and scarcely noticed process of decay. Indifference, in the long run, is deadlier than any coup, and democratic institutions are easily lost though neglect followed by decline and abandonment…"

As Judge Damon Keith recently said, "Democracy dies behind closed doors[,]" whether they are the closed doors of a judge's chambers disposing of a case summarily, or a settlement which is sealed, or the closed doors of an arbitration which is not public, or an unreviewed decision of a corporate or government official.

A California appellate court put it this way: "Participants in secret proceedings quickly lose their perspective, and the quality of the proceedings suffers as a consequence…Popular justice is public justice."

So I want to do four things:

1. Summarize the evidence of the trial's dying.
2. Remind you – much too briefly – what the trial is.
3. Describe our best guesses as to why the trial is dying.
4. Enumerate the ways in which the trial's death would be a catastrophe, and why your efforts to preserve the trial, especially the jury trial, are so important.

The Numbers

I am not a statistician, but I need to describe the highlights of the

quantitative data to show that now is the time we need to pay attention. It describes the "implosion" of the trial system to the point where "death" is not too strong a word.

Marc Galanter has done us a great service by compiling these numbers in a series of articles. Recently he wrote in an article – not yet published – that updated a study from 2002 to 2009. He said there was:

• "*No News*" – the downward trend lines continue.

• "*Big News*" – the civil trial is approaching extinction in the federal courts.

Just a few statistics:

In 1938, about 20% of federal civil cases went to trial. By 1962, it was down to 12%. And by 2009, the number had sunk to 1.7%.

The percentage of jury trials was down to just under 1%.

That is, during the time the Federal Rules of Civil Procedure have been in effect, there has been over a 90% decline in the percentage of cases going to trial, and the rate was accelerating toward the end of that period.

Civil rights cases, which – because of their personal quality are most likely to go to trial – fell from 20% in 1970 to less than 4% in 2002, a decline of 80% in 30 years.

The percentage of federal criminal cases going to trial fell from 15% in 1962 to 5% in 2002.

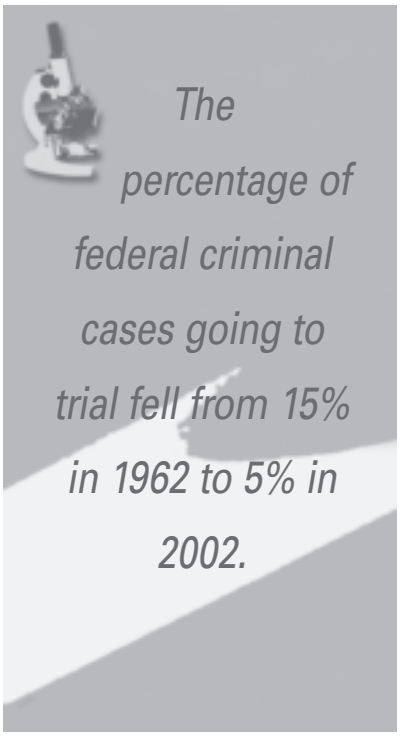
One more localized study found that in 1975 twice as many cases were resolved by trial as by summary judgment. By 2000, in the same district, three times as many cases were resolved by summary judgment than by trial.

So the rate of cases "disposed of" (a telling metaphor!) by summary judgment rose 350%.

By 2009, there were only 13.2 trials per judge, down 67% since 1962.

In 2009, there were fewer than six civil trials per year per federal judge about five criminal trials.

State statistics are harder to come by, but similar:



Between 1992 and 2001 (*only a 10-year period*), the number of trials in the 75 most populous counties fell 50% [though the number of cases was increasing].

This was the only part of the legal system that was shrinking. There were more statutes, more regulations, more case law, more cases, more lawyers, more judges, and a higher percentage of GDP going to legal matters.

So it is shocking that even the absolute numbers of federal civil trials is decreasing.

From about 12,000 in 1985 to about 3,271 in 2009. And the ratio of trial to filings is about 8% of what it was in 1962.

These numbers are generous, because they include cases where trials begin, but are not tried to verdict, and all evidentiary hearings, including TRO and preliminary injunction hearings.

The average length of trial is quite short – about a day or two. (We shouldn't think of the O.J. Simpson trial as typical.)

Judith Resnik gives us a graphic architectural portrayal of the disjunction between our concept of justice and the reality of our procedures. According to our perceived understanding, the trial is the sun around which all the procedural planets revolve. The reality has become something different.

She describes the new court house in Boston: "In this courthouse, some 25 trial courts look more or less alike: a judge's bench is placed at the back, a bit lower than is common, in a self-conscious (if subtle) effort to portray law as accessible and not unduly hierarchical. Each wall has an arch of equal height, to suggest the equality of all before the law. The designers of the courthouse chose the arches and the courtroom as central icons of their building.

"Yet a disjuncture exists between this new building, its courtrooms, and the practices that now surround processes...judges are now multi-taskers, sometimes managers of lawyers and of cases, sometimes mediators and sometimes referral sources, sending people outside of courts to alternative dispute resolution by judges and lawyers. "When that courthouse opened in 1998 in the district of Massachusetts, 142 civil and 48 criminal trials were completed. With approximately 25 trial courtrooms for district and magistrate judges available, about seven or eight trials were held per courtroom per year in the new courthouse."

What are we losing?

It takes some effort to show what the trial is for us – to undo TV drama and well-financed propaganda. We have to get to the public accounts of our own experiences as trial lawyers and trial judges of what the trial, in well-tried cases, routinely achieves.

Anthropologist Clifford Geertz has argued that real insight emerges through "a continuous tacking between the most local of local detail and the most global of global structures in a way as to bring both into view simultaneously." That's what the trial does — as we move

from the attempt to characterize the significance of the events in opening statements to the actual evidence presented through direct and cross examinations.

The power of the trial came as a surprise to me during my practice. In my earlier book, *A Theory of the Trial*, I described the attempt to explain the conviction I had formed of the trial's power. I used older religious language for this attempt and called it "a faith-seeking understanding." This faith began during my years of practice.

In their reflective moments, most good trial lawyers value the experience of participating in a practice that, astoundingly**,** can converge on factual truth and wise decision-making.

Remember the Tom Hanks's testimony in the movie *Philadelphia*: "The great thing about the practice of law is that sometimes we actually can discern justice and be stewards of its accomplishment." Trial lawyers value this even more than the real joy of participating in public affairs and the external rewards that comes from successful practice.

With this audience, I don't need to outline how our trials are conducted in detail. But we usually need to be reminded more than informed, as Doctor Johnson put it. Trials progress from opening statements, though direct and cross examinations in the plaintiff's case in chief, then defendant's case, then rebuttal, to jury instructions and then deliberation. They create the conditions for deliberations far more incisive and demanding than congressional hearings, or press conferences, or even the best journalism.

The evidentiary requirements of materiality, testimony based on personal knowledge in the language of perception, the requirements of foundation, so the question, "how do you know" precedes any assertions, are simple, not hypertechnical formalities. These basic "parliamentary" formalities are important for a range of reasons.

In a well-tried case, the trial's "consciously structured hybrid of different languages" can realize or actualize a usually dormant, but extremely powerful, democratic common sense to achieve real insight into the persons and events being tried. By contrast, much of the media serves as a kind of paralyzing narcotic to this common sense.

The trial allows for the simultaneous grasp of facts, norms, and possibilities for action. This grasp can be extremely refined.

The trial is a complex institution, conservative, yet suited to our contemporary needs. It proceeds by the construction and then the deconstruction of different sorts of narratives.

Our moral sensibilities are intertwined with these narrative structures.

Consider the variety of story-telling methods at play in the trial. We begin with opening statement. Openings invite the jury to see "what is case is about…" to see it as a broken promise, or an act of infidelity, or a misunderstanding, in a way that connects it with our deepest moral and political intuitions, those that constitute our way of life.

By contrast, direct examinations, with their enforced obsessive concern about detail, invite the jury to see the adequacy or the inadequacy of the characterizations the lawyers offer in opening statements.

And cross examinations demonstrate that even those chaste direct examination narratives are constructions, have an element of willfulness about them in what they omit and in the sequence and description of the witness's perceptions.

The trial can refine and elevate common sense judgment well beyond the anesthetized version created by mass communications.

Jurors often report their surprise at the quality of their own deliberations. The jury does so by the way it respects conflicting values and perspectives. It has an obsessive concern about factual details, because details matter in serious cases. It does that in a way that respects the rule of law as a law of rules In Justice Scalia's words: "Enforcing the rules serve a liberal regime's interests in predictability and stability. They make planning possible and protect us from arbitrary uses of power."

And, more controversially, though rooted in our history, the jury trials allows our juries the authority to "send a message," to discourage abuses of power.

The trial's fierce oppositions – differences in role and differences in language – create almost unbearable tensions. It's the resolution of those tensions which is – in our kind of modern society – justice itself.

Philosopher Stuart Hampshire wrote a good little book called *Justice Is Conflict*. He took that notion from what he understood the key insight of adversary justice, something that is simple but profound:

Audiatur et altera pars.

Let the other side be heard.

It's because it embodies that commitment to a unique degree that the jury trial is the crucible of democracy.

Why Are We Losing It?
So Far, Just Good Guesses

Explanations can be dangerous. When you explain a development as the result of social cause, it's easy to slip to thinking it is an inevitable result of that cause. Explanations come from looking through a microscope or telescope.

Microscopically **–** Galanter puts it this way: "…the decline has become institutionalized in the practice and expectations of judges, administrators, lawyers, and parties."

1. There has been a change in the culture of judging to what's been called "managerial judging." Judges see themselves as case managers, too often summarily disposing a case or muscling a settlement, rather than as officers who preside over an important public ritual.

2. Judges see themselves as problem solvers and multitaskers and embrace the dictum, "the worst settlement is better than the best trial."

3. There has been a change in the culture of lawyering. There are fewer lawyers with the skills and dispositions to go to trial. Trial lawyers have been replaced by litigators. This can lead to endless discovery and unnecessary and costly summary judgment motions.

4. Summary disposition is now easier. Summary judgment and, more recently, motions to dismiss [the *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* cases] what is "plausible" to elite judges with very uncommon experiences and *un*common senses determines outcomes, rather than proof.

5. There has been an intensification of the plea bargaining system: higher maximum sentences together with the trial tax result in offers no sane defendant can refuse.

6. The rise of arbitration. We have moved from skepticism to wholesale acceptance in the federal courts.

Telescopically **–** There are some broader explanations of the trial's demise (which are generally compatible with the "micro" explanations):

1. Social scientists talk about "convergence" of modes of social ordering. This eliminates the distinctiveness of different "modes of social ordering," to use Fuller's phrase. The law becomes more like the bureaucratic or market institutions surrounding it. Managerial judging is bureaucratic and the pressure to settle allows the market to invade the legal order.

The law ceases to be a distinct region where a citizen can appeal to legal or moral principle. The big picture is a more bureaucratic, monolithic society where there are fewer countervailing institutions to our corporate and public bureaucracies and automatic systems. (I sometimes think of the transition from the Roman republic to the empire.)

2. Some have pointed to the enormous democratizing of the American jury through statute and constitutional decision. The trial invokes common sense, life-world norms discontinuous with other power centers. If you can keep the jury from being cross-sectional, as we did until 40 years ago, the elites serving on juries may resist those norms. If the jury becomes more cross-sectional, more democratic, there may be greater conflicts with other sources of power.

Meaning of the Trial's Death

My main goal here is simply to enumerate what the trial has meant to us and what we are working to preserve:

1. We are working to preserve an institution where equitable judgments focused on attention to the details of a particular situation moderates the hardness of the law of rules.

Thomas Green, in his *Verdict According to Conscience*, a history of the English jury, wrote that the face-to-face nature of the trial made it impossible to forget that the law was somehow about justice, something that can be forgotten when we are shuffling pieces of paper.

I think of the words of a delegate to the Massachusetts Constitutional Convention of 1853. (They may be a little hard for the judges here to listen to:) He argued that the jury right had to be preserved as a safeguard against government oppression.

"Which is the best tribunal to try a case? The man who sits upon the bench, and who…has nothing in common with the people; who has hardly seen a common man in 20 years? Is he the better man to try the case than they who have the same stake in community, with their wives, and children and their fortunes depending on the integrity of the verdicts they shall render?"

To paraphrase that great conservative legal scholar, William Blackstone, writing in support of the jury: It is not to be expected that the few will be attentive to the concerns of the many.

And there are the wonderful words of G.K. Chesterton, English essayist of the early 20th century, reflecting on his jury service. His remarks came in the context of

criminal trials, but the drafters of the Seventh Amendment knew that similar considerations applied in civil cases:

"The trend of our epoch ….has been consistently toward … professionalism.… [M]any legalists have declared that the untrained jury should be altogether supplanted by the trained judge…[However], the more a man looks at a thing, the less he can see it, and the more a man learns a thing the less he knows it…A man who is trained goes on seeing less and less of its significance. Now it is a terrible business to make a man out for the judgment of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things… and the horrible thing about all legal officials, even the best…is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore the instinct of [our]…civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets."

2. We are working to preserve a distinctively American forum where a citizen can tell his own story in public and present the evidence to support it. Unlike our European cousins, we have not trusted a state official to decide what questions to ask and what evidence to be presented.

3. We want to preserve a forum with the devices to reveal "brutally elementary" factual truth. As Bentham put it: "Falsehood is the handmaiden of injustice." The details of events are important in serious matters.

4. We seek to retain the experience of citizen participation in self-government. In de Tocqueville's words, jury service "scrapes away the rust of private concern" that is the bane of market societies; it instills in a citizen "respect for the thing judged and the notion of right." It gives ordinary people some participation in the "spirit of magistracy." It makes of jurors not just alienated critics, but responsible participants

5. We want to limit the transfer of even more power to bureaucratic and corporate elites and to retain the balance between expertise and democratic decision-making that characterizes our republic

6. We want to stop the distortion of the norms for settlement. There appears to be a growing number of areas in the law where "all cases settle." In some places, in securities litigation and child support proceedings, the basis of settlement is the last settlement and for that the settlement before and so on back to the point where mind of man runneth not to the contrary. No one can remember an adjudication that ruled on the merits of the claim.

7. We want to preserve face-to-face drama in the legal system. We would feel and understand less about each case if they were decided on paper submissions and decided by experts. Face-to-face proceedings remind us that legal cases are somehow about justice. Drama, and the tensions it relies on, shows us more about the case.

Courtroom drama gets us closer to what was once called "true law," the just resolution of particular cases. This is superior to the mechanical application of necessarily overgeneralized legal rules, rules that can't really constrain the discretion of inevitably elite judges

8. We want to keep legal and democratic control of our economic systems. We don't want them to become more and more automatic and less moderated by common sense moral norms.

After the last four years, I think we understand better that our economic institutions are not benignly self-regulating. The trial is an important supplement to regulation.

9. We don't want to live in a more bureaucratized world where there is "rule by nobody," where no one takes responsibility for judgments and more officials can say, "It's out of my hands."

10. We want to limit the raw discretion that judges would have in the cracks between complex legal rules, rules which do not ultimately eliminate discretion.

11. We don't want more and more governance to occur behind closed doors.

12. Finally we want to keep an important source of knowledge about ourselves and key issues of public concern.

Without the trial, we would know less about the effects of asbestos, cigarettes, and lead poisoning. That is why we should not allow the American trial to go gentle into that good night!

Galanter's view is that it would take a major impact from outside the system to restore trials. I think he underestimates the respect that lawyers and judges have for the jury system.

And your efforts show our willingness to take concrete steps to preserve this precious aspect of our public culture. ■