



2011 Forum for State Appellate Court Judges

The Jury Trial Implosion: The Decline of Trial by Jury and Its Significance for Appellate Courts

THE CONTINUING DECLINE OF CIVIL TRIALS IN AMERICAN COURTS

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Executive Summary

In part I (“A Declining Portion of Cases Are Tried”), the authors document the steady decline in the portion of civil cases that have ended in trials over the last 50 years. In the federal courts the trend is approximately the same for both jury and bench trials, although there are actually fewer bench trials than jury trials at the present time. The state courts also show declines in both types of trial, but the decline in jury trials has been more gradual.

Part II (“Decline in the Absolute Number of Civil Trials”) examines comparable trends in the absolute number of federal civil trials in the past 10 years, and again finds significant declines. Again, the state data for 1976-2005, from several sources, is similar, showing declines in both jury and bench trials.

In part III (“Changing Composition of the Civil Trial Docket”), the authors investigate changes in the types of civil cases coming before the courts. In the federal courts, tort cases have largely been supplanted by civil rights cases. In the state courts, the shifts are more subtle, but relative increases are noticeable since 1992 in the presence of both automobile-related torts and medical negligence cases.

Part IV (“Comparison of Federal and State Trends”) compares the changes across the two court systems, and notes the steep declines in the number of federal criminal trials. It also examines trends in case types, geographic trends, and the stages at which cases terminate. The latter data show a major increase, in the past 50 years, in the portion of federal cases that terminate before a pretrial conference is held.

In part V (“The Road to Extinction”) and part VI (“What Difference Does Fewer Trials Make?”), the authors observe that the civil trial appears to be “approaching extinction,” and they observe shifts in ideology in which judges function increasingly as managers of dispute resolution, not as courtroom judges conducting trials before the public. They examine 50-year data on trials per sitting judge, trials per capita, and the number of trials compared with the U.S. gross domestic product. They also observe the contrast between the images of civil litigation and criminal trials that are found in the mass media and the reality of the small number of cases that reach trial. Finally, they consider whether courts are increasingly seen as just another arm of government. They ask whether the high esteem in which judges are held will continue when they are engaged less in providing accountability in a public setting and more in the type of management that can be found in any other government office.

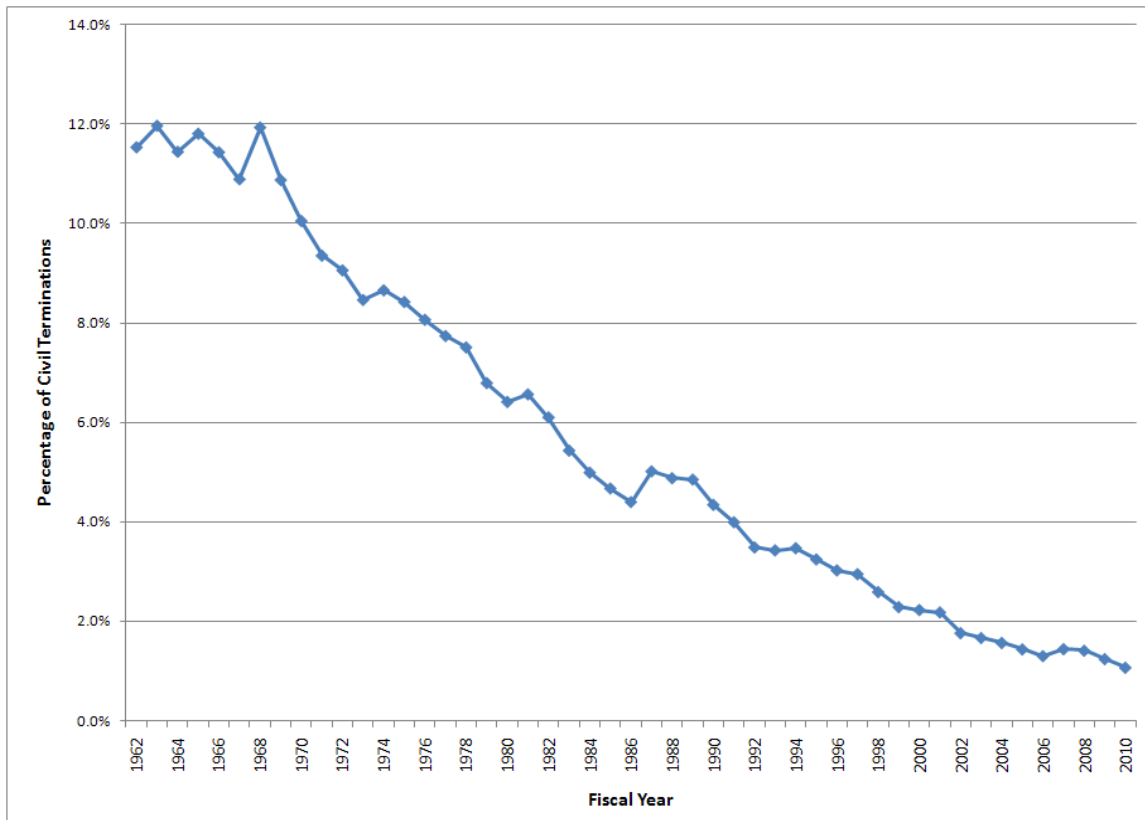
The recent data on civil trials can be summed up in two stories: *no news* and *big news*. The *no news* story is that the trend lines regarding the decline of trials are unchanged. The *big news* story is that the civil trial seems to be approaching extinction. Let’s look at the data first, then at some of their implications.

There are two components to the major trend lines. First, there is the century-long decline in the portion of cases terminated by trial. Second, there is the twenty-five year decline in the absolute number of civil trials. We begin with the former. We begin by presenting a picture of trials in the federal courts. The data from those courts is more abundant, more comprehensive, covers a longer period and provides a useful template against which we can measure changes in the state courts.

I. A Declining Portion of Cases Are Tried

A. Federal Courts

Figure 1
Percentage of Civil Terminations During or After Trial,
US District Courts, 1962-2010

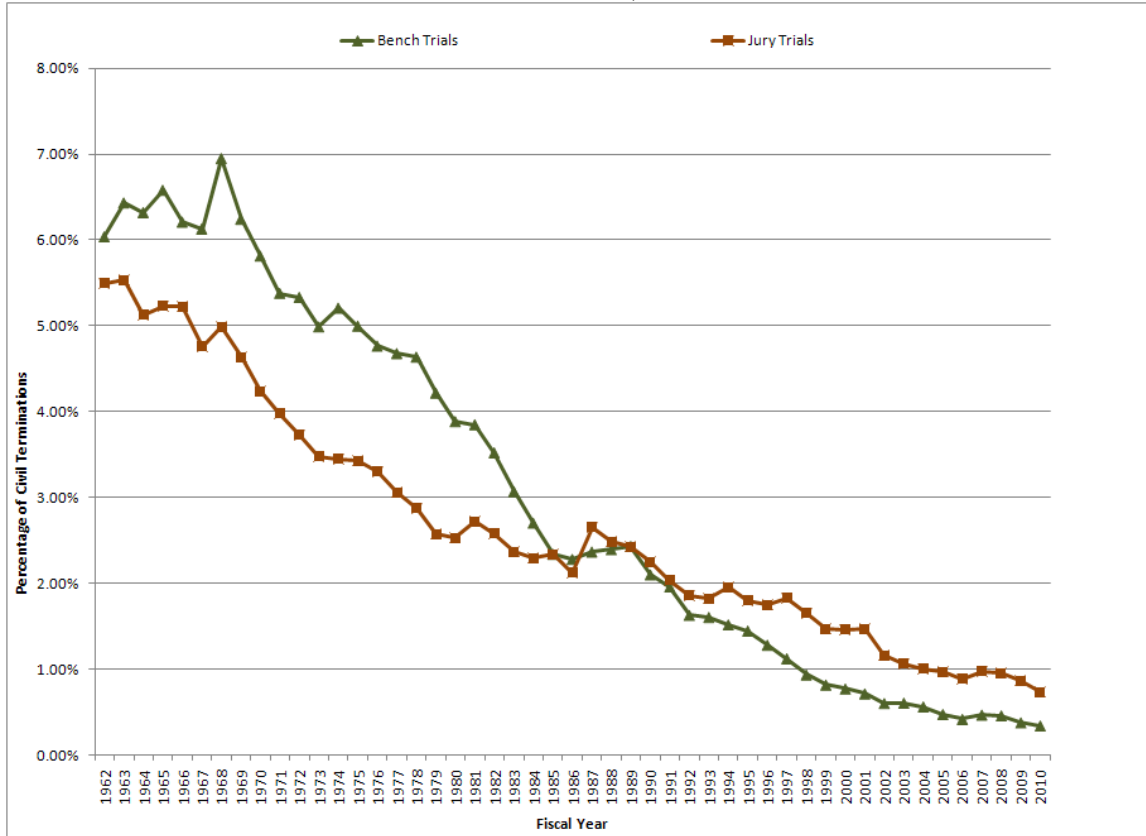


The steady decline depicted in Figure 1 is a continuation of a much longer decline of trials as a portion of terminations in the federal courts.¹ Both bench and jury trials have declined, but the decline of bench trials has been steeper. In every year before 1987, there were more bench trials than jury trials. But the ratio of bench to jury trials has been falling steadily, so that by 2009, there were 2138 jury trials but only 1026 bench trials. In 2009 there were just 41% as many jury trials as there were twenty-five years earlier, in 1984. But there were only 15% as many bench trials. The number of bench trials rebounded slightly in 2010 to 1058, but bench trials as a percent of total dispositions further decreased to 0.34%, compared to 6.04% in 1962 and 2.35% 25 years ago (right around the time bench trials began a steeper decline than jury trials). Jury trials also reached a new low in 2010 relative to total dispositions, at 0.73%. This is compared to

¹ Galanter, “The Hundred-Year Decline of Trials and the Thirty Years War,” 57 *STANFORD L. REV.* 1255, 1257-59 (2005) [Hereafter HYD].

5.49% in 1962 and 2.33% in 1985. Civil jury trial rates have now been below 1.0% since 2005, while bench trials dropped below 1.0% seven years earlier, in 1998.

Figure 2
Percentage of Civil Terminations by Bench and Jury Trials,
US District Courts, 1962-2010

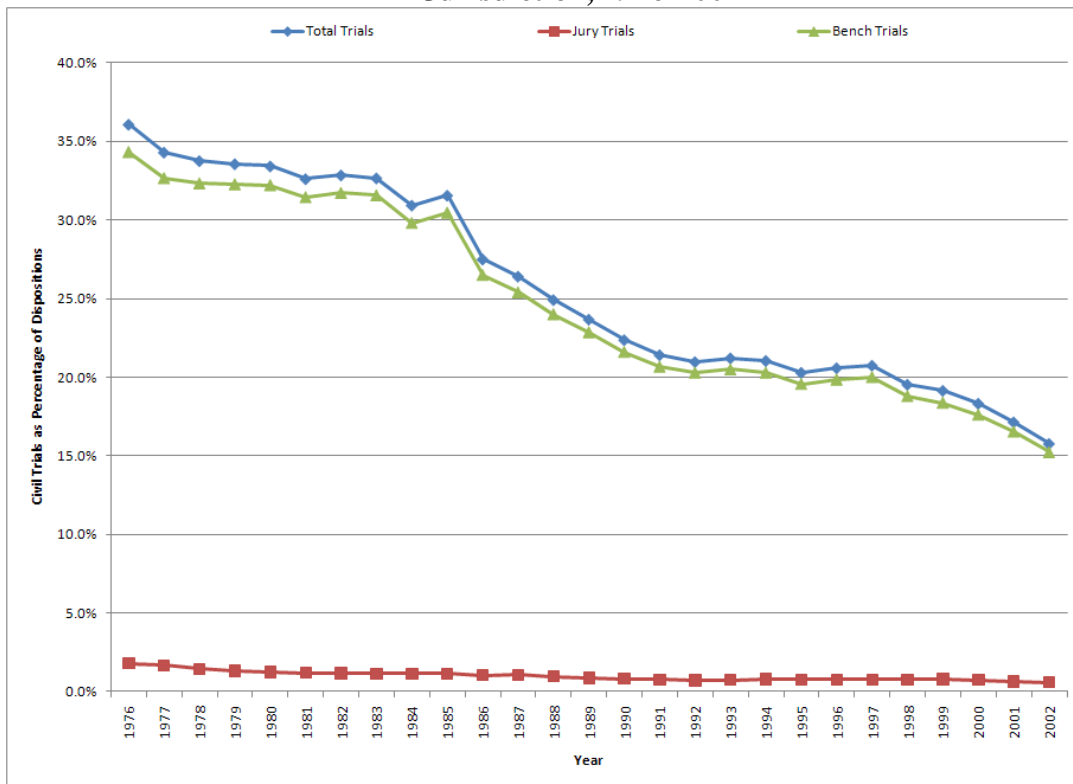


B. State Courts

The most comprehensive data regarding the state courts comes from the National Center for State Courts, which examined disposition data in the general jurisdiction courts of 22 states from 1976-2002.² During that period, civil trials declined from 36.1% to 15.8%. The 22 states (including the District of Columbia) surveyed included a cross-section of the country both geographically and in terms of population.

Additional information utilizing the state data provided by many of the Forum participants will be provided during the presentation of this paper. Our initial review of some of this new state data indicates that there continues to be a significant downward trend in the percentage of terminations by trial in virtually every jurisdiction.

Figure 3
Civil Trials as a Percentage of Dispositions in 22 State Courts of General Jurisdiction, 1976-2002



As we will see below, this picture is confirmed by data from the State Courts in a 45 county sample of the 75 most populous counties in the U.S. collected by the Bureau of Justice Statistics of the U.S. Department of Justice (referred to below as the BJS Data). The total number of civil trials in these counties fell by 52% from 22,451 in 1992 to 10,813 in 2005.

² Brian J. Ostrom, Shauna Strickland & Paula Hannaford, “Examining Trial Trends in State Courts: 1976-2002,” 1 J. EMPIRICAL LEGAL STUD. 755 (2004). (Hereafter NCSC.)

II. Decline in the Absolute Number of Civil Trials

A. Federal Courts

The absolute number of civil trials continues to decline.³ In 2009 just 3271 trials were commenced in the district courts. This is roughly half the number of trials commenced ten years earlier (6228 in 1999). It is 44% less than the number of trials (5802) in 1962, when there were about one-fifth of the total number of cases terminated in the district court. In other words, the ratio of trials to filings is about one-twelfth what it was in 1962. And while in 2010 the absolute number of trials increased slightly to 3309 (+1.1%) the percentage of dispositions by trial decreased.

The count of trials displayed in Figure 4 is, in two separate ways, a very generous count of trials. First, it is based on a very broad definition of trial as “a contested proceeding before a jury or court at which evidence is introduced,”⁴ a standard that allows more than one trial in a given case. Second, the “during and after” number includes all cases that reach the trial stage, not just those that complete it. Figures for the years up to 2002 indicated that nearly one-fifth of such cases were resolved during trial.⁵

We have utilized the long-standing Table C-4 of the Annual Report of the Administrative Office of the U.S. Courts (AO), which counts cases that terminate “during or after trial.” In the AO’s Table T-1 (which has been published since 1991) an additional column has been added to Jury and Nonjury trials “On the Issue” to produce a new enlarged total of civil trials. That additional column is “Motions, Injunctions, and Other,” which is explained in a note as “contested hearing[s] on motions for preliminary injunctions, temporary restraining orders, evidence or other matters not resulting in a final judgment or verdict.” After a general decline in the absolute number of these matters for a decade, they have begun to increase since 2006. The ratio of MIO compared to Total Jury and Nonjury trials increased notably in 2006 and has generally increased since then.

³ Adjustments have been made to the 2007 and 2008 data to account for a large number of misreported cases in the Middle District of Louisiana related to oil refinery explosions.

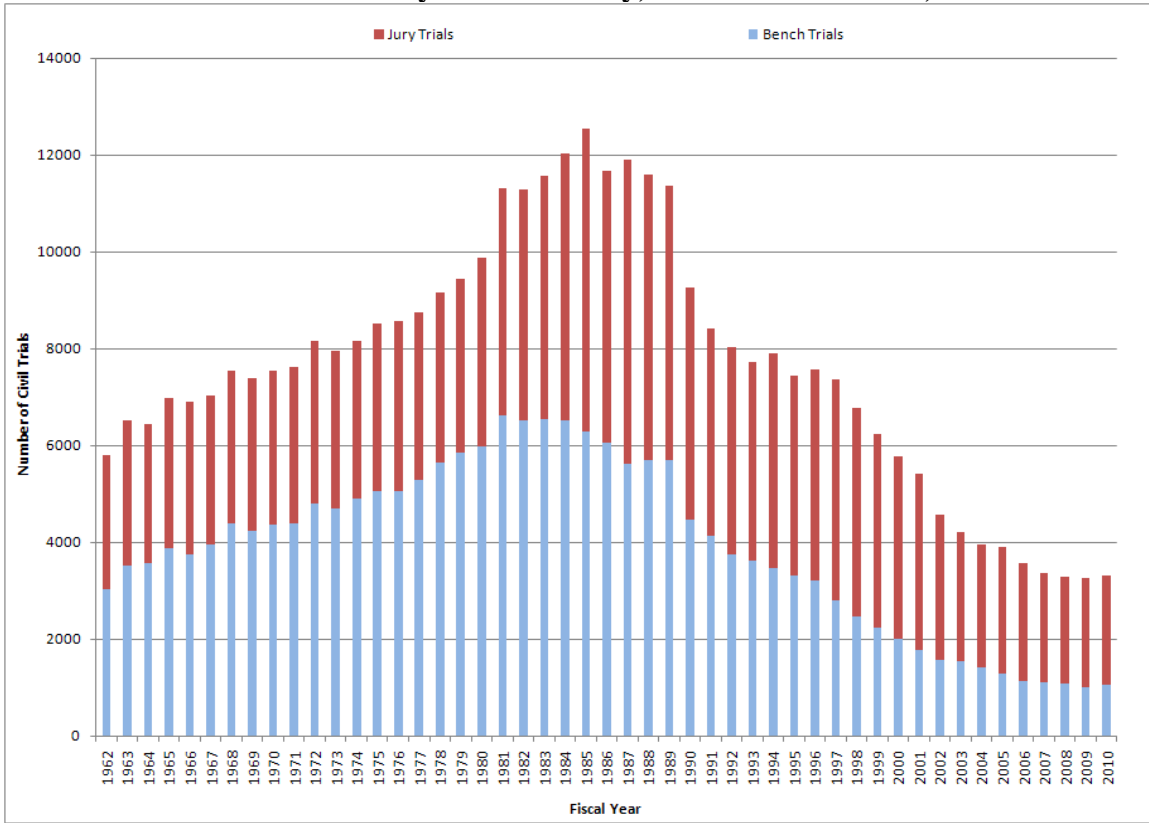
⁴ AO Form JS-10

⁵ Galanter, “The Vanishing Trial,” 1 J. EMPIRICAL LEGAL STUDIES 459, 462 Fig. 3. (2004) [Hereafter, VT] (Data to be updated at a later time.)

Table 1
Civil Trials as Reported in Table T-1
of the Report of the Administrative Office of the United States Courts

Year	Jury Trials on Issue	Nonjury Trials on Issue	Total Jury and Nonjury (TJN)	Motions, Injunctions and Other (MIO)	Grand Total including MIO (GT)	MIO as % of Grand Total	MIO as % of TJN
1991	4,517	3,665	8,182	2,842	11,024	25.78%	34.7%
1992	4,378	3,413	7,791	2,965	10,756	27.57%	38.1%
1993	4,245	3,322	7,567	2,999	10,566	28.38%	39.6%
1994	4,380	2,987	7,367	3,106	10,473	29.66%	42.2%
1995	4,249	2,801	7,050	3,345	10,395	32.18%	47.4%
1996	4,401	2,646	7,047	3,296	10,343	31.87%	46.8%
1997	4,491	2,380	6,871	3,284	10,155	32.34%	47.8%
1998	4,125	2,148	6,273	3,076	9,349	32.90%	49.0%
1999	3,795	1,929	5,724	2,808	8,532	32.91%	49.1%
2000	3,404	1,730	5,134	2,799	7,933	35.28%	54.5%
2001	2,980	1,490	4,470	2,043	6,513	31.37%	45.7%
2002	2,650	1,469	4,119	1,896	6,015	31.52%	46.0%
2003	2,603	1,433	4,036	1,794	5,830	30.77%	44.4%
2004	2,411	1,386	3,797	1,695	5,492	30.86%	44.6%
2005	2,312	1,375	3,687	1,607	5,294	30.36%	43.6%
2006	2,097	1,114	3,211	1,910	5,121	37.30%	59.5%
2007	2,269	1,118	3,387	2,213	5,600	39.52%	65.3%
2008	2,175	1,069	3,244	2,039	5,283	38.60%	62.9%
2009	2,138	1,026	3,164	2,145	5,309	40.40%	67.8%
2010	2,154	1,026	3,180	2,180	5,360	40.67%	68.6%
Change 1991-2010	-2,491	-2,639	-5,002	-662		+15.11%	+33.9%
% Change	-52.3%	-72.0%	-61.1%	-23.3%	-5,664 -48.6%	*****	*****

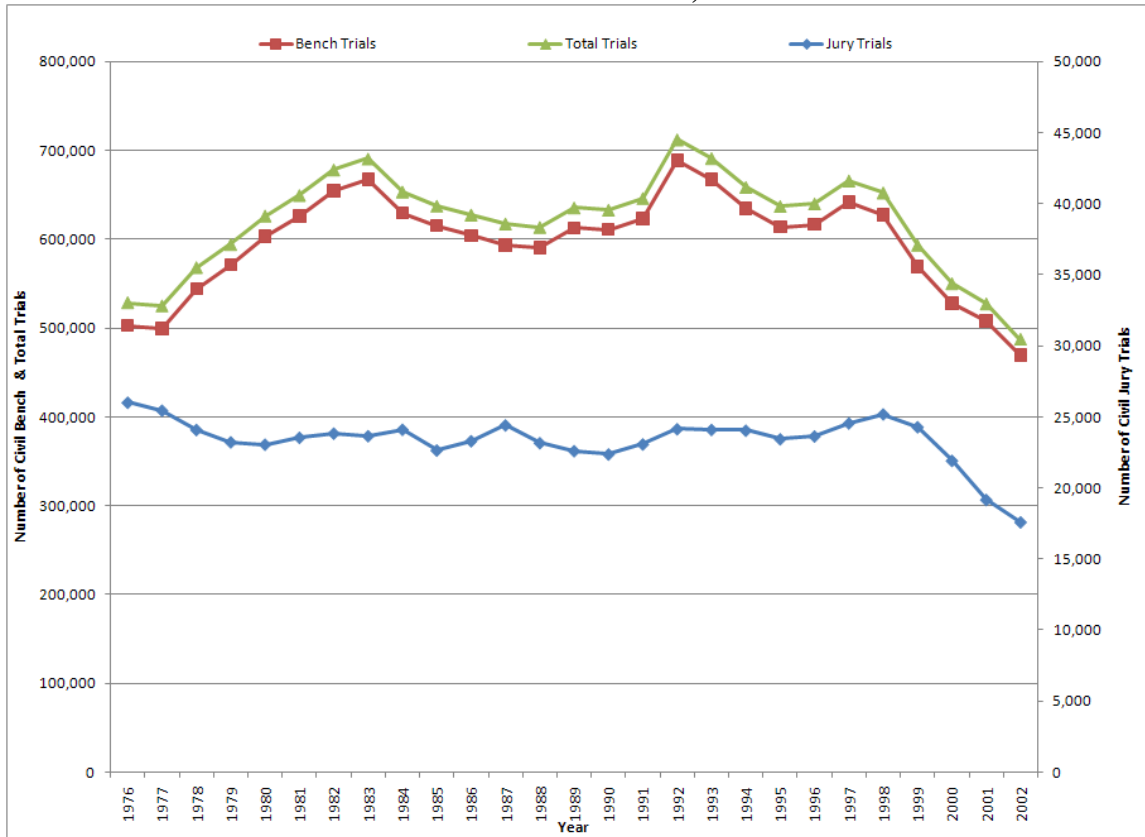
Figure 4
Number of Civil Trials by Bench or Jury, U.S. District Courts, 1962-2010



B. State Courts

As Figure 5 shows, the state courts exhibit a pattern of declining civil trials that resembles that in the federal courts. The steady fall in the absolute number of trials begins later in the states, in the early-1990s as opposed to the mid-1980s for the federal courts. In both state and federal courts, the decline in jury trials is preceded by a decline in bench trials.

Figure 5
Absolute Number of Bench and Jury Civil Trials Terminated in 22 State General Jurisdiction Courts, 1976-2002⁶



Data from the Bureau of Justice Statistics' (BJS) periodic studies of the 75 most populous counties provides much more detail on developments in the state courts.⁷ As shown in Table 2 below the absolute number of civil trials decreased 51.8% from 1992 to 2005. Trials on every subject declined over this period, but some subject types fell more dramatically than others. Premises liability and product liability saw declines of 59.7% and 65.8% respectively, while medical malpractice only declined 9.5%. In contracts, employment (9.83%) saw significantly less decline than fraud (47.04%), buyer plaintiff (51.19%) and seller plaintiff (72.90%). Real Property saw the greatest decline at 77.11%.

⁶ NCSC.

⁷ THOMAS H. COHEN, PH.D. AND LYNN LANGTON, M.A., CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005. Available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=554>. (Hereafter BJS.)

Table 2
Number of Trials in State Courts of General Jurisdiction in Sample of
75 Most Populous Counties in Select Years, 1992-2005⁸

	1992	1996	2001	2005	Change 1992- 2005
All	22451	15638	11908	10813	-51.84%
Tort	11660	10278	7948	7038	-39.64%
Automobile	4980	4994	4235	3545	-28.82%
Premises Liability	2648	2232	1268	1067	-59.71%
Product Liability	657	421	158	225	-65.75%
Medical Malpractice	1347	1201	1156	1219	-9.50%
Contract	9477	4850	3698	3474	-63.34%
Fraud	1116	668	625	591	-47.04%
Seller Plaintiff	4063	1637	1208	1101	-72.90%
Buyer Plaintiff	1557	832	793	760	-51.19%
Employment	468	621	453	422	-9.83%
Real Property	1315	510	262	301	-77.11%

Table 3
Percentage of Total Civil Trials by Case Type in State Courts of General
Jurisdiction in Sample of 75 Most Populous Counties
in Select Years, 1992-2005

	1992	1996	2001	2005
All	100.00%	100.00%	100.00%	100.00%
Tort	51.94%	65.72%	66.75%	65.09%
Automobile	22.18%	31.94%	35.56%	32.78%
Premises Liability	11.79%	14.27%	10.65%	9.87%
Product Liability	2.93%	2.69%	1.33%	2.08%
Medical Malpractice	6.00%	7.68%	9.71%	11.27%
Contract	42.21%	31.01%	31.05%	32.13%
Fraud	4.97%	4.27%	5.25%	5.47%
Seller Plaintiff	18.10%	10.47%	10.14%	10.18%
Buyer Plaintiff	6.94%	5.32%	6.66%	7.03%
Employment	2.08%	3.97%	3.80%	3.90%
Real Property	5.86%	3.26%	2.20%	2.78%

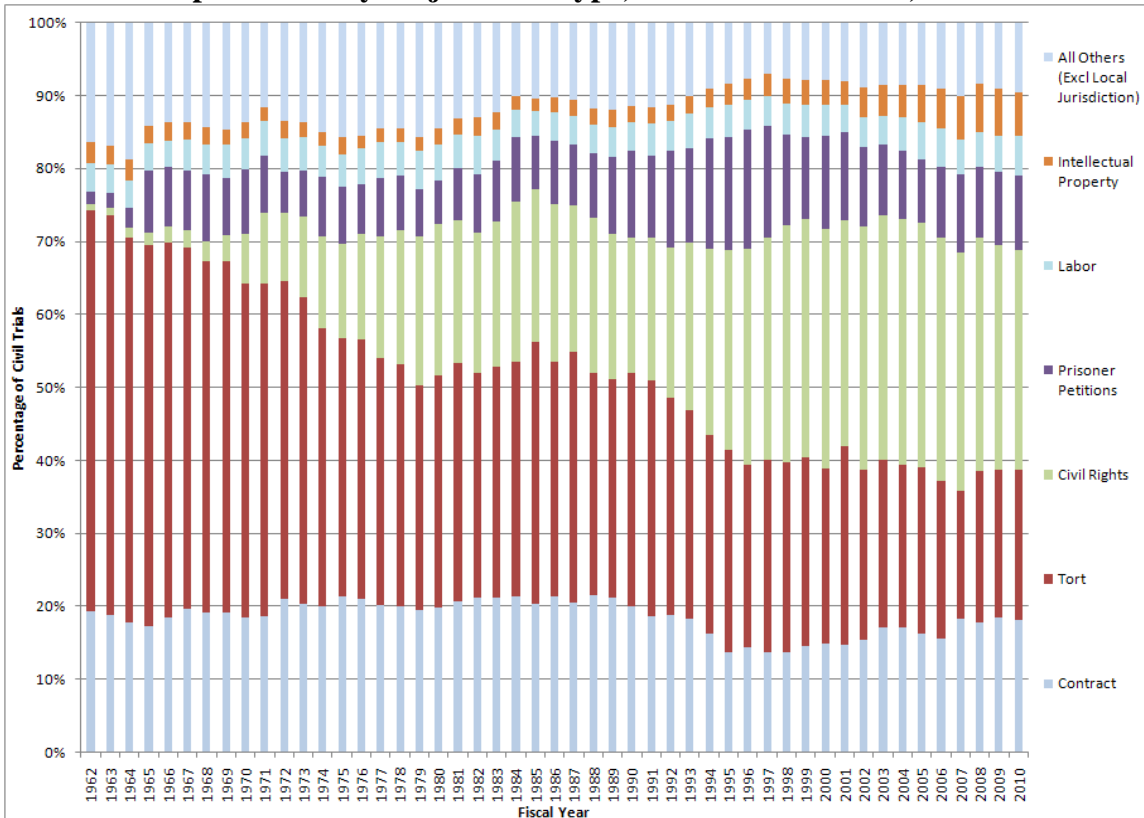
⁸ The counties included in the sample changed slightly over the course of the four BJS studies: San Jose, CA was added and Santa Clara, CA was excluded in 1996; Norfolk, MA was excluded in 2001 and 2005; and Mecklenberg, NC and El Paso, TX were added in 2001 and 2005.

III. Changing Composition of the Civil Trial Docket

A. Federal Courts

Along with the decline in civil trials, the composition of the civil trial docket has undergone some substantial changes over the last half-century. In 1962, nearly 55% of all civil trials were tort cases; in 2010 torts fell to 20.5% of civil trials. Over that same time period civil rights gained a significantly larger share of trials, increasing from a mere 0.9% in 1962 to 30.2% in 2010. Given the enactment of landmark civil rights legislation in the 1960s, the growth in this category in the late 1960s and early 1970s is not unexpected. The growth in this category as a percentage of trials was steep from the late 1960s until the late 1970s when civil rights began to consistently be between 19 and 22% of trials. The portion increased notably again, in the mid-1990s, within a few years of the passage of the Americans with Disabilities Act. Two years post-ADA (2002) civil rights trials were 20.7% of all civil trials and five years later the portion increased to 30.5%, and has not dropped below 30% since that time. Unfortunately, the Administrative Office’s C-4 Table does not provide much detail as to the type of civil rights cases terminated. In 1982, the civil rights category was divided into two sub-categories: civil rights employment and other civil rights. Additional break-down was not provided until 2008, when “ADA-Employment” and “ADA-Other” sub-categories were added. Prisoner petitions and intellectual property cases have also increased in their portions since 1962.

Figure 6
Makeup of Trials by Major Case Type, U.S. District Courts, 1962-2010



B. State Courts

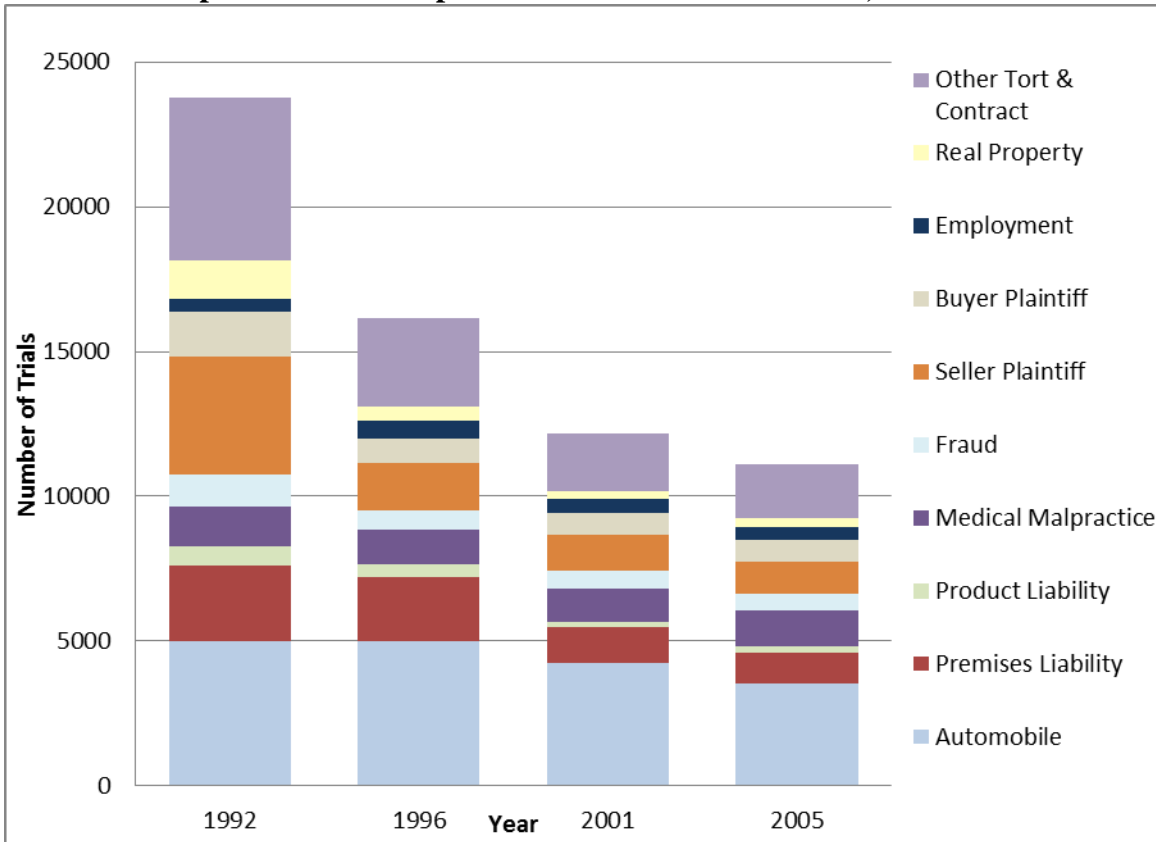
Figure 7 exhibits the shift in the composition of civil trials within the BJS 75-county sample:

Figure 7
Percentage of Civil Trials in Courts of General Jurisdiction by Case Type in Sample of 75 Most Populous Counties in Select Years, 1992-2005⁹



⁹ Some tort and contract case types were not specifically broken out in the BJS research. Those terminations are in the “Other Tort & Contract” category. (Applies to Figures 7 and 8)

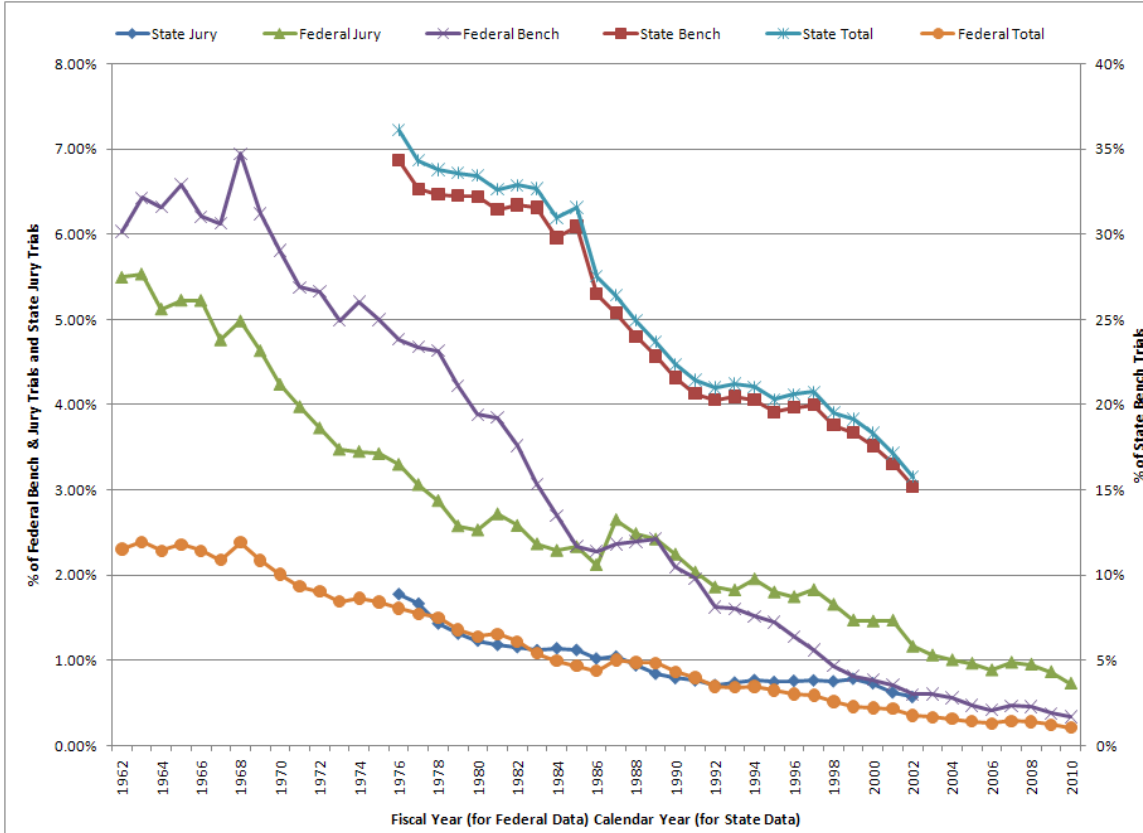
Figure 8
Number of Civil Trials in Courts of General Jurisdiction by Case Type in
Sample of 75 Most Populous Counties in Select Years, 1992-2005



IV. Comparison of Federal and State Trends

A. Comparison of Decline

Figure 9
Percentage of Civil Terminations by Trial in U.S. District Courts and General Jurisdiction Courts in 22 States (1962-2011 Federal, 1976-2002 State)

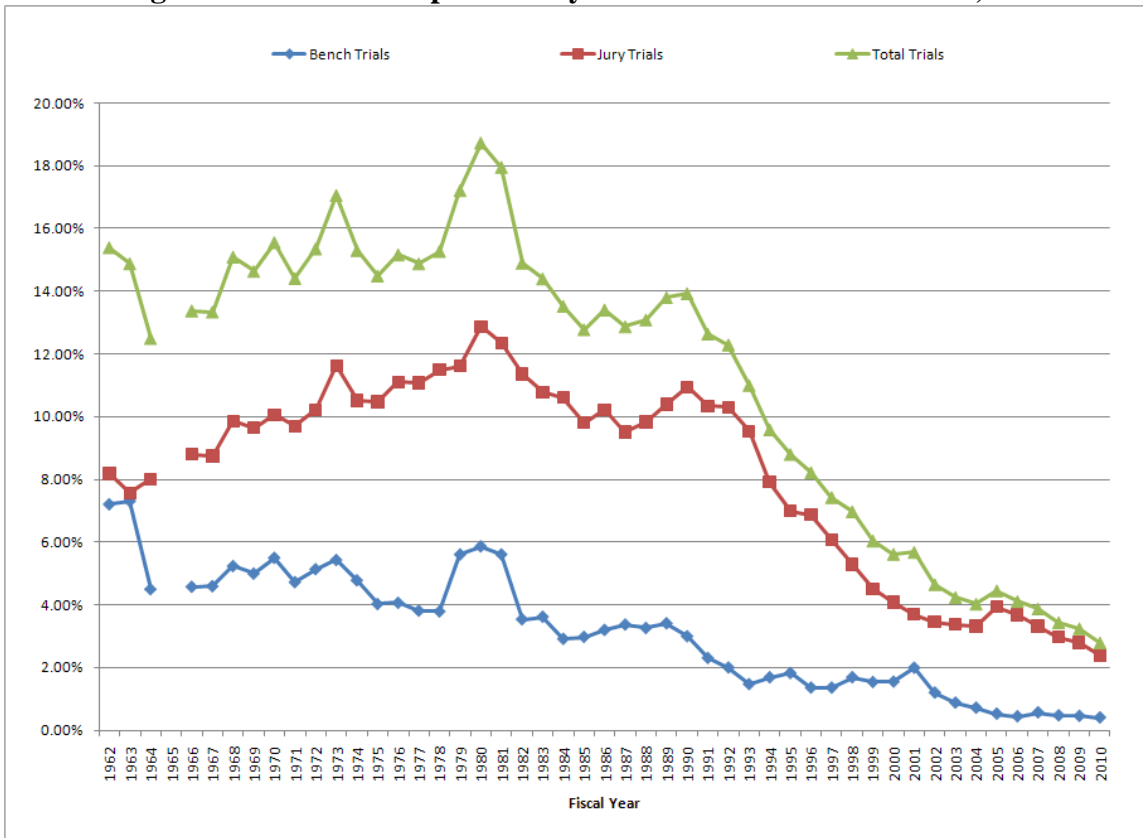


In the federal courts, there has been a great fall in tort trials, both absolutely and as a portion of the total. In the BJS's 75 counties torts fall more moderately in absolute terms. But since everything else fell much more, torts actually become a larger percentage of trials, increasing from 48% to 65% of all trials from 1992 to 2005. Among torts, medical malpractice has followed a distinctive path, falling only slightly (some 9% from 1992 to 2005) while other tort categories have undergone massive declines. As a result, over the course of the four BJS surveys, medical malpractice has risen from one of every nine tort trials to more than one out of every six—and since torts is a growing portion of all trials, these medical malpractice trials are now almost one of every eight of the total number of trials in these courts (Table 2).

B. Relation to change in criminal trials

It is worth mentioning that the decline in civil trials cannot be accounted for by a corresponding rise in criminal trials. Criminal trials have also been declining in both federal and state courts.

Figure 10
Percentage of Defendants Disposed of by Trial in U.S. District Courts, 1962-2010



In the federal courts the decline in the rate of criminal cases that reach trial begins much later than the decline in the rate of civil trials (cf. Figure 1). Jury trials are predominant and remain so. Figure 11 shows the trial rate in criminal cases becoming much higher than the rate in civil cases from the late 1960s but then falling more rapidly, so they are converging at present.

Figure 11
Civil and Criminal Trial Rates in U.S. District Courts, 1962-2010
(Base Civil Data is Number of Terminations, Base Criminal Data is Number of Defendants Terminated)

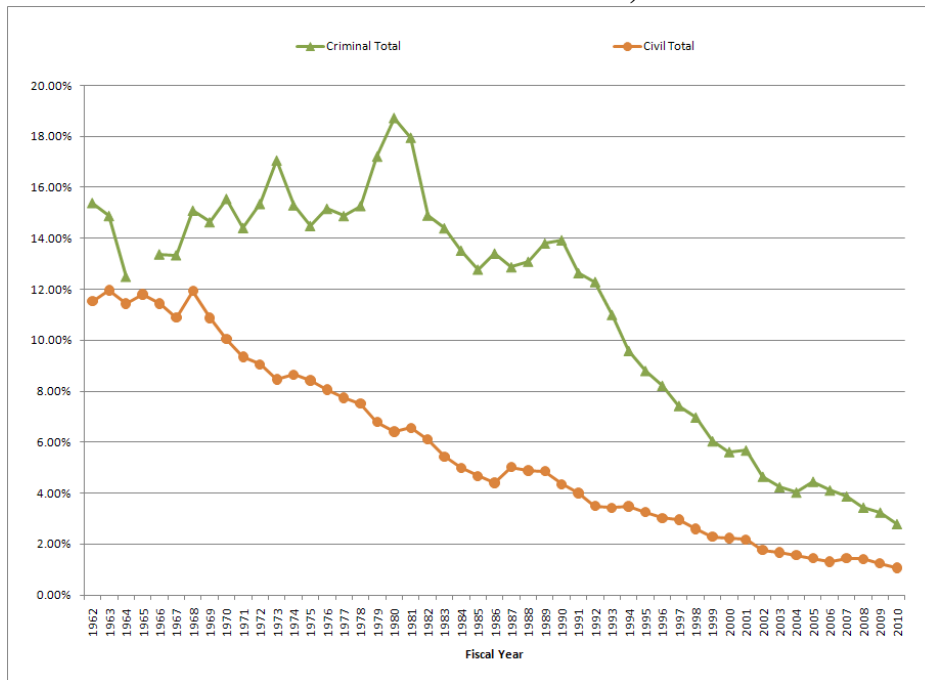
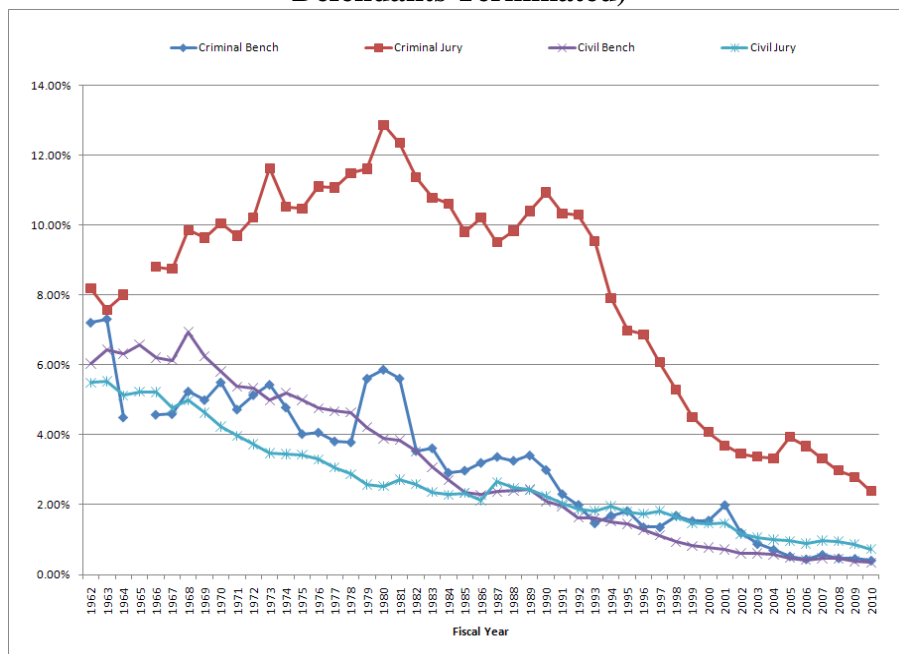


Figure 12
Bench and Jury Trial Rates in U.S. District Courts, 1962-2010
(Base Civil Data is Number of Terminations, Base Criminal Data is Number of Defendants Terminated)



C. Decline by Case Type

The decline of trials is quite general and not confined to cases of any particular type. Since the mid-1980s, the number of trials has fallen in every major category.

Figure 13
Number of Civil Trials, by Major Case Types, U.S. District Courts, 1962-2010

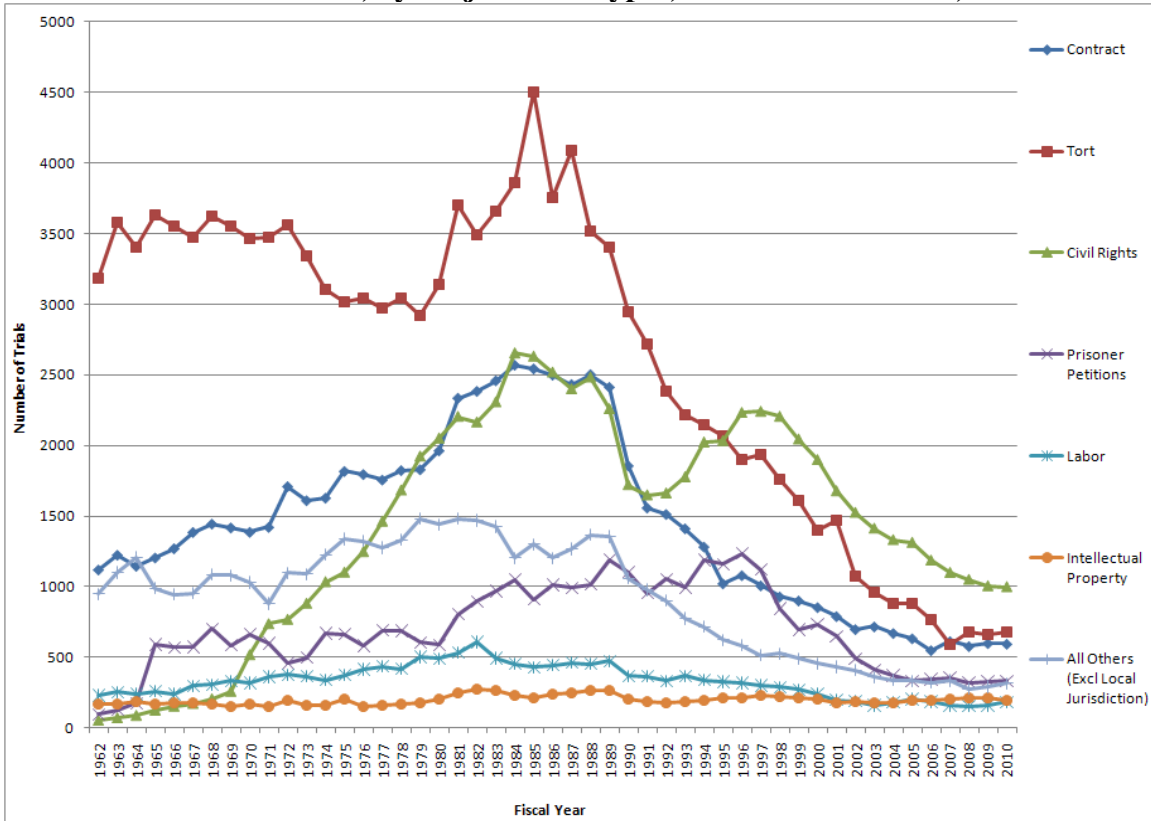
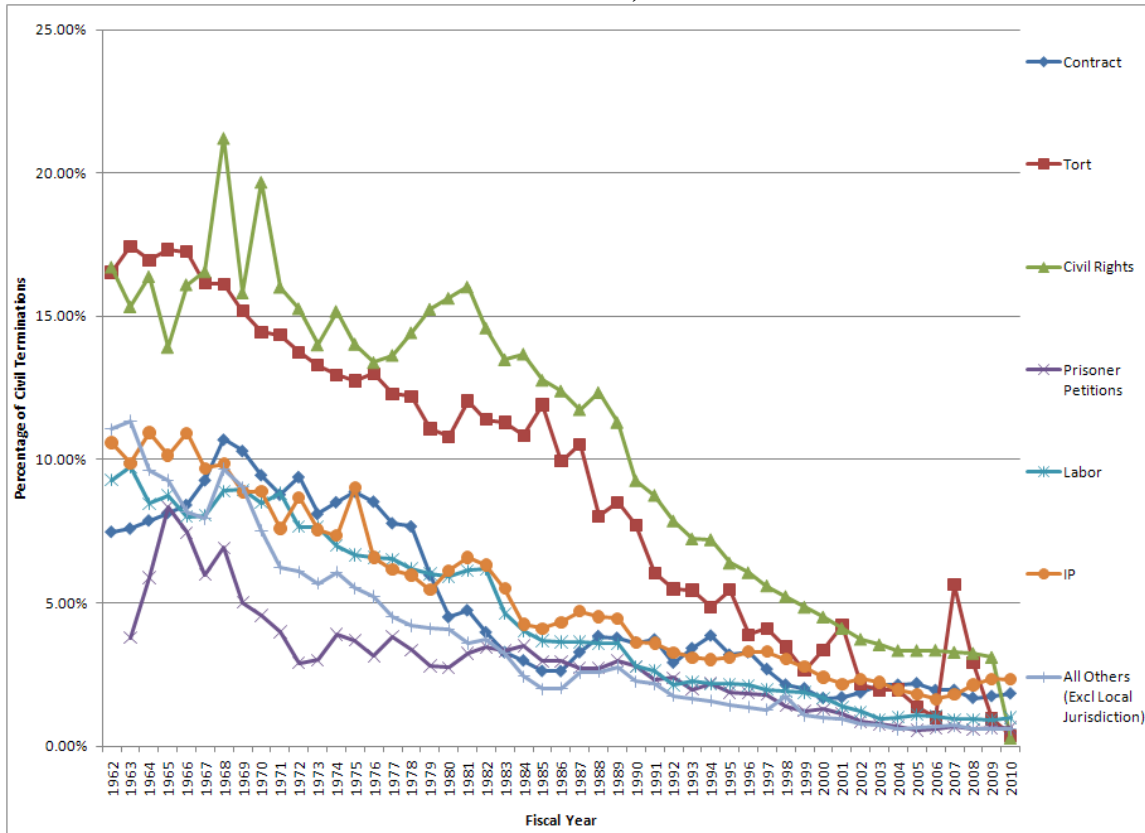


Figure 14
Percentage of Civil Cases that Reach Trial in Each Major Case Category,
US District Courts, 1962-2010



In the federal courts, the decline is steepest in torts and contracts, which have become a smaller portion of all trials. As a result, a growing portion of trials are in civil rights cases and prisoner petition, even though these categories too are declining in absolute numbers.

D. Change in Timing of Disposition

While fewer cases reach the trial stage, in the federal courts the portion terminating without court action has shrunk dramatically. The portion reaching pre-trial is relatively steady. The great majority of cases terminate in the “Before Pretrial” stage.

Figure 15
Number of Cases Terminated at Each Stage, U.S. District Courts, 1962-2010

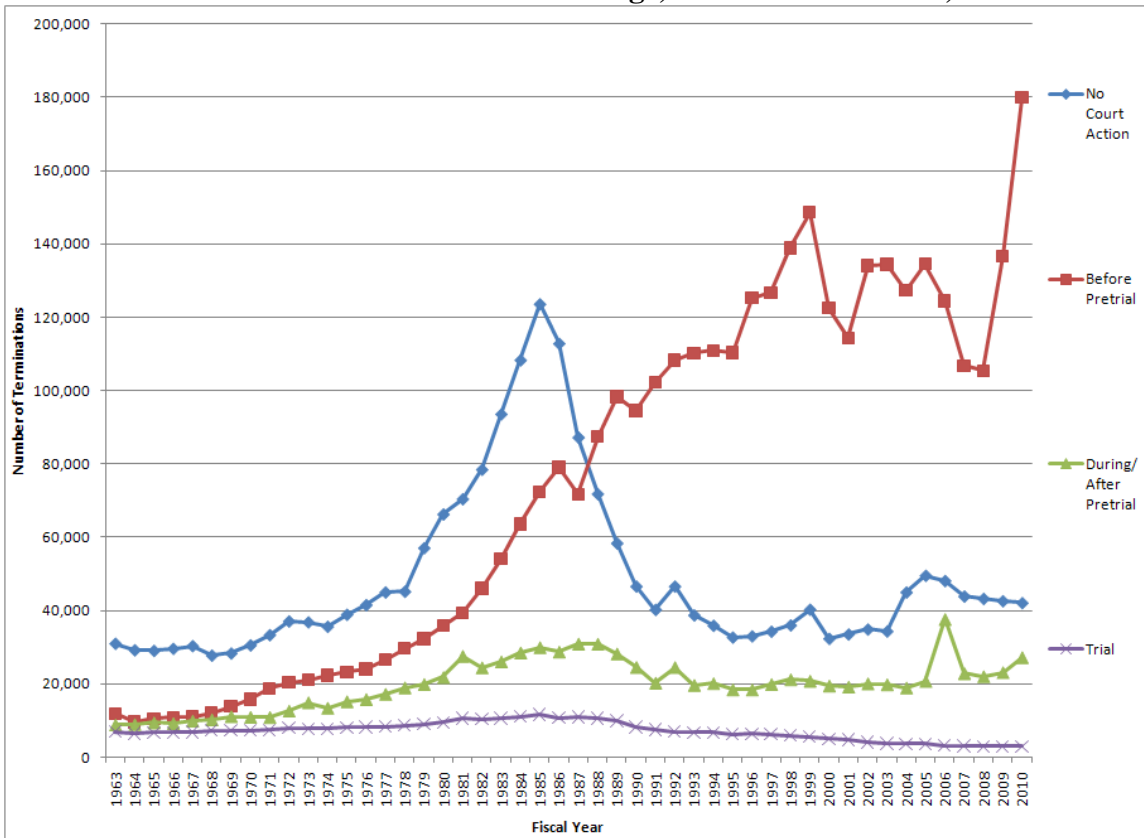
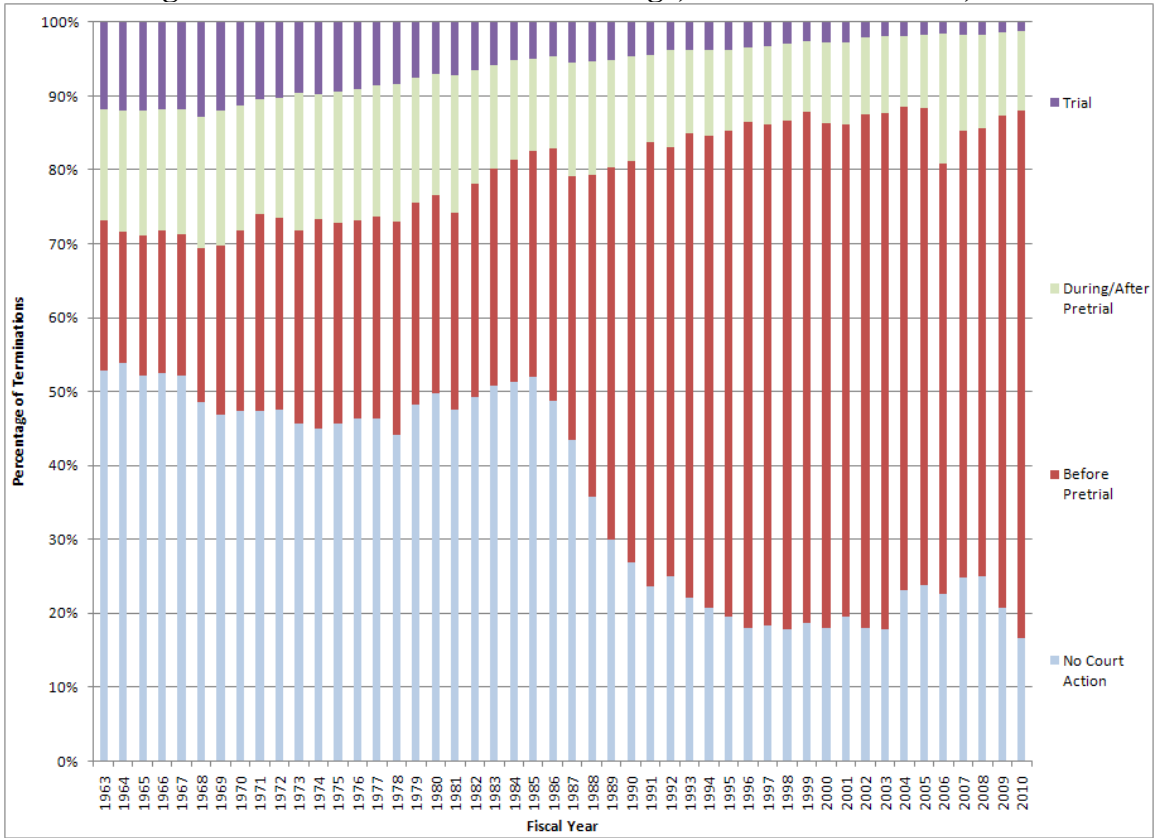


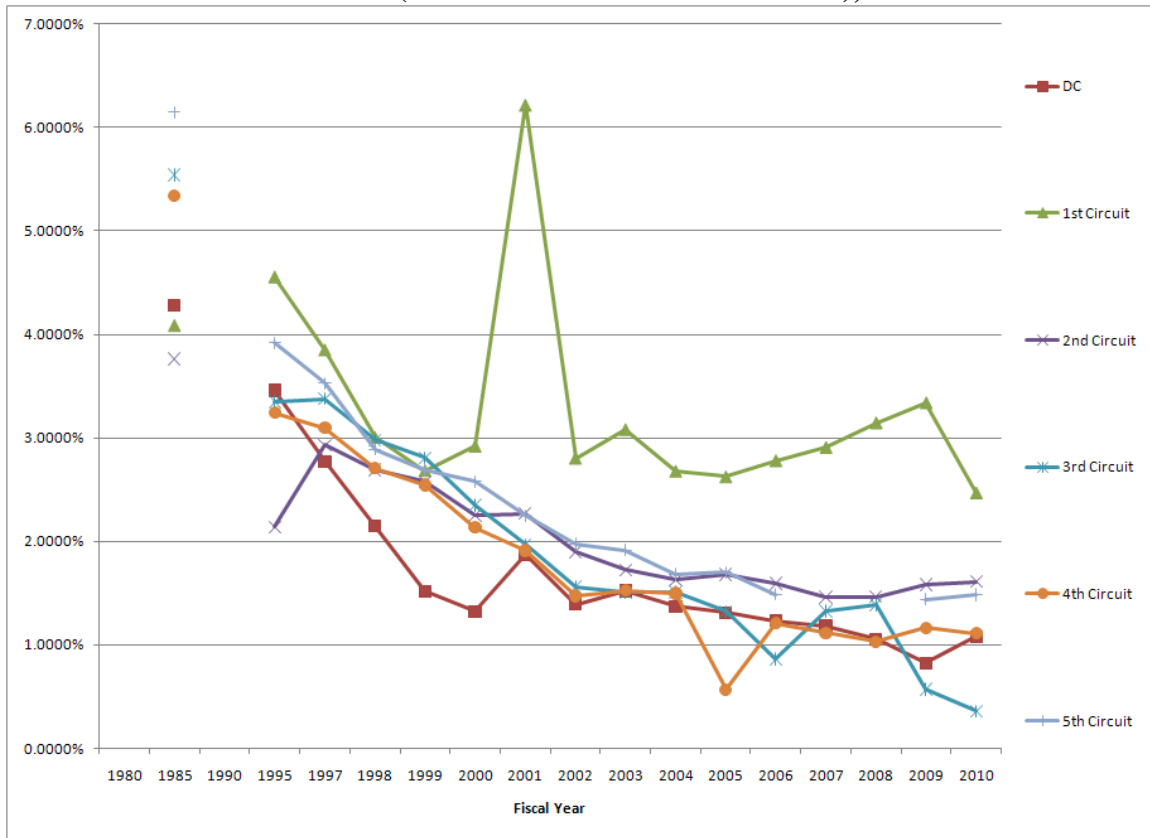
Figure 16
Percentage of Cases Terminated at Each Stage, U.S. District Courts, 1962-2010



E. Geographic variation

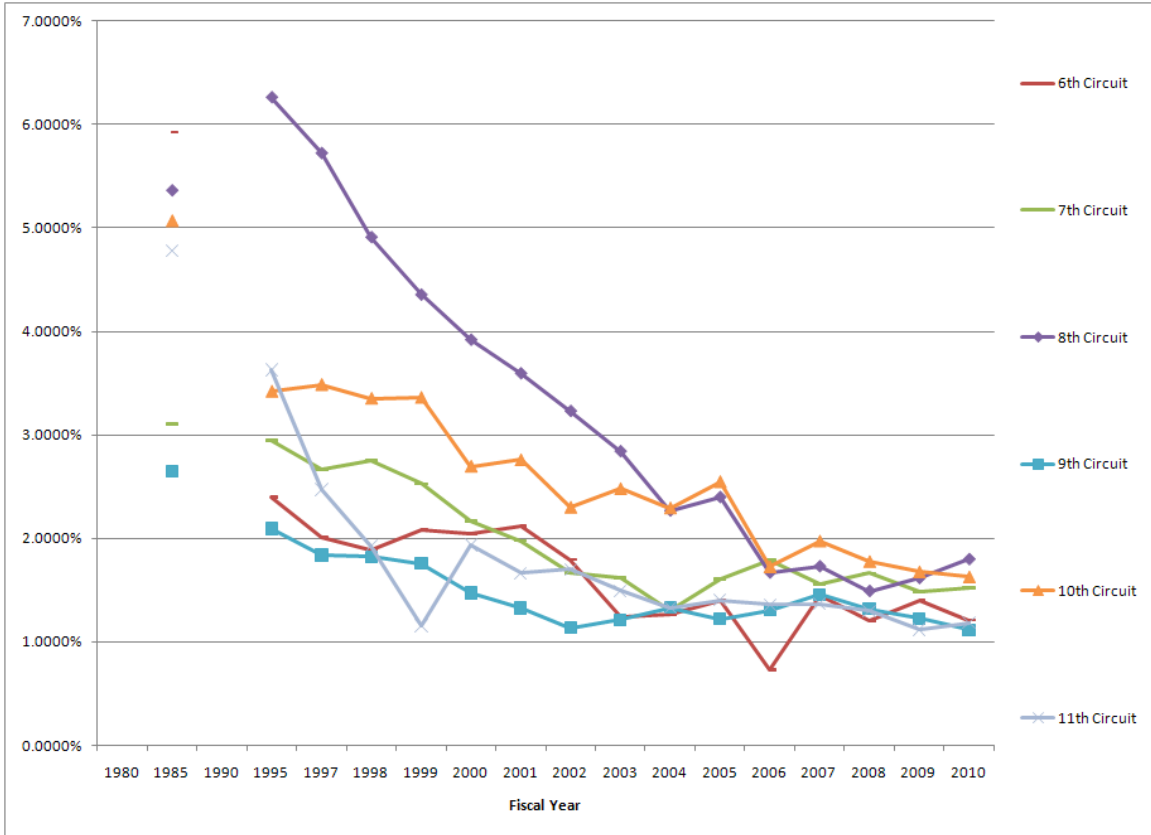
The decline is more precipitous in some places than in others. But as Figures 17 and 18 indicate, the decline is quite general.

Figure 17
Percentage of Civil Case Terminations During or After Trial,
US District Courts (DC Circuit and 1st – 5th Circuits), 1980-2010¹⁰



¹⁰ Data for the 5th Circuit has been excluded from the chart for both 2007 and 2008, in which the trial disposition rates were 18.35% and 5.55% respectively. As discussed previously, a large number of cases related to oil refinery explosions were terminated in the Middle District of Louisiana, most of which had been pending for more than 10 years. The spike in the 1st Circuit in 2001 is due to 290 jury trial terminations in Puerto Rico, which typically had between 20 and 50 jury trials over the period covered. There was no information in the narrative portion of the Judicial Business of the United States Courts regarding this outlier. Table T-1 reports Puerto Rico having only 14 jury trials in 2001.

Figure 18
Percentage of Civil Case Terminations During or After Trial,
US District Courts (6th – 11th Circuits), 1980-2010



So that's the *no news* story of continued decline.

V. The Road to Extinction?

What about the *big news* story that the civil trial is approaching extinction? Apart from the continuing long-term decline in the *percentage* of cases that reach trial (see Figure 2), we see an *absolute* decline that has been proceeding without interruption for about a quarter century (Figure 1).

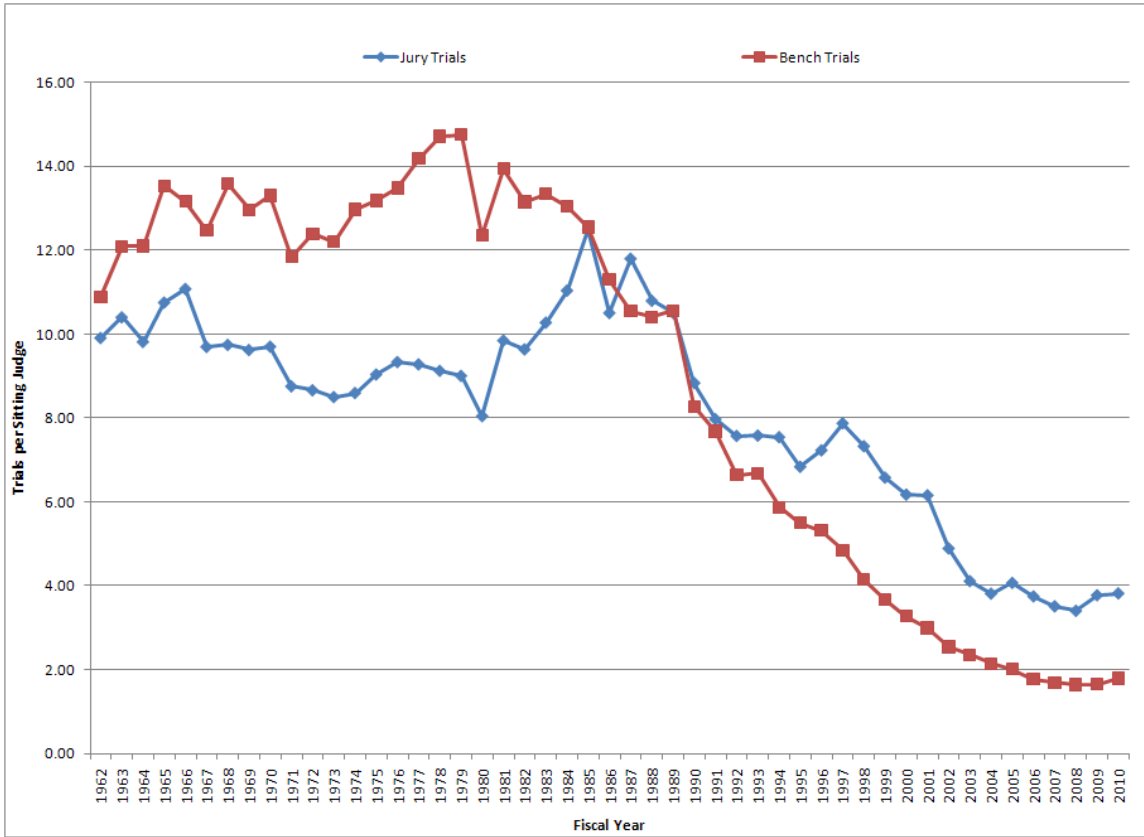
Although the rates of decline vary from one case type to another, decline is general. There is no major category of cases that is exempt (Figure 5). We think it is fair to say that decline has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties.

The decline is accompanied by an ideology that explains and promotes it to judges, administrators, lawyers, clients, and policy-makers. Some of the expressions of this ideology are: that the role of judges is to manage and resolve disputes; that adjudication is only one—and not always the optimal-- way to do that; that trials are expensive and wasteful; that that ordinarily disputes are preferably resolved by mutual concessions; that settlement benefits parties and the courts themselves; that outsourcing disputes to ADR institutions benefits courts without detriment to parties, and so forth. The trial-avoidance justified by this wisdom is seen to fit the interest of judges in keeping abreast of dockets and the interests of lawyers—both corporate lawyers who can minimize the risk of loss that might discredit them with clients and plaintiff lawyers who want to avoid the pro-defendant tilt of the appellate process.¹¹

The decline is self-perpetuating. There are fewer lawyers with extensive trial experience and new lawyers have fewer opportunities to gain such experience (hence, the rise of the trial skills training industry, NITA). As lawyers who ascend into decision-making positions have less trial experience, the discomfort and risk of trials looms larger in their decisions. Judges, too, accumulate less trial experience and, in many cases, less appetite for trials.

¹¹ Clermont and Eisenberg, “Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments,” 2002 U. ILL. L. REV. 947 (2002); Eisenberg, “Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes,” 1 J. EMPIRICAL LEGAL STUDIES 659 (2004).

Figure 19
Number of Civil Trials, Bench and Jury, per Sitting Judge,
US district courts, 1962-2010



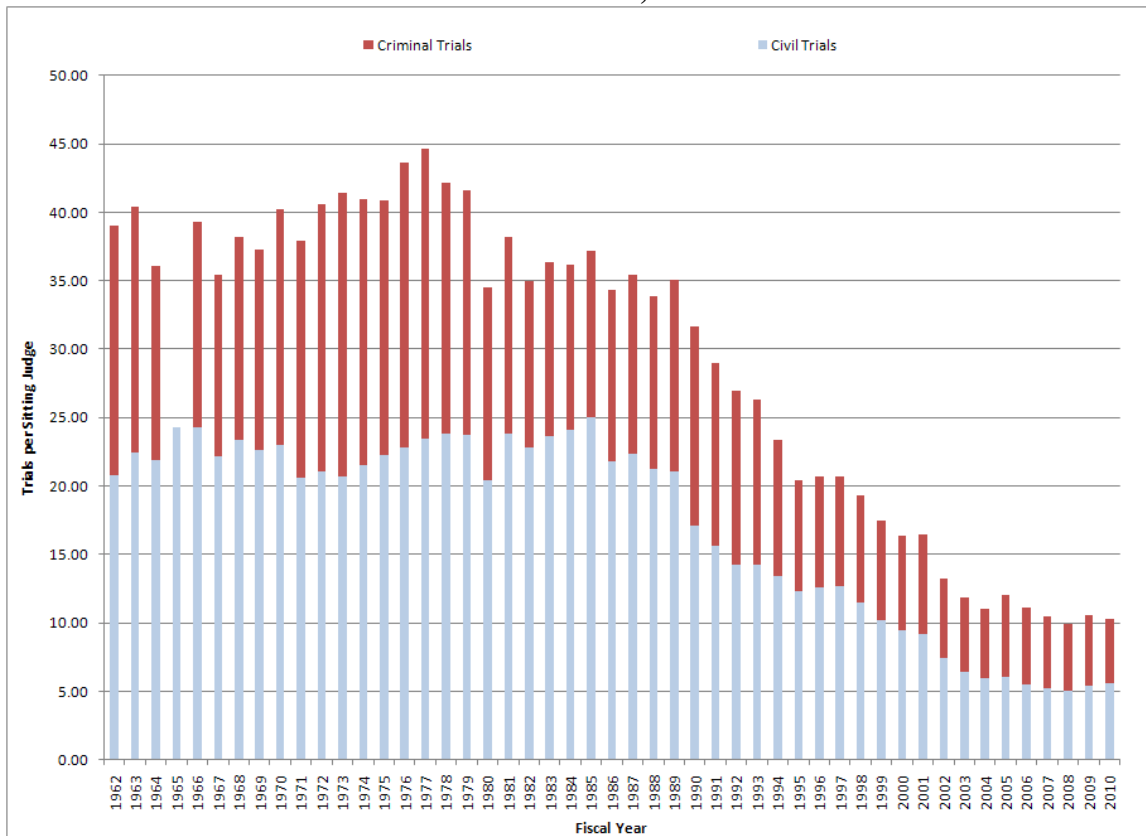
Figures 19 and 20 display the decline of trial experience in the federal judiciary. Figure 19 overstates the number of civil cases tried by sitting Article III judges. There are two other groups of judges who preside over civil cases: senior judges and magistrate judges. In 2008, there were 324 senior judges with assigned staff.¹² They provided “assistance to courts” in some 69,492 terminations (JFF table 6.6), that is in 19.3% of all terminations, civil and criminal. If we assume that their assistance included conducting a proportionate share of trials, the number of trials conducted by the 651 active Article III judges in that year would be reduced from 3244 to something like 2625.¹³

¹² JUDICIAL FACTS AND FIGURES [JFF] table 1.1.

¹³ In addition, magistrate judges conducted some 524 trials in 2008 (JFF Table 4.12). A note to JFF Table 6.4 tells us “All trials conducted by magistrate judges are excluded.” This is a puzzle, for we can’t discover where these magistrate trials are counted, although presumably these cases are included somewhere in the count of terminations. Since Table C-4 counts terminations by the stage at which they occurred, is it possible that these magistrate trial terminations are counted as terminations at an earlier stage?

Figure 20 depicts the decline in trial activity by federal judges, from about 40 trials annually in the era before the arrival of “managerial judging,” with its heavy investment of judicial effort in the early stages of cases, to about ten cases annually for the past decade. The onset of judicial proactivity is neatly displayed in Figures 15 and 16, as dispositions “before pre-trial” displace dispositions with “no court action.”

Figure 20
Number of Trials, Civil and Criminal, per Sitting Judge,
U.S. District Courts, 1962-2010



VI. What Difference Does Fewer Trials Make?

While the number of trials shrinks, the legal system as a whole continues to grow larger on many dimensions. There are more lawyers, more laws and regulations, more enforcement activity, and more expenditure on law. While these dimensions of legality more than “keep up” with the size of the economy and the society, the trial does not. There are fewer trials per capita (Figure 21) and fewer trials for each unit of GDP (Figures 22). Each of these measures began to decline in the 1980s, when the absolute number of trials began to fall.

Figure 21
Civil Trials in U.S. District Courts per million persons U.S. population, 1962-2011

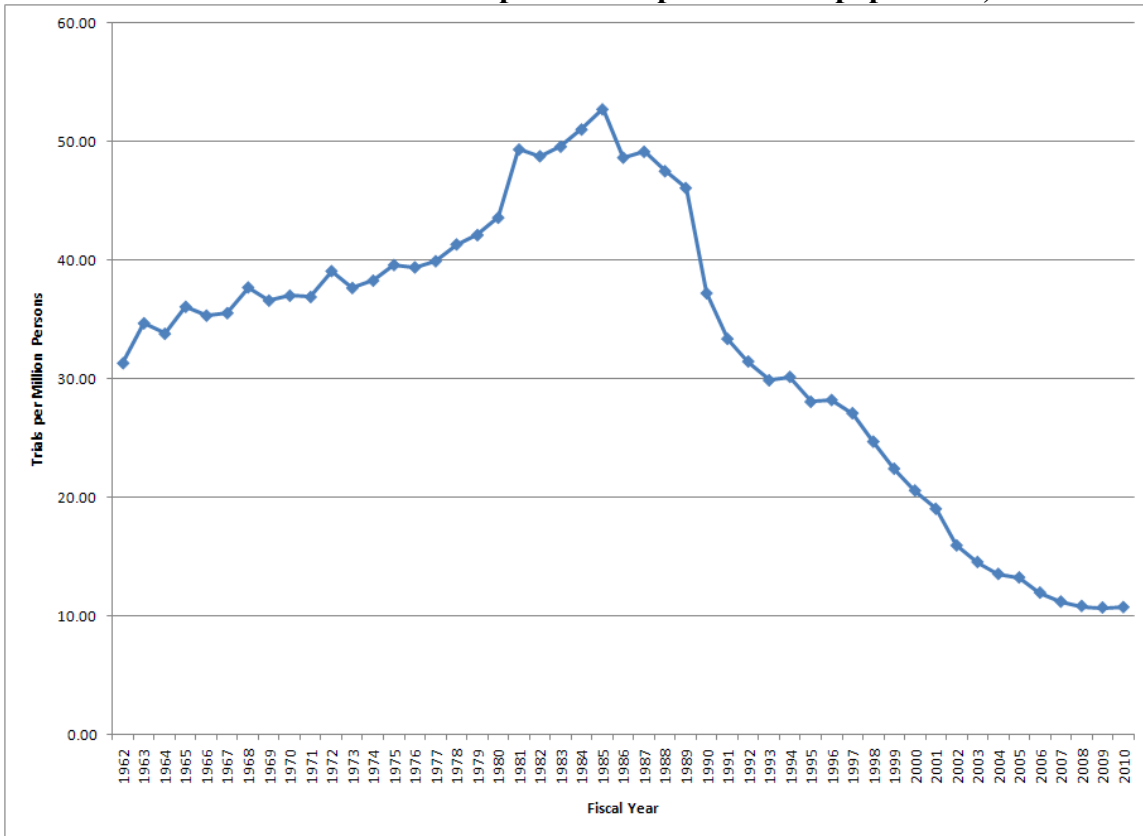
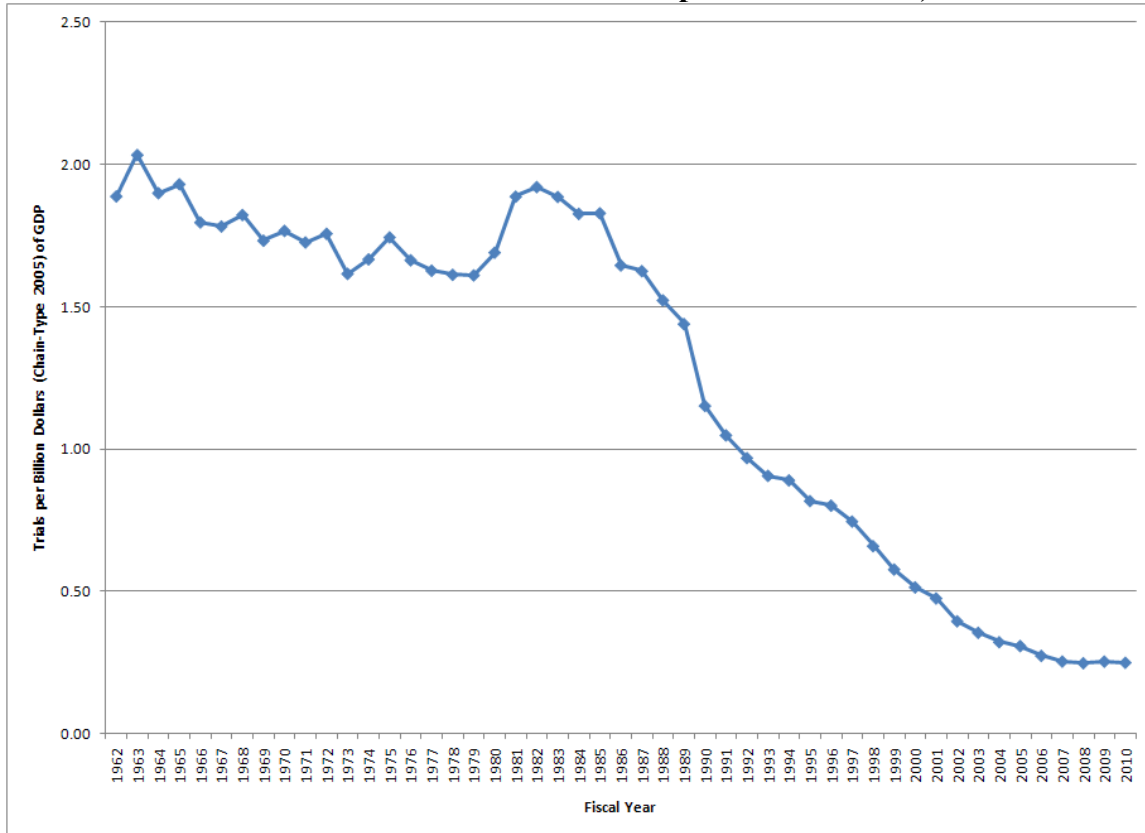


Figure 22
Federal Civil Trials in U.S. District Courts per \$ billion GDP, 1962-2011



The trial shrinks institutionally at a time when law and legal institutions play a larger role in public consciousness—not least in the form of news coverage and fictional depictions of trials in television, movies and books. Legends about increased litigiousness, a ‘litigation explosion,’ irrational juries and monster awards gained wide currency in the years surrounding the decline in the number of jury trials. The combination of media attention to trials with folklore about litigation seems to have concealed the shrinkage of trials from the wider public. Public perception of legal institutions is increasingly through the media rather than through personal experience. Contrary to real life, the population of trials in the media, reportorial and fictional, has not declined to a fraction of its former size. Exposure to media trials, overwhelmingly criminal rather than civil, may have actually increased. So cultural expectations of definitive adjudication are reinforced at the same time that its presence in real life is diminished. Judges continue to make decisions; with juries present less frequently, and with the intensified management of cases, judges’ range of decision has broadened. Their role as gatekeepers is enlarged, especially (in the federal courts, at least) by the elaboration of summary judgment (which now accounts for—in the federal courts, at least—far more terminations than do trials). This broad discretionary power is now further enlarged by *Twombly*¹⁴ and *Iqbal*’s¹⁵ elevation of judicial surmise at the filing

¹⁴ Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)

¹⁵ Ashcroft v. Iqbal, 125 S. Ct. 1399 (2009)

stage.¹⁶ Query: Does it matter if an increasing portion of authoritative precedent is declared in published opinions that arise not from actual trials where facts are determined, but from determinations of whether there should be a trial based on hypothesized facts?

In a setting in which trust in government is low, courts have managed to deflect most of the anti-government sentiment. As judges' work shifts away from adjudication toward administration and case management, it remains to be seen how this will affect public regard for them. To the extent that they are perceived as just another part of the government, instrumentally pursuing policies, they may dissipate the aura that they have so far maintained. Do the trial courts derive their legitimacy from the court(s) at the top of the hierarchy, or vice versa? To what extent is the courts' aura generated by the trial as an institution? The trial, unlike dismissals and negotiated settlements, is a site of deep accountability in which the leeways and reciprocities present in most social settings are unavailable. It is an empirical question how much members of the public regard judicial proceedings, especially trials, as fundamentally different from politics/administration.

The trend lines seem to be pushing real world (but not media) trials close to the vanishing point. The continuing steady decline of the number of civil trials is reminiscent of the famous disappearance of the Cheshire Cat in *Alice in Wonderland*:

. . . and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in all my life!'¹⁷

Perhaps the abundance of trials in the media is the lagging smile of the trial cat. We are not suggesting that the trial is inevitably fated to extinction. But it is a challenge to imagine what might bring about a turnaround. Our guess is that it would take a major impact from outside the system to restore a regime of trials. In the meanwhile we may get no better guidance than from a further exchange between Alice and the Cat:

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to,” said the Cat.

“I don't much care where—” said Alice.

“Then it doesn't matter which way you go,” said the Cat.

“—so long as I get somewhere,” Alice added as an explanation.

“Oh, you're sure to do that,” said the Cat, “if you only walk long enough.”¹⁸

¹⁶ Suja A. Thomas, “The New Summary Judgment Motion: the Motion to Dismiss under Iqbal and Twombly,” 14 *LEWIS AND CLARK L. REV.* 15 (2010).

¹⁷ LEWIS CARROLL, *ALICE IN WONDERLAND* (1867), chap. 6.

¹⁸ *Id.*