The Trials and Tribulations of Counting "Trials"

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THE TRIALS AND TRIBULATIONS
OF COUNTING "TRIALS"

Herbert M. Kritzer*

INTRODUCTION

Over the last decade, one of the major topics of Marc Galanter's research and writing has been the declining number of trials in the courts of the United States. An expanded issue of the Journal of Empirical Legal Studies was devoted to Galanter's initial analysis of what he labeled the "vanishing trial" and included a range of responses to that analysis, including speculations regarding what might account for the decline. There is no doubt that the number of proceedings in the federal district courts labeled as trials in the statistics compiled by the Administrative Office of the United States Courts (Administrative Office) has declined. I will show, however, that for recent years, this depends on which Administrative Office data series one consults and what that data series counts as a trial. While patterns of decline in the number of trials are evident in the statistics compiled by some state-

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level equivalents of the Administrative Office, there is some variation in what they label a trial.

While Galanter's work has produced significant commentary, it is important to realize that concerns in the United States about the decline of the jury trial are by no means new. Such concerns have been expressed at least since the late 1920s in scholarship such as Raymond Moley's article *The Vanishing Jury*,\(^3\) Dunbar Carpenter's letter to the ABA Journal, *The Jury System's Manifest Destiny*,\(^4\) Silas Harris's *Is the Jury Vanishing*,\(^5\) and J. A. C. Grant's *Felony Trials Without a Jury*.\(^6\) In fact, the decline in jury trials during this earlier period produced laments similar to what some commentators are expressing today:

Borrowing from the ideals of the French Revolution, "Equality, Liberty and Fraternity," we have in this country established a democratic form of government in order to safeguard and secure those ideals to all people. We have connected them with the then existing political and legal institutions and have since come to think that the institution is a necessary adjunct of the ideal itself. This is what has happened in the case of the jury. We no longer think of liberty or freedom or of any of the ideals of a democratic government and we cannot even think of a democratic form of government itself without thinking that the jury system is a necessary part of it. Conversely we say that when the jury system is dispensed of, we will, at the same time and in the same act, dispense with a democratic government and the ideals which it carries into effect. Justice being one of the ideals of a democratic government, we likewise say that without the jury system, justice among men will no longer exist.\(^7\)

Without a doubt, some types of trials, such as the jury trial in federal court, have declined in frequency, but the answer to the question of whether trials have generally declined depends on what one chooses to include in the category of "trials." Thirty plus years ago, I worked on the Civil Litigation Research Project (CLRP), a massive

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5. Silas A. Harris, *Is the Jury Vanishing?*, 4 CONN. B.J. 73, 76-80 (1930) (reporting that the number of requests for jury trials dropped sharply after a fee was imposed for such requests).


(for the time) study of civil litigation in state and federal courts funded by the United States Department of Justice. As part of that study, we collected data from a variety of sources, including court files and interviews with the attorneys representing the litigants in the cases for which we examined the court files. From the data in the court files, we noted a wide range of "events," one of which was the occurrence of a trial. Among the approximately 1,500 cases about which we collected data, we found 146 for which the records showed a trial as having occurred. Among the 1,520 lawyers we interviewed who had been involved in the court cases we sampled, 245 reported that the case involved a trial. For only 126 of those lawyers, however, did the court record show something that was labeled as a trial. In other words, 119 lawyers reported a trial for which we found no evidence in the court records. Furthermore, there were another thirty-three respondents who did not report a trial for which the court records listed a trial as having at least started.

A first reaction to these figures might be that they reflect problems with the lawyers' recall of the events in the case we were asking about. However, if that were the explanation for the inconsistency, one would expect there to be roughly equal number of false positives (lawyers saying there was a trial when the record does not show one) and false negatives (lawyers saying there was no trial when the record shows that there was a trial). It is more likely that this discrepancy reflects the ambiguity in what the lawyers understood when we asked whether there had been a trial, which in turn suggests variability in the definition of a "trial."

When I examined the frequency of trials in England for my contribution to the vanishing trial symposium, I encountered a range of problems related to the inconsistency in what was reported in the statistical materials compiled by the Lord Chancellor's Department (later the Department of Constitutional Affairs, and now the Ministry of Justice). One of those ambiguities concerned the adjudication of small claims disputes. In the early years I examined, the reports re-

8. We also sought to interview litigants, but that was a disappointing endeavor. For more detail on the study design, see Herbert M. Kritzer, Studying Disputes: Learning from the CLRP Experience, 15 LAW & SOC’Y REV. 503 (1980–81).
9. We actually interviewed more than 1,520, but with some lawyers we used a short-form of the survey instrument and did not ask about trials.
10. For another 1,242 respondents, the court records were consistent with the respondents not reporting a trial. These figures are from my re-analysis of the CLRP data; those data are available from the Interuniversity Consortium for Political and Social Research (Study No. 7994).
11. Arguably, one might expect there to be fewer "false" reports of trials because such a small proportion of cases involve trials.
12. See Kritzer, supra note 2.
ferred to trials in connection with small claims; in later years, the adjudication of small claims cases was labeled "arbitration." There was no appreciable change in the actual process; it was simply a relabeling. If one counts as "trials" only those proceedings labeled as "trials," however, the number of trials in England's County Courts would appear to have declined from a peak of about 50,000 in 1975 to about 13,000 in 2002. In contrast, if one combines what are labeled as trials with what are labeled as arbitration, the total number of trials in 1975 was about 56,000, and by 2002 the number had actually increased to about 69,000.

In the Parts that follow, I discuss the challenges and ambiguities involved in counting "trials" in the federal system, and more briefly in the state systems. The thrust of my analysis is that while there has most certainly been a drop in the number of jury trials in the federal courts, and probably in the state courts as well, the number of trials or equivalents in which the adjudicator is a single individual, usually called a "judge" but sometimes with other titles such as "hearing officer" or "referee," remains large.

II. TRIALS AS REFLECTED IN FEDERAL COURT STATISTICS

Galanter's article on the "vanishing trial" covered the period 1962 through 2002. Two of his key figures showed the pattern over time of what he labeled the "Number of civil trials" and the number of "Criminal defendants disposed of by . . . trial." What has happened in the intervening period? Figures 1 (civil trials) and 2 (criminal trials) replicate and extend Galanter’s figures through fiscal year 2011.

15. See Kritzer, supra note 2, at 746 fig.5. The 2002 figure is a decline from the combined peak of approximately 113,000 in the late 1990s.
16. See id.
17. See Galanter, The Vanishing Trial, supra note 1. Galanter has also now updated his analysis. See Galanter & Frozena, supra note 1.
18. Galanter, The Vanishing Trial, supra note 1, at 464 fig.1.
19. Id. at 494 fig.24.
20. The charts for federal trials in the district courts presented in this Article are derived from figures published in the reports prepared by the Administrative Office of the United States Courts, and are an extension of Galanter's charts for federal trials, see Galanter, The Vanishing Trial, supra note 1, which were also derived from Administrative Office reports. Since 1997, those reports have been entitled Judicial Business of the U.S. Courts. Statistics Division, Admin. Office of the U.S. Courts, Judicial Business of the U.S. Courts (1997–2011),
The data for civil trials come from Table C-4 in the Administrative Office's annual statistical report titled "Civil Cases Terminated, by Nature of Suit and Action Taken." The criminal trial figures come from Table D-4, which is labeled "Defendants Disposed of, by Type of Disposition and Offense." While not central to my discussion here, the picture since 2002 is not entirely clear. The number of cases disposed of by trial in 2011 is lower than in 2002, but there have been several ups and downs, and overall the number of cases disposed of by trial seems fairly steady in the last few years.


21. I have made two adjustments to the numbers reported in the annual judicial business reports. Specifically, there were unusual spikes in the number of cases disposed of by civil jury trials in 2007 and the number of cases disposed of by civil bench trials in 2008, both involving the middle district of Louisiana; that district has been running fifteen or fewer jury trials and five or fewer bench trials in recent years, but reported 6,353 cases disposed by jury trials in 2007 and 1,432 cases disposed by bench trials in 2008. The spikes appear to represent dispositions in one or two large multi-district litigation matters in that district, but it is not clear whether coding these dispositions as during or after trial is correct. See E-mail from Joe Cecil, Senior Research Assoc., Federal Judicial Center, to author (Mar. 15, 2011) (on file with author). For the figures I display, I have adjusted the total number of trials in the relevant years by assuming that the number of trials in the middle district of Louisiana is the average of the two surrounding years.

22. For my assessment of whether the number of trials in federal court has continued to decrease or has leveled off, see Herbert Kritzer, Where Are We Going? The Generalist vs. Specialist Challenge, 47 TULSA L. REV. 51 (2011) (book review).
23. Derived by author from sources cited supra note 20. The specific columns reported are for cases terminated “during or after” trial (either jury or nonjury).

24. Derived by author from sources cited supra note 20. The specific data reported are the sum of columns labeled “Acquitted by Jury” plus “Convicted by Jury” and the sum of “Acquitted by Court” plus “Convicted by Court.”
Do these figures represent the number of "trials"? Not necessarily: there can be consolidated cases in a single civil trial and multiple defendants in single criminal trial. Moreover, one must consider how the Administrative Office defines what constitutes a trial for purposes of its reports. Table C-4 is based on a reporting system derived from what was the Administrative Office's Form JS-6, which provides information on a case at termination. The specific element reported is the procedural progress of a case at termination. The instruction for coding the procedural progress variable describes a trial as follows: "a contested proceeding where evidence is introduced."  

The Administrative Office also reports the number of trials completed. According to the Administrative Office, "A trial is considered completed when a verdict is returned by a jury or a decision is rendered by the court." The data upon which this table is based are not directly connected to case dispositions and are provided through a different reporting vehicle (historically, the Administrative Office's Form JS-10, "Monthly Report of Trials and Other Court Activity"). This vehicle differentiates between criminal and civil cases, but does not provide information on the type of civil matter or type of criminal offense as do Tables C-4 and D-4. Figures 3 and 4 replicate Figures 1 and 2 using the data reported by the Administrative Office in what it now labels Table T-1, which is titled "Civil and Criminal Trials Completed, by District."


28. One could also examine geographic variation in the number of trials completed, but I have chosen not to do so.

29. See Judicial Business, supra note 26, at tbl.T-1 (2011). T-1 was originally titled C-7 and was renumbered in 2011. I will use T-1 to avoid confusion.
Figure 3: Civil Trials from Administrative Office Table T-1 (formerly C-7)^30

Figure 4: Criminal Trials from Administrative Office Table T-1 (formerly C-7)^31

The figures show that the number of civil "trials," both bench and jury, have been fairly stable over the last half decade; over that same time period, there has been a slow decline in criminal jury "trials," but a significant increase in criminal bench "trials" (the increase in bench "trials" has been proportionately greater than the overall increase in criminal case dispositions). When interpreting these patterns, however, one has to keep in mind how the Administrative Office has defined what counts as a trial: "a contested proceeding where evidence is introduced." There are a range of contested proceedings during which evidence may be introduced, including sentencing hearings, probation revocation hearings, hearings on a Daubert motion, hearings on fee petitions, requests for a temporary restraining order or a permanent injunction, summary jury trials, and possibly at least some hearings on summary judgment motions.

Administrative Office Table T-4, "Civil and Criminal Trials Resulting in Verdicts or Judgments, by District," provides more detail on the number of trials. For total trials, the table includes all contested hearings involving the presentation of evidence. Using the overall figures from this table, one gets a somewhat different view of changes in the number of federal trials. Figure 5 of this Article shows all civil trials and all criminal trials using the Administrative Office's broadest definition of trial (which includes hearings on contested motions, orders, and injunctions, plus contested sentencing hearings and probation revocation hearings, all of which include the presentation of evidence). In this Figure, we see a drop in civil trials, but little change over the last seven years. For criminal trials, there was a sudden drop from about 12,000 per year to 10,000–11,000 per year in 1994. Through 2005, the number of criminal trials fluctuated between 10,000 and 11,000. Since 2004, there has been a pattern of steady increase with the number of trials exceeding 14,500 in fiscal year 2011; the number of federal criminal trials according to these figures now exceeds the number when Table T-4 first appeared. A significant part of the recent increase is likely in response to the Supreme Court's decision in

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32. Based on data in the Administrative Office's report, Judicial Business of the U.S. Courts, the number of bench "trials" shown in Table T-1 (formerly in Table C-7) increased from 3,709 in Fiscal Year 2005 to 5,726 in Fiscal Year 2011, or 54.4%. See sources cited supra note 20. In contrast, the number of criminal cases disposed, as shown in Table D-4 in the reports, increased from 86,000 to 101,149, only 17.6%. Id.

33. Based on conversations with staff at the Administrative Office of the U.S. Courts, it is clear that the guidance given to the local staff persons who complete reports on case outcomes and on the use of "trial" is sufficiently ambiguous that there may be variance among the districts as to what gets counted as a trial for purposes of the reporting process, but it is not clear how much variance, if any, actually exists.
**Figure 5: All Trials from Administrative Office Table T-4**

United States v. Booker, which held that facts used in sentencing decisions in federal court must be proved beyond a reasonable doubt,\(^3\)\(^5\) Figure 5 makes it very clear that it is important to be specific about what one means when referring to trials.

Figures 6 and 7 take the information from the Administrative Office’s Table T-4 and break it down into the subcategories of trials for civil and criminal cases respectively. The number of jury trials shown in Figures 6 and 7 are the same as in Figures 3 and 4 because they derive from the same information in the reports provided to the Administrative Office by the federal district courts. Hence, the differences that become apparent in Figures 6 and 7 have to do with what one counts as nonjury trials. Again, the Administrative Office considers a trial to be any contested hearing that involves the presentation of evidence. Figure 7 shows that there has been a significant increase in such proceedings in criminal cases. At first glance, one might argue that the increased number of contested evidentiary proceedings in federal criminal cases is indicative of either an increase in adversarialism in criminal case processing or the impact of Booker. What Figure 7 does not take into account is the increasing number of criminal

\(^{34}\) Derived by author from sources cited supra note 20.

\(^{35}\) United States v. Booker, 543 U.S. 220, 243–44 (2005). Booker actually held that defendants had a right to require that those facts be proved to a jury; however, one could see the larger implication as requiring an evidentiary hearing in which a defendant could contest any facts that might influence the sentence to be imposed. See id.
defendants disposed each year from 1991 (56,747) through 2011 (101,149).38

36. Derived by author from sources cited supra note 20.
37. Derived by author from sources cited supra note 20.
To account for this increase, Figure 8 displays the number of trials per 100 defendants disposed over this period, and shows a clear pattern of decline through the time covered by Galanter's original analysis, despite the Administrative Office's expanded definition of trial. While that decline continues for jury trials, there is a sharp increase in the rate of nonjury trials, using the Administrative Office's broad definition, starting around 2005.

From this discussion, it remains clear that over the last thirty years there has been a pattern of decline in the total number of trials in the federal district courts, regardless of what is defined to count as a trial. However, the nature of that decline, and whether that decline has stabilized or, possibly for criminal cases, reversed course so that there is now a pattern of some increase, depends on how one defines a trial. If one were to put criminal trials in federal courts on a scale from most simple to most elaborate, with jury trials generally falling at the most elaborate end and proceedings such as sentencing hearings (other than in the very small number of federal death penalty cases) toward the least elaborate end, then it appears that the decline has been most striking at the elaborate end. Probably the greatest concern about the

40. See supra note 1 and accompanying text.
declining incidence of trial is with regard to jury trials. I will return to the issue of assessing the decline of jury trials in Part IV.

III. Moving Beyond the Federal District Courts

A. Other Federal Venues

While there is considerable ambiguity in counting trials in the federal district courts, the Administrative Office provides generally consistent data that allow one to observe relatively long-term trends in the district courts. However, if one is willing to adopt the Administrative Office’s broad definition of what constitutes a trial—a contested hearing at which evidence is presented—there is a wide range of federal venues that conduct trials. Most of these are adjudicatory bodies based within administrative agencies, although some are either Article I or Article III courts that are considered part of the federal judicial system. The data reporting by administrative agencies is far from consistent. Table 1 shows my effort to count the number of federal trials across most agencies conducted in the most recent year for which I could locate data.

Note the abundance of ambiguity here. For example, it is not clear how many of the bankruptcy court dispositions involved some sort of contested evidentiary hearings. In her contribution to the vanishing trial symposium, Elizabeth Warren reported that, in 2002, less than 4,000 adversarial proceedings in the bankruptcy court terminated “during or after trial.” The number of cases disposed after an adversarial proceeding in 2002 was about the same as in 2010, so a good estimate of the number of bankruptcy cases disposed after trial in 2010 is likely similar to that reported by Warren for 2002. However, we have no information on how “trial” is defined in this context, or whether there are other bankruptcy proceedings that would meet the Administrative Office’s definition of trial.

41. See, e.g., Burns, supra note 7.
43. While the count is undoubtedly incomplete, I believe it captures all of the major federal sources.
45. See supra note 34 and accompanying figure.
TABLE 1: FEDERAL “TRIALS” BEFORE COURTS AND ADMINISTRATIVE TRIBUNALS

<table>
<thead>
<tr>
<th>Venue</th>
<th>Number of “Trials”</th>
<th>Information Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal District Court, Civil FY2010</td>
<td>5,360</td>
<td>Judicial Business of the U.S. Courts 2010, Table C-7 (<a href="http://www.uscourts.gov/Statistics/JudicialBusiness.aspx">http://www.uscourts.gov/Statistics/JudicialBusiness.aspx</a>)</td>
</tr>
<tr>
<td>Federal District Court, Criminal FY2010</td>
<td>8,445</td>
<td>Judicial Business of the U.S. Courts 2010, Table C-7 (<a href="http://www.uscourts.gov/Statistics/JudicialBusiness.aspx">http://www.uscourts.gov/Statistics/JudicialBusiness.aspx</a>)</td>
</tr>
<tr>
<td>Board of Veterans Appeals, FY2009</td>
<td>13,515</td>
<td>Board of Veterans’ Appeals, Report of the Chairman, fiscal year 2010, p. 3 (<a href="http://bva.va.gov/docs/Chairman_year/Board_of_Veterans_Appeals_Report.pdf">http://bva.va.gov/docs/Chairman_year/Board_of_Veterans_Appeals_Report.pdf</a>)</td>
</tr>
<tr>
<td>U.S. Tax Court FY2009</td>
<td>704**</td>
<td>ABA Tax Section Court Procedure Committee, p. 19, Jan 22, 2010, San Antonio, Texas</td>
</tr>
</tbody>
</table>

* Number of hearings not reported.
** Number is rounded in report.

Another ambiguity concerns social security appeal hearings. These hearings are conducted on an inquisitorial basis; only the claimant appears at the hearing and the agency does not defend the decision that is being appealed. It is arguable whether these hearings meet the Administrative Office’s definition of a trial. They are certainly “evidentiary hearings,” and the administrative law judges (ALJs), through their questioning, can be quite hostile to the evidence being presented. Moreover, decisions by the ALJs in favor of claimants are subject to review by the Appeals Council on its own motion as part of the Council’s quality control responsibilities. Finally, it is also the case that from the viewpoint of advocates representing claimants, some of the ALJs are quite skeptical toward claimants; reports

47. See id. at 127.
49. See KRITZER, supra note 46, at 135–36.
by the Social Security Administration show that while the average ALJ denies around 40% of the appeals decided, some ALJs deny 80% or more of the appeals. This can impact how the advocates approach the hearings, and in some situations, the advocates may treat the hearings as if they were contested.

Despite all of these factors, it is questionable whether these are "contested hearings."

What the table shows is that there may be over one million federal trials aggregated across the federal adjudicatory bodies, about three-quarters of which took place in forums not labeled courts; only about one-half of one percent of these were jury trials in a federal district court. If one chooses not to count Social Security appeals, assumes that there were only 4,000 bankruptcy hearings that meet the definition of a trial, and drops the Court of Federal Claims dispositions because there is no information on the number of trials that occurred, the number of federal "trials" drops to about 329,000, of which about one and a half percent were jury trials.

Thus, while Galanter's work shows that federal trials in which lay jurors determine which side prevails have decreased, the number of federal adjudicatory proceedings in which parties have the opportunity to present evidence and challenge the opposing side's evidence (with the assistance of skilled counsel if desired and affordable) before a neutral decision maker is large, and may actually be growing. Besides the absence of the lay jury, the central element that differentiates the vast bulk of these adjudicatory proceedings is that they occur in specialized settings before adjudicators who decide only a specific type of case.

B. State Venues

In his article, The Vanishing Trial, Galanter included a brief discussion of trends in the number of trials in state courts. A more extensive discussion was provided by Brian Ostrom and his colleagues, drawing on data collected by the National Center for State Courts (National Center) concerning trials in state courts of general jurisdiction. The study included a table showing what counted as a trial in

51. See KRITZER, supra note 46.
52. A study of social security disability appeals found that in the early 1990s there were about 300,000 to 350,000 such appeals each year, roughly half of the number for fiscal year 2010. See id. at 113 fig.2.
each state for which the National Center had data. Some states only count a trial if a verdict is reached. Other states have different triggers for determining when a proceeding counts as a jury trial, including: (1) when voir dire begins; (2) when a jury is empaneled; (3) when opening statements are made; or (4) when the introduction of evidence begins. Some states count a bench trial after opening statements, when evidence has been introduced, or when the first witness is sworn. While the Administrative Office includes a range of contested proceedings in what it counts as a trial, it is unclear which proceedings, if any, states include in their counts of trials other than those that determine guilt, liability, or damages.

Brian Ostrom generously provided me with figures updating some of the National Center's data on trials in state courts of general jurisdiction; these updated data cover fourteen states and the District of Columbia Superior Court for civil trials, and sixteen states for criminal trials. These figures show that the number of criminal jury trials have actually been increasing slightly in the last several years, while the number of bench trials first increased slightly before settling back to approximately the same number as in 2002. The National Center's updated data show that civil jury trials have continued to decrease (by about a third since 2002) while the number of civil bench trials has remained relatively constant (actually increasing by about 10% between 2002 and 2009).

Analyzing the statistics from state courts is challenging due to differences in how states define "trial," as well as differences in the use of general jurisdiction courts rather than those of specialized or limited jurisdiction. Some states have unified court systems in which there is only a general jurisdiction court, but in many unified court systems, there are specialized dockets for cases such as traffic, family (divorce), probate, and small claims. As noted above, the data I received from the National Center covered civil trials in the general jurisdiction courts of fourteen states plus the District of Columbia Superior Court. Two of the states account for over 75% of the bench

55. Id. at 762–63 tbl.3.
56. See id.
57. See id.
58. The District of Columbia Superior Court is the local court for the District of Columbia and has jurisdiction equivalent to a state court.
59. According to these figures, jury trials constituted 41% of criminal trials in these courts in 1976, 51% in 2002, and 56% in 2009.
60. Jury trials constituted 18% of civil trials in these courts in 1976 compared to 15% in 2002 and 9% in 2009.
trials in the most recent year. One of these states is Virginia, which accounts for 32% of the bench trials; the figures for Virginia include trials in divorce cases, and these constitute about half of the bench trials reported for Virginia. The other state dominating the counts of bench trials is Texas, which accounts for 44% of the bench trials in the most recent year; 38% of those trials were tax cases, largely appeals from property tax assessments.

Staying with Texas and Virginia, the National Center data include criminal trials for Texas but not for Virginia; however, I was able to find data for both states online. For the most recent year, Texas shows a total of 909 bench trials and 3,209 jury trials. These numbers are about the same as reported for 1976, the first year in the series—911 for bench trials and 2,954 for jury trials. However, the total number of criminal dispositions has quadrupled over the period, from 71,630 to 277,201. The number of criminal trials peaked in the early 1990s: 1,841 (in 1990) for bench trials and 4,265 (in 1991) for jury trials. In contrast, in the most recent year for which statistics are available, Virginia concluded less than half the number of cases (122,908) as did Texas (277,201), but conducted 37,654 bench trials and 1,894 jury trials. The ratio of dispositions, Virginia to Texas, is 0.44; for jury trials the ratio is 0.64; and for bench trials it is 41.33. The likelihood that a case in Virginia will be disposed of through a bench trial is ninety-three times that in Texas; the equivalent ratio for jury trials is 1.4. Is Virginia really that different from Texas, or is Virginia counting Virginia hams while Texas barbecued briskets?


63. See OFFICE OF COURT ADMIN., ANNUAL REPORT FOR TEXAS JUDICIARY: FISCAL YEAR 2011 (2012), available at http://www.txcourts.gov/pubs/annual-reports.asp. This report actually shows the total number of civil trials as 122,231 compared to the figure of 32,982 in the National Center data; the difference is family law matters: 48,822 divorce cases, 853 cases involving the Uniform Interstate Family Support Act (UIFSA), and 39,574 “other family law matters.” The figures in this report seem to show that a majority of Texas divorces come after trials: 48,969 trials versus a total of 45,053 combining default, agreed, or summary judgments or directed verdicts. In Texas, a trial is counted if an opening statement is made or evidence is introduced. How many of these divorce “trials” involve disputes being resolved by the judge versus the judge being presented with evidence to support an agreement on property division, child support, or maintenance is unknown.

64. See generally id.; VIRGINIA'S JUDICIAL SYSTEM, supra note 62.

65. See VIRGINIA'S JUDICIAL SYSTEM, supra note 62. I count here only felony cases, though the report also shows figures for misdemeanor cases. The figures for Texas are for the district court; in Texas, misdemeanors are handled by limited jurisdiction county courts.

66. Actually, one difference is what gets counted as a disposition. Texas includes motions to revoke (presumably probation, parole, or both). Even after removing these from the total number of dispositions in Texas (i.e., decreasing the base used to compute the percentage of cases
Neither Wisconsin nor Minnesota is included in the National Center’s data on trials. They make for a good comparison because they are neighbors and have virtually the same population. Wisconsin produces an annual report that includes a “Disposition Summary” for all cases statewide. Minnesota does not publish a similar report, but the state court administrator’s office generously provided me with detailed breakdowns akin to those that Wisconsin makes publicly available. For Minnesota, “Trial counts represent all cases where trial activity was held, including cases settled or dismissed during trial and mistrials; trial counts do not imply the number of cases concluded by trial.” For Wisconsin, a trial is counted once the trial starts, even if the case is settled shortly after the trial begins (e.g., during voir dire).

For some types of cases (e.g., felonies, traffic, delinquency, “child in need of protection,” and general civil) the numbers for the two states are very similar; however, for other types of cases (e.g., misdemeanors, divorce, small claims), the numbers differ greatly. It is unclear whether the differences between the two states, ignoring categories that one state reports and the other does not, reflect differences in definitions, differences in reporting practices, or the effects of differences in the underlying law. Divorce is an area in which at least some of the difference (729 reported trials in Minnesota versus 2,912 in Wisconsin) could be due to differences in law. Wisconsin’s marital prop-


68. For the last several years, a report has been prepared that contains some performance measures, which includes some information on trials. See State Court Administrator’s Office, Performance Measures: Minnesota Judicial Branch 102 (2011), available at http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Annual_Report_2011_Perf_Measures_Approved_JC_Nov_2011.pdf.

69. This tabulation is on file with the author.

70. E-mail from Deb Dailey, Manager of Research and Evaluation, Court Services Division, State Court Administrator’s Office, to author (Mar. 19, 2012) (on file with author).

71. E-mail from Sara Ward-Cassady, Deputy Director of State Courts, Office of Court Operations, to author (Mar. 21, 2012) (on file with author).

72. Wisconsin disposed of a total of 22,221 divorce cases in 2010 compared to 17,576 in Minnesota in 2010, a difference that could account for only a small portion of the gap in trials in divorce cases in the two states.
erty regime might be producing more disputes that must be resolved through a trial.\footnote{Wisconsin shifted from a traditional common law property regime for married couples to a system similar to community property. For a discussion of the adoption of this regime and some of its implications, see Howard S. Erlanger & June Miller Weisberger, \textit{From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later}, 1990 Wis. L. Rev. 769.}

When we turn to other court-like bodies that conduct proceedings that might be labeled trials, things get very complicated among the states. The states vary both in how they organize their adjudication of “administrative” disputes, and in how they label the forums that hear those disputes. For example, in most states, disputes concerning workers’ compensation are handled by an administrative agency, but in some states (e.g., Nebraska, Oklahoma, Montana, Rhode Island, and New Jersey) there is a Workers’ Compensation Court.\footnote{In Minnesota, workers' compensation disputes are heard by an administrative agency, but appeals from decisions of that agency go to the Minnesota Workers' Compensation Court of Appeals. In Rhode Island, the Workers' Compensation Court is part of the state's unified court system, and in Nebraska, judges of the Workers' Compensation Court are subject to retention elections.} Similarly, tax appeals in some states are heard by an administrative body (e.g., the Wisconsin Tax Appeals Commission, the Kansas Board of Tax Appeals, and the Michigan Tax Appeals Tribunal), while in others there is a state tax court (e.g., Minnesota, New Jersey, Maryland, and Oregon).

Additionally, there is substantial variation in the organization of administrative hearings. For example, in Wisconsin, workers’ compensation hearings are handled in the Department of Workforce Development; in Minnesota those hearings are handled by ALJs based in the Office of Administrative Hearings (which handles a range of areas, including disputes over granting and revocation of a variety of licenses); and in Texas, such hearings are handled by ALJs based in the Department of Insurance. In Minnesota, hearing officers based in the Department of Human Services handle FAIR hearings, which involve the denial or termination of a range of social welfare benefits.\footnote{The Supreme Court's decision in \textit{Goldberg v. Kelly} mandated FAIR hearings. See Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970).} In Wisconsin, the Division of Hearings and Appeals in the Department of Administration handles FAIR hearings (along with a range of other matters including, licensing, disputes over the provision of special education, and compensation of crime victims). Not surprisingly, the way in which each of the states tracks and reports information varies tremendously.
One exception to the variability of what is reported is in the area of unemployment compensation. Persons denied unemployment compensation can appeal that denial, and employers who believe that a former employee was granted compensation when the ex-employee was not entitled to receive it can appeal the grant of compensation. Because of the federal involvement in the unemployment compensation system, states are required to report to the federal government the number of appeals processed, and the vast majority of appeals go to a hearing because hearings are scheduled very quickly; virtually no appeals are settled or otherwise withdrawn. Table 2 shows the number of unemployment compensation appeals handled by Minnesota and Wisconsin; this number eclipses all other trials in those two states combined. Nationally, in 2010, there were close to two million appeals related to unemployment compensation claims. Figure 9 shows the trend in the number of appeals starting with 1997. As one would expect, the number of appeals is, at least in part, a function of the state of the economy and the accompanying unemployment rate. Even when the economy was in very good condition in the late 1990s, however, the number of appeals (and hence hearings) related to disputes over entitlement to unemployment compensation was close to one million per year.

Table 2 shows the numbers of contested administrative hearings in Wisconsin and Minnesota. This table does not include all such hearings, but does include the types of matters that produce the largest numbers of hearings. The number of unemployment compensation appeals hearings exceeds all trials occurring in each state's courts. Table 2 does not separate out the number of tort trials in the two states; there were 266 such trials in Minnesota (251 jury trials) and 305 in Wisconsin (248 jury trials). The number of workers' compensation cases that involved a hearing was two to three times the number of tort trials in the courts. Overall, even with these partial numbers, the combined number of trial-like events in the two states totaled 113,101; Court trials constitute about 41% and 31% of trial-like events in Wisconsin and Minnesota respectively.

76. For a description and analysis of unemployment compensation appeal hearings, see Kritzr, supra note 46, at 23-77.
78. Contested hearings in workers' compensation deal with questions of whether there was in fact an injury, whether the injury was work-related, whether requested medical treatment is necessary, and, in some cases, the degree of permanent disability, which in turn affects the amount of compensation that is paid.
### Table 2: Counting “Trials” in Wisconsin and Minnesota

<table>
<thead>
<tr>
<th></th>
<th>Wisconsin</th>
<th></th>
<th>Minnesota</th>
<th></th>
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<tbody>
<tr>
<td></td>
<td>Jury</td>
<td>Bench</td>
<td>Jury</td>
<td>Bench</td>
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<tr>
<td><strong>Trials in Court</strong></td>
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<td></td>
</tr>
<tr>
<td>Criminal</td>
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<tr>
<td>Felony</td>
<td>848</td>
<td>89</td>
<td>926</td>
<td>191</td>
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<tr>
<td>Misdemeanor</td>
<td>352</td>
<td>87</td>
<td>1,405</td>
<td>712</td>
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<tr>
<td>Minor criminal (incl. traffic)</td>
<td>830</td>
<td>3,690</td>
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<tr>
<td>Traffic</td>
<td>192</td>
<td>31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Contested Forfeiture</td>
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<td></td>
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<tr>
<td>Traffic</td>
<td>243</td>
<td>3,577</td>
<td>306</td>
<td>3,586</td>
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<tr>
<td>Parking</td>
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<td></td>
<td></td>
<td>125</td>
</tr>
<tr>
<td>Other</td>
<td>34</td>
<td>1,617</td>
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<tr>
<td><strong>Civil</strong></td>
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<td></td>
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<tr>
<td>General (torts, contract, etc.)</td>
<td>353</td>
<td>706</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family</td>
<td></td>
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<tr>
<td>Major Family (divorce)</td>
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<tr>
<td>Divorce</td>
<td>6</td>
<td>2,906</td>
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<td>729</td>
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<tr>
<td>Support</td>
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<td>59</td>
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<tr>
<td>Paternity</td>
<td>0</td>
<td>1,003</td>
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<tr>
<td>Domestic Abuse</td>
<td></td>
<td></td>
<td></td>
<td>149</td>
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<tr>
<td>Other Family</td>
<td>0</td>
<td>932</td>
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<td>135</td>
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<tr>
<td>Small Claims (“conciliation” in MN)</td>
<td>3</td>
<td>4,888</td>
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<tr>
<td>Unlawful detainer</td>
<td></td>
<td>638</td>
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<td>Other minor civil</td>
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<td>41</td>
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<tr>
<td>Probate</td>
<td>14</td>
<td>4,050</td>
<td>0</td>
<td>387</td>
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<td><strong>Juvenile</strong></td>
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<td></td>
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<td>Delinquency (adult offense)</td>
<td>0</td>
<td>607</td>
<td>9</td>
<td>514</td>
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<tr>
<td>Status offense</td>
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<td></td>
<td></td>
<td>183</td>
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<tr>
<td>CHIPS (dependency, neglect)</td>
<td>51</td>
<td>224</td>
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<td>Termination of Parental Rights</td>
<td>176</td>
<td>41</td>
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<tr>
<td>Other</td>
<td>0</td>
<td>1,121</td>
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<td><strong>Total “Court” Trials</strong></td>
<td>2,272</td>
<td>21,879</td>
<td>3,813</td>
<td>12,821</td>
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<tr>
<td><strong>“Trials” Outside Courts</strong></td>
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<td></td>
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<tr>
<td>Unemployment compensation appeals (2011)</td>
<td>23,392</td>
<td>30,329</td>
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<tr>
<td>Workers compensation</td>
<td>688</td>
<td>745</td>
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<tr>
<td>FAIR hearings</td>
<td>2,353</td>
<td>5,400</td>
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</tr>
<tr>
<td>Other administrative hearings</td>
<td>3,796</td>
<td>613</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total All “Trials”</strong></td>
<td>59,380</td>
<td>53,721</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent of All “Trials” Occurring in Courts</td>
<td>40.7%</td>
<td>31.0%</td>
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</table>
IV. Conclusion

The preceding discussion makes it clear that counting trials is not a simple process. It is clearest for jury trials, but even for those trials, one must decide at what point a trial is to be counted: when voir dire is begun, voir dire is completed, opening statements are made, testimony is started, one side completes the presentation of its case, both sides complete their cases, closing arguments and jury instructions are presented, jury deliberation begins, or a verdict is returned. Which point is most appropriate depends in significant part on why one believes that jury trials are important, a question I return to below.

When one starts counting nonjury trials, the definition of a trial becomes very important. Can a trial only take place in a "court"? And, if so, how does one deal with the arbitrariness in what gets called a "court"? If one limits trials to events in courts, is it further limited to "courts" that are formally part of the judiciary, or can it include entities called "courts" that fall outside the judiciary (e.g., "immigration
TRIALS AND TRIBULATIONS

Within the entities one is willing to include for purposes of counting trials, one must decide what exactly constitutes a trial conducted without a jury. For example, does a proceeding in which a judge, broadly defined to include adjudicators with other titles such as "hearing officer," makes findings of fact constitute a trial?

As discussed above, the Administrative Office defines a trial as "a contested proceeding where evidence is introduced." Does one include all such proceedings as trials, or should there be some limits, such as only counting proceedings that dispose of a case in some manner? For example, does one exclude contested sentencing hearings after a guilty plea? If one does that, should not one also exclude civil trials, jury or nonjury, in which liability is stipulated and the only issue to be decided is the amount of damages to which the plaintiff is entitled? What about proceedings that technically do not dispose of a case, but effectively can do so, such as a hearing on a defendant's motion to exclude an expert (a Daubert motion), in which testimony is taken from the challenged expert and, which, if the motion to exclude is granted, will lead to summary judgment? What about inquisitorial proceedings in which only one side appears, and hence the hearing is not contested in a formal adversarial sense? If a trial is defined as a "contested hearing where evidence is presented," is there any reason not to count hearings before adjudicators who are not employees of the government, which we typically label "arbitration"?

I do not have an answer to the question of what should or should not be counted. Ultimately, as noted above, that depends on why we care about the number of trials. Are we concerned about how one or more institutions are functioning? Are we concerned about the ability of persons and organizations involved in conflict to obtain a decision from a neutral adjudicator? Does it matter whether the adjudicator is a specialized professional, as in the typical administrative hearing setting, or a generalist professional, as is the traditional judge, or lay judges as in some justice of the peace courts (or many magistrates' courts in England), or a group of laypersons brought together on an ad hoc basis to form a jury? Does the proceeding have to be public in order to be counted as a "trial," and if so, should we only count proceedings in which someone other than parties involved are present given that the vast majority of trial-like proceedings that are open to the public attract no attendance from the public at large?

It is clear that the number of jury trials declined in many, perhaps most, jurisdictions in the United States over the last fifty years. However, that decline represents a long-term phenomenon extending back through much of the twentieth century. Some of the early decline in criminal jury trials reflected legal changes that allowed defendants to plead guilty. Further, there have been vast changes over the last fifty years that might explain the continued decline. First is the requirement imposed by the Supreme Court that all criminal defendants facing potential jail time and who cannot afford to hire counsel be provided counsel at the government's expense.\(^8\) Today, the majority of criminal defendants charged with felonies in many jurisdictions are represented by public defenders or assigned counsel.\(^8\) Before most defendants had lawyers, many would have had something that would be called a trial, but those so-called trials would lack much of the character that we normally expect in a trial.\(^8\) One impact of the provision of counsel was likely a reduction in the number of trials as a result of lawyers counseling many defendants that going to trial would have little point and might involve significant costs in terms of a harsher sentence.

A second change is the increased level of education and training of the police over this period.\(^8\) One impact of these changes may have been a decline in the number of dubious arrests, and hence, fewer cases in which the defendant has any meaningful defense to the criminal charges. A third change, which would function in tandem with changes in policing, is the shift toward more career prosecutors and a smaller proportion of lawyers who work as prosecutors relatively briefly as a means of obtaining trial experience, and thus very much want to go to trial to gain that experience.\(^8\) Highly experienced pros-
ecutors are better able to identify cases that are not worth taking to trial because of marginal or problematic evidence, or significant uncertainty regarding the defendant's guilt, and they have less motivation to try cases for the sake of obtaining trial experience. A final factor that might account for more rigorous screening of cases, and hence a decline in "triable" cases (from the defendant's perspective), is increased caseloads, which would encourage prosecutors to shift their standards so as to eliminate cases in which some question exists, but which previously they might have felt were worth trying.

Unless, for some reason, we adopt the position that all criminal cases should be tried, we must ask whether a case should be tried or whether resolution by a guilty plea or dismissal is appropriate. We would probably agree that dismissal is appropriate when the prosecutor has significant doubts about whether a trial would produce a guilty verdict. Undoubtedly, there would be less agreement on when a guilty plea is clearly appropriate. One might say that a guilty plea is appropriate when there is no meaningful chance that a trial would produce anything other than a guilty verdict, but agreeing on cases for which this would be true may be difficult. One could say that there is something that might be labeled a "triable case," even if we cannot always agree on whether a particular case is or is not triable. Even if we cannot agree on some proportion of cases, however, one might expect that the combination of more professional policing, more experienced prosecutors, and more defense attorneys means that cases that at one time would have gone to trial are now filtered out either by dismissal or pleas of guilty. To this, one could add the impact of sentencing guidelines, which may reduce defendants' willingness to roll the dice in the hope of a lighter sentence. I should emphasize that I do not want to suggest that there are no negative reasons that the number of criminal trials have declined; I simply want to make clear that there are likely some good reasons for the decline.

When we turn to civil trials we can again ask why trials are desirable. We should probably distinguish between trials involving two private parties and trials involving a private party and a governmental party. What is clear from the analysis I have presented above is that there is ample opportunity for trial-like consideration of a wide range of disputes between citizens and government, although with certain exceptions (e.g. immigration issues or tax issues), relatively few actually take place in institutions we label courts. As for disputes between private parties, there is a definite trend of decline—with certain exceptions, the most prominent of which is disputes over the entitlement
to unemployment compensation. Given that the cost of trials in private civil cases falls largely on the parties, one can ask whether the decline is itself a rational and positive development. The economics of the settlement process is driven by the combination of assessments of the likelihood of success at trial, estimates of likely trial awards, and the cost of going to trial. For smaller cases (under six figures), the costs of going to trial tend to be a, probably the, driving force; even for plaintiffs paying lawyers on a percentage-fee basis, a compromise settlement will often put more money in the plaintiff’s pocket than will a fully successful trial.

Repeat actors in the civil litigation process understand the cost calculation issues, and part of the decline may represent increased sophistication on the part of these actors and a resulting willingness to reach or urge settlement. To this, one can add the increased use of mediation as part of the pretrial process, which can be particularly useful in cases in which an unsophisticated party fails to grasp the economics of settlement versus trial, or in which a party is overly optimistic about what can be achieved at trial. For the most repeat of the repeat players, insurance companies, the nature of the sophisticated tools they now use to value cases may also increase their willingness to settle, particularly if they can achieve the settlement on favorable terms. If parties look at the economic realities, including costs and uncertainties over outcomes, and conclude that a settlement is preferable to the costs and risks associated with going to trial, particularly a jury trial, why is that a negative development? Alternatively, if there is a benefit to the community to have more trials in such cases, but the

85. I do not know whether there is a trend of decline in disputes over payment of workers’ compensation; I know of no national-level data on this, and longitudinal data from individual states are very sketchy.


87. This reflects the costs of going to trial that will be deducted from what the plaintiff receives along with any amounts owed to parties with a subrogated interest in the case. I discuss how this works in my book on contingency fee legal practice. See Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States 174–75 (2004).

parties do not feel that going to trial is worth the cost, why should the parties be forced to bear the cost of something that benefits the community?\textsuperscript{89} While one might argue that what should be done is to reform the process to reduce the costs of trial, I would observe that essentially all efforts to date to accomplish that have been largely unsuccessful; in fact, the primary solution to reduce the cost of litigation is to find ways to shortcut the process and avoid trials.

\textsuperscript{89} There are a range of possible benefits from more jury trials, one of which is the possibly positive impact of the experience of serving on a jury. See John Gastil et al., The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation 179 (2010); see also Andrew J. Bloeser et al., Jury Service as Civic Engagement, 40 Am. Pol. Res. 179 (2012).