

# THE DIMINISHED TRIAL

Nora Freeman Engstrom\*

## INTRODUCTION

The civil trial is vanishing. In 1938, trials resolved roughly 20 percent of civil cases in federal court.<sup>1</sup> By 1990, only 4.3 percent of federal civil filings reached trial.<sup>2</sup> By 2000, a mere 2.2 percent did.<sup>3</sup> And, most recently, in 2016, the civil trial rate was halved again.<sup>4</sup> Over the past twenty years, between 1997 and 2016, the number of civil trials in the nation's federal courts dropped 62 percent.<sup>5</sup> Another way to look at it: Federal courts conducted half as many civil trials in 2016 than they did in 1962, even while disposing of over five times as many civil cases.<sup>6</sup>

At the state level, where the vast majority (perhaps 98 percent) of civil litigation takes place, trial rates are lower still.<sup>7</sup> The National Center for State

---

\* Professor of Law, Associate Dean for Curriculum, and Deane F. Johnson Faculty Scholar, Stanford Law School. This Article was prepared for the Colloquium entitled *Access to Justice and the Legal Profession in an Era of Contracting Civil Liability*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 27, 2017, at Fordham University School of Law. I am grateful to Nathan Werksman for excellent research assistance, and I am indebted to the attendees of the Colloquium for their insightful comments and suggestions.

1. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633.

2. *Id.*

3. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2000 ANNUAL REPORT OF THE DIRECTOR 159 tbl.C-4 (2000), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/c04sep00.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/c04sep00.pdf) [<https://perma.cc/SRV4-NGRH>]. Note that, as discussed in more detail below, this table ("Table C-4") defines a trial as "a contested proceeding at which evidence is introduced" and therefore counts as "trials" certain events which we might not believe truly qualify (e.g., a contested hearing to determine whether to issue a restraining order). See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

4. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2016 ANNUAL REPORT OF THE DIRECTOR tbl.C-4 (2016) [hereinafter 2016 ANNUAL REPORT], [http://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c4\\_0930.2016.pdf](http://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2016.pdf) [<https://perma.cc/G8GT-FKU4>].

5. Compare *id.*, with ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 1997 ANNUAL REPORT OF THE DIRECTOR 152 tbl.C-4 (1997), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/c04sep97.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/c04sep97.pdf) [<https://perma.cc/YTP5-QMQ5>].

6. The federal courts tried 5802 civil cases in 1962 compared to 2781 today, while disposing of 50,320 civil cases in 1962 compared to 271,302 today. Compare 2016 ANNUAL REPORT, *supra* note 4, tbl.C-4, with Galanter, *supra* note 3, at 462 tbl.1.

7. See ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 85 (2011) (estimating that 98 percent of trials occur at the state level). To be sure, less is known about state trial rates because, as one commentator succinctly explains, "[s]tate-court data is more limited, harder

Courts (NCSC) reports that, in 2016, the percentage of civil cases resolved by jury trial ranged from .05 percent to .50 percent in the twenty-four jurisdictions studied.<sup>8</sup> In these states, as on the federal level, the trend is sharply downward: From 2000 to 2009, for example, the percentage of state civil jury trials dropped a stunning 47.5 percent.<sup>9</sup>

Zeroing in on individual jurisdictions reveals a picture that is particularly stark. The entire state of West Virginia saw twenty-one federal civil trials (bench and jury) in 2016.<sup>10</sup> Wyoming saw eight.<sup>11</sup> Alaska saw three.<sup>12</sup> And Vermont saw two.<sup>13</sup> The story in states is similar. In Iowa in 2014, for example, there were thirteen counties where no trial verdicts were entered whatsoever, and there were sixty-one counties with three or fewer jury verdicts (whether in civil or criminal cases).<sup>14</sup>

So, trials are disappearing. That fact is as disturbing as it is consequential, and it has captured our collective attention, as we “mourn” and “lament” the civil trials’ demise.<sup>15</sup> Further, we not *only* mourn. We also painstakingly and resolutely study: *Lots* of attention has been paid to charting, analyzing, and understanding these arresting trends.<sup>16</sup>

to collect, and difficult to compare.” Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 164 (2005).

8. 2016 Civil Caseloads—Trial Courts: 2016 Civil Jury Trials and Rates, NAT’L CTR. FOR ST. CTS., [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro) [<https://perma.cc/L836-WD76>] (last visited Mar. 15, 2018). The NCSC counts a proceeding as a “trial” as long as “the jury has been sworn, regardless of whether a verdict is reached.” *Id.* (quoting COURT STATISTICS PROJECT, STATE COURT GUIDE TO STATISTICAL REPORTING 38 (2017), [http://www.courtstatistics.org/~/\\_media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx](http://www.courtstatistics.org/~/_media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx) [<https://perma.cc/NV9R-6HVJ>]).

9. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 1 n.1 (2012), [http://iaals.du.edu/sites/default/files/documents/publications/a\\_return\\_to\\_trials\\_implementing\\_effective\\_short\\_summary\\_and\\_expedited\\_civil\\_action\\_programs.pdf](http://iaals.du.edu/sites/default/files/documents/publications/a_return_to_trials_implementing_effective_short_summary_and_expedited_civil_action_programs.pdf) [<https://perma.cc/SG3W-P2JE>]. *But cf.* Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials,”* 62 DEPAUL L. REV. 415, 421 (2013) (suggesting that, for a number of reasons, we ought to interpret statistics showing declining trial rates with caution).

10. 2016 ANNUAL REPORT, *supra* note 4, tbl.C-4A.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Number of Iowa Civil Jury Trials Continues to Decline*, IOWA ST. B. ASS’N (Mar. 18, 2015), <http://www.iowabar.org/?page=CivilJuryDecline> [<https://perma.cc/38V6-9L3Q>].

15. Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mazingo? A Trial Judge’s Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 99 (2010); Stephen D. Susman & Thomas M. Melscheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 434 (2013). Judge Patrick Higginbotham notes:

Over the past two decades, awareness of the decline of trials has crept slowly into the collective judicial consciousness. What most judges passed over as a temporary phenomenon brought on by dynamic dockets or by circumstances in a particular geographic region has now been recognized as an across-the-board change, albeit one that came on slowly at first.

Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 748 (2010).

16. *See, e.g.*, BURNS, *supra* note 7, at 82–111; CIVIL JUSTICE INITIATIVE, NAT’L CTR. FOR STATE COURTS & STATE JUSTICE INST., THE LANDSCAPE OF CIVIL LITIGATION IN STATE

But that might not be the half of it. This Article suggests that the other part of the story is that trials are not only vanishing. The few that remain also appear to be shrinking. Influenced by what Judith Resnik long ago dubbed “managerial judging”—a willingness on the part of trial judges to take ad hoc, improvisational action in the name of administrative efficiency and effective docket management—judges seem to be taking a more active role *during* trials in an effort to speed these proceedings along.<sup>17</sup> As they do, trials seem to be undergoing a subtle metamorphosis: becoming shorter, more regimented, subject to less party control, and more affected by particular judicial whims.<sup>18</sup>

This transformation is important in its own right. And it is particularly impactful because of the interaction between the two trends. As the number of trials dwindles, the few that are left have an outsized and ever-larger effect—when it comes to enforcing laws, setting precedent, establishing settlement rates, promoting accountability and transparency, and, more broadly, shaping Americans’ interactions with, and conception of, the civil justice system.<sup>19</sup>

This Article thus highlights the need for a much larger inquiry into not only what is happening *to* trials but also what is happening *in* those that remain. Part I draws together statistics that suggest that trials are changing: Short trials (of one day) are becoming relatively more common, while long trials (of twenty days or more) are becoming less common.<sup>20</sup> Part II then identifies

---

COURTS, at iii–vi, 25–28 (2017), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [<https://perma.cc/3YQX-GW92>]; ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 14–15, 21–29 (2017); Galanter, *supra* note 3, at 459; Hecht, *supra* note 7, at 166–81; John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 522 (2012).

17. See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Elaborating on the concept, E. Donald Elliott explains: “Managerial judges believe that the system does not work; that *something* must be done to make it work; and that the only plausible solution to the problem is *ad hoc* procedural activism by judges.” E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986).

18. “Managerial judging” was initially conceived of as affecting only the pretrial and post-trial period. See Resnik, *supra* note 17, at 377. Thus, to quote John Langbein, it was assumed that managerial judging left “adversary domination of the trial (especially jury trial) largely unaffected.” John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 859 (1985). As judges’ turn to management has become better understood, however, many have recognized that judges’ activism in the name of efficiency has not just affected the pretrial or post-trial period. Rather, it has significantly and consequentially affected the trial itself. See, e.g., Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. (forthcoming 2018) (on file with author); Richard L. Marcus, *Reining in the American Litigator: The New Role of American Judges*, 27 HASTINGS INT’L & COMP. L. REV. 3, 23 (2003); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1261–62 (2010).

19. See Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 229–30 (“This small fraction of cases that are tried by juries . . . provide the signals and markers that influence the outcome of a vastly larger number of cases settled or abandoned without trial.”).

20. Note, this is different from saying that federal civil trials are getting shorter overall. There is no clear evidence that they are—though it is true, the percentage of trials lasting three days or less has dropped slightly over time, from 79 percent of all federal civil trials in 1983 to 75 percent in 2016. Nora Freeman Engstrom, *Civil Trial Data From 1983 to 2016* (2016)

and explores some of the factors that may explain these trends. Finally, a brief conclusion highlights some problems with all the above and issues a call for further study and analysis.

#### I. CONSIDERING TRIAL TRENDS: FEWER LONG TRIALS AND A HIGHER PROPORTION OF SHORT TRIALS

Federal trial data points to a subtly transformed trial landscape. Our starting point to discern changes in trial procedure is 1983, the year the Rules Committee amended the Federal Rules of Civil Procedure to make “case management an express goal of pretrial procedure” and, some suggest, the year managerial judging finally and firmly took hold.<sup>21</sup> When one compares the trials of 1983 and the current day, two changes jump out.

First, since 1983, the percentage of very short (one day) federal civil trials increased substantially, from 46 percent in 1983 up to 54 percent in 2016.<sup>22</sup> Thus, quite remarkably—starting in 2007 and every year since—*the majority of all federal civil trials have been wrapped up in only one day*. Figure 1 below illustrates the point graphically.

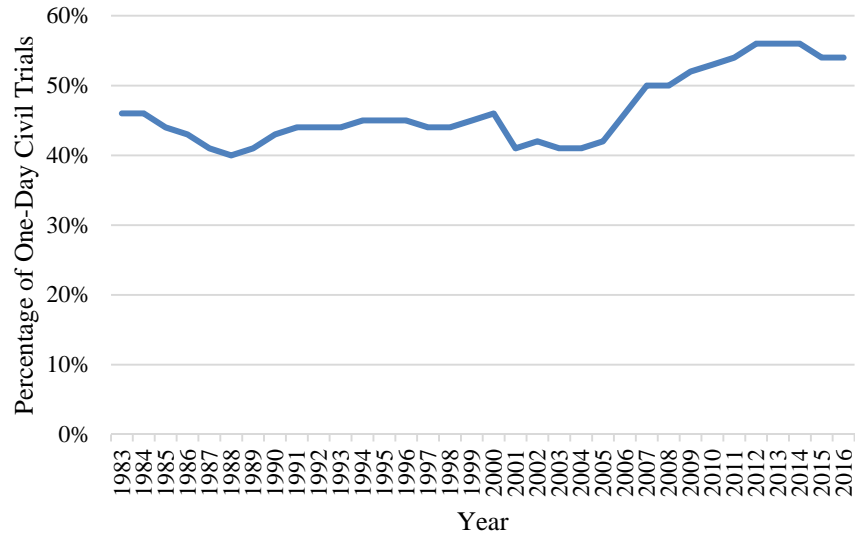
---

(unpublished manuscript) (on file with author) (compiling data from Tables T-2 and C-8 from the 1983 through 2016 Administrative Office of the United States Courts’s *Director’s Annual Reports*).

21. FED. R. CIV. P. 16(a) advisory committee’s notes to 1983 amendment; *see, e.g.*, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 676 (2010) (“If one is looking for a turning point in the history of judicial case management in the federal courts . . . it would be 1983 . . .”); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 527 (1986) (suggesting that the 1983 amendments marked the official “approval” of “managerial judging”). To be sure, any year one picks as a starting point for these trends is necessarily somewhat arbitrary, as judges did not all embrace case management techniques en masse. Some judges embraced judicial management in the 1970s, while Congress only added its voice to the chorus (with the passage of the Civil Justice Reform Act) in 1990. *See* Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 791–94 (1993).

22. Engstrom, *supra* note 20. During this period, the *total* number of federal civil trials dropped precipitously from 14,391 in 1983 to 4572 in 2016. *Id.* Accompanying that extraordinary drop, the raw number of trials lasting one day decreased as well, from 6642 in 1983 to 2471 in 2016. *Id.* For trial lengths prior to 1983, *see* Galanter, *supra* note 3, at 477–78, 479 fig.11, 479 fig.12. Table T-2, the source of this data, does not include time spent in jury deliberation; when offering the length of trial, it only tracks “judges’ time on the bench.” Email from Sheila Barnes-Jones, Statistics Div. Staff, U.S. Judicial Data & Analysis Office, to author (Sept. 28, 2017) (on file with author).

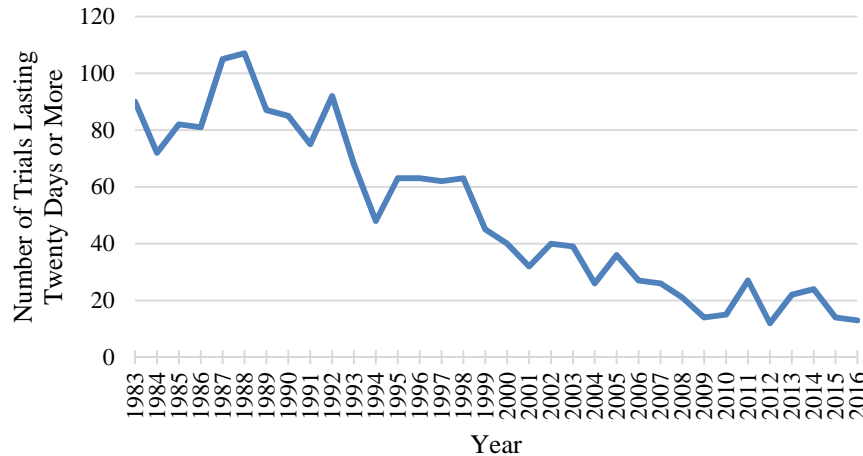
Figure 1: Percentage of Civil Trials Lasting One Day in All U.S. District Courts, Combined (1983–2016)



The number of protracted federal civil trials (those trials lasting twenty days or more) has also been in flux, though in the opposite direction. True, the percentage of long trials has remained very low throughout the period, vacillating between 0 and 1 percent of all federal civil proceedings. But the raw numbers suggest a subtle decline: While there were ninety trials lasting twenty or more days in 1983 and there were 107 in 1988, there have been fewer than thirty such proceedings every year since 2006, and, remarkably, there were only thirteen protracted civil trials in all of 2016.<sup>23</sup>

23. Engstrom, *supra* note 20. The “shrinking” of federal proceedings is broadly consistent with research suggesting that federal court judges’ time on the bench is also in decline. See Jordan M. Singer & William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 566 (2014) (presenting evidence suggesting that, as the years pass, federal judges are spending less and less time on the bench in open court).

Figure 2: Number of Civil Trials Lasting Twenty Days or More in All U.S. District Courts, Combined (1983–2016)



A final note is that the above data points to an uptick in *short* trials and a reduction in *long* trials in our federal courts—and this is particularly remarkable because it defies expectations. A sophisticated observer, in other words, might expect to see a move toward longer and more protracted proceedings for at least three reasons. First, as our society grows increasingly complex, the conventional wisdom is that federal civil litigation is becoming increasingly complicated.<sup>24</sup> Second, over the years, we have seen an uptick in pretrial motions practice (both motions to dismiss and motions for summary judgment).<sup>25</sup> An observer might predict that this motions practice is weeding out suits that are slam dunks (and that might, for example, be resolved midtrial via a motion for judgment as a matter of law), leaving only closer and more hotly contested disputes to be litigated.<sup>26</sup> Third, and most

24. See, e.g., Galanter, *supra* note 3, at 477, 517 (noting that “[i]t is widely believed that within the period covered here [from 1965 to 2002], the cases that are tried have become more complex and consume larger investments of resources” and that “litigation has become more technical, complex, and expensive”); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1411 (1997) [hereinafter *The Civil Jury*] (recognizing the “growing complexity of today’s litigation”); Lauren Fajoni Bartlett, *From the Virtual Courtroom to the Virtual Courthouse: Fundamental Considerations for the Modern Lawyer*, FOR DEF., Jan. 2010, at 22, 22 (suggesting that, these days, “cases are more complex, the legal issues are more complicated”).

25. For the uptick in Rule 56 motions, see *infra* notes 32–34 and accompanying text. Rule 12(b)(6) motions are also on the rise, following the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). For discussion and estimates of those cases’ effects, see generally David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203 (2013).

26. On the other hand—and as I discuss below in Part II.B—we might expect that pretrial motions practice, particularly when it leads to *partial* dismissal or *partial* summary judgment, will weed out some, but not all, claims in complex cases, thus shaving the time necessary to try them. If so, then the overall effect of pretrial motions practice on trial time across the full distribution of cases, from simple to complex, could be fully consistent with the observed trends.

puzzlingly, over the years, we have seen a sharp rise in the proportion of jury trials as compared to bench trials: In 1983, the majority (56 percent) of federal civil trials were conducted without a jury; only a minority (44 percent) were jury trials.<sup>27</sup> But by 2016, that had flipped: 71 percent of trials (1965 out of 2781) were jury trials; a mere 29 percent (816 out of 2781) weren't.<sup>28</sup> This is surprising because evidence suggests that jury trials, which require a jury to be impaneled and instructed, take far longer than bench trials—roughly twice as long.<sup>29</sup> Yet, even while a higher proportion of trials are jury trials, a higher proportion of trials are also completed in just one day.

## II. WHAT MAY EXPLAIN THE ABOVE TRENDS?

The above suggests that our trials are changing and, in certain respects, defying expectations. But how, exactly—and why? We cannot definitively answer either question without conducting detailed empirical analysis. Lacking that, the discussion below offers tentative hypotheses in an attempt to generate discussion and pave the way for future inquiry.

### A. *Change in Inputs: Simpler Cases Are Coming to Trial?*

One possibility, admittedly at odds with the conventional wisdom above, is that outputs are affected by inputs, and we may be seeing a higher proportion of one-day trials alongside fewer long trials because there may be a boost in simpler claims. This may or may not be right; much more study is needed to evaluate the relative complexity of those cases reaching trial. A good place for such an inquiry to start would be Administrative Office of the U.S. Courts, Table C-4, which lists the number of civil cases terminated and action taken, by case type.<sup>30</sup> With this table, one can evaluate how many of each type of case (such as consumer credit, motor vehicle personal injury, deportation, and patent) made it to trial in a given year, though, of course, a great deal of study and analysis would be needed to determine which cases properly qualify as “simple” or “complicated,” as well as whether the complexity of a particular *kind* of case (product liability, say) has changed over time.<sup>31</sup>

---

27. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 1983 ANNUAL REPORT OF THE DIRECTOR tbl.C-4 (1983). There were 11,625 trials in 1983, including 5064 jury trials and 6561 nonjury trials. *Id.*

28. 2016 ANNUAL REPORT, *supra* note 4, tbl.C-4. This is consistent with Galanter's 2004 finding. *See* Galanter, *supra* note 3, at 465 (“In the course of the rise and then fall in the number of federal civil trials, the makeup of these trials changed. More of them are before juries and fewer are bench trials . . .”).

29. Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176, 176 & n.3 (1996) (collecting authority and concluding that “[t]he available data generally agree that jury trials take about twice as long as judge trials”).

30. *See, e.g.*, 2016 ANNUAL REPORT, *supra* note 4, tbl.C-4.

31. Another possibility might be that the “who” has changed—namely, that a surge in pro se litigants is affecting the duration of civil trials. I cannot rule that out because the data are incomplete. But it does not appear that, at least in recent years, there has been an uptick in the proportion of pro se filings (though it could be that pro se cases are not being filed more often but, for some reason, are now going to trial at unusually high rates). In 2016, out of 291,851 civil filings, 85,992—or 29 percent—were filed pro se, whereas in 2005, out of 253,273 civil

*B. Pretrial Practice Is Winnowing Down Contested Issues?*

A second possible explanation is that pretrial practice may be streamlining trial. In particular, in 1986, the Supreme Court decided the so-called *Celotex* trilogy—three cases that dramatically expanded the issues amenable to pretrial resolution via summary judgment.<sup>32</sup> Thereafter (and, some say, even before *Celotex* came down), parties started filing—and judges started granting—more motions for summary judgment (which disposed of entire cases) and also *partial* summary judgment (which disposed of just parts of cases).<sup>33</sup> According to Joe Cecil of the Federal Judicial Center: “Over the 25-year period [from 1975 to 2000], the percentage of cases with one or more summary judgment motions granted in whole or in part doubled from 6 percent to 12 percent.”<sup>34</sup> When the latter motions were granted, judges effectively took formerly contested issues off the table and winnowed down the questions that had to be addressed and resolved at trial. This winnowing may help to explain why we are witnessing an uptick in trials of just one day.

In addition (or maybe, in the alternative), in 1983 and again in 1993, the Rules Committee beefed up Rule 16 pretrial conferences considerably.<sup>35</sup> In particular, in 1983, Rule 16(c)(1) was added to judges’ playbook. It provides that, at any pretrial conference, the court can consider the “formulation” and simplification of issues, including the “elimination of frivolous claims or defenses.”<sup>36</sup> Rule 16(c)(3) was also expanded, to empower trial courts to consider, and take action with respect to, “the possibility of obtaining admissions of fact . . . which will avoid unnecessary proof” as well as

---

filings, 76,314—or 30 percent—were filed pro se. Compare 2016 ANNUAL REPORT, *supra* note 4, tbl.C-13, with ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR 88 tbl.S-24 (2005), [http://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/s24.pdf](http://www.uscourts.gov/sites/default/files/statistics_import_dir/s24.pdf) [<https://perma.cc/4LTJ-JC59>].

32. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–50 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–88 (1986); see also Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 984, 1041–49 (2003) (suggesting that the *Celotex* trilogy “transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation”).

33. See Miller, *supra* note 35, at 1048–57 (discussing the “greater judicial receptivity” to motions for summary judgment following the *Celotex* trilogy); cf. Engstrom, *supra* note 25, at 1204 n.4 (reporting that the “steepest increase in summary judgment filings and grants came before the *Celotex* trilogy, not after”).

34. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 883 (2007).

35. For more on the 1983 amendments, see generally ARTHUR R. MILLER, FED. JUDICIAL CTR., THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY (1984), <https://www.fjc.gov/sites/default/files/2012/1983Amnds.pdf> [<https://perma.cc/AGE4-RD37>]. For the 1993 amendments, see Miller, *supra* note 32, at 1004 (explaining that the 1993 amendments further “embellished” Rule 16).

36. FED. R. CIV. P. 16(c)(1) (1983); see *id.* 16(c) advisory committee’s notes to 1983 amendment (explaining that Rule 16(c)(1) “has been added in the hope of promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone”).



“stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence.”<sup>37</sup> These newly invigorated Rule 16 conferences, and the actions taken therein or thereafter, may be narrowing claims and inducing parties to stipulate to more facts, which again, would serve to abridge the zone of legitimate controversy.

### C. *Anomalies in the Data?*

A third possibility is that the above is best explained by oddities in trial data, as that data is maintained and reported by the Administrative Office of the U.S. Courts.

#### 1. More Mid-Trial Settlements?

First, Table C-4, from which the above data are drawn, is not a count of *completed* trials or trial verdicts but merely a count of cases terminated “during or after trial.”<sup>38</sup> Thus, a case “counts,” and might appear as a one-day trial in the discussion above, if the parties reach a settlement soon after the trial gets underway.<sup>39</sup> Given that mid-trial settlements are tallied, might it be that a higher proportion of trials are wrapped up in just one day because, as the years go by, a higher proportion of civil cases are being resolved soon after trial commences via consensual settlement?

Maybe. But the scattered data we have suggests not. According to Marc Galanter, in fact, over time we have seen *fewer* cases consensually resolved mid-trial, not more. He reports that, in 1988, 24 percent of federal civil cases were resolved “during” trial, whereas by 2002, only 18 percent of cases were resolved “during” the trial proceeding.<sup>40</sup> Thus, rather than solving the puzzle, this settlement wrinkle seems to deepen the mystery.

#### 2. More Non-Trial Proceedings Counted as Trials?

A second possibility, which also arises from quirks in the Administrative Office’s data, is that Table C-4 tallies not only bona fide trials but, instead, all “contested proceeding[s] at which evidence is introduced.”<sup>41</sup> Given this expansive definition, Table C-4 counts as “trials” certain events which are not trials in any traditional sense, such as a contested hearing to determine whether to issue a temporary restraining order or to qualify an expert against a *Daubert* challenge. Owing to this inclusivity, Table C-4 offers a fairly crude—and generous—indicator of classic trial activity.

---

37. *Id.* r. 16(c)(3). For more on these stipulations of fact, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.471 (2004).

38. *See, e.g.*, 2016 ANNUAL REPORT, *supra* note 4, tbl.C-4.

39. *See* Galanter, *supra* note 3, at 461 (“The Administrative Office’s Table C-4 . . . is not a count of completed trials but of cases that arrive at the trial stage.”).

40. *Id.* at 461; *see also id.* at 466 fig.3 (illustrating the drop graphically). Galanter elaborates: “As fewer cases managed to survive until the trial stage, those that began a jury trial were more resistant to being deflected from pursuing the trial through to its conclusion.” *Id.* at 461.

41. *Id.* at 461.

How generous? It is difficult to say for sure, though we have an inkling. Professor Jonah Gelbach has recently completed a rigorous study of federal civil cases that had docketed trial activity in calendar year 2014. Sifting through hundreds of thousands of dockets, Gelbach found 1574 federal cases that had either a bench or jury trial in 2014, whereas Table C-4 reports that 2920 trials (nearly twice as many) were conducted during that same period.<sup>42</sup> This is critically important because it points to a serious mismatch between “real” trials and “reported” trials, and it also helps to explain one-day trials’ popularity (since some of the one-day trials reported above are not real trials at all).

But while this insight has profound implications,<sup>43</sup> it stops short of unraveling our current mystery. It fails to explain why we are seeing an *uptick* in one-day trials (unless we believe that contested hearings are on the upswing, which is certainly possible but not obvious).<sup>44</sup> And it also does nothing to explain why protracted trials (those of over twenty days) have become so rare.

#### D. The Shrinking Jury?

Still another possible explanation is that more trials are now conducted in front of fewer jurors—another change reportedly associated with greater speed and efficiency.<sup>45</sup>

The twelve-person jury was an early and central feature of the American judicial system. Indeed, the Charter of Jamestown established the twelve-person jury in 1607, and, as early as 1898, the Supreme Court rejected Utah’s attempt to cut the jury down to size.<sup>46</sup> Whereas the Utah Supreme Court had stated, “There can be no magic in the number 12, though hallowed by time,”

---

42. Compare Memorandum from Jonah Gelbach, Professor, Univ. of Pa. Law Sch., to author (Oct. 11, 2017) (on file with the author), with ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS, 2014 ANNUAL REPORT OF THE DIRECTOR tbl.C-4 (2014), [http://www.uscourts.gov/sites/default/files/c04dec14\\_0.pdf](http://www.uscourts.gov/sites/default/files/c04dec14_0.pdf) [<https://perma.cc/R948-MEBM>].

43. Gelbach’s calculations reveal that we have been overestimating the incidence of federal trials—and that trials are, in fact, much scarcer than scholars have so far recognized.

44. Here, perhaps the best hypotheses would be that either *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny have led to more contested hearings regarding the admissibility of expert testimony or that *Jones v. Bock*, 549 U.S. 199 (2007), which interpreted the Prison Litigation Reform Act of 1995’s exhaustion requirement, has led to more contested hearings in the prison litigation context as judges probe whether the plaintiff-prisoner has successfully exhausted prison grievance procedures.

45. This move from twelve to six jurors has been motivated by a desire to “streamline civil trials.” *The Civil Jury*, *supra* note 24, at 1467; see also Hans Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 711 (1971) (“The reasons presently given for reduction of the size of federal civil juries are to expedite jury trials and to lessen their cost.”). Some, however, insist that “[o]verall, little court time is saved by reducing jury size.” Stephan Landsman, *In Defense of the Jury of 12 and the Unanimous Decision Rule*, 88 JUDICATURE 301, 303 (2005).

46. *The Civil Jury*, *supra* note 24, at 1468–70.

the Supreme Court disagreed.<sup>47</sup> According to the Court: “[T]he wise men who framed the Constitution of the United States and the people who approved it were of the opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.”<sup>48</sup> The Court then reiterated that position in 1899, declaring: “we are clearly of the opinion that the word ‘jury,’ in section 19 of article 1, as well as in other places in the constitution where it occurs, means a tribunal of twelve men.”<sup>49</sup>

Yet, in time, the Supreme Court changed its tune. In *Williams v. Florida*, decided in 1970, the Supreme Court surprised onlookers by upholding a Florida statute that provided for six-person juries in all noncapital cases.<sup>50</sup> Emboldened by *Williams*, in the early 1970s, a number of district courts adopted local rules providing for juries of fewer than twelve in civil cases.<sup>51</sup> And a few years later, in *Colgrove v. Battin*, those actions were tested and approved.<sup>52</sup> From there, in 1991, the Rules Committee essentially codified *Colgrove* and amended Federal Rule of Civil Procedure 48 to give judges discretion to empanel anywhere from six to twelve jurors.<sup>53</sup> Exercising this discretion, some districts specify a particular number of jurors in their local rules (although that number varies), others provide a range, and still others vest the choice in the trial court’s discretion.<sup>54</sup> Now, with the dust settled, it seems that the majority of federal civil trials are argued before juries of between six and eight.<sup>55</sup> Since smaller juries are associated with faster adjudications, that might help to explain some of the fluctuation above.

---

47. The Utah Supreme Court continued: “Intelligence, impartiality, and integrity are the qualities that will enable and influence jurors to ascertain and declare the truth. Such a result does not depend upon any particular number.” *State v. Bates*, 47 P. 78, 80 (Utah 1896).

48. *Thompson v. Utah*, 170 U.S. 343, 353 (1898).

49. *Capital Traction Co. v. Hof*, 174 U.S. 1, 15 (1899) (quoting *Lamb v. Lane*, 4 Ohio St. 167, 179 (1854)).

50. 399 U.S. 78, 79, 102–03 (1970). As the text indicates, the opinion came as a surprise. See 9B ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2491 (3d ed. 2017) (“Until June 22, 1970, when the Supreme Court decided the case of *Williams v. Florida*, no one doubted that, unless the parties stipulated otherwise, a jury in a civil case in federal court had to consist of exactly twelve jurors, neither more nor less.”).

51. MILLER, *supra* note 50, § 2491 (recounting this history).

52. 413 U.S. 149, 149–50 (1973). Subsequently, in *Ballew v. Georgia*, 435 U.S. 223, 245 (1978), the Court struck down a Georgia law providing for criminal juries of five.

53. See FED. R. CIV. P. 48(a) (“A jury must begin with at least 6 and no more than 12 members . . .”). Prior to the 1991 amendment, Rule 48 provided: “The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of jurors shall be taken as the verdict or finding of the jury.” MILLER, *supra* note 53, § 2491 n.8 (quoting FED. R. CIV. P. 48 (1990)).

54. Thornburg, *supra* note 18, at 1277–78 (discussing judges’ increasingly active trial management).

55. *The Civil Jury*, *supra* note 24, at 1478. In fact, the Standing Committee recommended in June 1996 that federal courts ought to return to twelve-person juries, but that recommendation was rejected. Thomas D. Rowe, Jr., *The Twelve-Person Federal Civil Jury in Exile*, 46 U. MICH. J. L. REFORM 691, 691 (2013).

### E. Bifurcation?

Another economization technique that may explain some of the above is judicially ordered bifurcation of complex trials, either to separate liability from damages or, particularly in mass tort cases, to separate common issues (such as general causation) from those peculiar to particular plaintiffs. Expressly permitted by Federal Rule of Civil Procedure 42(b), bifurcation is often associated with “expedition and economy” because, if the plaintiff does not prevail in the first part of the trial, the “later” issue need not be addressed.<sup>56</sup>

Historically, bifurcation was limited and rare.<sup>57</sup> But now, in many states, legislation requires courts to split questions of liability from damage determinations whenever punitive damages are at issue.<sup>58</sup> And commentators assert that bifurcation is becoming more common, particularly in complex cases, such as those asserting mass tort and intellectual property claims, as well as suits involving violations of antitrust and environmental laws.<sup>59</sup> Again, more study is needed to determine whether bifurcation is, in fact, on the upswing and, if so, the precise effect of this development. But it could be that a move toward slicing and dicing certain claims is fueling some of the observed trends.

### F. Judges’ More Active Trial Management?

Last but not least, influenced by the ethos of managerial judging, trial judges themselves seem to be taking a more active role in trial processes, including by imposing time restrictions on opening statements and closing arguments and imposing strict trial time limits, across the entire proceeding.<sup>60</sup>

---

56. Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 722 (2000) (declaring that there is a “clear consensus” that, for certain disputes, “bifurcation offers huge potential trial savings”); Jennifer M. Granholm & William J. Richards, *Bifurcated Justice: How Trial-Splitting Devices Defeat the Jury’s Role*, 26 U. TOL. L. REV. 505, 511–12, 537 (1995). This common-sense prediction was tested and seemingly confirmed in 1963. See Hans Zeisel & Thomas Callahan, *Split Trials and Time Savings: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1624 (1963) (studying “regular” and “separated” trials and concluding that bifurcation yielded substantial time savings).

57. Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a “Reverse Bifurcation” Approach to Punitive Damages*, 2 CHARLESTON L. REV. 375, 378–79 (2008) (tracing the relevant history).

58. For a compilation of relevant legislative activity, see *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 618–19 (1996) (Ginsburg, J., dissenting).

59. Gensler, *supra* note 59, at 725 (reporting that “federal judges regularly employ bifurcation in complex litigation such as mass tort cases” and that “[b]ifurcation is also common in patent litigation, complex environmental litigation, antitrust litigation, and complex employment litigation”); see *Ciena Corp. v. Corvis Corp.*, 210 F.R.D. 519, 521 (D. Del. 2002) (“[B]ifurcation of complex patent trials has become common.”); accord John K. Setear, *Comments on Judges’ Opinions on Procedural Issues*, 69 B.U. L. REV. 765, 778 (1989) (“The enthusiasm for bifurcation of trials verges on the glowing.”).

60. As Elizabeth Thornburg writes: “Judges can and do impose the same kind of ‘less is more’ . . . philosophy on trials that they have imposed on the pretrial stage of litigation.” Thornburg, *supra* note 18, at 1324. Exhibiting this “less is more” philosophy, some judges are also known to impose strict time limits on direct testimony or cross-examination. See, e.g., *Cruz v. N.Y.C. Dep’t of Educ.*, 376 F. App’x 82, 84 (2d Cir. 2010) (affirming the trial court’s imposition of a two-hour limit on certain witnesses’ testimony); *Malone v. State Farm Lloyds*,

### 1. Limits on Opening Statements and Closing Arguments

First, many trial courts now impose strict time constraints on parties' opening statements and/or closing arguments.<sup>61</sup> Unlike trial time limits that curtail *aggregate* trial time (discussed below), these à la carte limits have been around for a long time.<sup>62</sup> And, I cannot say whether courts these days are imposing more or stricter limits than they have in the past. Further study is needed.

Yet, current limits are certainly notable for their popularity and rigidity. In a recent suit out of New Jersey, for example, a federal judge limited both the plaintiff and the defendant to ten minutes for their opening statements.<sup>63</sup> In another "somewhat complicated case" in Florida where sixteen witnesses testified, the plaintiff was limited to a five-minute opening statement and a fifteen-minute closing argument.<sup>64</sup> And, in a Tennessee medical malpractice trial in 2011, where the plaintiff suffered catastrophic cognitive injury allegedly at the hands of the defendants, the plaintiff was limited to "just twenty minutes" to make her opening statement, even while defendants were allotted twice that.<sup>65</sup>

---

203 F.3d 827, 827 (5th Cir. 1999) (per curiam) (finding no abuse of discretion in the trial court's placement of a limitation on cross examination of State Farm's expert).

61. For further discussion of these restrictions, see Thornburg, *supra* note 18, at 1279, 1285–86.

62. Appellate courts have long emphasized that "a trial judge in the federal judicial system has wide discretion in such matters as length of counsel's argument as long as he treats both sides substantially alike, and does not give one side a preference or advantage over the other." *Alston v. West*, 340 F.2d 856, 858 (7th Cir. 1965); *see also* *Rosiello v. Sellman*, 354 F.2d 219, 220 (5th Cir. 1965) ("A trial judge in the exercise of sound discretion may always limit argument."); Michael R. Flaherty, Annotation, *Propriety of Trial Court Order Limiting Time for Opening or Closing Argument in Civil Case—State Cases*, 71 A.L.R.4th 130 (1989) ("It is well settled that the imposition of time limits on the arguments of counsel is within the sound discretion of the trial court . . .").

63. *Faulman v. Sec. Mut. Fin. Life Ins. Co.*, No. 04-5083(AET), 2008 WL 4330188, at \*2 (D.N.J. Sept. 17, 2008), *aff'd on other grounds*, 353 F. App'x 699 (3d Cir. 2009).

64. *Maleh v. Fla. E. Coast Props., Inc.*, 491 So. 2d 290, 291 (Fla. Dist. Ct. App. 1986) (per curiam) (reversing the trial court after finding that the limits constituted an arbitrary abuse of discretion).

65. Brief of Appellant at \*xviii, *Mayo v. Shine*, 392 S.W.3d 61 (Tenn. Ct. App. 2012) (No. E2011-01745-COA-R3-CV), 2011 WL 6425729; *see, e.g.*, *Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462, 1464 (10th Cir. 1994) (affirming, where the district court restricted each side to ten minutes for opening statements and twenty-two minutes for closing arguments); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. C 10-4572 SI, 2013 WL 10936486, at \*1 (N.D. Cal. July 11, 2013) (allocating each party "25 minutes for opening statements" and "up to 45 minutes for closing argument" in a six-week antitrust trial); *Bullock v. Mount Sinai Hosp. of Greater Miami, Inc.*, 501 So. 2d 738, 739 (Fla. Dist. Ct. App. 1987) (reversing, where the trial court limited the plaintiff's opening argument to five minutes, while the defendant was given twice as much time). Courts are also imposing strict limits on opening statements and closing arguments in criminal cases. *See, e.g.*, *United States v. Holt*, 493 F. App'x 515, 521–22 (5th Cir. 2012) (rejecting the claim that the district court abused its discretion by limiting closing argument to five minutes per defendant at the conclusion of a three-day trial); *United States v. Gray*, 105 F.3d 956, 962–63 (5th Cir. 1997) (affirming, where the defendants were allotted three minutes for opening statements and thirteen minutes for closing argument); *United States v. Roemer*, No. 93-4943, 1994 WL 500633, at \*4 (5th Cir. Sept. 2, 1994) (affirming, where the "district court limited opening statements by the three defendants to a total of 15 minutes, allowing Roemer only five minutes to present his opening argument"); *Petta v. Cain*, No.

## 2. Across-the-Board Trial Time Limits

Another way in which judges are taking a more active role—and *directly* affecting the length of trials—is by imposing trial time limits and thereby restricting the length of time one or both parties have to present evidence at either a bench or jury trial (or trial equivalent).<sup>66</sup> Unlike the restrictions above, these limits curtail the entire trial, not just a part. And they are fairly new: They were unheard of prior to 1977 and rare throughout the 1980s and early 1990s.<sup>67</sup> But, they got a boost in 1993 when the Rules Committee revised Rule 16 to authorize trial judges to impose, at any pretrial conference, an order “establishing a reasonable limit on the time allowed to present evidence.”<sup>68</sup> And, with that official stamp of approval, throughout the 1990s and 2000s, trial time limits steadily gained popularity.<sup>69</sup>

Now, it seems that trial time limits are widely used and broadly endorsed.<sup>70</sup> Indeed, in recent years, courts have started to experiment with time limits,

---

CIV.A. 01-3891, 2002 WL 1216619, at \*1, 6–7 (E.D. La. June 3, 2002) (denying petitioner’s habeas corpus petition, where petitioner was sentenced to two concurrent terms of life imprisonment following a closing argument, where his lawyer was limited to twenty minutes).

66. For more on trial time limits, see generally Engstrom, *supra* note 18; Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663 (1993); John E. Rumel, *The Hourglass and Due Process: The Propriety of Time Limits on Civil Trials*, 26 U.S.F. L. REV. 237 (1992).

67. The first known time-limited trial was *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 11, 15 (D. Conn. 1977), a massive antitrust case that involved some 30,000 factual allegations. As of 1986, one commentator correctly observed: “Recent opinions establishing time limits on trials have broken the barrier of novelty, but strict limits are still rare.” Roger W. Kirst, *Finding a Role for the Civil Jury in Modern Litigation*, 69 JUDICATURE 333, 337 (1986). Likewise, an appellate court noted in 1993 that the limits’ propriety was a “matter of first impression” and that “[f]or well over a century, trial judges in the Commonwealth, have been able to control the flow of testimony at trials without the imposition of time limits.” *Chandler v. FMC Corp.* 619 N.E.2d 626, 629 (Mass. App. Ct. 1993).

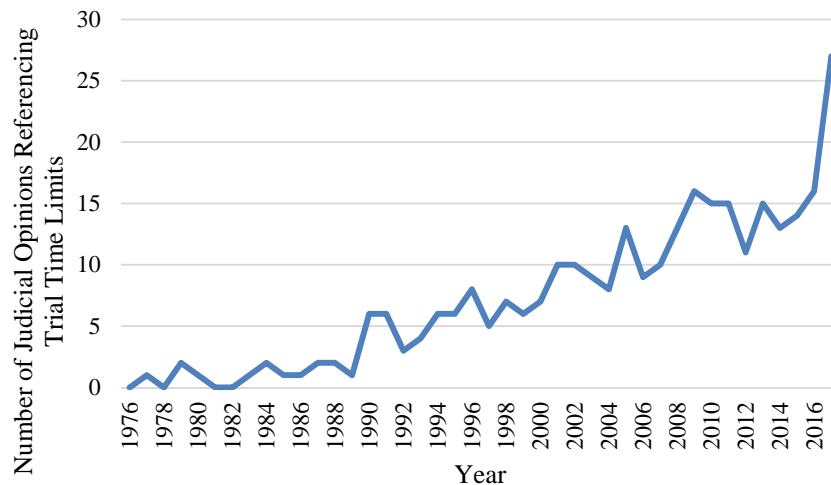
68. FED. R. CIV. P. 16(c)(2)(O). Prior to the 1993 amendment, some judges imposed time limits, but the source of their authority was murkier. See Engstrom, *supra* note 18.

69. See, e.g., *United States v. Morrison*, 833 F.3d 491, 504 (5th Cir. 2016) (“Imposing time limits during trial is a growing trend among district courts.”); *Maloney v. Brassfield*, 251 P.3d 1097, 1101 (Colo. App. 2010) (suggesting that timed trials are increasing); Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge’s View*, 48 ARIZ. ST. L.J. 481, 500 (2016) (observing that “[h]ard time limits on the presentation of evidence in jury trials . . . is a growing phenomenon”); William P. Frank et al., *Time Limits Imposed on the Case in Chief*, in 4 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 41:5 (4th ed. 2016) (observing that “more and more district courts are setting time limits on trial”); Andrew L. Goldman & J. Walter Sinclair, *Advisability and Practical Considerations of Court-Imposed Time Limits on Trial*, 79 DEF. COUNS. J. 387, 387 (2012) (discussing the “growing trend of imposing time limitations”); Michael L. Siegel, *Pragmatism Applied: Imagining a Solution to the Problem of Court Congestion*, 22 HOFSTRA L. REV. 567, 598 n.132 (1994) (calling the use of trial time limits a “growing trend”); Martha K. Gooding & Ryan E. Lindsey, *Tempus Fugit: Practical Considerations for Trying a Case Against the Clock*, FED. LAW., Jan. 2006, at 42, 43 (“[C]ourts are increasingly . . . impos[ing] specific limits on the amount of time the parties are allotted to present their case at trial.”).

70. For the fact that time limits are “broadly endorsed,” see Engstrom, *supra* note 18 (collecting evidence).

not only in civil suits, but also in criminal cases.<sup>71</sup> And on the civil side, time limits are now being used to limit the duration of both complex and straightforward trials, in both state and federal court. Offering further evidence of trial time limits' growing popularity, I have conducted an admittedly crude quantitative study on Westlaw, gathering all published and unpublished state and federal cases that discuss the imposition of trial time limits.<sup>72</sup> That study, while hardly definitive, tends to confirm that the imposition of trial time limits is sharply on the rise.

Figure 3: Trial Time Limits—Decisions by Year  
(1980–2017)



71. See, e.g., *United States v. Cousar*, No. 06-007, 2007 WL 4456798, at \*2 (W.D. Pa. Dec. 16, 2007) (“Although it may be more common for a district court to impose time limits in a civil trial, setting time limits in a criminal trial is equally authorized.”).

72. To do this, I started with a search of “adv: trial /6 time /1 limit! % ‘speedy trial,’” which yielded some 6428 cases prior to 2018. I then reviewed each case to see if trial time limits were actually imposed. From there, I KeyCited dozens of the cases the search identified to unearth any cases I had initially missed. Ultimately, this yielded a dataset of 302 cases from 1977 to December 31, 2017. As the text indicates, any empirical study that relies, for raw data, on Westlaw’s ALLFEDS and ALLSTATE databases must be viewed with caution, as Westlaw only captures the tip of any litigation iceberg. (This general limitation is apt to be especially pronounced in this particular context, because trial time limits are often imposed in pretrial orders, which are not typically published.) Beyond that, when it comes to *what* subset of material Westlaw captures, there is bound to be some variation over time and across space, confounding any effort to identify “trends.” For a discussion of these and other difficulties, see Engstrom, *supra* note 25, at 1214–16. The observed rise is, however, in some ways more remarkable given the well-known biases of what makes it into Westlaw. That is, many believe that judges are more likely to publish cases that “limn the boundaries” of their authority or “raise issues of first impression.” *Id.* at 1215 & n.43. Consequently, we might expect that judges would have been more inclined to publish decisions imposing or reviewing time limits back when these restrictions were new and when judges’ authority to impose the restrictions was uncertain (which was true prior to the amendment to Rule 16 in 1993). Over time, as trial time limits have lost any claim to novelty—and it has also become clear that restrictions are not only permissible but also reviewed with great deference—the likelihood that any single imposition would result in a published decision or even generate an appeal would seemingly

## CONCLUSION

The above discussion suggests that trials are not only disappearing. Owing to a number of disparate developments, the ones that remain seem to be shrinking in size.

Now, to the extent judges are the ones orchestrating all this, some might heartily applaud judges' handiwork. All the above reforms—including the increased granting of motions for partial summary judgment, increased pretrial activity, a reduction in the size of the civil jury, increased bifurcation, the imposition of time restrictions on opening statements and closing arguments, and the increased imposition of across-the-board trial time limits—in one way or another, seem destined to reduce the amount of time and effort devoted to processing a given case.<sup>73</sup> In an era that prizes and prioritizes efficiency and cost-cutting, some may say that's a great thing.

Moreover—and returning to where this Article began—some may even suggest that the above reforms and restrictions are beneficial because they will (somewhat counterintuitively) help to *revive* the vanishing trial. The idea is that some savvy litigants, at least implicitly, compare trials (Door Number 1) to other available dispute resolution mechanisms, such as settlement, arbitration, mediation, summary trials, and even voluntary dismissals (collectively, Door Number 2). To the extent that trials are seen as unduly cumbersome, time consuming, and expensive, more litigants will opt for these other alternatives. But, if the above reforms work, and trials are streamlined and simplified, we might see a renewed interest in—and appetite for—Door Number 1.<sup>74</sup>

Yet, many of the above reforms do not merely expedite the resolution of claims. Many come with negative side effects that also need to be evaluated and tallied. For example, some of the above reforms (notably, bifurcation and the imposition of across-the-board trial time limits) are said to slant the playing field away from plaintiffs and toward defendants, which could affect the direction and evolution of substantive law.<sup>75</sup> Other reforms (particularly

---

decline. Cf. KATHY D. PATRICK ET AL., S. DIST. OF TEX. JURY INNOVATIONS PROJECT, PILOT PROGRAM MANUAL 75 (2009), <http://www.txs.uscourts.gov/sites/txs/files/PilotProgramManual.pdf> [<https://perma.cc/2TSV-QX2G>] (observing that time limits are frequently imposed but rarely appealed). Thus, the above trend line, which reveals more and more Westlaw cases discussing or imposing time limits, to my mind, points to genuinely increased incidence.

73. Even this common-sense assumption may not hold up in all cases. For why trial time limits may not actually save trial time, for example, see Engstrom, *supra* note 18. For evidence refuting the assumption that smaller juries are more efficient, see *The Civil Jury*, *supra* note 24, at 1484.

74. Stephen D. Susman & Richard L. Jolly, *An Empirical Study on Jury Trial Innovations* 2–8 (Nov. 8, 2016) (unpublished manuscript), [http://civiljuryproject.law.nyu.edu/wp-content/uploads/2016/10/sdS-rLJ\\_An-Empirical-Study-on-Trial-Innovations-11.8.16.docx](http://civiljuryproject.law.nyu.edu/wp-content/uploads/2016/10/sdS-rLJ_An-Empirical-Study-on-Trial-Innovations-11.8.16.docx) [<https://perma.cc/F52Q-2XNW>] (advocating trial time limits as a way to “stem the tide of America’s disappearing civil jury trials”).

75. AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS 105 (2005), [https://www.americanbar.org/content/dam/aba/administrative/american\\_jury/final\\_commentary\\_july\\_1205.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/american_jury/final_commentary_july_1205.authcheckdam.pdf) [<https://perma.cc/BYW2-3ARR>] (suggesting that “bifurcation may dramatically favor one side over the other—in some cases predetermining the ultimate outcome of the trial”); Engstrom, *supra* note 18 (suggesting that, depending on



restrictions on jury size) are associated with greater variability and unpredictability in case outcomes.<sup>76</sup> Others seem destined to impair and undermine litigants' sense of procedural justice—the all-important sense that the proceeding was respectful, meticulous, dignified, thorough, and just.<sup>77</sup> Still others vest so much discretion with the trial judge—and offer the judge so little guidance regarding the proper exercise of that discretion—that they risk subjecting adjudications to unprincipled, inconsistent, and arbitrary judicial decision-making.<sup>78</sup> At the same time, as judges exercise ever-greater power, and litigants and jurors exercise comparatively less, we risk departing from our traditional, adversary roots—a departure which might not necessarily be bad, but surely merits thoughtful inquiry.<sup>79</sup> Last but not least, certain of the above reforms seem destined to leave probative evidence and persuasive argument on the cutting-room floor, and, in so doing, threaten to undermine litigant autonomy and erode decisional accuracy.<sup>80</sup>

In short, we are witnessing both the disappearance *and the downsizing* of the American civil trial. What is fueling this transformation? And, as trials are abridged, what precisely is gained, and what is lost? To answer these questions, more study is needed. It should be undertaken carefully, without preconception or delay.

---

how time is allocated, trial time limits risk systematically biasing the civil justice system toward defendants); Granholm & Richards, *supra* note 56, at 513–14 (collecting empirical evidence suggesting that bifurcation advantages defendants).

76. Many suggest that a reduction in jury size leads to less predictable and more variable jury verdicts. *See, e.g.*, Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 30–31 (1993) (amassing evidence); *The Civil Jury*, *supra* note 24, at 1484–85 (same).

77. Engstrom, *supra* note 18 (arguing that trial time limits are apt to impair litigants' sense of procedural justice); *accord In re Marriage of Ihle*, 577 N.W.2d 64, 68 (Iowa Ct. App. 1998) (concluding that “public confidence in the justice system tends to become tarnished when a trial concludes without an opportunity for the parties to present all the evidence they believe to be important”). For more on procedural justice, see Engstrom, *supra* note 18 (collecting sources).

78. Engstrom, *supra* note 18 (arguing that trial time limits are susceptible to unprincipled and inconsistent application because “[i]t is very doubtful, in the current climate, that two judges asked to preside over two trials would both impose time restrictions, and, if they did, it is extremely doubtful that they would allot similar amounts of time, even to similarly-situated litigants”).

79. As Paul Carrington observes: “The hidden effect of case management is a transfer of power away from individual parties and their lawyers, and also from juries or appellate courts . . . .” Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 62 (1997). For how, precisely, trial time limits effect this transfer, see Engstrom, *supra* note 18.

80. Granholm & Richards, *supra* note 56, at 510–11 (suggesting that bifurcation undermines decisional accuracy); *see also* McKnight v. Gen. Motors Corp., 908 F.2d 104, 115 (7th Cir. 1990) (suggesting that trial time limits may undermine the “accuracy of factual determination”). It is also said that a reduction in jury size impairs decisional accuracy. *See, e.g.*, Landsman, *supra* note 45, at 301 (“[Larger juries] are more likely to produce accurate results.”).