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The Death of the American Trial

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INTRODUCTION

The trial as the normal way to deal with litigation, especially civil litigation, was doomed to decline, and perhaps even to vanish, and probably nothing can stop the process. If the trend can be reversed at all, it will be only slightly. We can, so to speak, keep the California condor and the whooping crane alive, but we cannot make them as common as pigeons and sparrows.

Lawrence Freedman

"[If the trial dies] the cause will not be a tyrant's ax but a long and scarcely noticed process of decay. Indifference, in the long run, is deadlier than any coup, and democratic institutions are easily lost through neglect followed by decline and abandonment."

Judge William L. Dwyer

This book is an appeal, not an explanation. The American trial is one of our greatest cultural achievements. Not only does it stand in a rich tradition, but it has earned the admiration of most of the people—lawyers, judges, jurors, and social scientists—in the best position to know. Its consciously structured hybrid of languages and practices can realize a usually dormant common sense to achieve an unanticipated insight into the persons and events on trial that seems not to be available any other way. Though rooted in tradition, the devices of the trial as they have evolved in response to practical challenges seem keenly calibrated to achieve what we Americans need now. That is to bring our moral and political sensibilities to bear on actual events while preserving stability and respect for the rule of law, and incrementally to adapt our basic structures to those sensibilities. The trial is one of those traditional institutions that have allowed us in America to escape the worst of the bureaucratized and ideological cruelties of the "onslaught of modernity." To engage Professor Friedman's analogy, we can now take the bald eagle off the endangered species list because of political will energized to save an important symbol of our identity.

We may, however, presently be destroying it. This institution seems to be disappearing in one context after another. This at a speed that has the sober social scientists who have chronicled it staring in disbelief at their own results. The percentage of federal civil cases that ended in trial declined from 11.5 percent in 1962 to an amazing 1.8 percent in 2002, *one-sixth as many*.[1] Though the absolute number of cases "disposed of"—to use a telling metaphor—has increased five-fold, even the absolute number of trials has declined. Similar patterns have prevailed in civil, criminal, and bankruptcy proceedings, in federal and state courts, and in both jury and bench trials. The *rate* of decline has *rapidly accelerated* in the very recent past. This "implosion" has occurred just as we have made simple changes in its structure that have, in my view, increasingly realized the power of the institution, its ability to do exactly what we continuously need to do. Not everyone has greeted this decline with dismay. The trial's cultured despisers—historians, economists, a few judges—have seen its demise as the more or less inevitable atrophying of a primitive vestigial organ unsuited to contemporary society. It may have been appropriate for cruder times, but not for our advanced society. This can be the expression of a kind of positivist faith, often with scientistic overtones, that the trial's death is a sign of progress. It can be the expression of a faith in the impersonal workings of our economic and political systems, which are, we are to believe, benignly self-regulating. Or it can, more rarely, have almost a weary Hegelian feel: just as the institution realizes its greatest potential it must, like a ripe fruit, fall off the branch to the ground, there to slowly rot away.

Of course, very different kinds of cases are tried: white collar and violent crime, medical and, increasingly, legal and accounting malpractice claims, civil rights cases,

[1] *See below at* pp. for a fuller account and sources.

mass tort cases, large commercial and antitrust cases. Historically, the "trials" afforded in these areas have been both theoretically and practically different from each other. That remains true today. But the core of the trial has not changed dramatically during the past fifty years and trials have tended to disappear in all these areas. Criminal cases are plea bargained. Civil cases are settled or subject to summary dismissal without trial. The context and consequences are somewhat different, but the disappearance of the trial can helpfully be considered as a single development across all these areas. My goal is less to identify the causal mechanisms that together explain the recent catastrophic decline in the number of cases tried than to identify the *significance* or *meaning* of this decline. I will ask what does this means for our legal order and what does it tell us about our broader society?

I proceed this way because, as Hannah Arendt taught, "explanations" are dangerous in political matters. They implicitly suggest that the shape of political practices, such as the trial, is a function of, is inexorably caused by, economic or social or cultural variables and that those connections are beyond political action. So our functionalist commentators are likely to be fatalist where we should be activist: acting in public to save this central mode of acting in public. "Pessimists are cowards and optimists are fools." For us, justice must emerge from a tension of opposites: justice is strife.[2] Opposed institutions and practices can redeem each other. The *more* inconsistent trial methods are from our other modes of social ordering, the more necessary they may be for us

I will argue that the trial, though in statistical decline, has a comprehensiveness among our modes of social ordering that makes it unique. It is here that political purpose,

[2] *See* Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000).

legal structure, and moral sensibility come together under "the discipline of the evidence." That is why the trial is the "central institution of law as we know it," as James Boyd White eloquently put it. It is the place whose disciplines may, in Milner Ball's subtle words, evoke from jurors and judges "a willing suspension of disbelief in their own civility" and allow them to "recognize and act on what is beyond their ordinary selves, just as constitutional law helps the citizenry as a whole to do."[3] That is why, in the more disengaged words of legal historian Freedman, the trial has always been central to the "ideology"[4] of the common law. Languages and practices here allow us to engage in an act of practical integration that is crucial for the health of our society. The values in play, though often incommensurable in theory, serve to illuminate the practical task and realize the lawfulness that is appropriate for us now.

I begin with an account of our contemporary trial. Without such an account, we literally do not know what we are talking about when we bemoan *or* applaud its death. This is essential because of the levels of misinformation that surround it and because the trial too often "takes the rap" for real limitations in its surrounding institutions, bureaucratic and market. And so I provide a compressed account of what we actually achieve at trial. This account has—indeed must have—an idealizing quality, in order to show how real ideals are embedded in the details of what we actually do, albeit less and less often. Here it is essential that I say to the reader, "Don't think, look!"[5] and so it is my obligation to provide a simple descriptive account of trial practices. But I also should provide some of the layers of justification for these "artificial" kinds of conversations to

[3] Milner Ball, "A Little Mistrust Now and Then," *University of Cincinnati Law Review* 66 (1998), 877, 887.
[4] *See infra* at _____. .
[5] Ludwig Wittgenstein, *Philosophical Investigations*, trans Elizabeth Anscombe (New York: Mcmillan, 1953), 31..

counteract a kind of false populism that very unpopulist critics tend to bring against the trial. It is true, as critic Robert Kagan has said, that the trial combines high levels of participation with high levels of formality. I try to show why this combination makes sense. And so I try to show how these linguistic practices are of a piece with deeper and broader convictions, "considered judgments of justice," as Rawls likes to say.

The second chapter provides some historical and institutional context. I want to show that the trial has been an *important* feature of our legal order in America. "Upon this point, a page of history is worth a volume of logic."[6] So, first, I supply only a very short and selective page. I hope to convince the reader that its frequency and its form have often been at the heart of historical focus and controversy and for good reason. A living tradition is always a tradition of argument. My overall argument is that this continues to be true, that it is important to identify what the death of the trial would *mean* for us, and, finally, that we should not let the trial "go gentle into that good night."

Now there are deep continuities of the form of trial as we have it with earlier forms. Some of the most important, most significant, qualities of the trial have not changed greatly since the eighteenth century despite the differences in overall institutional and social context. Federal District Court Judge William Dwyer stressed these continuities:

> Trial by jury succeeded in part because it appealed to the same irrational values that were served so well by the old methods. And it still does. Drama and catharsis are provided on a scale rivaling that of team sports. The adversary system pits one party against the other. Trial by battle lives on in the contest between hired champions called lawyers. Oath-helpers are no longer around, but character witnesses sometimes play a similar role. The requirement that the verdict be unanimous—originally adopted

[6] *New York Trust Company v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)

> on the premise that the outcome must reflect the unambiguous will of God—now serves a different goal: that of making the jury listen carefully to the views of all its members.[7]

But some aspects of the trial have changed: indeed it would be impossible, as John Dewey taught, for a practice to maintain even the *same* qualities *without* changing where the general institutional context *is* changing. I try to provide a very broad-brush account of significant changes in the shape of the trial and some plausible suggestions for their appearance. Not surprisingly, especially in England, there often appeared a tension between the trial's aspiration (its "ideology") and the often grim reality of its actual functioning in a society that was, by our standards, impoverished, oppressive and deeply class-riven. Much of significant reform in the nineteenth and twentieth centuries both in England and, to an even greater extent in the United States, involved changes that allowed us to realize the ideals that I describe in the first chapter. Further, another marker of the importance of the trial is our recognition that its characteristics are a matter of constitutional law, of *fundamental* law. Many of these details go beyond the range of legislative fiat. In my view this reflects intuitions that the institution is close to the heart of the American proposition. I survey aspects of the trial that have been recognized as fundamental in this way.

In the third chapter, I describe in a broader and less historical idiom how trials have always stood at the exact point of defining tensions within our public culture. These tensions are enduring. If "justice is conflict," then *maintaining* these tensions is a key aspect of achieving the only kind of justice we can aspire to. That is what is at stake in the death of the trial. Finally, I make explicit what has been implicit: that to understand

[7] William L. Dwyer, *In the Hands of the People: The Trial Jury's Origins, Triumphs, Troubles, and Future in American Democracy* (New York: St. Martin's Press, 2002), 36.

the meaning of trial practices, one must emulate the hedgehogs and the foxes[8]: it is important to identify the ideals that animate the institution, often expressed by its champions, but also to see the finest of details of what takes place there.

The trial, then, has enormous normative appeal, has enjoyed a central position during the formative era of our legal order, is a creature of fundamental law, and stands astride some of the most important tensions that have defined our national character. What is the evidence that suggests that the trial is dying? In the fourth chapter, I review the empirical evidence of its decline. Marc Galanter and his colleagues have shown a rapid decline in the numbers of criminal and civil trials in the United States over the last thirty years and what can only be called a *catastrophic* crash over the last ten years. We are approaching the point where the word "death" is not overstatement. These declines have a self-perpetuating quality, as the key actors lose the skills and dispositions necessary to try cases. Well, if the trial is such a powerful set of practices, why do the important actors in a position to choose avoid them? I survey the tentative speculations about what is fueling the decline.

I then assess what may be the most obvious explanation for the death of the trial: that it is a deeply flawed practice for achieving its human purposes. It is possible that I have painted a deceptively positive picture. The contemporary trial has not been without its critics. I survey the major criticisms and find that, where valid, they are rooted in defects of the surrounding bureaucratic and market institutions which are candidates for reform.

[8] Foxes know many things, but the hedgehog knows one really important thing, or so Isaiah Berlin taught us.

Finally, I turn to the goal of this effort, to determine the significance the death of the trial would have for us. I identify the consequences for our national life of the death of this great mediating institution. In the course of answering that question, I explore some of the alternative methods of social ordering that are replacing the trial and ask what difference the differences make.

One theoretical point: I will argue here that the assumptions about the nature of the American jury trial that animate at least some critics are wrong. What does it mean for an assumption about a set of public practices and institutions to be "wrong?" One can show that they are inconsistent with much of what we do and have done, practices that are appropriate candidates for what philosopher John Rawls called "considered judgments of justice,"[9] institutionalized judgments made under favorable conditions in which those who are best suited to know have a high level of confidence. The conservative insight suggests that we ought to be wary of the spirit of abstraction, an ideological temper that reduces complex and subtle practices to one or two simple ideas. (That is why I attempt a concrete picture of the trial in the first chapter.) But that is not the end of the matter. The very possibility of reform of public institutions, including those that Rawls proposes, assumes the possibility that what we actually do may be inconsistent with the ideals that should control and structure those institutions. The relationship between practices and ideals is a circular one, in which each may be refined by comparison with the other, to arrive at a position that Rawls calls "reflective equilibrium," the position in which there is at least temporary peace between practices and ideals. This calls for political judgment of a form that parallels on the level of institutions the kind of judgment that the trial itself is often able to achieve at the level of

[9] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971):47.

individual cases. A position on what the trial *should* be can only be justified "by the mutual support of many considerations, of everything fitting together into one coherent view."[10] After our more theoretical self-understandings are tutored by our practices, and those practices reconsidered in light of our understandings, we are in a position to give the best interpretation of the American trial. As Clifford Geertz consistently maintained, it is by cycling between the most detailed descriptions of institutionalized practices and the broadest generalizations that we are likely to achieve real insight into both those practices and our more general ideas.[11] The task of understanding the trial is an interpretive task and it "is partly evaluative, since it consists in the identification of the principles which both best 'fit' or cohere with the settled law *and legal practices* of a legal system *and also provide the best moral justification for them*, thus showing the law 'in its best light.'"[12]

[10] *Id.* at 579.
[11] Clifford Geertz, "From the Native's Point of View: On the Nature of Anthropological Understanding," in *Interpretive Social Science: A Reader*, Paul Rabinow and William M. Sullivan eds. (Berkeley: University of California Press, 1979): 239.
[12] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994): 239-41 (postscript to the 2d edition)(*emphasis added)* (describing Dworkin's jurisprudential method).