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# What Will We Lose If the Trial Vanishes?

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## What Will We Lose If the Trial Vanishes?

Robert P. Burns\*

### **I. Introduction**

The disappearance of the American trial presents a major crisis for the legal profession today. One of the archetypes of American culture is a lawyer addressing a jury on a matter of public importance. Our own self-understanding as a profession in a democratic society has always included a prominent place for the trial lawyer's craft. We are now in danger of relegating this powerful image to old movies and television drama. My focus here is on the *meaning* of the death of the American trial. I ask the simple questions, "If the American trial is dying, so what? What difference does it make?" I answer that it makes a great deal of difference. The trial is one of the great achievements of our public culture, that it stands in a rich tradition, and that it is much admired by most of those in a position to know: trial lawyers, judges, and the social scientists who have studied it carefully. And so my goal is not primarily to *explain* the trial's demise. Explanations are dangerous in matters of political morality because they easily slide into one form or other of determinism. Determinisms make us resigned or complacent, when we should be activist. In our legislature and in our courts, we have the power to take appropriate action to resuscitate the trial, to bring it back to life. This essay, like my earlier work on this subject,<sup>1</sup> is an appeal, not primarily an explanation.

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<sup>1</sup> ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009).

The loss of the trial would wound our legal order and our democratic government seriously. As federal district court judge William Dwyer put it, “The jury trial is the canary in the mineshaft” of our democracy. “[I]f it goes, if our people lose their inherited right to do justice in court, other democratic institutions will lose breath too.”<sup>2</sup> If the trial dies, “it would not be by 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.”<sup>3</sup> Or, as federal appellate judge Damon Keith put it more succinctly, “democracy dies behind closed doors.”<sup>4</sup> That is true whether they are the closed doors of a judge’s chambers where he is disposing of a case summarily, or of a conference room where a sealed settlement is reached, or of an arbitration which is not public, or of an office where an unreviewable decision of a corporate or government official takes place. As a California appellate court put it, “Participants in secret proceedings quickly lose their perspective, and the quality of the proceedings suffers as a consequence....Popular justice is public justice.”<sup>5</sup> As the late Milner Ball so well understood, the formality and sometimes ritual character of the trial embody a respect for each party, however lowly he or she may be in the ordinary business of life, and stand as a bulwark against a purely instrumental treatment of persons as a mere means to some predetermined end to be pursued bureaucratically.<sup>6</sup>

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<sup>2</sup> WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, AND FUTURE IN AMERICAN DEMOCRACY (2002), 153. *See also* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM (2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Detroit Free Press v. Ashkroft*, 303 F.3d 681, 683 (6<sup>th</sup> Cir. 2002).

<sup>5</sup> *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83, 95 (2<sup>nd</sup> Dist. 1968), *quoted in* MILNER BALL, THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS (1982), 46.

<sup>6</sup> BALL, *supra* note 5.

In this essay, I will do four things. I will summarize the evidence that the trial is dying. I will remind you very briefly what a trial is. I will describe our best guesses as to why the trial is dying. Finally, I will enumerate the ways in which the trial's death would inflict a serious wound on our public culture.

## **II. What the Numbers Say**

I review the quantitative data on the incidence of trials not as an end in itself, but as an indication that we need to pay attention *now*. We will see below that some of the more likely explanations of the trial's decline understand it as a kind of self-sustaining and, indeed, accelerating process. The fear here is, of course, that we may reach a point where we actually lose the ability to retain this important element of our public culture, even if we want to.<sup>7</sup> And the numbers make it clear that the word "death" is not too strong a word.

Marc Galanter and Angela Frozena have recently updated previous work to bring the data up to 2009.<sup>8</sup> With regard to civil trials in the federal courts, they conclude that there is "no news" and "big news." The "no news" is that the half-century old downward trend lines continue. The "big news" is that the civil trial in the federal courts is approaching extinction. Here is a very brief summary of the most illuminating statistics from both Galanter's earlier and his more recent work. In 1938, about 20% of federal civil cases went to trial. By 1962, the percentage was down to 12%. By 2009, the number has

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<sup>7</sup> The analogy with global warming is inevitable. At a certain point in the process, it becomes irreversible. That it is a natural process in the case of global warming and an institutional and social process in the case of the loss of the trial doesn't really matter.

<sup>8</sup> Marc Galanter and Angela Frozena, "A grin without a cat" "Civil Trials in the Federal Courts," unpublished paper available at: [http://civilconference.uscourts.gov/LotusQuicker/dcc/Main.nsf/\\$defaultview/AD5073Ba32C18525771F0038C680/\\$File/Marc%20Galander%20Frozena%20A%20Grin%20Without%20a%20Cat.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuicker/dcc/Main.nsf/$defaultview/AD5073Ba32C18525771F0038C680/$File/Marc%20Galander%20Frozena%20A%20Grin%20Without%20a%20Cat.pdf?OpenElement).

sunk to 1.7%. The percentage of jury trials in federal civil cases was down to just under 1%, and the percentage of bench trials was even lower.<sup>9</sup> So between 1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90% and the pace of the decline was accelerating toward the end of that period, until very recently, when there was almost literally, no further decline possible. Even civil rights cases, where the personal quality of the perceived injury creates a somewhat higher likelihood of trial, had an incidence of trial that fell from 20% in 1970 to 4% in 2002.<sup>10</sup> The percentage of federal criminal cases going to trial fell from 15% in 1962 to 5% in 2002. One more localized study of a federal district court found that in 1975 twice as many civil cases were resolved after trial than by summary judgment; by 2000, in the same district three times as many cases were resolved by summary judgment as by trial. So in that district the rate of cases “disposed of,” to use a telling metaphor, by summary judgment rose by 350%. In the new federal courthouse in Boston, about which more later, there were only about seven or eight trials per courtroom per year. By 2009, there were fewer than six civil trials and about five criminal trials per federal judge per year. And these trials were not generally long: they averaged about two days each. State statistics are harder to come by, but they showed a similar pattern. In the ten years between 1992 and 2001, the number of trials in the seventy-five most populous counties fell by about 50% (though the number of filed cases was actually increasing).<sup>11</sup> In the criminal context, from 1976 to 2002, the percentage of cases tried by judge or jury fell over 60%.<sup>12</sup>

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<sup>9</sup> Id.

<sup>10</sup> Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” 1 J. EMP. LEGAL STUDIES 459, 468 (2004).

<sup>11</sup> Id. at 480.

<sup>12</sup> BURNS, *supra* note 1 at 82-88.

The trial seems to be the only part of the legal system that is shrinking. There were more statutes, more regulations, more case law, more cases, more lawyers, more judges and a higher percentage of GDP going to legal matters.<sup>13</sup> And so it is shocking that even the absolute numbers of federal civil trials is decreasing, from about twelve thousand in 1985 to about 3200 in 2009. The ratio of trials to filings is about 8% of what it was in 1962. And these numbers are generous, because they include as “trials” cases where trial begins, but are not tried to judgment, and all evidentiary hearings, for example, hearings on preliminary injunctions.<sup>14</sup> Judith Resnick gives us a graphic architectural portrayal of the growing discontinuity between our traditional assumption that the trial was “the central institution of the law as we know it,”<sup>15</sup> the sun around which all our procedural planets revolve, and the reality of the way cases are actually handled. She describes the new federal court house in Boston:

In this courthouse, some twenty trial courts look more or less alike: a judge’s bench is placed at the back, a bit lower than is common, in a self-conscious (if subtle) effort to portray law as accessible and not unduly hierarchical. Each wall has an arch of equal height, to suggest the equality of all before the law. The designers of the courthouse chose the arches and the courtroom as central icons of their building.... Yet a disjuncture exists between this new building, its courtrooms, and the rules and practices that now surround processes, which have also been reshaped many times during the twentieth century. Judges are now multitaskers, sometimes managers of lawyers and cases, sometimes mediators and sometimes referral sources, sending people outside of courts to alternative dispute resolution by judges and lawyers.... When that courthouse opened in 1998 in the District of Massachusetts, 142 civil and 48 criminal trials were completed. With approximately twenty-five trial courtrooms for district and magistrate judges available, about seven or eight trials were held per courtroom per year in the new courthouse.<sup>16</sup>

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<sup>13</sup> Id. at 88.

<sup>14</sup> Galanter & Frozema, *supra* note 8.

<sup>15</sup> JAMES BOYD WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW & LEGAL EDUCATION (1999), 108.

<sup>16</sup> Judith Resnick, “Whither and Whether Adjudication?” 86 B.U.L.REV 1122, 1126 (2006).

### **III. What Are We Losing?**

A good deal of my effort over the years has been directed at showing what the trial is for us.<sup>17</sup> This is primarily a task of description and interpretation, one necessary to undo the effects of TV drama and well-financed public-relations campaigns. The point of this description is to convey a sense of the power of trial practices and languages to illuminate in a unique way the human action that always provides the subject matter of legal cases. Anthropologist Clifford Geertz has argued that real insight into social events requires “a continuous dialectical tacking between the most local of local detail and the more global of global structures in a way as to bring both into view simultaneously.”<sup>18</sup> To understand the trial’s importance for us, we need to pay very close attention to the languages and practices that prevail at trial *and also* ask more “philosophical questions” about the significance of this “most local of local detail.” For me, the conviction that the trial was a great cultural achievement came not mainly from academic reflection, but rather from the “radical empiricism” of actually trying criminal and civil cases. (That is why I, with some trepidation, used an old theological term, *fides quaerens intellectum*, “faith seeking understanding,” for my account of the trial. The more theoretical account was an attempt at an interpretation and an understanding of a practice whose power I had already *experienced*.) I think this trial lawyer’s experience leading to respect for the trial is hardly unique. Yes, it is true that trying cases can be exhilarating and, for some, remunerative. In their reflective moments, however, trial lawyers value the experience of participating in a

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<sup>17</sup> See e.g., ROBERT P. BURNS, A THEORY OF THE TRIAL (1999); Robert P. Burns, “The Lawfulness of the American Trial,” 38 AM. CRIM. L. REV. 205 (2001).

<sup>18</sup> Clifford Geertz, “From the Native’s Point of View: On the Nature of Anthropological Understanding,” in INTERPRETIVE SOCIAL SCIENCE: A READER (Paul Rabinow & William M. Sullivan, eds.) (1979), 239.

public enterprise that, *astoundingly*, can often actually converge on a fair understanding of the human action that is always at the center of any case and can point the way to a fair grasp of what should be done about it.<sup>19</sup> We are the stewards of that great cultural achievement. Doctor Johnson told us that we are “more frequently required to be reminded than informed.”<sup>20</sup> The lawyers and law students who are the most likely readers of this essay need only a little reminding of what the trial is in its local detail. I shall set about to do just that.

The trial proceeds from opening statements through the plaintiff’s<sup>21</sup> case-in-chief to the defendant’s case-in-chief then (sometimes) on to the plaintiff’s then the defendant’s rebuttal cases. The cases are usually followed by a jury instruction conference, then closing arguments, and finally the reading of the instructions to the jury. Generally, the trial works through the construction, then the deconstruction, then the attempted reconstruction of very different kinds of narrative. The fully characterized narratives of opening statements, where each lawyer has significant freedom to tell the jury what he or she thinks “this case is about” are deconstructed by the very juxtaposition of competing narratives and then ultimately by the destructive or critical aspects of closing argument.<sup>22</sup> The much more legally constrained narratives of each direct examination can immediately be deconstructed by the cross-examination that follows. This rhythm allows the jury both to see how things hang together, to see the coherence of each side’s case, the only way

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<sup>19</sup> Recall the testimony of Tom Hanks’ character in *Philadelphia* about why he loves the law. See BURNS, *supra* note 17 at 220-40.

<sup>20</sup> Johnson, *Rambler* #2 (March 24, 1750).

<sup>21</sup> For ease of reference, I shall call the party with the burden of proof the “plaintiff,” even when referring to criminal cases.

<sup>22</sup> One of the rhetorical commonplaces of closing argument is to maintain that the opposing lawyer has “broken his promise” to supply evidence to support the important claims he has made.

discursive intellects like ours can work, but also to grasp the willfulness that inevitably goes into adversary story-telling, to understand how the common sense generalizations out of which they are built up are just a bit *overgeneralized* and the stories just a little *too* good. This extraordinarily disciplined discourse is enormously more demanding than are the usually lazy interchanges of press conferences and Congressional hearings and the inevitably single-voiced accounts of even the best journalism.

Many of the legal restraints or formalities regulating the presentation of evidence are really quite simple.<sup>23</sup> They are far from being hypertechnical and serve important public purposes. The notion of materiality keeps the presentation of evidence loosely tethered<sup>24</sup> to the “law of rules”<sup>25</sup> embedded in the substantive law and serves to protect the democratic legitimacy of the rule of law. And so it protects the liberal values surrounding both predictability and the constraint of official discretion.<sup>26</sup> They make planning possible. The requirement of foundation as to personal knowledge<sup>27</sup> and the derivative imperative that testimony be, to the extent feasible,<sup>28</sup> in “the language of perception,” allows the jury to understand the basis of any witness’s assertion before actually hearing that assertion. It imposes a kind of orderliness in the presentation of testimony and allows for a defter interpretation of the entire case presented.

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<sup>23</sup> I cannot say the same for all of the sometimes byzantine rules of evidence. See Robert P. Burns, “Notes on the Future of Evidence Law,” 74 *TEMPLE L. REV.* 69 (2001).

<sup>24</sup> For an account of why I say “loosely tethered,” see BURNS, *supra* note 17 at 26-33.

<sup>25</sup> Antonin Scalia, “The Rule of Law as a Law of Rules,”

<sup>26</sup> H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* ( ).

<sup>27</sup> *FEDERAL RULES OF EVIDENCE* 602.

<sup>28</sup> *Id.* at Rule 701.

In a well-trying case, this “consciously structured hybrid” of languages and performances can realize a usually dormant, but extremely rich and subtle, democratic common sense.<sup>29</sup> In my view, much of the media serves as a kind of paralyzing narcotic for this capacity for democratic governance.<sup>30</sup> The discipline of trial language, by contrast, facilitates real insight into the persons and events being tried. Judge William Dwyer emphasized this elevating power of the trial’s devices:

My admiration for the jury, strong while I was [a] trial lawyer, has only deepened during my service as a judge. Imperfect and battle-scared though it is, the jury, as I see it, still is able to reach fair and honest verdicts, to say “no” to official power when that word must be uttered for the sake of freedom, and to legitimize hard decisions for a questioning public. It still “contributes most powerfully,” as Tocqueville wrote a hundred at sixty-five years ago, “to form the judgment and increase the natural intelligence of the people.” And it sheds light on two other democratic institutions, the ballot box and the initiative and referendum. If jury trials as a rule produce sounder results than we can count in elections—which I believe they do—one reason may be the quality of information given to citizens who must decide. In contrast to the chaos and mendacity of much political campaigning, and to the scattergun delivery of thirty-second television commercials, a jury hears testimony that is kept to the point by an impartial referee, tested by cross-examination, and offered throughout the day. We should be able to learn something valuable from the differences in communication.<sup>31</sup>

It is challenging to give an adequate account of the simultaneous grasp of facts, norms, and possibilities for action that the trial can occasion and to demonstrate how the trial can be both a conservative institution and yet one suited to contemporary needs.<sup>32</sup>

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<sup>29</sup> See David J. Smigelskis, “Realizing the Practical Intelligence of American Juries,” 95 *Nw. U. L. REV.* 1015 (2001).

<sup>30</sup> On the republican tradition at the basis of American institutions, see HANNAH ARENDT, *ON REVOLUTION* (1963).

<sup>31</sup> WILLIAM DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY’S ORIGINS, TRIUMPHS, TROUBLE, AND FUTURE IN AMERICAN DEMOCRACY* (2002), xiii.

<sup>32</sup> For my attempt, see BURNS, *supra* note 17.

As I noted, the trial proceeds by the construction and attempted destruction of *different sorts* of narratives.<sup>33</sup> The narrative of openings invites each jury to see “what this case is about,” in a contract case, for example, to see it *as* about a broken promise or, *as* an act of disloyalty, or *as* a simple misunderstanding. Our moral sensibilities are closely intertwined with all of the stories that are likely told in opening statement, each of which implicitly invokes a more or less powerful norm, beginning the process by which the jury is required to make a judgment not only as to which factual account is more *likely*, but also which moral or legal norm is the more *important*.

Not that factual accuracy is unimportant. The trial is actually obsessive in exploring the details of what has occurred, because details matter in serious cases. And so the demanding strictures that are imposed on direct examination provide relatively reliable elements from which an accurate factual narrative can be built up, but also allow the jury to refine the more general norms that are embedded in the broader narratives of opening statement. And cross-examination can serve to demonstrate that even the apparently chaste and “factual” narratives of direct examination themselves have an element of willfulness about them, apparent in both the remaining characterizations that the witness chooses and the inevitable selectivity and ordering of the facts recounted.

So the trial respects detailed factual truth, the subtle moral sensibilities of common sense, and the “the rule of law as a law of rules.” More controversially, though deeply

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<sup>33</sup> See Robert P. Burns, “The Distinctiveness of Trial Narrative,” in *THE TRIAL ON TRIAL*, eds. Antony Duff et al. (2005).

rooted in our history and traditions,<sup>34</sup> the trial allows the jury to judge that the most important aspect of the case is not the maintenance of formal legality, but something else. The latter judgment rarely takes the form of overt nullification, though it sometimes does. It may be that the jury concludes that the law as written fails to capture what is most morally salient about the case or, despite its literal meaning, could not have been intended to apply to *this* set of circumstances, or, more rarely still, is simply unjust in all or most applications. Or the jury may conclude that the most important aspect of the case is the opportunity it presents to “send a message” to the police or prosecutors who used offensive methods to bring the case to trial. More often, it will involve simply *seeing* the case in a way that takes it outside the meaning of the written law, as the latter might be interpreted without the benefit of the devices of the trial.

It is the trial’s fierce oppositions, its differences in role and differences in language, that create almost unbearable intellectual and emotional tensions. These tensions in performance and role reflect real tensions in our values and forms of life. For us, the resolution of these tensions deftly in a particular case is what justice, and I would say, law, actually are.<sup>35</sup> The trial is, for us, the crucible of democracy.

#### **IV. Some Guesses as to the Cause of the Trial’s Decline**

I have argued that explanations are dangerous when it comes to political issues. There is always the danger that isolating a “cause” of a political, social, or legal

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<sup>34</sup> JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994).

<sup>35</sup> STUART HAMPSHIRE, *JUSTICE IS CONFLICT* (1999); James Boyd White, “An Old-Fashioned View of the Nature of Law,” 12 *THEORETICAL INQUIRES IN LAW* 381 (2011).

development will implicitly assume one form or other of determinism and lead to fatalism and paralysis. The better the explanation, the greater the temptation to resignation and passivity. When the “cause” itself is well-established in our actual institutions and practices, and the link between cause and effect seems strong, it is easy to think of the effect as an *inevitable* effect, a kind of “false necessity.” We become resigned when we should be activist. In the final analysis, our legislatures and appellate courts will decide whether the trial lives or dies. And I believe that our legislatures and appellate courts remain “spaces of freedom” where conviction and courage can lead to the kind of action which can reverse the current decline of the trial.

We are just beginning to understand the forces that have led us to our current plight and so all arguments must be tentative.<sup>36</sup> In general, we can try to understand the trial’s decline by looking through a microscope or a telescope. Each form of visual enhancement has its own strength. “Microscopic” explanations tend to look at specific beliefs or incentives possessed by important actors in the legal order. “Telescopic” explanations place the phenomenon in a broader social or institutional context and tend to see it as a reflection of larger forces. Microscopic explanations are preferred by the foxes among us, the telescopic by our hedgehogs.

First, the microscopic explanations. Galanter and Frozena have written recently that “the decline has become institutionalized in the practice and expectations of judges, administrators, lawyers, and parties.”<sup>37</sup> There appears to have been a continuing change in

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<sup>36</sup> For a fuller inventory of possible causes, see BURNS, *supra* note 1 at 88-101.

<sup>37</sup> Galanter & Frozena, *supra* note 8.

the culture of judging in the direction of “managerial judging.” Stephen Yeazall has stressed the ways in which modern procedural rules have bestowed on the trial judge enormous and effectively unreviewable discretion to make important decisions shaping the outcome of the cases before them: “[T]he discretion of trial judges has expanded partly because of increased complexity, but even more so from the multiplication of discretionary procedural, evidentiary, and management decisions.”<sup>38</sup> Galanter noted one effect of this development by quoting a Colorado Supreme Court judge: “While an appellate court may have the opportunity to reverse any individual trial judge every few years, I know that trial judges, in their numerous workday rulings, reverse appellate courts every day.”<sup>39</sup> Deferential standards of review and prohibitions on interlocutory review effectively insulate these decisions from reversal. Managerial judging has become something of an ideal in much of our legal culture: “[I]nfluential judges and administrators in the federal courts embraced the notion that judges were problem solvers and case managers as well as adjudicators.”<sup>40</sup> And so judges

shifted from an understanding that their role was to move cases toward trial (with settlement a welcome by-product of these efforts) to a view that it was their job to resolve disputes; they also embraced process pluralism—i.e., the notion that there was more than one right way to deal with a dispute—and accordingly they welcome “alternative processes in the courts and in forums outside the courts.”<sup>41</sup>

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<sup>38</sup> Stephen C. Yeazell, “The Misunderstood Consequences of Modern Civil Procedure,” 1994 WISC. L. REV. 631.

<sup>39</sup> Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” 1 J. EMP. LEGAL STUDIES (2004) 459, 519, quoting Gregory Kellam Scott, “Judge-Made Law: Constitutional Duties and Obligations Under the Separations of Powers Doctrine,” 49 DEPAUL L. REV. 517 (1999).

<sup>40</sup> Galanter, *supra* note 28 at 5.

<sup>41</sup> Marc Galanter, “A World without Trials?” J. DISPUTE RESOLUTION (2006) 12, 20-21.

Not only have many judges become pluralists, they have become pluralists with a presumption against trial. “The ‘*normative valence*’ of going to trial has changed, as leaders of the bench and bar bemoan the need to take cases to trial.”<sup>42</sup> As one federal judge put it, “‘One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement.’”<sup>43</sup> Or, as it is sometimes said more succinctly, “A bad settlement is almost always better than a good trial.” Bentham was right in saying, “Publicity is the vary soul of justice...It keeps the judge himself, while trying, on trial.”<sup>44</sup> One can see why some judges might be inclined to avoid that kind of scrutiny.

The culture of lawyering has also had an effect. Fewer “litigators” are comfortable trying cases. This is, of course, a self-sustaining development. As fewer young lawyers try (usually small) cases early in their careers, they may become wary about trying more important cases as they get older. The process of discovery and the pretrial motion practice that accompanies it can become an end in itself. And it can become endless, as fewer lawyers have a sense of when they have learned enough to try the case effectively. There is little doubt, too, that the billable hour contributes to this process, as lawyers have incentives to continue the pretrial process rather than undergo the higher levels of stress that surround trial.

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<sup>42</sup> Judith Resnik, “Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts,” 1 J. EMPIRICAL LEGAL STUDIES 811 (2004).

<sup>43</sup> Hubert L. Will, Robert R. Merhige, Jr., & Alvin B. Rubin, “The Role of the Judge in the Settlement Process,” 75 F.R.D. 203, 203 (1978).

<sup>44</sup> Resnick, *supra* note 31 at 831 n. 234.

Another microscopic explanation of the trial's decline emphasizes the increasing ease with cases can be "disposed of," to use that telling metaphor, through "dispositive" pretrial rulings. A key development in this process was the Supreme Court's liberalization of the standards for granting summary judgment over two decades ago.<sup>45</sup> More recently, the Court has raised the level of specificity necessary to survive a motion to dismiss. Plaintiffs must now pass some relatively undefined notion of "plausibility" before being permitted even to begin discovery.<sup>46</sup> This latter may affect many civil rights actions, where the plaintiff is required to prove intent, leading to the early dismissal of precisely the cases *more* likely to go to trial than standard commercial cases. Additionally, there has been the intensification of the plea bargaining system<sup>47</sup> and the ever-increasing support of the federal courts for diverting cases into arbitration.<sup>48</sup>

If one looks through a telescope, rather than a microscope, there are more systemic and theoretical "big-picture" explanations for the trial's decline. The trial has always been a realm apart from other social systems, with distinctive rules and rituals which resist the simple importation of power relationships existing in the broader economic and social worlds. It has provided a distinct region where a citizen may appeal to legal rules or moral sensibilities. The notion here is that the law is becoming more a creature of the bureaucratic and market institutions that surround it. Managerial judging is discretionary and bureaucratic, as is the dismissal of cases based on the intuition of a judicial official that

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<sup>45</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

<sup>46</sup> *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>47</sup> GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003).

<sup>48</sup> Most recently, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (Federal Arbitration Act preempts California rule that class action arbitration waivers are unconscionable).

the complaint is not “plausible.” These intuitions are schooled by elite ideology and experience. Increasing the pressure to settle by increasing the costs of litigation allows the prior distribution of resources to determine the results of legal cases. The resulting picture is not pretty. It is of a more bureaucratic and monolithic society where there are fewer countervailing institutions balanced against our corporate and private bureaucracies.

Then there are explanations that focus on the enormous democratization that has occurred over the past half-century in the composition of the American jury, through the operation of both statute and constitutional adjudication. As I noted above, the trial invokes the common-sense life world norms of the jury. If legal limitations on access to participation in the jury can keep it from being truly cross-sectional, the resulting elite composition of the jury may blunt the discontinuity between life-world norms and those that prevail in other power centers. As the jury becomes more democratic, the tensions between its distinctive mode of social ordering and those that prevail in other social systems may become close to intolerable, leading to various forms of pressure to reduce its significance in the legal order.<sup>49</sup> The latter would then, consistent with the prior “telescopic” explanation of the trial’s decline, become more congruent with other social systems.

## **V. The Meanings of the Trial’s Disappearance**

My goal here is simply to enumerate, with some elaboration, what the trial has meant to us and what we stand to lose with its disappearance. First, we would lose an

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<sup>49</sup> See Robert P. Burns, “The History and Theory of the American Jury,” 83 CAL. L. REV. 1477 (1995).

institution where the equitable judgments<sup>50</sup> occasioned by attention to the details of a particular situation moderate the harshness of the law of rules. Kalven and Zeisel's great study of the American jury noticed that that jurors made distinctions that the written law did not, for example, that the defendant had already suffered injury or that the victim was disinclined to prosecute or that the crime was hardly ever prosecuted or that the defendant in an armed robbery used a toy gun rather than a real gun.<sup>51</sup> Thomas Green, in an important work,<sup>52</sup> maintained that it was the face-to-face nature of the English trial that made it impossible completely to forget that the law was *somehow* about justice, something that is easier to forget when we are just shuffling papers. The devices of the trial and the lay jury here complement one another. The jurors, unlike a judge who can simply get too used to it all, can actually allow the languages of the trial to affect them, to "get inside them."

Chesteron put it best:

The trend of our epoch up to this time has been consistently toward specialism and professionalism....Many legalists have declared that the untrained jury should be altogether supplanted by the trained judge....[However,] the more a man looks at a thing, the less he sees it, and the more a man learns a thing the less he knows it....[T]he man who is trained ...goes on seeing less and less of its significance....Now it is a terrible business to mark a man out for the judgment of men. But it is a thing to which a man can grow accustomed, as he can to other terrible things....And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it....Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop. Therefore the instinct of Christian civilization has most wisely declared that into their judgments there shall

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<sup>50</sup> See Danien Shanske, "Revitalizing Aristotle's Doctrine of Equity," 4 LAW, CULTURE & THE HUMANITIES 352 (2008).

<sup>51</sup> HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 270, 293, 338 (1966).

<sup>52</sup> THOMAS GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 (1985).

upon every occasion be infused fresh blood and fresh thoughts from the streets.<sup>53</sup>

Delegate Benjamin Butler to the Massachusetts Constitutional Convention of 1953

expressed a similar notion:

Which is the best tribunal to try [a] case? This man who sits upon the bench, and who...has nothing in common with the people; who has hardly seen a common man in twenty years....Is he the better man to try the case than they who have the same stake in the community, with their wives, and children, and their fortunes, depending on the integrity of the verdicts they shall render?<sup>54</sup>

We would also lose a distinctively American forum where a citizen can tell his own story in a public forum, with the help of a spokesperson whose particular gift is the power to translate private interests into public appeals, and then, subject to rules designed to assure relevance and reliability, *choose* what evidence to submit to support that story. The maxim *Audiatur et altera pars* (“Let the other side be heard!”) is the first principle of adversary justice. Telling one’s own story is important: “No philosophy, no analysis, no aphorism, be it ever so profound, can compete in intensity and richness with a properly narrated story.”<sup>55</sup> In the American trial, it is the party who both chooses what opening statement to make, to tell the jury “what this case is about,” what norms to appeal to, and who is also given the means to support the story told. This is in quite marked contrast to continental reliance on the examining magistrate to frame the issue, determine the scope of

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<sup>53</sup> G.K. CHESTERTON, *TREMENDOUS TRIFLES* (1920), 65, 67-68. Justice Fortas put it this way: “[J]udges do become case-hardened. Judges do sometimes tend, after many years, to take a somewhat jaundiced view of defendants. Many trial judges tend to become a bit prosecution minded. That’s the basic justification for a jury.” Alan W. Schefflin, “Jury Nullification: The Right to Say No,” 45 *SOUTHERN CAL. L. REV.* 213 (1972).

<sup>54</sup> JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND IDEAL OF DEMOCRACY* (1994), 84, *quoting* OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION (1853), 458.

<sup>55</sup> HANNAH ARENDT, *MEN IN DARK TIMES*, 22 (1970).

discovery, and usually to dominate the questioning at trial.<sup>56</sup> In some ways that may be appropriate for somewhat more homogeneous, organic, and hierarchical societies, but it would be inconsistent with our broader institutions.<sup>57</sup> The trial's vanishing would reduce the space for effective speech in the United States.

In his classic article on the merits of adversary adjudication,<sup>58</sup> Lon Fuller emphasized the relative rigor and rationalism with which adjudication addresses questions of basic fact, what Arendt called “brutally elementary” factual questions. The devices of the trial are organized specifically to elevate the concrete, the factual and the multiple.<sup>59</sup> “No ideas but in things!”<sup>60</sup> This obsessive concern with the details of the factual context serves as a critique of lazy over-generalized abstractions, but it also emphasizes the importance of simple accuracy. As Bentham, put it, falsehood is the “handmaiden” of injustice.<sup>61</sup>

We would also lose an important vehicle for citizen self-governance. DeToqueville celebrated the jury as the device which “rubs off that private selfishness which is the rust of society.”<sup>62</sup> In his view, it could instill in citizen-jurors a kind of “respect for the thing judged and the notion of right[,]” an actual experience of one’s moral and political nature. Its participation in the “spirit of magistracy”<sup>63</sup> could produce not just alienated critics of

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<sup>56</sup> BURNS, *supra* note 1 at 115.

<sup>57</sup> *Id.* at 116.

<sup>58</sup> Lon L. Fuller, “The Forms and Limits of Adjudication,” 92 HARV. L. REV. 353 (1978).

<sup>59</sup> BURNS, *supra* note 17 at 125-30.

<sup>60</sup> WILLIAM CARLOS WILLIAMS, PATERSON (1951), 14.

<sup>61</sup> JEREMY BENTHAM, 1 RATIONALE OF JUDICIAL EVIDENCE 22 (1827) [1978].

<sup>62</sup> ALEXIS deTOCQUEVILLE, 1 DEMOCRACY IN AMERICA 295 (trans. Henry Reeve) (1945).

<sup>63</sup> *Id.*

public affairs, but persons who bear the responsibility for the always constrained choices that have to be made.

The trial's vanishing would transfer political authority away from the increasingly well-educated, literate, and informed citizens<sup>64</sup> who sit on American juries to public and corporate bureaucratic elites:

The vanishing trial is, in many regards, the vanishing jury. Power and discretion have shifted away from the jury and more and more now is in the hands of the judge. To put it another way, the long-term historical development is to shift decision making from amateurs to professionals. The jury decides few felony cases; prosecutors and public defenders do it now, in the process of plea bargaining. Lawyers and the parties dicker and settle.<sup>65</sup>

Blackstone, whom no one can accuse of being a populist, understood the jury as a corrective to the inevitable elitism of the judiciary, whose "decisions, in spite of their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity; it is not to be expected from human nature that the few should always be attentive to the interests and good of the many."<sup>66</sup>

The death of the trial would also distort the process of settlement. It would be the case that in more and more areas, "all cases settle." Cases would be evaluated not based on a history of adjudication, but on a history of prior settlements, going back to a time where the mind of man runneth not to the contrary. Paul Butler has suggested that this

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<sup>64</sup> *U.S. v. Shonubi*, 895 F. Supp. 460, 493 (1995) (Weinstein, J.) (on the increasing sophistication of American juries and the misplaced nature of paternalistic attitudes); Murphy, "Some Reflections on Evidence and Proof," 40 S. TEX. L. REV. 328 (1999) (the maturity of American jurors). There is, of course, the irony that the rising educational level of jurors accompanies the disappearance of the jury trial.

<sup>65</sup> Lawrence M. Friedman, "The Day before Trials Vanished," 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 690, 698 (2004).

<sup>66</sup> WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND (1768) [1979], 379.

pressure to bargain away every principle is corrosive, suggesting that we either have no principles or have not the means by which to implement them.<sup>67</sup> And transforming too many settlement offers into “Offers that they can’t refuse,” given the often punitive costs of going to trial, also breeds cynicism about basic institutions.

The trial’s disappearance would eliminate face-to-face drama from our legal order. I have already mentioned Thomas Green’s argument that the face-to-face nature of the trial kept the idea of justice alive in English law. The elimination of the trial would cause us to feel and understand less about each case. Stephen Burbank, a tough-minded empiricist himself, has concluded that recent trends must convince “even the most hard-hearted empiricist that some litigants in some types of cases in some courts are not receiving reasonable opportunities to present their cases.”<sup>68</sup> Without face-to-face encounter, we lose an opportunity to respond to a concrete person:

Such a response points to a hidden foundation, a mythic core that is repressed by the commodified images of positive law’s unreflective, outward gaze. Behind what John Noonan referred to as the mask of the law lies its hidden, ethical foundation: the repressed poetics of Justice....The associative, affective logic of visual images help us escape the disembodied logic or instrumental reasoning. When the flesh of the image ... arouses and transforms the viewer’s heart and soul...it invokes law’s hidden source, which is Justice....Standing face to face, the neighbor calls us. In our response to that primary ethical calling we affirm our ethical nature ....<sup>69</sup>

Judge Patricia Wald has pointed to the dangers of more and more of our law being developed in the context of summary judgments.<sup>70</sup> As Burbank notes, “the law developed

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<sup>67</sup> Paul Butler, “The Case for Trials: Considering the Intangibles,” 1 J. EMPIRICAL STUDIES (2004), 634.  
<sup>68</sup> Stephen B. Burbank, “Vanishing Trials and Summary Judgment in Federal Civil Cases,” 1 J. EMPIRICAL STUDIES 590, 622 (2004).  
<sup>69</sup> Richard K. Sherwin, “Law, Metaphysics, and the New Iconoclasm,” [http://ssrn.com/sol3/papers.cfm?abstract\\_id=1004361](http://ssrn.com/sol3/papers.cfm?abstract_id=1004361).  
<sup>70</sup> Patricia M. Wald, “Summary Judgment at Sity,” 76 TEX. L. REV. 1897 (1998).

in the context of summary judgment will be arid, divorced from the full factual context that has in the past given our law life and the capacity to grow.”<sup>71</sup> The dramatic quality of the trial cannot be replaced by summary proceedings:

But the trial is not only oral, it is dramatic. It involves conversations among lawyers, witnesses, and the court, all of which are performances. The performances are often adversarial and manifest the tensions among the plays within the constraints of the ordinary language in which these struggles take place. At trial, as in drama, freedom encounters freedom. Some things cannot be plausibly said, and the tenor of the interpersonal relations themselves is revealing. The drama is engrossing: it forces us to dwell within the tensions among the participants. It actualizes our powerful tacit powers of sensibility to grant insight “into the world’s embracing horizon of meaning, within which a complex actions unfolds, illuminated and judged by it.” It allows us to “think toward the truth ‘from the middle’ of our creaturely existence....What Bentley says about theater is true for trials—that “the little ritual of performance, given just a modicum of competence, can lend to the events represented another dimension, a more urgent reality” that overcomes that lazy or bureaucratic indifference that is, indeed, the “rust of society.”<sup>72</sup>

There would be two further related developments. The death of the trial would render the systems on which we rely more automatic, more “self-regulating.” The most dramatic example is our economic system, which we have recently learned is not so benignly self-regulating, at least not in the public interest. There would be fewer structures imposed by the legal system (and common sense norms) within which the systems would operated and which it had to respect. “Because legal practices, most dramatically the American trial, partake of the richer normative order of the life world, they may impose limits on what our systems, following their own inexorable logic may do.”<sup>73</sup> As one social theorist put it:

The law serves as some kind of pivot or transmission belt between lifeworld and systems. The life world is the (potential) site or a loosely connected

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<sup>71</sup> Burbank, *supra* note 68 at 626.

<sup>72</sup> BURNS, *supra* note 1 at 122 (citations omitted).

<sup>73</sup> *Id.* at 124 (emphasis omitted).

network of non-institutionalized discourse in which collective self-reflection and self-definition takes place. The law institutionalizes the channels (in the form of political and legal procedures) and provides a language or medium (in the form of binding norms) through which the results of these informal deliberative processes can become socially binding and effective—and can to a certain degree constrain and regulate the “systems.”<sup>74</sup>

One can sneer at “regulation by litigation,” but in the United States, with its relatively weak regulatory system, litigation in general and trials in particular are crucial institutions for keeping our systems from turning against us.<sup>75</sup> In less happy lands, the notion that the basic structure of society is “beyond good and evil,” to be known, if at all, by purely scientific means, has produced catastrophic results.<sup>76</sup> The continued vitality of the trial is an important antidote to those modes of thought.

A related consequence of the trial’s disappearance would be the increasing bureaucratization of American society. Corporate bureaucracies rationally organized to achieve (sometimes short term) profit maximization would be less qualified. We would have to rely more completely on our often politically beleaguered administrative agencies to control the latter. And even within the legal system itself, formalistic modes of adjudication, which parallel bureaucratic decision-making, would be less qualified. Bureaucratic modes of social ordering seek “to exclude questions of value or preference as obviously irrelevant to the administrative task, and it would view reliance on nonreplicable, nonreviewable *judgment* or *intuition* as a singularly unattractive method for

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<sup>74</sup> Bernard Peters, “On Reconstructive Legal and Political Theory,” in HABERMAS, MODERNITY, AND LAW (Mathieu Deflem ed.) 122 (1996).

<sup>75</sup> CARL BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 135 (2001).

<sup>76</sup> BURNS, *supra* note 17 at 240-44.

decision.”<sup>77</sup> Insofar as a bureaucratic apparatus grinds forward mechanically and inexorably we may end up with what Hannah Arendt has famously called an irresponsible “rule by nobody.”

It is unlikely, however, in many cases that general rules really do decide particular cases. Instead of a mechanical system deciding cases deductively, what we will probably have in many cases are judges deciding cases in the interstices of complex rules which do not themselves decide the case. Unlike the devices of the trial, which can really “get inside” the decision-maker and whose moral sources actually can trump the subjectivity of a lone decision-maker, complex patterns of jurisdictional, procedural, evidentiary, and substantive rules can invite manipulation by a Cartesian judge viewing those rules from a distance. After all, as Judge Posner, put it, “There is almost no legal outcome that a really skillful legal analyst cannot cover over with legal varnish” at least “when the law is uncertain and emotions aroused.”<sup>78</sup> The grim picture that thus emerges from the trial’s disappearance is a bureaucratized world where the run of cases are ground out by an irresponsible mechanism and the remaining cases “when the law is uncertain and emotions aroused” by the untutored subjectivity or political commitments of the judge.

There is another effect of the declining importance of public processes of adjudication. We are continuing to lose a major source of public information on important questions of general concern. Many arbitrations are not public and settlements are often private and sealed. “As long as courts continue to be places that provide public data in

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<sup>77</sup> JERRY MASCHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 26 (1985).

<sup>78</sup> Richard Posner, “Forward: A Political Court,” 119 *HARV. L. REV.* 52, 48 (2005).

volume and kind outstripping that produced about adjudication in administrative agencies, and as long as private providers do not regularly disseminate information about or provide access to their processes,” then “with the declining trial rate comes a diminution of public knowledge of disputes, of the behavior of judges, and of the forging *in public* of normative responses to discord.”<sup>79</sup> This decline can erode our sense of common norms. After all, “[c]ourtroom procedure becomes a common language through which a secular society honors its democratic heritage and applies its values (in particular that of fundamental fairness) to human transactions” where “[l]awyers and the rituals they observe, can be critical players in this process.”<sup>80</sup> The trial contains precisely those elements which the procedural justice literature identifies as important for the perception of justice.<sup>81</sup>

Finally, the death of the trial would eliminate more than knowledge about the particular dispute:

Landsman has noted that that “[l]awsuits against the tobacco industry and gunmakers and, recently, the fast-food industry, inspire more public debate about tort law than hours of ‘issues’ advertisement or scholarly articles.” The death of the trial would also remove a source of *disciplined information about matters of public significance*: “The risks posed by asbestos, cigarettes, and a host of other items would not have been broadcast without the sharing of information obtained in litigation and disseminated at trial.” Bogus has emphasized that companies that were successful for years at keeping regulators at bay finally had to accede to the compulsory process of discovery and adverse examination of defense witnesses at trial.<sup>82</sup>

Historically, public trials have been important sources of information and crucibles or debate for some of the most important public issues that have arisen in our history: from

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<sup>79</sup> Judith Resnick, “Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk,” 81 CHI-KENT L. REV. 521, 567 (2006).

<sup>80</sup> Robert M. Ackerman, “Vanishing Trial, Vanishing Community? The Potential Effect of the Vanishing Trial on America’s Social Capital,” 2006 J. DISPUTE RES. 166-69 (2006).

<sup>81</sup> Id.

<sup>82</sup> BURNS, *supra* note 1 at 133-34.

fugitive slaves and slavery itself to labor unrest and sweatshop conditions to political radicalism in the period after the First World War and again in the sixties.<sup>83</sup> We would be the much poorer in our understanding of these events without what we have learned from the public trials that illuminated them. Those trials were an important part of our national character.

The death of the trial would then have multiple meanings for us. It poses a major crisis for the legal profession today, one that I hope we have the collective vision and courage to address:

It would eliminate a forum where equitable considerations moderate the rigor of the law of rules. It would deprive us a distinctively American forum where a citizen can tell his own story in public and offer the evidence to make it effective. It would destroy a space where serious attention is paid to simple factual truth. It would reduce serious citizen participation in self government and likely damage the authority of the entire judicial branch. It would roll back the hard-earned enfranchisement of women and minorities. It would transfer power to political and technical elites. It would distort the norms for settlement and have a corrosive effect on our sense of real freedom to reach compromise. It would destroy the traditional relationship between face-to-face proceedings and the notion that legal proceedings were somehow about justice. And by squeezing drama out of those proceedings, it would impoverish the range of cognitive capacities we deploy in the law. We would both feel and see less. The death of the trial would compress into a monolith the variety of and tensions among our modes of social ordering. They could no longer qualify or redeem each other. We would have less freedom to address pressing issues in different ways.

In particular, the death of the trial would render our economic systems more automatic and beyond qualification by ordinary moral norms. It would mean the end of our ability incrementally to adjust our basic structures by norms that have their homes in other parts of our social world. The death of the trial would create a more bureaucratized world. It would also create a world in which judges could exercise more raw discretion in the interstices of complex legal rules unstructured and unqualified by the objectivity of the real social norms that the trial realizes. It would mean the

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<sup>83</sup> EDWARD W. KNAPPAN, STEPHEN G. CHRISTIANSON & LISA OLSON PADDOCK, eds., GREAT AMERICAN TRIALS: FROM SALEM WITCHCRAFT TO RODKEY KING (1994).

end of an irreplaceable *public* forum and would mean that more of the legal order would proceed behind closed doors. And it would deprive us, American citizens, of an important source of knowledge about ourselves and key issues of public concern.<sup>84</sup>

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<sup>84</sup> BURNS, *supra* note 1 at 134-35.