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WHERE ARE WE GOING? THE GENERALIST VS. SPECIALIST CHALLENGE

Herbert Kritzer*

ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* (Univ. of Chi. Press 2009). Pp. 200. Cloth. \$29.00. Paperback. \$20.00.

LAWRENCE BAUM, *SPECIALIZING THE COURTS* (Univ. of Chi. Press 2011). Pp. 296. Cloth. \$85.00. Paperback. \$27.50.

INTRODUCTION

Institutions constantly evolve and change. Courts are no exception. In *Death of the American Trial* and *Specializing the Courts*, Robert Burns and Lawrence Baum tackle issues of change in American courts. The common thread, explicit in Baum's book but only implicit in Burns', is the movement away from decision making by generalists (lay juries and/or generalist judges) to decision making by specialists (specialized courts, administrative tribunals, and specialist arbitrators). Baum tackles the question from the perspective of a social scientist; Burns tackles it from the normative perspective of a law professor with experience as a practitioner in the courts. Baum seeks to assess the causes and consequences of specialization; Burns seeks to argue that the declining role of trials — his real focus is the decline of *jury* trials — in the American legal system is a negative development. Baum concludes that the growth of specialization has both positive and negative implications; Burns concludes that the “death” of the American trial would be worse than unfortunate.

A central question that both books raise is how to evaluate change in the direction of increased specialization. That is, what are the effects of the changes that the authors see as occurring? Baum explicitly considers two different criteria. The first is what he calls the “neutral virtues”¹ of specialization: the quality of decisions, efficiency, and uniformity in the law. The second is the substance of decisions (i.e., do specialized courts make different decisions than one would find in a generalist court?). Burns does not explicitly discuss criteria, but it is clear that he is concerned about the legitimacy of the courts, and legal processes more generally, and the democratic value of citizen

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1. LAWRENCE BAUM, *SPECIALIZING THE COURTS* 218 (2011).

participation in the courts as jurors. The latter includes both the benefits to citizens of seeing the courts in operation and the benefits to the courts of having to be aware of, and responsive to, the presence of ordinary citizens in the jury box.

Both authors rely on extant research for their empirical information. Baum surveys that research as it relates to specialized courts widely (including his own work on patent litigation² and on immigration cases³). For his empirical information, Burns relies very heavily on Galanter's work on the "vanishing trial."⁴ Essentially, Baum undertook his project to assess what was happening with specialized courts; Burns sought to make the case that there would be negative consequences should trials disappear.

QUICK SUMMARIES

The Death of the American Trial is a relatively brief book consisting of an introduction and five chapters. The first chapter presents the elements of a trial, drawing heavily on the idea that a trial involves constructing a narrative or story. Burns discusses the role of direct and cross-examination, as well as that of the opening statements and closing arguments. In this chapter it becomes very clear that Burns is thinking about the American style of trial by jury rather than other forms of trial. Chapter Two presents some historical material, concerning both the English antecedents of the American jury trial and the development of the American style of jury trial, including the role of the jury as a finder of law, as well as fact during an earlier stage of American legal development. Chapter Three is a brief discussion of the "fundamental tensions the trial defines,"⁵ by which Burns means the frequent tension that arises between law and justice. Burns notes the inevitable inability of rules and the language expressing rules to capture the full complexity of human interaction, and the need for there to be institutional mechanisms such as the jury to negotiate this tension. Chapter Four describes the data showing the declining number of trials, and considers thirteen alternative explanations for this decline; Burns devotes the most attention to one specific explanation, that trials are "costly, inefficient, incapable of achieving factual truth, and at odds with the values underlying the rule of law,"⁶ an explanation that he vehemently rejects. Interestingly, Burns focuses here not on the trial but on issues related to the pretrial process labeled by William Dwyer as the "six deadly sins" ("overcontentiousness, expense, delay, fecklessness, hypertechnicality, and overload").⁷ The chapter concludes with some modest proposals for "[r]eform of the [c]onduct of

2. See Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823 (1977).

3. See Lawrence Baum, *Judicial Specialization and the Adjudication of Immigration Cases*, 59 DUKE L.J. 1501 (2010).

4. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); see also Marc Galanter, *A World without Trials*, 2006 J. DISP. RESOL. 7 (2006); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005).

5. ROBERT P. BURNS, *THE DEATH OF THE AMERICAN TRIAL* 69 (2009).

6. *Id.* at 101.

7. *Id.* at 102 (citing WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY* 112 (2002)).

[t]rial.”⁸ The final chapter, titled “The Meanings of the Trial’s Death,”⁹ is perhaps best described as a lament that goes through the effects that Burns believes would result should the (jury) trial disappear.

In *Specializing Courts*, Baum sets out to examine three issues, the most important of which is the consequences of specialization. The other two issues are the extent of judicial specialization in the contemporary United States, and the causes of that specialization. Chapter One sets up the book by laying out the questions to be addressed, and considers the issue of the extent of specialization. Chapter Two provides more discussion of the possible answers to the questions of cause and effect of specialization, and serves as the framing for the subsequent chapters, which consider in turn the areas of foreign policy and security, criminal cases, governmental litigation over economic issues, and private litigation dealing with economic issues. The final chapter seeks to put “the [p]ieces [t]ogether.”¹⁰ In considering his three issues, Baum examines only venues that are formally part of the judicial branch and hence include “court” in their names. He chooses to exclude “administrative adjudicators”¹¹ (including those whose decisions are directly appealable to an intermediate appellate court, and one venue which is called a “court”). He explains this exclusion as based on two considerations:

[S]ubject-matter specialization is generally taken for granted in the executive branch, so the question of how to explain departures from the generalist ideal for courts is not directly relevant to administrative tribunals . . . [and] the consequences of judicial specialization are more difficult to probe for [in] administrative tribunals, because their location in the executive branch reduces their comparability with generalist courts.¹²

Baum does acknowledge that in some states administrative law judges serve in multiple agencies and hear a wide range of cases, a point which does seem to undercut his decision, particularly since he does not limit his analysis to the federal system.¹³ As I will discuss in detail below, I have significant questions about Baum’s decision to exclude from consideration administrative tribunals and administrative adjudicators. Even with the exclusion of administrative tribunals, there are a large number of specialized courts, and consequently, Baum turns to a series of case studies to answer his second two questions, grouping courts into the four categories previously listed, and devoting a chapter to each group. In his “[p]utting the [p]ieces [t]ogether,”¹⁴ chapter, Baum returns to the questions of what explains specialization and what are the consequences of specialization. Baum concludes that policy goals — the desire to achieve particular types of outcomes — are a better explanation of specialization than are

8. *Id.* at 109.

9. *Id.* at 112.

10. BAUM, *supra* note 1, at 207.

11. *Id.* at 9.

12. *Id.* at 9-10 (footnote omitted).

13. *Id.* at 9 n.5.

14. *Id.* at 207.

what he labels the “neutral virtues”¹⁵ (quality of decisions, efficiency, and uniformity in the law). Interestingly, while policy goals dominate the motivations of the creators of specialized courts, Baum concludes that success in achieving those goals is mixed, and is more likely to be achieved by concentrating cases than by concentrating judges; that is, the specialization of judges is less important than limiting the number of judges hearing some type of case.

JURIES AS THE NONSPECIALIST IDEAL

While Burns does not frame his discussion in terms of generalist vs. specialist adjudication, his book can be read as a defense of what is the most generalist form of adjudication: decisions by lay, nonspecialist jurors selected to serve on an ad hoc basis, usually for a single case. While Burns titles his book in terms of “trials,” the bulk of his discussion clearly implicates juries, and his references to nonjury trials are few and far between.¹⁶ Importantly, unless one believes that the jury trial will completely vanish, something that is extremely unlikely for criminal cases (barring some unforeseeable future events) but not wholly inconceivable for civil cases,¹⁷ the question becomes how many jury trials do we need in order to provide the legal and political benefits that Burns believes come from such trials?

Is the American (Jury) Trial Vanishing?

Galanter’s article on the “vanishing trial”¹⁸ covered the period 1962 through 2002. What has happened in the intervening period? In a recent paper, Galanter has extended his analysis through 2010.¹⁹ That analysis shows a continued decline through 2006, but since 2006 the number of civil trials, both bench and jury, appears to have been fairly stable;²⁰ the number of criminal defendants whose cases were disposed of by jury trials, although stable for part of the period since 2002, has in the last two years resumed its

15. *Id.* at 218.

16. Concerns in the United States about the decline of the jury trial are by no means new, and go back at least 70 years. For a brief review of literature examining the pattern of decline of jury trials in the first third of the 20th Century, see Herbert M. Kritzer, *Empirical Legal Studies Before 1940: A Bibliographic Essay*, 6 J. EMPIRICAL LEGAL STUD. 925, 932, 945-46 (2009).

17. The United States is fairly unique in the way that we use juries for civil cases; one also still finds civil juries in Ontario, British Columbia, and the Australian state of Victoria. See Neil Vidmar, *Lay Decision-Makers in the Legal Process*, in OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 626, 627 (Peter Cane & Herbert M. Kritzer eds., 2010). At the same time, the use of jury trials in criminal cases continues to be strong in countries whose legal system derives in some way from the English common law, with more than 50 such countries employing criminal juries, and some civil law countries now employ juries in at least some criminal cases. *Id.* at 627. The civil jury has all but disappeared in England. See R.M. Jackson, *The Incidence of Jury Trial During the Past Century*, 1 MODERN L. REV. 132 (1937). Jury trials are guaranteed in many federal civil cases by the 7th Amendment (which has not been applied to the states) and by all but one state constitution. See Maurice Possley, *Covering Civil Courts*, in COVERING CRIME AND JUSTICE, <http://www.justicejournalism.org/crimeguide/chapter09/chapter09.html> (last visited Oct. 18, 2011).

18. See Galanter, *The Vanishing Trial*, *supra* note 4.

19. Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts* (June 9, 2011) (paper presented at Pound Civil Justice Institute 2011 Forum for State Appellate Court Judges, New York) (on file with the author).

20. *Id.*

decline.²¹ What the data shows is that over the last 50 years there has been a decline in trials in the federal district courts, both in relative and absolute terms. However, such trials have far from disappeared, and the jury trial is not on its deathbed. Given the cost of trials and the ever present lament about the cost of justice, one can debate whether the decline that has occurred reflects the recognition of cost savings from alternative methods or the diminished role of a crucial democratic institution.

Implicit in Burns' argument is that whatever dispositional mode is now being used to resolve cases that once went to a jury trial is inferior. Whether that is true depends on how those cases are being resolved, a question that has been hotly discussed in responses to Galanter's vanishing trial work. Almost certainly there is no one factor that accounts for the cases that have moved away from jury trials,²² and it is unclear whether there is even a dominant explanation. Most likely it is a combination of factors each contributing its own small piece to the decline.²³

Are (Jury) Trials a Mixed Bag?

Trial certainly has potential benefits to the parties in a case, but one should not assume that trials are *necessarily* a positive for the parties. In civil disputes, going to trial has significant financial costs and carries risks that often can be readily monetized. In criminal cases, trial has significant nonmonetary costs for victims and witnesses, and being confronted by those persons may be emotionally costly to the defendant as well. We do know that in criminal cases, the dominant mode of disposition has long been, in most American jurisdictions, a plea of guilty. While this is often described as resulting from "plea bargaining,"²⁴ it is unclear whether much bargaining actually occurs in most cases. The simplest explanation for the high rate of resolution by pleas of guilty is that, in a large proportion of criminal cases, there is no meaningful defense available to the accused. That is, defendants often plead guilty for the simple reason that they are guilty and the evidence against them is clear and unequivocal!²⁵ Moreover, we know that juries are not particularly good evaluators of certain types of evidence in criminal cases. In particular, jurors are heavily swayed by eyewitness identifications even when those identifications have occurred in situations that produce unreliability or bias,²⁶ and recent efforts to deal with these problems will have the inevitable result of increasing the cost and complexity of the trial process.²⁷

21. *Id.*

22. See generally BURNS, *supra* note 5, at 88-101.

23. *Id.* (reviewing over a dozen explanations for the declining number of trials).

24. See generally GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003).

25. In fact, it is likely that a significant portion of criminal cases have been resolved by a guilty plea or its equivalent throughout the history of the common law trial. See Daniel M. Klerman, *The Selection of Thirteenth-Century Disputes for Litigation* (University of Southern California Law School, Olin Research Paper No. 00-10, Working Paper No. 80, 2011).

26. For a brief summary of the research on the unreliability of eyewitness testimony, see NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 194-95 (2007). Regarding the controversy over eyewitness testimony, see Adam Liptak, *34 Years Later, Supreme Court Will Revisit Eyewitness IDs*, N.Y. TIMES, Aug. 22, 2011.

27. See Benjamin Weiser, *In New Jersey, Rules Are Changed on Witness IDs*, N.Y. TIMES, Aug. 24, 2011 (describing new procedures in New Jersey to review eyewitness testimony before it is presented to juries).

In his homage to the trial, Burns notes that “[n]o triable case is perfect.”²⁸ This simple phrase raises three explanations for the declining incidence of trial. First, it may be that the understanding of what constitutes a “triable” case has changed such that the number of such cases has declined. Second, it may be that through increased selectivity, lawyers who have a great deal of influence over what gets to trial are filing fewer triable cases. For example, much of the increase in criminal cases in the federal courts reflects the growth of drug-related prosecutions (e.g., drug purchase and drug sale); this is happening at the same time that crime generally has been falling sharply. It may well be that a higher percentage of drug cases are “dead bang” losers for the defendant (i.e., the defendant is in physical possession of the drugs when arrested and there are no viable claims that any search involved was unlawful), and hence such cases are less likely to involve triable issues than is true for other kinds of criminal cases. Third, it may be that the increased professionalism of police agencies and the fact that an increasing proportion of prosecutors make a career in that area of practice means that the cases being prosecuted reflect better police work and more careful decisions by prosecutors leading to fewer cases where there are issues for trial.

Burns does not go so far as to argue that the American (jury) trial is perfect. He does provide some “[r]easonable [p]roposals for the [r]eform of the [c]onduct of [t]rial.”²⁹ His proposed changes are, however, very minor, and many of them have been implemented in at least some jurisdictions. Many of the changes he proposes would certainly constitute improvements and aid the nonspecialist decision makers serving as jurors. However, those changes largely pick around the big issues confronting juries, and some may increase the cost and complexity of the trial process.

Ideals and Realities

Burns presents his case based on an idealized image of a trial.³⁰ Certainly many trials at least come close to the ideal he describes, and hence constitute what he labels “well-trying” cases.³¹ However, Burns does not address the question of the relative frequency of “well-trying” cases compared to cases that fall significantly short of being well-trying. At one point, Burns claims that “[j]ury determinations often have a quality of depth or substance about them because the trial puts the jury in a position to judge with care and skill.”³² The problem with this statement is the word “often.” What exactly does Burns mean when he says “often”? On what basis does he make this claim (is there any systematic, empirical evidence on this point)? What evidence is there that the jury does a better job than would some specialized decision maker? Is there any evidence that the jury is better at assessing the credibility of witnesses? Is the jury better at weighing evidence, such as eyewitness testimony? On the latter point, one could certainly imagine that a professional adjudicator, specialized or generalist, who has had training in the

28. BURNS, *supra* note 5, at 28.

29. *Id.* at 109-110.

30. Burns acknowledges that he is describing an “ideal trial;” however, at a later point he portrays his idealized description in Chapter 1 as “what we actually do at trial.” *Id.* at 31, 70.

31. *Id.* at 34.

32. *Id.* at 36.

issues related to eyewitness testimony would be more likely to allocate an appropriate weight to such evidence.

The Jury Trial as Political Culture

While not central to the question of specialization, Burns lauds jury trials for their democratic value, repeatedly referencing observations by Alexis de Tocqueville about the importance of the (jury) trial as part of American democracy. As Burns notes, “[t]he trial is structured by the *tension between citizen participation in governance and deference to experience and authority*,”³³ and serves as “a focal point for the resolution of endless *tensions between judgment and power*, while allowing the former some oxygen to survive in a world of power.”³⁴ The trial has not always been a particularly democratic institution, a point that Burns seems to have some uncertainty about. At one point, he asserts that “[t]he jury has a unifying quality and has *always* been understood as representing a cross-section of, and so the entire, community”³⁵ yet at the bottom of that same page one finds the following: “It was only forty years ago that, owing to legislative changes and constitutional decisions, minorities and women began to serve on juries in significant numbers.”³⁶

While the American jury is generally a praiseworthy institution, it is easy to ignore some dark episodes in its past. Perhaps the darkest of the dark occurred in the South during the period of legalized racial segregation and during the efforts to achieve desegregation. I write this essay around the time of the 50th anniversary of the publication of *To Kill a Mockingbird*, which includes as a central feature the trial and conviction of Tom Robinson, an African-American falsely accused of assaulting a white woman.³⁷ One can read in *Simple Justice*, Richard Kluger’s fine history of the Brown decision, about the acquittal by an all white South Carolina jury of a white sheriff accused of brutally beating and blinding Isaac Woodward, an African-American who was traveling home to North Carolina following his discharge from the army after spending 15 months in the jungles of the south Pacific.³⁸ During the middle and late 1960s, all-white juries sitting in trials of whites who had killed or assaulted civil rights workers routinely failed to convict, either returning acquittals or failing to reach a verdict.³⁹ While we are now a generation or more passed this dark period of American history, it is important to remember it when one is inclined to over-glamorize the role that the jury has played in American democracy.

It is true that juries, and the experience of serving on a jury, have benefits beyond the outcome for the parties to the trial. The presence of juries may enhance the

33. BURNS, *supra* note 5, at 78 (emphasis in the original).

34. *Id.* at 81.

35. *Id.* at 118 (emphasis added).

36. *Id.*

37. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

38. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 298-99 (1975).

39. Some of these events were dramatized in the film *Mississippi Burning*. *MISSISSIPPI BURNING* (Orion Pictures 1988).

legitimacy of courts,⁴⁰ but how many trials are necessary to produce such an effect is unknown. Jury service is a form of civic education, and recent research has shown that persons who had served on a jury evidence an increase in civic engagement.⁴¹ However, one can still ask the question of who should bear the costs associated with relying on juries if their primary value is civic rather than to the parties to a trial.

ARE SPECIALIZED COURTS A BETTER WAY?

The central question I take away from Burns' analysis is whether there is a better way to decide contested cases than by the use of lay juries, and it is this question that connects Burns to Baum's *Specializing Courts*. As discussed above, the lay jury is the ultimate generalist decision maker; the jurors bring no specialized backgrounds, only common experience. Generalist judges would be the next step along what one might describe as the generalist to specialist continuum. After that would be specialist judges and/or specialist courts within the judicial branch of government.⁴² Still more specialist might be administrative tribunals or administrative courts outside the judicial branch, either within executive agencies or within independent agencies or commissions.

Adjudication in Other Venues

If one moves beyond what we commonly label "trials" to include as trials all dispute resolution situations where a neutral third party makes a decision after a hearing in which one or both parties have the opportunity to present and/or challenge evidence, the number of federal trials sky rockets. Table 1 shows an effort to count the number of trials, broadly defined, conducted in the most recent year for which I could locate data.⁴³ What the table shows is that there were over one million federal trials aggregated across the federal adjudicatory bodies, three-quarters of which took place in forums not labeled courts (and only about one half of one percent were jury trials in the federal district court). Many of these proceedings are not open to the public (e.g., social security appeal hearings); but even those that are open to the public seldom involve attendance by persons not directly involved in the matter. At the state and local level one would find hundreds of thousands (perhaps millions) of trial-like hearings dealing with workers' compensation, unemployment compensation, various kinds of welfare benefits, and revocation and reinstatement of various kinds of licenses.⁴⁴

40. While this is a common claim about juries, reflected most prominently in references to de Tocqueville (e.g., "The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government." Powers v. Ohio, 499 U.S. 400, 407 (1991) (Kennedy, J.) (quoting 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 334-337 (Schocken 1st ed. 1961))), there is apparently no empirical evidence supporting this.

41. JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).

42. I use the term "judicial branch" to include both Article I and Article III federal courts. While one might argue that only Article III courts are within the judicial branch, both sets of courts are administered under the same umbrella, relying upon the Administrative Office of the U.S. Courts and the Federal Judicial Center for various types of administrative, training, and research support.

43. While the count is undoubtedly incomplete, I believe it captures all of the major federal sources. I note also that I draw the number of trials in the federal district courts from a different source in the federal reports than used by Galanter, and hence the numbers in Table 1 differ from what Galanter reports.

44. One could also include private adjudication involving what is commonly labeled "arbitration" which

TABLE 1: FEDERAL “TRIALS” BEFORE COURTS AND ADMINISTRATIVE TRIBUNALS

Venue	Number of “Trials”	Information Source
Federal District Court, Civil FY2010	5,360	Judicial Business of the U.S. Courts 2010, Table C-7 [http://www.uscourts.gov/Statistics/JudicialBusiness.aspx]
Federal District Court, Criminal FY2010	8,445	Judicial Business of the U.S. Courts 2010, Table C-7 [http://www.uscourts.gov/Statistics/JudicialBusiness.aspx]
Court of Federal Claims, Cases Disposed	[1,217]*	Judicial Business of the U.S. Courts 2010, Table G-2A [http://www.uscourts.gov/Statistics/JudicialBusiness.aspx]
Court of International Trade	116	Judicial Business of the U.S. Courts 2010, Table G-1 [http://www.uscourts.gov/Statistics/JudicialBusiness.aspx]
Bankruptcy Court, Cases Disposed after Adversary Proceedings FY2010	[60,173]*	Judicial Business of the U.S. Courts 2010, Table F-8 [http://www.uscourts.gov/Statistics/JudicialBusiness.aspx]
Immigration Courts, with representation, FY2010	122,465	U.S. Department of Justice, Executive Office for Immigration Review, FY2010 Statistical Yearbook, p. G1 [http://www.justice.gov/eoir/statspub/fy10syb.pdf]
Immigration Courts, without representation, FY2010	164,742	U.S. Department of Justice, Executive Office for Immigration Review, FY2010 Statistical Yearbook, p. G1 [http://www.justice.gov/eoir/statspub/fy10syb.pdf]
Board of Veterans Appeals, FY2009	13,515	Board of Veterans' Appeals, Report of the Chairman, fiscal Year 2010, p. 3 [http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2010AR.pdf]
Social Security Administration, Office of Disability Adjudication and Review (ODAR), FY2010	737,616	http://www.ssa.gov/appeals/charts/National_Hearing_Decisions_FY2007-FY2011_2nd_Qtr%20.pdf
NLRB, ALJ Hearings, FY2009	194	Seventy-fourth Annual Report of the National Labor Relations Board for the Fiscal Year Ended September 30, 2009, p. 15 [http://www.nlr.gov/sites/default/files/documents/119/nlr2009.pdf]
U.S. Tax Court FY2009	700**	ABA Tax Section Court Procedure Committee, p. 19, Jan 22, 2010, San Antonio, Texas
Military Court Martials	2,774	Annual Report of the Judge Advocates General of the Armed Forces [http://www.armfor.uscourts.gov/newcaaf/annual/FY10AnnualReport.pdf]
Department of Labor, Federal Employee Workers Compensation (OWCP) BHR FY2008	6,789	Office of Workers' Compensation Programs, Report to Congress 2008, p. 10 [http://www.dol.gov/owcp/08owcpmx.pdf]
Department of Labor, OSHA (OSHRC) ALJs FY2010	107	U.S. Occupational Safety and Health Review Commission, FY2010 Performance and Accountability Report, p. 7 [http://www.oshrc.gov/performance/10perfrpt.pdf]
* Number of hearings not reported.		
** Number is rounded in report.		

Thus, while Galanter’s work shows that trials in which lay jurors determine which side prevails have decreased, the number of adjudicatory proceedings in which parties have the opportunity to present evidence and challenge the opposing side’s evidence (with the assistance of skilled counsel if desired and affordable) before a neutral decision maker is large, and may actually be growing.⁴⁵ Besides the absence of the lay jury, the central element that differentiates the vast bulk of these adjudicatory proceedings is that they occur in specialized settings before adjudicators who decide only a specific type of case. This leads to what I would describe as the central question in Baum’s study: what difference does specialization make?

typically involves the presentation of evidence, often in testimony at a hearing. I do not consider private adjudication, which is very often highly specialized and involves adjudicators with specialist backgrounds, in this essay.

45. A study of social security appeals published in the 1990s found that in the early 1990s there were about 300,000 to 350,000 such appeals each year, roughly half of the number for FY2010. See HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 113 (1998).

The Dimensions of Specialization

In thinking about specialized venues, Baum identifies two dimensions of concentration: adjudicator concentration and case concentration. The general jurisdiction court is the central example of a venue that is neither concentrated in cases of a particular type or in the types of cases the judges handle. Administrative tribunals, such as those which hear appeals related to denial of social security disability benefits, are an example of adjudicatory bodies that are dually concentrated, reflecting the highly technical nature of the regulations governing the determination of disability.⁴⁶ The Court of Appeals for the Federal Circuit is an example of an adjudicatory body where cases are concentrated but the judges are not (because of the wide range of case types that come to the Federal Circuit). The U.S. Tax Court presents an example of an adjudicatory body where cases are not concentrated (because tax cases can also go to the Federal District Court or the Court of Federal Claims) but where the judges hear only tax cases.⁴⁷

Table 1 above, which showed the number of cases *decided* by various federal adjudicatory bodies, makes clear that adjudication has become highly specialized, and that limiting one's analysis solely to entities labeled "courts" grossly underestimates the role of specialization in federal court-like processes. Hence, one can question Baum's conclusion that "[f]or the most part, American judges remain generalists"⁴⁸ and that "[s]pecialization remains the exception to the rule, [albeit] . . . an increasingly significant exception."⁴⁹ In fact, judging in the United States does involve a high level of specialization; it is simply that the largest part of the specialization that has occurred has taken place in the context of administrative tribunals, which conduct much more adjudication than do the entities that are formally part of the judicial branch of government.

The Politics of Judicial Structure: Why Are Specialized Adjudicatory Bodies Created?

Most of the specialized adjudicatory bodies are linked to the modern administrative state. Unlike most of the specialized courts described by Baum, which were spun off from generalist courts, these bodies came into being in connection with the creation of various benefit or regulatory programs. One court Baum discusses, the U.S. Tax Court, started out as a part of the Internal Revenue Service, but over time evolved into an Article I court.

What accounts for the creation of a specialized court? As noted previously, Baum suggests two broad explanations: to achieve what he labels the neutral virtues (high

46. *See id.* at 120-27.

47. While both the federal district court and the court of federal claims can hear tax cases, in FY2009 those courts disposed of only 1,436 (ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2009 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 166, tbl.C-4.) and 96 (*Id.* at 298, tbl.G-2A) cases respectively, compared to over 32,000 cases disposed of by the Tax Court; that is, about 95 percent of tax cases are found in the Tax Court. Thus, while the Tax Court does not have *exclusive* jurisdiction over federal tax cases, such cases are in fact *concentrated* in that court.

48. BAUM, *supra* note 1, at 215.

49. *Id.* at 217.

quality decisions, efficiency, and uniformity in the law) and to obtain case outcomes favored by those supporting the creation of such courts. He shows that for the specialized courts he examines, the latter of these goals seems to dominate.⁵⁰ If one considers that previous research on the politics of judicial structure, that finding is not surprising. For example, Barrow and Walker examined in detail the politics surrounding the creation of the Eleventh Circuit by splitting it off from the old Fifth Circuit. The arguments advanced for the division align with some of the neutral virtues (workload and the resulting efficiency issues), but the actual decision making process was tied up with the question of what types of decisions the two new circuits would make, particularly on civil rights issues that were of central concern to the long-time chair of the Senate Judiciary Committee, James Eastland of Mississippi.⁵¹

While the dividing of the Fifth Circuit turned on specific policy issues, the creation of the Courts of Appeals in the late 19th century involved a century long struggle between those who wanted federal courts to be oriented toward the states (as reflected in the structuring of the federal district courts around state boundaries when those courts were created by the Judiciary Act of 1789) and those who wanted the federal courts to be a nationalizing force. The argument for creating the intermediate court of appeal in the federal system was made in terms of administrative needs, but the resistance came from those fearful that local interests would be harmed by judges who looked not to their states but to the federal government.⁵² In their analysis of the creation of the Federal Court of Appeals, Richardson and Vines distinguish between what they label the democratic subculture and the legal subculture.⁵³ The former can be viewed as values associated with the substantive policy concerns involved in the politics of judicial structure and the latter with two of the neutral values described by Baum: quality of decisions and uniformity of law. A third subculture, identified by Kuykendall, extended Richardson and Vines' analysis to include administrative values which explicitly capture the element Baum refers to as efficiency.⁵⁴

Baum's decision to focus only on what we formally label "courts" significantly shapes his conclusion. While it is possible that the motivation for creating adjudicatory bodies such as the social security appeals system or the workers' compensation tribunals was to achieve specific substantive outcomes, in some systems (e.g., adjudicating disputed unemployment compensation claims) the operational design is intended to produce fast results in order to reduce delay in receipt of benefits by those who need them.⁵⁵ Arguably, the social security system is designed to deal with a highly specific set of governing regulations. Tax courts have mixed goals of assuring a flow of revenue but also of dealing with a very specific and technical set of laws consistently. If Baum had

50. *Id.* at 207-210.

51. For an analysis of the politics surrounding the creation of the 11th Circuit, see DEBORAH J. BARROW & THOMAS G. WALKER, *A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM* 8 (1988).

52. See RICHARD J. RICHARDSON & KENNETH N. VINES, *THE POLITICS OF THE FEDERAL COURTS: LOWER COURTS IN THE UNITED STATES* 18-35 (1970).

53. *Id.* at 7-11.

54. C. Mae Kuykendall, *Should Hidden Standards Shape Our Courts?* 61 *JUDICATURE* 57 (1977).

55. Federal mandates impose strict timetables on the resolution of unemployment compensation appeals. See KRITZER, *supra* note 45, at 26.

expanded his purview to include administrative tribunals, he may have reached a different conclusion concerning the relative balance between the neutral virtues and obtaining favored case outcomes.

Impact of Specialized Adjudication

This brings us to what is the central question in Baum's analysis: what are the consequences of specialization? Baum considers three types of potential consequences: Advantage for one side or the other, potential administrative efficiencies (greater throughput, faster dispositions, etc.), and the quality of the adjudication, both in terms of consistency and in terms of accuracy.

While Baum discusses all three of these questions, he essentially punts with regard to the latter two, the neutral virtues. He notes that there is little evidence on the question of efficiency,⁵⁶ and that specialization could actually reduce efficiency by "securing more careful consideration of certain cases."⁵⁷ While there is certainly no guarantee that specialist courts would be more "efficient," the example of appeals of decisions concerning eligibility for unemployment compensation, a setting where speed is of particular concern because of the need to get benefits to a claimant quickly, shows a specialist venue can be specifically designed and staffed to be fast and efficient. In a generalist venue, one could design special proceedings for certain types of cases (e.g., domestic violence) to achieve fast decisions, but arguably this constitutes a kind of specialist court embedded within a generalist court, as is the case for many of what are called "problem-solving courts."⁵⁸

As for quality of decisions, Baum observes that "we have little meaningful evidence of differences in the quality of decision making between generalist and specialized courts" in no small part due to the "difficulty of measuring the quality of judges' work."⁵⁹ He notes that looking at whether court users prefer generalist or specialist courts will not answer the question of which produces high quality decisions because those preferences could reflect expected outcomes rather than "quality" of the decisions in some other sense.⁶⁰ This neglects what we know from the extensive body of research on procedural justice, and how factors other than outcomes shape parties' assessment of legal processes; as I discuss in my conclusion, this connects to another potential impact of specialization which deals with perceptions.

Baum devotes more attention to assessing whether the supporters of specialization in a particular area achieve their goals of obtaining preferred policy outcomes. In his individual chapters, Baum gives examples of how specialization appears to lead to particular policy results that are what one would expect the proponents of creating the specialized courts would want. Perhaps the best example is the Foreign Intelligence Surveillance Act ("FISA") Court. When that court was created, lenient requirements for

56. BAUM, *supra* note 1, at 218.

57. *Id.* at 219.

58. See Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 39-43 (2005).

59. BAUM, *supra* note 1, at 219.

60. *Id.* at 220.

warrants were established. Not surprisingly, the FISA Court is not known for rigorously evaluating warrant requests. However, while one can find examples such as the FISA Court, Baum's conclusion regarding the success of supporters of a specialized court in achieving their policy goals is mixed: "Among the specialized courts that were created to advance certain judicial policies, some have carried out this mission. Other courts have adopted distinctive approaches to policy that their creators did not intend."⁶¹ Thus despite Baum's detailed discussion of a number of courts, we do not come away with a general conclusion regarding the impact of specialized courts on the substance of policy. Sometimes there is an impact, and sometimes there is not, and sometimes when there is an impact it is not what the proponents of creating a particular specialized court were hoping for.

Not surprisingly, Baum chooses not to take a "firm position" on whether or not specialized courts are desirable.⁶² His clearest recommendation is that those considering the creation of such courts need to operate from a better information base than they usually do. He observes, "Decisions whether to create specialized courts are typically made on the basis of limited information, and predictions about the effects of specialization frequently rest on folk theories whose validity is questionable."⁶³ In this he echoes Malcolm Feeley, who raised much the same issue about court reform more generally almost 30 years ago.⁶⁴

CONCLUSION

Burns fears for the demise of the (jury) trial, in significant part because he sees it as a significant element of what gives the American court system legitimacy. This links directly to an issue that Baum does not discuss with regard to judicial specialization: What is the potential impact of specialization on the perceptions of both court users and the public at large?

While at one time the standard assumption was that a court's output shaped the views of the parties' perceptions of whether justice was done, we now know from the extensive literature on procedural justice that a party's perception that the process in the court was fair has a significant impact on that party's view.⁶⁵ Do parties perceive the process in specialized courts differently than in nonspecialized courts? One could hypothesize that judges who exude expertise on the substance of a matter before them would be perceived as producing a fairer process than would be true for matters being handled by generalist judges or lay jurors. Simply knowing that the court is specialized might lead to a perception of increased fairness. If given a choice between having their case decided by a nonspecialist, either a generalist judge or a lay juror, or by a specialist judge, which would the potential litigant choose? Or alternatively, under what

61. *Id.* at 221.

62. *Id.* at 226.

63. *Id.* at 227.

64. See MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 37-39 (1983).

65. The literature on procedural justice and its relationship to assessment of fairness is extensive. The leading work on the subject is by Tom Tyler. For a general discussion, see E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 30-34 (1988). Baum makes a tangential reference to this work, but does not devote significant attention to it. BAUM, *supra* note 1, at 20-51.

circumstances, or for what types of cases, would a potential litigant prefer a generalist over a specialist decision maker, and vice versa?

Similarly, one could ask whether the public views specialized courts more favorably than generalist courts. As with the individual users, there might be a general perception that specialization leads to “better” outcomes regardless of whether there is any evidence that allows a critical examination of quality differences between generalist and specialist courts. Stated more generally, how is the perceived legitimacy of an institution adjudicating disputes between private parties or between private parties and the government affected by the expertise of the adjudicator? Or, alternatively, under what conditions or for what types of matters does a high degree of specialization enhance legitimacy and under what conditions or for what types of matters is legitimacy greatest when lay jurors serve as the adjudicator? These questions are fundamental to the issues raised by both Burns and Baum, but neither is able to provide systematic evidence to help provide answers.