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**JUDGE & JURY SYMPOSIUM:** The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future

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**LEXISNEXIS SUMMARY:**

... Reliable data is available only for jury trials. ... Annual dispositions of civil cases in federal courts increased fairly steadily from 1962 to 1985, then declined slightly. ... In criminal cases, the annual numbers of all trials, and of jury trials, rose and fell during the first part of the period, reached another peak in 1990, and sharply declined after that. ... The OCA reports contain statistics for the "criminal docket," "civil docket," and "juvenile docket." ... Professor Galanter suggests there may be additional factors that have affected the federal system: the enactment of more statutes with a mandatory minimum sentence, increased funding for law enforcement, and changes in federal prosecutors' policies for plea and trial strategy. ... It is true that most cases are resolved with little or no discovery, but it is also true that only the rarest case goes to trial without substantial discovery. ... Institutional litigants, usually defendants, perceive binding arbitration as less expensive, less risky, or more favorable for other reasons. ... This trend would appear to have contributed to the decline in civil jury trials in both the state and federal systems. . ... If a pretrial mediation requirement were a principal cause of the decline in civil jury trials, one might expect to see a greater effect in the state system, where it has been more prevalent longer, than in the federal system. ... The 406-case decline in the number of compensation jury trials was 23% of the total decline of 1,774 cases. ... More likely, perhaps, dispositions by dismissal, non-suit, default, and settlement may have grown at a faster rate in the state system, resulting in declines in both jury trials and, to a slightly lesser degree, summary judgments. . ... Judges SEE FIGURE 2 IN ORIGINAL SEE FIGURE 3 IN ORIGINAL SEE FIGURE 4 IN ORIGINAL APPENDIX B 1986 2004 Trial Courts 532 652 Civil Dispositions 316,748 296,492 Civil Jury Trials 3,639 1,865 Criminal Dispositions 601,200 808,757 Criminal Jury Trials 6,386 7,672 SEE FIGURE 5 IN ORIGINAL Percent Change From 1986-2004 APPENDIX C Federal Texas Courts Civil and Courts Criminal Cases Civil Cases 1986-2004 1985-2002 Criminal Cases 1990-2002 Annual number of jury Civil - 52% - 49% trials Criminal - 57% 20% Annual rate of Civil - 50% - 45.3% dispositions after jury Criminal - 68% - 10.7% trial Average annual number Civil - 61% - 58.2% of jury trials per court Criminal - 62% - 2.0% SEE FIGURE 6 IN ORIGINAL

**TEXT:**

[\*163]

I. Overview

It seems it just suddenly occurred to someone a few years ago that while courts have plenty of cases and more are being filed all the time, fewer and fewer ever actually go to trial, and maybe that might be important. Ours is a culture on the lookout for trends, n1 so one wonders how a steady, steep, decades-long decline in the number of trials - quite possibly "the most profound change in our jurisprudence [\*164] in the history of the Republic," n2 as one respected federal district judge wrote to his colleagues - could escape notice as long as it did. I want to return to this question by the end of this article. Why the decline in trials was overlooked may be as important as the decline itself.

At any rate, the alarm at last was sounded, bar leaders and judges were alerted, and the academy was summoned to study the matter, which it has done. The report is now in, and the evidence is unambiguous. The federal courts tried fewer cases in 2002 than they did in 1962, while disposing of over five times as many civil cases and over twice as many criminal cases. n3 In that forty-year period, the rate of federal-court dispositions by trial fell by more than two-thirds in criminal cases and by more than five-sixths in civil cases. n4 This is a stunning development. For every three cases a prosecutor's office tried in 1962, or for every six civil cases a law firm tried, each on average tried only one apiece in 2002. And most of the decline in civil trials has occurred since 1985. n5 State-court data is more limited, harder to collect, and difficult to compare, but at least one study shows that state courts appear to be experiencing a trend similar to what is occurring in the federal courts. n6

What about trials in Texas courts? Reliable data is available only for jury trials. The principal study of state courts included Texas statistics, n7 but I am not aware that those figures have been examined separately. My purpose here is to do so, then to consider possible explanations for what is happening, and finally to assess the likely effects of these developments.

## II. Trials in Federal Courts: 1962-2002

In December 2003, the Litigation Section of the American Bar Association conducted a Symposium on the Vanishing Trial, at which Professor Marc Galanter of the University of Wisconsin Law School presented a study entitled *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*. n8 The study [\*165] drew on data collected from the federal courts by the Administrative Office of the U.S. Courts for the years 1962 through 2002, and to a much lesser extent, available data on state-court operations. n9 I shall not repeat here Professor Galanter's lengthy and detailed report; I shall only summarize a few of his findings to provide a context for looking at the data for Texas courts.

Annual dispositions of civil cases in federal courts increased fairly steadily from 1962 to 1985, then declined slightly. n10 Annual dispositions of criminal cases generally increased throughout the entire period except for a few years in the late 1970s. n11 In civil cases, the annual numbers of all trials, and of jury trials, generally increased until 1985, then generally declined. n12 In criminal cases, the annual numbers of all trials, and of jury trials, rose and fell during the first part of the period, reached another peak in 1990, and sharply declined after that. n13 A summary of the statistics is set out in the table at Appendix A. n14

As the data reflect, from 1962 to 2002, the number of federal judges more than doubled, as did annual criminal case dispositions, and annual criminal dispositions per judge rose about 5%, from 119 cases to 125. n15 Annual civil case dispositions multiplied five-fold, so that annual civil dispositions per judge rose 133%, from 180 cases to 421 cases. n16 The increased efficiency in case dispositions is undoubtedly attributable to the addition of 534 magistrate judges, n17 technological improvements, and better case management techniques. n18

Over the forty-year period, the annual number of civil trials fell 21%, from 5,802 to 4,569, and the annual number of criminal trials fell 30%, from 5,097 to 3,574. n19 But from 1985 to 2002, the decrease in civil trials was a remarkable 64%, from 12,529 to 4,569, and from 1990 to 2002, the decrease in criminal trials was 55%, from 7,874 to 3,574. n20 In [\*166] 2002, 115 more courts tried 10,439 fewer cases than in 1985. n21

The annual number of civil jury trials increased slightly - 9% - between 1962 and 2002, but between 1985 and 2002, it fell by more than half - 52%. n22 The annual number of criminal jury trials decreased slightly - 2% - over the entire period, but also fell more than half - 57% - between 1990 and 2002. n23 Measuring either from 1985 or 1990, the annual number of jury trials in all cases was almost halved in 2002. n24

The annual rate of civil dispositions after jury trials was 5.49% in 1962, 2.33% in 1985, and 1.16% in 2002 - a 79% decline over the period, and a 50% decline between 1985 and 2002. n25 For criminal cases, the annual rates were 8.18% in 1962, 10.94% in 1990, and 3.46% in 2002 - a 65% decline over the period, and a 68% decline between 1990 and 2002. n26

Average annual jury trials per judge in 1962 were 9.9 in civil cases and 9.7 in criminal cases. n27 By 1985, the number for civil cases had risen to 12.5, and by 1990 the number for criminal cases to 11.4. n28 But in 2002, these numbers had fallen more than 60%, to 4.9 and 4.3, respectively. n29

Thus, by any measure, the number of jury trials in federal courts has declined precipitously since about 1985.

### III. Jury Trials in Texas Courts: 1986-2004

#### A. Data and Protocols

For many years, the Office of Court Administration ("OCA") has published the Texas Judicial System Annual Report, containing a description of the Texas court system along with statistics on its operation based on data collected from court clerks throughout the state. n30 The protocols for reporting data appear to have remained constant since at least 1986. Although one cannot be sure that these [\*167] protocols have always been consistently interpreted by all of the clerks in submitting their reports, there is nothing to indicate that the degree of any inconsistency has changed. In other words, if an activity was understated in 1986, it was likely understated in 2004, and to about the same extent. Also, while reporting is mandatory, not all clerks report every year. n31 But in the years since 1986, at least, the deficit has been small enough that the accuracy of the information is not significantly impaired. Thus, even if the reports' depiction of court operations is imperfect, the statistics they contain can appropriately be compared from year to year. Each report covers a fiscal year ending August 31. n32

To characterize the jurisdictional structure of the Texas court system as elaborate would seriously understate the matter. Until 2003, OCA's annual reports contained a lengthy, detailed description of Texas courts' jurisdiction, which, though carefully researched and written, may nevertheless have been incomplete or inaccurate in various particulars. n33 The complexity of the jurisdictional framework simply makes it impossible to be sure. Texas has seven types of trial courts: district courts, constitutional county courts, statutory county courts, statutory probate courts, justice of the peace courts, small claims courts, and municipal courts. n34 Broadly speaking, municipal courts have jurisdiction over minor criminal cases and cases for the imposition of minor civil penalties, and justice of the peace courts and small claims courts have jurisdiction of misdemeanors and civil cases involving up to \$ 5,000. n35 Although the number of jury trials these courts conduct is impressive on its face - over 8,500 in 2004, close to half of all of the jury trials in the State - the rate as a percentage of total dispositions (10.3 million) is tiny - about 8 in 10,000 dispositions. n36 Because this rate is so small, I have excluded these courts from my analysis. I have also excluded the constitutional county courts, whose principal function is county government, not adjudication of cases. Thus, for purposes of the discussion that [\*168] follows, by "county courts," I mean statutory county courts and statutory probate courts, and by "trial courts," I mean district courts and county courts.

Trial court dockets may be specialized, either by statute or by local arrangements of the judges. In the larger metropolitan areas, the judges usually agree to assign the criminal docket exclusively to designated courts, and at times family law and juvenile cases as well. In other areas of Texas, trial courts handle all cases. Thus, it can be somewhat misleading to calculate a jury trial rate per trial court when some have only criminal cases and others have only civil cases or only particular types of civil cases. But the divisions of dockets among courts does not appear to have changed

markedly since 1986, and thus a rate calculated for all jury trials in all courts that year can appropriately be compared to rates calculated the same way in succeeding years. Changes in those rates over the years may indicate trends, even though the rates for courts in some areas or with some dockets may actually be much different.

The OCA reports contain statistics for the "criminal docket," "civil docket," and "juvenile docket." n37 Since 1986, family law cases have comprised more or less half the civil docket. n38 I have excluded those cases and juvenile cases from the analysis in this article for two reasons. First, the rights to a jury trial and to a binding verdict are limited in family law cases, and jury trials are therefore much less frequent than in other civil cases. Jury trials are also less frequent in juvenile cases. Second, such cases cannot be brought in federal court, and an important purpose of this article is to compare the situations in the Texas and federal systems. A better comparison requires excluding family law and juvenile cases. Thus, in what follows I mean by "civil cases" civil, non-family, non-juvenile cases.

The numbers of non-jury trials in civil cases reported to OCA do not appear to reliably reflect trials in the conventional sense, with an opening statement, evidence, summation, and judgment. Clerks are vaguely instructed to report a disposition by non-jury trial as one after a hearing. The 2004 report shows 117,842 dispositions "After Trial - No Jury." n39 This would average almost 68 per court, which is far higher than possible if one thinks of conventional non-jury trials, and based on anecdotal evidence, far higher than actual. Of the total, 11,646 [\*169] were in tax cases n40 and 13,864 were in "Other Civil Cases," excluding cases not clearly identifiable as injury or damage cases, workers' compensation cases, condemnation cases, and suits on accounts, contracts, notes, and debt. n41 For these latter categories, 5,975 non-jury trials were reported, or about 17 per court. n42 This is a more realistic number but seems low, again based on anecdotal evidence. I do not suggest that the reported data are wrong, only that it is difficult to tell from the categories exactly what is being reported. For this reason, and especially since the number of non-jury trials reported in "other" cases is so high, I have not tried to analyze whether non-jury trials have declined. Further research into the reporting processes might make it possible to do this.

## B. Analysis

Annual dispositions of civil cases declined by about one-fourth from 1986 to 1995, then steadily increased to within 6% of the 1986 level. n43 Annual dispositions in criminal cases rose by about one-third from 1986 to 2004. n44 The annual numbers of jury trials in civil cases declined fairly evenly between 1986 and 2004, while they grew fairly evenly in criminal cases. n45 These statistics are set out in Appendix B. n46

From 1986 to 2004, the number of trial courts increased 23%, annual civil dispositions decreased 6%, and annual criminal dispositions increased 35%. n47 Annual civil dispositions per court fell about 24%, from 595 to 455, while annual criminal dispositions per [\*170] court grew about 10%, from 1,130 to 1,240. n48

Jury trials became less frequent in both civil and criminal cases, but the decline for civil cases was much more pronounced. The annual number of civil jury trials fell 49%, while the annual number of criminal jury trials actually grew 20%. n49 The rate of civil dispositions after jury trial fell from 1.15% to 0.63%, while the rate of criminal dispositions after jury trial declined only 10.7%, from 1.06% to 0.95%. n50 Civil jury trials per court fell 58.2%, from 6.8 to 2.9, while criminal jury trials per court declined only 2.0%, from 12.0 to 11.8. n51

The decline in civil jury trials in Texas courts has closely paralleled the decline in the federal courts, while in criminal cases the situations are much different, as summarized in Appendix C, figure 3. n52

OCA reports also contain statistics on summary judgments, but only in the district courts. The reports show that the annual number of summary judgments declined from 5285, or 1.67% of dispositions in 1986, to 3,340, or 1.13% of dispositions, in 2004. n53 Thus, the rate of dispositions by summary judgment in the district courts fell by 25% between 1986 and 2004. The number and rate of summary judgments rose very slightly in 1998, the year after Rule 166a(i) of the Texas Rules of Civil Procedure was added to allow a summary judgment when "there is no evidence of one or more essential elements of a claim or defense," n54 but since 1998 both figures have steadily declined. n55

#### IV. Diagnosis

To quote Stephen Stills: "There's something happening here. What it is ain't exactly clear." n56 Much thought has already been given to the reasons for the decline in federal court trials. Texas's experience may shed further light on this phenomenon.

[\*171]

##### A. Criminal Cases

By most accounts, one major change in the federal criminal justice system that has contributed significantly to the decline in the number of criminal trials in federal courts is the adoption of federal sentencing guidelines in the late 1980s and early 1990s. n57 Not only do these guidelines prescribe sentences based on the circumstances presented, they also take into account the accused's willingness to accept responsibility and thus, penalize the refusal to plead guilty. n58 The Texas system has had no such change. A criminal defendant in state court still has the option of being sentenced by a jury, and there are no sentencing guidelines. The uncertainty about what a jury will do, within a range of likely prospects, preserves an incentive to go to trial.

The relative stability of the Texas system can serve as a "control" in assessing the decline in federal criminal jury trials if other variables are not at play. Professor Galanter suggests there may be additional factors that have affected the federal system: the enactment of more statutes with a mandatory minimum sentence, increased funding for [\*172] law enforcement, and changes in federal prosecutors' policies for plea and trial strategy. n59 But any effect from mandatory minimum sentences should resemble that of the mandatory sentencing guidelines, and it is hard to see how the other two factors could have had much impact at all. If funding levels for law enforcement or prosecutorial strategies affect the frequency of criminal jury trials at the federal level, one would expect state changes to have a similar impact on state courts; however, there is simply nothing to indicate that they do. Professor Galanter found no appreciable increase in the length of criminal jury trials in federal courts, nor did he identify an increase in the expense of a trial as a reason for the decline. n60 For indigent defendants, of course, expense is not a factor, but expense is important to the government and could influence prosecutors' willingness to accept plea agreements. However, nothing suggests that it has. Also, unlike the civil justice system, with mediation and arbitration handling much of the work of resolving disputes, there is no reasonable alternative for resolving criminal proceedings. The comparative stability of the Texas criminal justice system strongly suggests that the cause of the decline in federal criminal jury trials can be traced to the sentencing guidelines.

From the available evidence, it appears that criminal jury trials have declined in the federal system because the ultimate outcomes in these cases have become more certain and defendants risk an increase in their sentence by insisting on a trial in the face of those certainties.

##### B. Civil Cases

For civil cases, there is no "control" for trying to assess the causes of declining civil jury trials in Texas state and federal systems. Factors that may be contributing to this decline affect both systems, although in important respects, differently. Among those factors are the following.

###### 1. Escalating Pretrial Expense and Delay

Civil litigation is expensive, and for many, prohibitively so. Professor Kent Syverud, former dean of Vanderbilt Law School, has written:

Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its

details - [\*173] in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it. n61

The most costly aspect of civil litigation is discovery, n62 yet all efforts to restrict it are vigorously opposed by the bar and to a large extent by the bench as well. n63 Discovery often provides a litigant the only practical means of access to information in the hands of an opponent or third party, on which the effective prosecution of a claim or assertion of a defense depends. n64 But for the civil justice system as a whole, that information is the tiniest fragment of the mountain of information that is requested and produced. n65 Efforts to increase the efficiency of the process have not been very productive.

It is true that most cases are resolved with little or no discovery, n66 but it is also true that only the rarest case goes to trial without substantial discovery. Thus, as the American College of Trial Lawyers has suggested:

We may ... have a situation that an economist would recognize as a market failure - in which the litigants' preferences for trial may never be manifested as a consequence of insufficient resources to survive the costs of discovery. n67

This is borne out by what appears to be a consensus in the trial bar - that fewer cases can afford to be litigated through trial. Expense would appear to be a principal factor in the decline of civil jury trials.

Delay might also have been a factor at one point. In 1987, it was important for the Supreme Court of Texas to encourage trial courts to schedule jury trials no more than eighteen months from the appearance of the defendant. n68 Crowded dockets kept many courts from meeting that time standard. The delay in getting to trial may [\*174] once have encouraged litigants to settle. If that delay contributed to a decline in jury trials, it should no longer be an important factor because civil jury trials have declined to half the level in 1986, and a trial setting is not as distant as it once was.

## 2. Unpredictability and Higher Stakes

The American College of Trial Lawyers has observed that "defendants and their attorneys are fearful - more so than in bygone days - that a jury will hand them a result that is totally disproportionate to anything they rationally ought to be able to expect from an adjudication." n69 Although the statistical evidence is conflicting, there is evidence that such fears are unfounded, that there is no "liability crisis" or "litigation explosion," n70 that in fact jury awards may be falling rather than rising, and that aversion to jury trials based on unreasonable risk is an unjustified reaction to unfortunately exaggerated media coverage of the occasional big verdict. n71 From a defendant's perspective, however, statistical assurances that most verdicts do not bring down the sky may offer little comfort. The small likelihood of a bad result is one thing; the small likelihood of an intolerable result is something else. Russian roulette played with a revolver with a very large cylinder is still Russian roulette.

From a plaintiff's perspective, the fear of a bad result is essential to encourage settlement. The risk of an undesirable outcome must be large enough to overcome an unreasonable defendant's intransigence in denying responsibility for injury and prompt more careful conduct in the future. But, as risks - or at least perceived risks - increase, they incentivize avoidance in other ways, such as by resort to alternative dispute resolution mechanisms and by legislative changes in the substantive law. Both have become more commonplace in the past two decades. Thus, while it is impossible to say with certainty that a concern for unacceptable unpredictability and risk has caused the decline in civil jury trials, it does appear to be a contributing factor.

## 3. The Growth in Agreements to Arbitrate

During the five years I served as a judge of the 95th District [\*175] Court in Dallas County, from 1981 to 1986, I

never once received a motion to compel arbitration, nor do I recall during my first years on the Supreme Court of Texas seeing a petition challenging the denial of such a motion. The first came late in 1991, resulting in our decision the following year regarding *Jack B. Anglin Co. v. Tipps*.<sup>n72</sup> We noted that eight years earlier the United States Supreme Court had referred to a "national policy favoring arbitration."<sup>n73</sup> Since *Tipps*, cases involving arbitration issues have become a large part of our docket.<sup>n74</sup>

Institutional litigants - like employers, insurers, securities dealers, health care providers, contractors, and home builders - have in the past decade increasingly insisted on arbitration agreements with employees, customers, and clients.<sup>n75</sup> Institutional litigants, usually defendants, perceive binding arbitration as less expensive, less risky, or more favorable for other reasons. Even trial lawyers, who generally deplore this migration to arbitration, often insist on arbitration agreements with clients.<sup>n76</sup> Unquestionably, a large number of disputes that would have resulted in litigation, and often probably in trials, are [\*176] now resolved by binding arbitration. This trend would appear to have contributed to the decline in civil jury trials in both the state and federal systems.

#### 4. The Increase of Referrals to Mediation as a Prerequisite to Trial

Before 1986, mediation was not much in use in Texas, either in state or federal courts.<sup>n77</sup> Not long after that, state courts began requiring that parties submit to mediation, and by the early 1990s courts were routinely making mediation a prerequisite to trial.<sup>n78</sup> For many years now, that requirement has been essentially absolute in the larger metropolitan counties, often (but not always) by local rule.<sup>n79</sup> Federal courts in Texas were not as quick to encourage mediation and still appear to be less insistent on mediation as a prerequisite to trial than many state courts.<sup>n80</sup>

If a pretrial mediation requirement were a principal cause of the decline in civil jury trials, one might expect to see a greater effect in [\*177] the state system, where it has been more prevalent longer, than in the federal system. The fact that the decline in both systems is very closely parallel might be taken to suggest that the principal cause lies elsewhere. That may not be true, however, since so many factors are at play. Many cases are settled through pretrial mediation, but it is not clear how many of these cases would otherwise have gone to trial. The increased requirement of pretrial mediation suggests that judges view it as an effective means of disposing of cases. But at least one observer notes that there is little empirical evidence to support this view.<sup>n81</sup> Another possibility is that the requirement of pretrial mediation indicates a judicial predisposition against trials.<sup>n82</sup>

#### 5. Changes in the Substantive Law

A complete legislative revamping of the Texas Workers' Compensation Act<sup>n83</sup> in 1989 has certainly caused a decline in civil jury trials in Texas courts. In 1986, the district courts disposed of 8,671 compensation cases, 430, or nearly 5%, by jury trial.<sup>n84</sup> No other category of cases had so high a rate of jury-trial disposition, and the average for all cases was only 1.15%.<sup>n85</sup> In 2004, the district courts disposed of only 417 compensation cases, 24, or almost 6%, by jury trial - about ten times the average rate for all civil cases.<sup>n86</sup> There were more jury trials in compensation cases in 1986 than there were compensation cases in 2004.<sup>n87</sup> Changes in the law centered [\*178] adjudication in administrative proceedings and strictly limited court review. The 406-case decline in the number of compensation jury trials was 23% of the total decline of 1,774 cases.<sup>n88</sup> Although compensation cases may be brought in federal court under diversity jurisdiction,<sup>n89</sup> most such cases in Texas are brought in state court, and any effect of the change in Texas law on the decline of civil jury trials in federal courts in Texas, let alone throughout the United States, was undoubtedly negligible.

Trial lawyers of both stripes, plaintiffs' and defendants', commonly report that tort reform initiatives in the legislature over the past two decades, which limit causes of action and cap damages, have caused a decline in civil jury trials in state and federal courts in Texas.<sup>n90</sup> The effect of such changes has not been, and probably cannot be, measured with any degree of accuracy. The American College of Trial Lawyers has concluded, based on the impressions of its members, that tort reform has had little effect on the number of civil jury trials in the federal courts as a whole.<sup>n91</sup> If that is true, and if changes in Texas law account for much of the decline in civil jury trials in state courts, then the causes of the decline in federal courts have had much less effect in state courts.

## 6. Changes in Procedural Law

There is evidence to indicate that in the federal courts, the rate of dispositions by summary judgment has more than quadrupled since 1960, more than doubled since 1975, and has increased from half the rate for jury-trial dispositions in 1975 to three times that rate in 2000. n92 Professor Arthur Miller of the Harvard Law School has explored the doctrinal bases for these apparent changes in an extensive article. n93 [\*179] The American College of Trial Lawyers has concluded that "summary judgment is today playing some role in the Vanishing Trial phenomenon" and that:

The impact of summary judgment on the number of trials would appear also to have been intensified by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), admonishing trial judges to serve as "gatekeepers" by critically assessing expert evidence before admitting it. n94

There is no empirical data to support such "intensification."

Data for Texas district courts show a decrease, not an increase, in the rate of dispositions by summary judgment since 1986. n95 That year, the rate was a little more than twice the rate of civil dispositions by jury trial; by 2004, both rates had fallen by about half, and the difference between them had slightly narrowed. n96 The Supreme Court of Texas did not adopt *Daubert's* approach in construing Rule 702 of the Texas Rules of Evidence until 1995, n97 and not until 1997 did Texas procedure allow for summary judgment based on a lack of evidence, a component of federal procedure since the 1986 trilogy of United States Supreme Court decisions construing Rule 56 of the Federal Rules of Civil Procedure. n98 Yet the rate of dispositions by summary judgment in Texas district courts was steadily declining before those changes in procedure and has continued to decline since.

It is not clear why summary judgments appear to have [\*180] contributed to a decline in civil jury trials in the federal system but not in the state system. Since 1997, the controlling law in the two systems has been about the same. n99 Possibly, federal courts are more likely to grant summary judgment. More likely, perhaps, dispositions by dismissal, non-suit, default, and settlement may have grown at a faster rate in the state system, resulting in declines in both jury trials and, to a slightly lesser degree, summary judgments.

## 7. The Transmutation of Trial Judges into Case Managers

As caseloads have increased over the past three decades, the creed of case management - that judges' time is better spent overseeing pretrial proceedings than sitting in trial - has gained converts. Effective case management is no doubt critical in handling heavy dockets, but it has created an impression among trial judges that settlement means success and trial means failure. Professor Judith Resnik of the Yale Law School has written that "the federal judiciary has adopted an anti-adjudication and pro-settlement agenda." n100 Professor Miller echoed that the role of trial judge has been transformed "from that of neutral arbiter to case supervisor." n101 And the American College of Trial Lawyers has concluded:

Many judges are exerting strong pressure to settle rather than try cases, and ... this is a factor that influences, to a greater or lesser extent, the behavior of at least some lawyers and litigants in deciding not to proceed to trial. n102

All of this may also be said of state judges, as indicated by the increased use of pretrial mediation already discussed. In some cases, trial courts even order multiple mediations. n103

If a judicial predisposition against trials has contributed to their decline, there does not appear to have been much objection in the trial bar or from litigants. On the contrary, only in the last few years has anyone even seemed to notice



that the numbers of civil jury trials were declining. It may be that settlement as a judicial priority has merely grown side by side with cost-containment and risk-reduction as objectives of parties and lawyers.

[\*181]

#### 8. A Growing Lack of Trial Skills

The American College of Trial Lawyers has suggested that civil jury trials may be declining because fewer lawyers possess the requisite skills and experience, leading to what it calls a "fear of trialing" - a reluctance to go to trial. n104 This may be true, but of course, each helps cause the other: fewer trials results in less training and experience, which results in fewer trials. It does not seem helpful to know which came first.

#### V. Prognosis

If the causes of the decline in civil jury trials could be identified, the question would then be whether any effort should be made to reverse the situation. Is the decline good or bad for the American civil justice system?

It must fairly be said that civil disputes are being resolved sufficiently to the satisfaction of the public and the bar that the decline in civil jury trials was scarcely noticed until fairly recently. Increasingly, the pretrial process is but a preface to mediation. This seems to have met with judicial approval, and if the bar and litigants are discontent, at least they have raised little objection. Likely defendants continue to insist on agreements for binding arbitration when they can, and plaintiffs have been unable to resist the national and state policy favoring this privatized dispute resolution. If the expense and unpredictability of arbitration increase, it may come to more closely resemble trial. But as yet there is no indication that the migration to binding arbitration by those who are able to elect that course is losing any steam.

If the present course continues, then many other things must change. There will be less need for courtroom skills, and less need for courtrooms. The academy will need to de-emphasize trial practice courses and instead stress instruction and training in pretrial litigation and mediation. Arbitration may require many of the same skills that trial does, but law schools should nevertheless adjust to focus on training for arbitration. Mediation and arbitration do not allow for appeal, and thus there will be less need for appellate courts. The case law they would generate to provide the rules and principles of a developing common law must be replaced by legislation. And that legislation will be most influenced by those who can most easily [\*182] participate in the legislative process.

None of this should be surprising. The civil jury trial is all but extinct outside the United States, so one need only look at the civil justice systems of other politically and economically developed countries to see what can be expected from the present trend. In sum, those systems use legislated civil codes in place of the judicially-developed common law and an inquisitorial process in place of an adversarial one. n105

If it should be determined that the present course must be arrested and reversed, then the two most popular approaches at present will almost certainly not achieve the desired end. The preferred approach is to extol ever more loudly the benefits of civil jury trials, to remind the public, for example, that Blackstone described trial by jury as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy," n106 that Justice Story called trial by jury "justly dear to the American people," n107 and that the Supreme Court referred to the right of jury trial in civil cases as "fundamental and sacred." n108 If the public is listening, it is not convinced. Jury-trial defenders sound like someone selling cod liver oil as a soft drink and insisting that people should buy it because it is good for them, even though it costs more than soda and leaves a bad taste in the mouth. The other preferred course is to try to force a return to civil jury trials, such as by legislating and adjudicating restrictions on mediation and arbitration. Setting aside the distinctly un-democratic aspect of this approach, it seems unlikely that it can succeed, or that the public can be forced to accept a civil justice system it does not want.

The civil jury trial, as a dispute-resolution product, is losing its market. To recover, it needs more than a better

advertising campaign. Its costs must be slashed and its taste improved. Significant cost reductions: (1) necessitate a more sensible approach to discovery that has reasonable limitations; (2) require focused, staged requests for information; (3) severely sanction recalcitrance and withholding; and (4) are efficiently supervised. Perhaps this is impossible, although the criminal justice system manages to operate without the benefits, and free of the problems, of unlimited discovery. Certainly real cost reductions have eluded efforts to achieve them. Also, the civil jury [\*183] trial cannot be made more attractive to those now determined to avoid it unless the requirements for liability are better defined (than say, for example, intentional infliction of emotional distress), and unpredictability in results reduced.

My own view is not only that the civil jury trial is well worth preserving, but **that it must be preserved to assure public participation in civil dispute resolution**, the continued development of the common law, and a bar well-trained in advocacy. A civil justice system lacking in these elements will be very different, and in important respects, deficient. **The right to trial by jury, enshrined in both our federal and state constitutions**, cannot be allowed to become dead letter without every effort being made to preserve it.

Finally, it must also be noted that decline in civil jury trials, having continued as it has over decades, cannot easily be reversed and will likely be irreversible at some point. One can hope that point is still in the future.

[\*184]

#### APPENDIX A

|                                 | 1962   | 1985    | 1990    | 2002    |
|---------------------------------|--------|---------|---------|---------|
| Active U.S. Judges              | 279    | 500     | 541     | 615     |
| Civil Dispositions              | 50,320 | 268,070 | 213,020 | 258,876 |
| Civil Bench Trials              | 3,037  | 6,276   | 4,476   | 1,563   |
| Civil Jury Trials               | 2,765  | 6,253   | 4,781   | 3,006   |
| Criminal Defendant Dispositions | 33,110 | 47,360  | 56,519  | 76,827  |
| Criminal Bench Trials           | 2,387  | 1,409   | 1,693   | 919     |
| Criminal Jury Trials            | 2,710  | 4,644   | 6,181   | 2,655   |

[\*185]

[SEE FIGURE 1 IN ORIGINAL]

Active U.S. Judges

[SEE FIGURE 2 IN ORIGINAL]

[\*186]

[SEE FIGURE 3 IN ORIGINAL]

[SEE FIGURE 4 IN ORIGINAL]

[\*187]

#### APPENDIX B

|                    | 1986    | 2004    |
|--------------------|---------|---------|
| Trial Courts       | 532     | 652     |
| Civil Dispositions | 316,748 | 296,492 |
| Civil Jury Trials  | 3,639   | 1,865   |

|                       |         |         |
|-----------------------|---------|---------|
| Criminal Dispositions | 601,200 | 808,757 |
| Criminal Jury Trials  | 6,386   | 7,672   |

[SEE FIGURE 5 IN ORIGINAL]

Percent Change From 1986-2004  
[\*188]

#### APPENDIX C

|                                                |          | Federal<br>Courts<br>Civil Cases<br>1985-2002<br>Criminal<br>Cases<br>1990-2002 | Texas Courts Civil and<br>Criminal Cases<br>1986-2004 |
|------------------------------------------------|----------|---------------------------------------------------------------------------------|-------------------------------------------------------|
| Annual number of jury trials                   | Civil    | - 52%                                                                           | - 49%                                                 |
|                                                | Criminal | - 57%                                                                           | 20%                                                   |
| Annual rate of dispositions after jury trial   | Civil    | - 50%                                                                           | - 45.3%                                               |
|                                                | Criminal | - 68%                                                                           | - 10.7%                                               |
| Average annual number of jury trials per court | Civil    | - 61%                                                                           | - 58.2%                                               |
|                                                | Criminal | - 62%                                                                           | - 2.0%                                                |

[\*189]

[SEE FIGURE 6 IN ORIGINAL]

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure  
Guilty Pleas  
General Overview  
Criminal Law & Procedure  
Juries & Jurors  
Size of Jury  
General Overview  
Governments  
Courts  
Small Claims Courts

#### FOOTNOTES:

n1. See generally John Naisbitt, *Megatrends: Ten New Directions Transforming Our Lives* (Warner Books, Inc. 1982) (examining trends in American Society); John Naisbitt & Patricia Aburdene, *Megatrends 2000: Ten New Directions for the 1990's* (William Morrow & Co. 1990) (same); Andrew Zolli, *TechTV's Catalog of Tomorrow: Trends Shaping Your Future* (Que Publishing 2003) (same).

n2. William G. Young, *An Open Letter to U.S. District Judges*, Fed. Law., July 2003, at 30, 30.

n3. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459, 461, 492-93 (2004).

n4. *Id.*

n5. *Id.* at 461.

n6. Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. Empirical Legal Stud. 755, 755 (2004).

n7. *Id.* at 761-73.

n8. Galanter, *supra* note 3, at 459 n..

n9. *Id.* at 460 & nn.2-3.

n10. See *id.* at 461.

n11. *Id.* at 493 fig.23.

n12. *Id.* at 461, 462-63 tbl.1.

n13. Id. at 494, 496 fig.25.

n14. The statistical data relied upon to compile the table at Appendix A is found in tables scattered in the lengthy appendix of Professor Galanter's seminal article. See id. at 532-34, 554, 560.

n15. See *infra* app. A.

n16. See id.

n17. See Galanter, *supra* note 3, at 504 tbl.3.

n18. See id. at 502, 505.

n19. See *infra* app. A.

n20. Id.

n21. See id.

n22. See id.

n23. See id.

n24. See id.

n25. See id.

n26. See id.

n27. See id.

n28. See id.

n29. See id.

n30. The reports since 1996 are available on OCA's website, [http://www.courts.state.tx.us/oca/publicinfo/annual\\_reports.asp](http://www.courts.state.tx.us/oca/publicinfo/annual_reports.asp) (last visited Nov. 7, 2005).

n31. See, e.g., Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 39 n.1 & 44 n.1 (2004).

n32. See, e.g., id. at 36.

n33. See, e.g., Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 2003, 37-53 (2003).

n34. Id. at 38-39; see also id. at 52 (noting that there is no distinction between small claims court and a justice of the peace court and that the justice of the peace court is considered to principally function as a small claims court).

n35. *Id.* at 51-52.

n36. See Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 54, 57 (2004).

n37. See, e.g., *id.* at 42-43.

n38. See generally Office of Court Admin., Texas Judicial System Annual Reports, Fiscal Years 1986-2004 (compiling data from the Texas court system).

n39. Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 43 (2004).

n40. *Id.*

n41. *Id.*

n42. *Id.*

n43. See *id.* at 43, 48; Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 2003, 155, 269 (2003); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1995, 187, 315 (1995); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127, 138 (1986).

n44. See Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 42, 47 (2004); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1995, 188, 316 (1995); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1994, 176, 190 (1994); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 126, 139 (1986).

n45. See generally Office of Court Admin., Texas Judicial System Annual Reports, Fiscal Years 1986-2004 (compiling data from the Texas court system).

n46. The statistical data relied upon to compile the table at Appendix B is found in the OCA's annual reports from 1986 to 2004. Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004 (2004); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986 (1986).

n47. See *infra* app. B.

n48. *Id.*

n49. See *id.*

n50. *Id.*

n51. *Id.*

n52. 2. See app. C fig.3.

n53. See Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 43 (2004); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127 (1986).

n54. Tex. R. Civ. P. 166a(i).



n55. See generally Office of Court Admin., Texas Judicial System Annual Reports, Fiscal Years 1986-2004 (compiling data from the Texas court system).

n56. Stephen Stills, *For What It's Worth* (ATCO Records 1966).

n57. See Galanter, *supra* note 3, at 493-95; Am. Coll. of Trial Lawyers, *The "Vanishing Trial:" The College, the Profession, the Civil Justice System* 2 n.5 (2004) (noting that "on the criminal side of the federal trial docket, there is also a strong disincentive to go to trial - the mandatory minimum sentencing requirements and the Federal Sentencing Guidelines"), available at [http://www.actl.com/PDFs/Vanishing\\_Trial\\_wAppendices&uscore;Final.pdf](http://www.actl.com/PDFs/Vanishing_Trial_wAppendices&uscore;Final.pdf) (last visited Nov. 7, 2005).

n58. See Galanter, *supra* note 3, at 494-95.

Unless the court determines that a departure from the given sentencing range is warranted due to factors not adequately addressed by the guidelines, the court is bound by the limits of the guideline range. The sentence created is non-parolable, and the availability of good-time credit while in prison is limited, thus enhancing the determinacy and the severity of the guidelines. The guidelines offer an incentive to avoid trial in the form of a criminal-offense-level reduction (one axis of the sentencing grid) for what is termed "acceptance of responsibility." Although proceeding to trial does not automatically disqualify an offender for the reduction, the guidelines state that it is only in "rare situations" that the incentive can be preserved after exercising this option.

*Id.* (footnote omitted); Am. Coll. of Trial Lawyers, *supra* note 57, at 28-29.

The 15 years of experience under the Guidelines have reduced the frequency of criminal trials by the impact which this regime has had in bringing about guilty pleas.

1. A defendant who chooses to go to trial and to have a Judge or jury determine his guilt or innocence will pay a severe price under the Guidelines if convicted at trial.

2. Very little flexibility is left to defense counsel or the Judge after conviction to reduce the Guidelines sentence range.

*Id.*

n59. Galanter, *supra* note 3, at 495.

n60. See *id.* at 477-84.

n61. Kent D. Syverud, ADR and the Decline of the American Civil Jury, 44 UCLA L. Rev. 1935, 1942 (1997).

n62. Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405, 1416-17 (2002).

n63. See Syverud, *supra* note 61, at 1939 (explaining that the plaintiff's bar and judiciary promote civil litigation into settlements because the cost of litigation is too high).

n64. See Charles Silver, Does Civil Justice Cost Too Much?, 80 Tex. L. Rev. 2073, 2082-86 (2002) (explaining that the costs of discovery helps regulate needless discovery, which gives opponents access to desired information).

n65. See *id.* at 2093-98 (discussing the benefits and costs of civil discovery).

n66. See *id.* at 2095.

n67. Am. Coll. of Trial Lawyers, *supra* note 57, at 17.

n68. Tex. R. Jud. Admin. 6(b)(1), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. F app. (Vernon 2005).

n69. Am. Coll. of Trial Lawyers, *supra* note 57, at 18.

n70. See Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis,"

and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982, 982 (2003).

n71. See Galanter, *supra* note 3, at 517-18.

n72. 842 S.W.2d 266, 267 (Tex. 1992).

n73. *Id.* at 268 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

n74. See, e.g., *In re McKinney*, 167 S.W.3d 833, 834 (Tex. 2005) (per curiam); *In re Nexion Health at Humble, Inc.*, 48 Tex. Sup. Ct. J. 805, 2005 WL 1252271, at 1 (Tex. May 27, 2005) (per curiam); *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 734 (Tex. 2005); *In re AdvancePCS Health, L.P.*, 48 Tex. Sup. Ct. J. 584, 2005 WL 856961, at 1 (Tex. Apr. 15, 2005) (per curiam); *In re Wood*, 140 S.W.3d 367, 368 (Tex. 2004) (per curiam); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 225 (Tex. 2003); *In re First Texas Homes, Inc.*, 120 S.W.3d 868, 868 (Tex. 2003) (per curiam); *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234, 234-35 (Tex. 2002); *Callahan & Assocs. v. Orangefield Indep. Sch. Dist.*, 92 S.W.3d 841, 842 (Tex. 2002) (per curiam); *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 548 (Tex. 2002) (per curiam); *In re Serv. Corp. Int'l*, 85 S.W.3d 171, 172 (Tex. 2002) (per curiam); *In re Halliburton Co.*, 80 S.W.3d 566, 567 (Tex. 2002); *Mariner Fin. Group, Inc. v. Bossley*, 79 S.W.3d 30, 30-31 (Tex. 2002); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 752 (Tex. 2001); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 482 (Tex. 2001); *In re L & L Kempwood Assocs., L.P.*, 9 S.W.3d 125, 126 (Tex. 1999) (per curiam); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999) (per curiam); *In re Louisiana Pac. Corp.*, 972 S.W.2d 63, 63 (Tex. 1998) (per curiam); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 703 (Tex. 1998) (per curiam); *Burlington N. R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 629-30 (Tex. 1997); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 88 (Tex. 1996) (per curiam); *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) (per curiam); *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 897 (Tex. 1995) (per curiam); *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994) (per curiam); *Capital Income Props.-LXXX v. Blackmon*, 843 S.W.2d 22, 22 (Tex. 1992) (per curiam).

n75. See Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. Empirical Legal Stud. 843, 897-906, 910 (2004).

n76. See, e.g., *In re John M. O'Quinn, P.C.*, 155 S.W.3d 195, 197 (Tex. App. - Tyler 2003, orig. proceeding); *Tanox, Inc. v. Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 105 S.W.3d 244, 248-49 (Tex. App. - Houston [14th Dist.] 2003, pet. denied).

n77. See Kathleen A. Devine, Note, *Alternative Dispute Resolution: Policies, Participation, and Proposals*, 11 *Rev. Litig.* 83, 85-86 (1991) (noting that the federal government has provided for "effective administration of justice" via ADR mechanisms by way of the Federal Arbitration Act, which provides a framework for arbitration by private agreement). Many state legislatures have followed the federal government's lead and have passed laws "that encourage [the] early resolution of pending litigation through various settlement procedures." *Id.* at 86. "In June 1987 the Texas legislature unanimously approved the Alternate Dispute Resolution Procedures Act." *Id.* at 86 n.16.

n78. See Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 *SMU L. Rev.* 2079, 2079-80 (1993).

n79. See, e.g., *Bexar County (Tex.) Civ. Dist. Ct. Loc. R. 9(A)*.

All jury cases will be scheduled for an ADR hearing approximately four months before trial. At the ADR hearing it will be presumed that mediation should be ordered, but the ADR judge may decide that mediation would not be appropriate in a particular case. In most cases the court will order mediation and appoint a mediator.

*Id.*; *Harris County (Tex.) Civ. Dist. Ct. Loc. R. 3.4.3* ("In the discretion of the court, preference in setting cases for trial shall be given to matters in which the parties have participated in alternate dispute resolution procedures."); *Tarrant County (Tex.) Civ. Dist. Ct. Loc. R. 3.01(a)* ("On its own motion or by agreement of the parties, the Court will refer a case for resolution by an alternative dispute resolution procedure ... ."); *Travis County (Tex.) Civ. Dist. Ct. Loc. R. 17.4(a)* ("All cases set for trial on the merits on the jury docket or on the more than half day non-jury docket [Local Rule 2.4(a)], including cases set before an Associate Judge, are automatically referred to pre-trial mediation [with limited, specified exceptions].").

n80. See *E.D. Tex. Loc. R. app. H (c)(1)* (requiring parties in all cases, with specified exceptions, to consider alternative dispute resolution); *N.D. Tex. Civ. Just. Expense & Delay Reduction Plan IIIA* (requiring parties in all cases to consider alternative dispute resolution); *S.D. Tex. Loc. R. 16.4.A* (requiring parties to discuss settlement and alternative dispute resolution); *W.D. Tex. Loc. R. CV-88(a), (c)* (providing for, but not requiring, alternative dispute resolution).

n81. See Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 *J. Empirical Legal Stud.* 571, 585 (2004).

It seems that ADR could affect the trial rate (as opposed to the absolute number of trials) in two ways: first, if

ADR is keeping out of court cases that are disproportionately those that would have gone to trial, and second, if court-annexed ADR is causing more settlements than otherwise would have occurred before trial. I am not aware of reliable studies that support either proposition.

Id.

n82. See Am. Coll. of Trial Lawyers, *supra* note 57, at 22 ("Mandatory ADR ... in some cases, may betray a judicial hostility toward trial.").

n83. See generally Tex. Lab. Code Ann. 401.001-.023 (Vernon 1996 & Supp. 2005) (encompassing the Texas Worker's Compensation Act).

n84. Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127 (1986).

n85. See *id.*

n86. See Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 43 (2004).

n87. See *id.* (In 2004, there were 417 worker's compensation cases disposed of in total.); see also Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127 (1986) (In 1986, there were a total of 430 worker's compensation cases disposed of by jury trials.).

n88. See *infra* app. B (In 1986, there were 3,777 civil jury trials, and in 2004, there were 1865 civil jury trials - a difference of 1,912.); see also Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 43 (2004) (In 2004, there were 24 civil jury trial disposing of compensation cases - a difference of 406 from 1986.); Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127 (1986) (In 1986, there were 430 compensation cases disposed of by jury trials.).

n89. See, e.g., *Nat'l Union Fire Ins. Co. v. Russell*, 972 F.2d 628, 630 (5th Cir. 1992).

n90. Scott Atlas & Nancy Atlas, Potential ADR Backlash: Where Have All the Trials Gone? To Mediation or Arbitration, *Disp. Resol. Mag.*, Summer 2004, at 14, 15.

n91. Am. Coll. of Trial Lawyers, *supra* note 57, at 10 (Out of twelve factors listed as being contributors to the decline of civil jury trials in federal courts, tort reform was listed as the tenth in relation to its impact.).

n92. See Galanter, *supra* note 3, at 483-84; see also Stephen Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?, 1 *J. Empirical Legal Stud.* 591, 593, 616 (2004).

n93. See generally Miller, *supra* note 70 (examining the use of summary judgments to dispose of litigation before trial).

n94. Am. Coll. of Trial Lawyers, *supra* note 57, at 14.

n95. See Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127 (1986) (In 1986, there were a total of 6,600 dispositions by summary judgment.); see also Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 43 (2004) (In 2004, there were a total of 3,771 dispositions by summary judgment.).

n96. See Office of Court Admin., Texas Judicial System Annual Report, Fiscal Year 1986, 127 (1986) (In 1986, there were 3,709 civil dispositions by jury trial - which is 56% of the number of dispositions by summary judgment. The difference between the total number of dispositions by summary judgment and by civil jury trial was 2,891.); see also Office of Court Admin., Annual Report of the Texas Judicial System, Fiscal Year 2004, 43 (2004) (In 2004, there were 1,439 dispositions by jury trial, which is a 61% decrease from 1986. Dispositions by summary judgment in 2004 was 3,771, which is a 43% decrease from 1986. The difference between the total number of dispositions by summary judgment and by jury trial in 2004 was 2,332.).

n97. See *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

n98. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Celotex Corp. v. Catrett*, 477 U.S.

317, 322 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). See generally Miller, *supra* note 70 (discussing the increased use of summary judgments in the federal system as a result of the 1986 trilogy.).

n99. See Tex R. Civ. P. 166(a)(i).

n100. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 *Harv. L. Rev.* 924, 995 (2000).

n101. Miller, *supra* note 70, at 1004.

n102. Am. Coll. of Trial Lawyers, *supra* note 57, at 12.

n103. See, e.g., *Dear v. Scottsdale Ins. Co.*, 947 S.W.2d 908, 911 (Tex. App. - Dallas 1997, writ denied) (involving three mediations in the same case).

n104. Am. Coll. of Trial Lawyers, *supra* note 57, at 22.

n105. See Stephan Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 *J. Empirical Legal Stud.* 973, 982 (2004).

n106. William Blackstone, 3 *Commentaries* 379.

n107. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830).

n108. *Jacob v. New York City*, 315 U.S. 752, 752 (1942).