

Advocacy in the Era of the Vanishing Trial

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I. INTRODUCTION

The vanishing trial is part of our legal landscape. Lawyers, who are clear-eyed people little given to romantic sentimentality, will inevitably accommodate their lawyering styles to this phenomenon, even if they are unhappy with this course of events. It has often been remarked ruefully that “trial lawyers” have almost all become “litigators.” I have been teaching trial skills to practicing lawyers through the National Institute for Trial Advocacy (NITA) for thirty years, and those same skills to law students for about the same time. I am definitely ambivalent about a change in the way in which our continuing legal education (CLE) organizations and law schools imagine the legal process when that change hastens the death of the trial.¹ After all, one of the identified causes for the death of the trial—an institution which is, in my view, a significant cultural achievement—is the sharp decline in trial skills among bar members and the resulting aversion to bringing cases to trial. If lawyers increasingly view trials as deviant events, their approach to litigating cases will itself become one of the causes of the trial’s disappearance. The “new normal” will become a self-fulfilling prophecy, operating through our collective professional psychology and, derivatively, through the economics of actually getting a case to trial.

What is the “vanishing trial” phenomenon? I have summarized it in the following terms:

Marc Galanter and Angela Frozena have recently updated previous work to bring the data up to 2009. With regard to civil trials in the federal courts, they conclude that there is “no news” and “big news.” The “no news” is that the half-century downward trend lines continue. The “big news” is “that the civil trial [in the federal courts] is approaching extinction.” Here is a very brief summary of the most illuminating statistics from both Galanter’s earlier and more recent

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1. See, e.g., ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (2009).

work. In 1938, about 20% of federal civil cases went to trial. By 1962, the percentage was down to 12%. By 2009, the number sunk to 1.7%. The percentage of jury trials in federal civil cases was down to just under 1%, and the percentage of bench trials was even lower. So between 1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90% and the pace of the decline was accelerating toward the end of that period until very recently, when there was almost literally no further decline possible. . . . One more localized study of six federal district courts found that in 1975, twice as many civil cases were resolved after trial than by summary judgment; by 2000, in the same districts three times as many cases were resolved by summary judgment than by trial. So in those districts the rate of cases “disposed of,” to use a telling metaphor, by summary judgment rose 350%.²

I am, for the reasons given below, reluctant at this stage to concede defeat and to reimagine the way lawyers should conceive of a lawsuit. Given the low percentage of civil cases that go to trial—less than two percent in the federal system—I would not blame anyone for surrendering to an “inevitable” result that we collectively continue to create.

In this essay, I will do three things. First, I will offer reasons why even good litigators must continue to understand the trial—an understanding that can come only from studying and participating in it. Second, I will offer a few suggestions about how we are likely to litigate differently in the era of the just-about-vanished trial. Third, I will argue that these changes are not likely to create a more just legal order. Although an individual lawyer must proceed in the manner that is in his client’s interest, lawyers, as stewards of our legal order, should seek collectively to maintain the trial as an important element of that order.

First, for the foreseeable future, it will be important for litigators to have some imagination for the structure and experience of the trial. Effective deposition practice, for example, requires an understanding of necessary foundations for personal knowledge,³ authentication,⁴ the sometimes elusive definition of hearsay,⁵ and the hearsay exceptions.⁶ Some experience of evidence law as it actually functions at trial is

2. Robert P. Burns, *What Will We Lose if the Trial Vanishes?*, 37 OHIO N.U. L. REV. 575, 576–77 (2011) (alteration in original) (footnotes omitted).

3. See FED. R. EVID. 602.

4. See *id.* 901–902.

5. See *id.* 801(a)–(d).

6. See *id.* 803–804, 807.

important for conducting a deposition effectively on those issues. After all, summary judgment motions have to be supported by *admissible* evidence,⁷ or at least the reliable promise of admissible evidence.⁸ Without the experience of successfully laying the necessary foundations for important categories of evidence at trial, it is hard to believe that a lawyer could move directly from the statement of the rule to the necessary questions at a deposition. Certainly, the usual law school approach to evidence law through the study of appellate cases would be of very limited value. Because the profession will be unlikely to change the culture of American law schools' teaching methods anytime over the next ten years⁹ (beyond that I am unsure), we cannot count on law schools contributing much to this enterprise.

More broadly, it is still true that the entire structure of civil procedure has been built up as a path to an adversary trial, with its combination of narrative and argumentative elements. It is hard to understand much of civil practice—how to conduct an interview, identify important documents, or conduct depositions—without understanding the trial. Especially for us Americans, who have very little experience in our ordinary lives of good storytelling, the centrality of narrative to the trial and, derivatively, to all of legal procedure, is necessarily something that is learned. As with evidence law, learning civil practice abstractly is nothing like learning it from the inside. One of our greatest (adopted) political philosophers put it this way: “No philosophy, no analysis, no aphorism, be it ever so profound, can compare in intensity and richness of meaning with a properly narrated story.”¹⁰

And so I have always thought that it makes more sense for a law student or a young lawyer to take a trial practice course or CLE seminar first, and only then a deposition course or seminar. Trying cases provides an imagination for what is a compelling story and what elements it contains. That imagination allows for effective pretrial and even appellate practice. A basic principle of effective advocacy is “facts

7. See FED. R. CIV. P. 56(c)(4) (“An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.”).

8. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (“We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment.”).

9. Michael Polanyi noted that no significant scientific breakthrough has ever convinced the guardians of the status quo. Rather, each successful step forward has simply managed to hold its ground until the once dominant scientists have died off.

10. HANNAH ARENDT, *MEN IN DARK TIMES* 22 (1955).

persuade; conclusions don't." That principle holds true at all levels, but one can understand it more deeply if one has had some experience in the trial courtroom.

In particular, we commonly assume that we "know" things when we actually lack "personal knowledge" within the meaning of Rule 602 of the Federal Rules of Evidence. Trial lawyers would know this distinction well. The latter, in effect, requires *perceptual knowledge* and, in practice, requires that testimony be in the "language of perception." The latter excludes hearsay evidence and much lay witness opinion testimony. It is probably true that many of the great figures in the history of Anglo-American evidence law were partly in the thrall of the then-dominant variants of philosophical empiricism, which saw such perceptions as purely given, hard foundations out of which secure knowledge could be constructed. We have since seen effective assaults on "the myth of the given" and the ascent of the notion that perceptions are to some extent "theory-laden." For practical purposes, however, the notion that perceptions are more likely to be reliable than our usual inventory of opinions and prejudices is unassailable. Much of what goes on in the trial court involves challenging the reliability of evidence that is good enough to be admissible but whose weight is subject to serious question. The dozen or so modes of impeachment—which almost always provide commonplaces, as the old rhetoricians liked to say, from which to draw arguments that suggest the limitations on the probative value of testimony and other evidence—illustrate this principle. I think it will remain true that lawyers who have a sense of the disciplined and rigorous way the trial court treats claims of individual knowledge are likely to be better lawyers at all levels of litigation.

II. SOME LIKELY CHANGES IN LAWYERING METHODS BECAUSE OF THE VANISHING TRIAL

There may come a time—and it may already be happening—that the way in which we conduct civil litigation changes because of the vanishing trial. There is some evidence—studies are ongoing¹¹—that

11. See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 21–23 (Mar. 2011), [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (finding rates of filing of defendants' motions to dismiss have generally increased, but the rates of dispositive rulings dismissing cases have not increased). But see Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2274–75 (2012) (noting the effects of the two cases have

*Iqbal*¹² and *Twombly*¹³ have led a significant number of district court judges to dismiss more cases as pleading “implausible” claims. That trend would probably lead defense counsel to devote more resources to those motions, just as the “Summary Judgment Trilogy” seemed to have some effect on summary judgment practice some time ago. These sorts of cases at the Supreme Court level signal a change of mood that indicates a greater receptivity to summary disposition. It is that change of mood, rather than the narrow holding of the cases or rearticulation of standards, that is likely to have concrete effects in the lower courts.

For practicing lawyers, habitual patterns of litigation that have proven successful will continue to have an important influence. We will probably realize only after the fact that we have adapted to a new procedural regime. For example, deposition practice may be changing. I have for quite some number of years been the Program Director for the Midwest Regional Deposition practice program for NITA. We have traditionally taught deposition practice with two overarching goals: (1) exhaustive discovery on those points that prior legal and factual analysis indicates are important; and (2) the creation of a clear and unambiguous transcript that can be used to control witnesses at trial or in lieu of testimony at trial with some witnesses, and only secondarily in support of summary judgment motions. My suspicion is that deposition practice may be somewhat reconceived, with achieving and resisting summary judgment and with settling cases more at its core.

Without identifying all the ways in which this could occur, let me note several. It seems that the traditional advice offered to clients in witness preparation—to give the most limited possible fair answer to questions—should be rethought. The traditional notion was that any testimony the witness gives at deposition could only be used against him at trial: there was everything to lose by fully describing the case and really nothing to gain. However, if an increasingly important function of the deposition is to convince opposing counsel of the strength of one’s case for settlement purposes, there is every reason for a witness to put all, or at least more, of his cards on the table at the deposition—even if such testimony is volunteered, that is, not directly responsive to a narrowly construed question.

been much greater than the rates of grants of motions to dismiss would suggest).

12. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

13. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The increasing incidence of summary judgment may have a further effect on witness preparation. It may become harder and harder to supplement limited answers at depositions with supplemental (sometimes called “sham”) affidavits that substantially change the import of a witness’s testimony.¹⁴ It may become more important that a witness’s deposition testimony be complete because counter-affidavits may not be effective at the summary judgment stage, and there will be no opportunity to tell a fuller story at trial.¹⁵

Additionally, depositions may focus more on the sort of adverse examination that creates a transcript in support of a summary judgment motion aimed narrowly on a single element of the plaintiff’s claim, rather than a broader “information gathering” strategy aimed at learning about a larger range of facts that the examining lawyer realizes may be beyond what he already suspects to be true. The deposition will focus on confirming in unambiguous language what that lawyer already believes to be true. After all, the vanishing trial phenomenon will reduce the likelihood of being surprised by an important detail that the attorney failed to discover.¹⁶

I can imagine critics of American civil justice applauding the latter development. It could, after all, focus the lawyer on the “jugular issue” defined by the legal rules and reduce the amount of unnecessary discovery. I will discuss that consideration below. But in another way, the vanishing trial phenomenon, by depriving American lawyers of an imagination for what is persuasive at trial and the importance of a single powerful “factual theory and theme,” is likely to increase the incidence of discovery for its own sake, on matters peripheral to the examining lawyer’s theory and theme. The river of pretrial procedure can lose its banks and become a broad delta little related to “what this case is about,” as trial lawyers have traditionally put it in opening statements. That kind of unnecessary discovery may increase the costs of litigation generally and serve as an additional reason why clients are unwilling to support bringing cases to trial.

14. EDWARD J. BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 244–56 (3rd ed. 2006).

15. It has, in the past, been possible to conduct “impeachment by omission” on a point omitted from deposition testimony and included at trial, but this form of impeachment is relatively difficult to do effectively and requires an expertly created deposition transcript.

16. We will see shortly that this development has some significant, and in my view negative, consequences for the quality of civil justice.

III. IMPORTANT CHARACTERISTICS OF THE AMERICAN TRIAL

I want to spend most of my time here arguing that the American trial has characteristics, many of them so obvious that we can forget them, that cannot be replaced by other procedures. As Dr. Samuel Johnson said, it is generally more important that men be reminded than informed.¹⁷

The face-to-face trial—especially the jury trial—has characteristics that no other dispute resolution method has. James Boyd White referred to the face-to-face hearing as the sun around which all the planets in our procedural world revolve. His colleague Thomas Greene, writing in the context of the history of English criminal law, argued that the face-to-face trial, even in the awful form it took in the seventeen and eighteenth centuries, kept alive the notion that legal proceedings were *somehow* about justice. There are, no doubt, significant impersonal forces working to reduce the incidence of trials. Ultimately, appellate courts, trial courts, and legislatures will decide whether to take the steps necessary to preserve the trial. I think these institutions remain “places of freedom” that are not simply the playthings (“dependent variables” wholly controlled by objective “independent variables”) of those impersonal social and economic forces. We may act responsibly and politically in those forums to preserve practices and institutions that represent aspects of our republican inheritance.

What, then, are the characteristics of the trial and the forms of advocacy appropriate to it? It is easy to forget the concrete characteristics of an American trial. We should remind ourselves of them from time to time.¹⁸ The rules of the trial force the conversation that takes place there down to the “concrete and specific features of the case.” Recall Sandburg’s account:

“Do you solemnly swear by the everliving God that the testimony you are about to give in this cause shall be the truth, the whole truth and nothing but the truth?”

“No, I don’t. I can tell you what I saw and what I heard and I’ll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if

17. Samuel Johnson, *No. 2, Saturday, March 24, 1749–50*, THE RAMBLER, Mar. 24, 1750.

18. For a much fuller inventory see ROBERT P. BURNS, A THEORY OF THE TRIAL 126–41 (1999).

you summoned Christ as a witness in this case what he would tell you would burn your insides with the pity and mystery of it.”¹⁹

The paradox that Sandburg’s dialogue illuminates is that, for the likes of us, the more we take the concrete facts of the case seriously and attend to what witnesses saw and heard, the closer we may get to a real understanding of the meaning of the underlying events. We will, of course, never reach the real “God’s-eye” view, but we can, with some fear and trembling, approach it *if* we are willing to criticize the stereotypes and prejudices we inevitably bring to trial. The devices of the trial allow for precisely that kind of situated criticism of our received views, which may allow the truth of a very specific situation to emerge.

Second, the dramatic events occur at trial through a temporal sequence. Each exchange has, for a moment, a complete monopoly on the immediate attention of judge or jury. Plato famously referred to time—the sequence of “nows”—as the “moving image of eternity.”²⁰ Each exchange in the trial court may be the privileged lens through which the meaning and importance of the events tried can be seen. The temporal sequence in real time allows us to pause over the significance of each fact.

Third, temporal compression in the American jury trial—the entire case has to be tried during a relatively short and continuous period—allows for holistic grasps of the evidence: it allows each part to be seen in light of the whole and the whole to be understood in light of the parts. As the trial winds down toward its end, it requires each advocate to address precisely the arguments made by the opponent that he or she perceives as likely to be the most persuasive.

Fourth, the devices of the trial achieve a psychologically demanding postponement of judgment. The trial is constituted by a rhythm between continuous presentation and continuous interruption. Each full narrative in the opening statement is interrupted by a competing narrative. Direct examination is followed by cross-examination. A case-in-chief is interrupted by another, and then by rebuttal evidence. Continuous presentation is necessary because the coherence of a narrative is an important aspect of its possible truth. Interruption is necessary because each continuous narrative inevitably leaves something out.²¹

19. CARL SANDBURG, *THE PEOPLE, YES* 193 (1936).

20. PLATO, *TIMAEUS* 19 (Benjamin Jourett trans., The Liberal Arts Press 1949) (360 B.C.).

21. In American practice, as opposed to British, the judge almost never summarizes the evidence, imposing another “official” narrative on the evidence.

Fifth, the jury will inevitably be assessing the “truthfulness” of all the participants in the trial. The truthfulness of witnesses will tell the jury not only about the likelihood of the accounts they give, but about who they are through a form of character evidence that the rules of evidence do not exclude. The lawyers, too, have a kind of truthfulness appropriate to their role, though it is of a more public, diplomatic,²² and political sort. The jury will implicitly ask whether their case allows them to be fair to the competing norms and considerations that are always in play at trial. The trial itself then becomes a “lens and metaphor” for the underlying events being tried.

In sum, the “[c]haracteristics of the trial, then, force the mind downward toward the concrete, intensify the competition over the meaning of the events being tried, and cultivate the suspension of judgment until all the aspects of the situation are explored.”²³ The aural medium of the trial allows us to “become” each other person in the trial drama, but at a distance beyond touching distance, so that we have the conditions for justice: sympathy and detachment.²⁴ And dramatic performance can mediate between public norms and the “particular details of the individual case.”²⁵ As the late Milner Ball put it: “Live presentation . . . may give more urgent reality to the particular acts that establish distance between a given case and general rule or that expose a given case to competing rules.”²⁶ The dramatic tensions within the trial function positively to reveal, in ways that are only partially articulated, what is at issue in the case: “At its best, the presentation of a case is a coincidence of reality and illusion, not in the sense of perjury, but in the sense of theatrical metaphor—the reenactment of relevant and material elements for reflection and judgment.”²⁷ As Eric Bentley—an important theorist of drama—put it, “The little ritual of performance, given just a modicum of competence, can lend to the events represented another dimension, a more urgent reality.”²⁸ A trial lawyer is the producer and director of, and an actor in, an extremely demanding and engaging drama. The process requires an understanding of human sensibilities and

22. “Trial advocacy” was once called “trial diplomacy,” as the title of a classic trial advocacy treatise suggests. ALAN E. MORRILL, TRIAL DIPLOMACY (2d ed. 1974).

23. BURNS, *supra* note 18, at 132.

24. RONALD BEINER, POLITICAL JUDGMENT 102–04 (1983).

25. *Id.* at 137.

26. MILNER S. BALL, THE PROMISE OF AMERICAN LAW 61 (1981).

27. *Id.* at 50.

28. ERIC BENTLEY, THE THEATRE OF COMMITMENT 207 (1967).

a craftsman's care for language. The loss of those sensibilities is not the primary reason to reverse the decline in the trial, but it is collateral damage from the wound to our public culture of which trial lawyers may be especially aware.

Think back, for example, to the way in which I have speculated that deposition practice may be changing. The practice would, I believe, be more mechanical, more legalistic: more of the effort would go into trying to fit the evidence, as shaped by pretrial practice, into or outside of the legal categories, with relatively less concern for either the whole story or even the factual detail of the underlying events. More time would be spent wrestling with witnesses for verbal concessions dictated by the legal rules. I think it would be more about words, not things.

It might be suggested that the latter development would enhance the rule of law, but this is largely an illusion. Marc Galanter has made the point that this mode of practice does not really enhance the rule of law, because multiplying legal issues increases the range of discretionary determinations:

In a realm of ever-proliferating legal doctrine, the opportunities for arguments and decisions about the law are multiplied, while arguments and decisions become more detached from the texture of facts—at least from facts that have weathered the testing of trial. The general effects of judicial activity are derived less from a fabric of examples of contested facts and more from an admixture of doctrinal exegesis, discretionary rulings of trial judges, and the strategic calculations of the parties. Contests of interpretation replace contests of proof. Paradoxically, as legal doctrine becomes more voluminous and more elaborate, it becomes less determinative of the outcomes produced by legal institutions.²⁹

That cases are decided based less on “facts that have weathered the testing of trial” has a number of consequences. In the first place it pulls the actual decision in the case away from the reality of what has occurred and so undermines the rule of law. Our actual lives will not be subject to the law, but rather to a relatively formulaic reconstruction of those lives. Judge Patricia Wald argued some time ago that the development of law, even at the appellate level, would be disfigured without the kind of full factual development that can occur only through the trial, and not through summary proceedings. It is not a good thing that “[f]ederal

29. Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 29 (2006) (footnotes omitted).

jurisprudence is largely the product of summary judgment in civil cases.”³⁰ Rather, it poses the danger that “the law developed through summary judgment will be arid, divorced from the full factual context that has in the past given our law life and the capacity to grow.”³¹

Somewhat paradoxically, the trial is more likely to produce determinate “right answers” to cases than are other procedures that purport to be a more mechanical application of the “law of rules” by judges. The latter allow for a broader range of judicial discretion than is exercised by the jury after trial—the point that Galanter made above. The notion here, of which it is very challenging to give anything approaching an adequate account,³² is that there really is a best way forward in most cases that can be reflected in a wise judgment in the individual matter. That judgment requires a refined balancing of the competing considerations, which can never be homogenized into a single continuum that the judgment may fairly reflect. Such balancing is not for all time or all situations, but only for the very particular facts of the individual case. In reaching that judgment, a judge or a jury who has really been affected by the “consciously structured hybrid” of languages and practices will exercise very little discretion in the sense of an unrestrained freedom to do whatever he wants.

It has been suggested that the American public order is becoming more bureaucratic, more imperial, and more byzantine. Yes, American lawyers will continue at times to argue relatively refined issues of law to judges in the trial and appellate courts. But it would be a shame if those in the legal profession became nothing more than adept practitioners of a technical legal discourse divorced from the real world of ordinary Americans and so of American juries. We lawyers would be the poorer for it. Much more importantly, the American legal order would too.

James Boyd White has described the important question before us in the kind of language we use in the legal order:

[T]here is always the question whether we shall find ways to insist upon our own freedom and responsibility in a world of constraint, to respect the humanity and reality of other people and their experience, and to contribute to the formation of a culture and a polity that will enhance human dignity—or whether we shall instead lead lives

30. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998).

31. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 597, 625–26 (2004).

32. I tried in a previous work. See BURNS, *supra* note 18, at 220–44.

imprisoned in dead modes of thought and expression that deny the value of ourselves and other people, and the activities of life we share.”³³

White argues that American courts are under more “pressure than the rest of us to speak in dead, mechanical, or bureaucratic ways, and that they should resist these forces strenuously.³⁴ The trial resists the obfuscation of specialized language and preserves a “strong truth-bearing everyday language, not marred or corrupted by technical discourse or scientific codes . . . of which we are in need as citizens, and as moral agents.”³⁵ Keeping the American trial from vanishing and continuing to educate American lawyers to speak in this forum for constrained democratic debate offers an important element of that resistance.

33. JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE*, at xi (2006).

34. *Id.* at 11.

35. IRIS MURDOCH, *METAPHYSICS AS A GUIDE TO MORALS* 164 (1992).