Replace "The Vanishing Trial" with More Helpful Myths

John Lande [FNa1]

23 Alternatives to the High Cost of Litigation 161 (2005).

***161** University of Wisconsin Law School Prof. Marc Galanter has set much of the legal and dispute resolution worlds abuzz with his report, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts." 1 J. Empirical Legal Studies 459 (November 2004).

He marshals a massive amount of data to document an apparent paradox: The proportion of cases going to trial has dropped sharply during the past 40 years despite substantial increases in many other legal indicators, including the number of lawyers, the number of cases filed, and the amount of published legal authority. The most stunning fact is that the civil trial rate in the federal courts steadily dropped to 1.8% in 2002, from 11.5% in 1962.

"The Phenomenon Known as the Vanishing Trial," or TPKATVT, has taken on a life of its own that transcends empirical reality. In TPKATVT's short career, starting in 2002, the American Bar Association Litigation and Dispute Resolution Sections established task forces to study it, there have been numerous sessions about it at conferences of judges, lawyers, and other dispute resolution professionals, and there are three symposia (and counting) in legal publications on it, as well other law review articles about it.

I submit that the Vanishing Trial is a myth--and not a particularly helpful one at that. To say that it is a myth is not to suggest that the facts or analysis in Prof. Galanter's report are fictional or inaccurate. Rather, it is a myth defined as a "popular belief or story that has become associated with a person, institution, or occurrence, especially one considered to illustrate a cultural ideal." Human societies need myths to help provide meaning for life. Social scientists find that myths are powerful in modern societies as popular stories are integrated into individuals' and organizations' core values and beliefs. This article argues that TPKATVT is a misleading and counterproductive myth and suggests alternative myths and methods for addressing the ideals embodied in TPKATVT.

THE MYTH'S CONSTRUCTION

The vanishing trial myth has three elements: (1) The, (2) Vanishing, and (3) Trial. "The" implies, inaccurately, that there is a single uniform phenomenon of trial. "Vanishing" implies, inaccurately, that "the trial" is on the verge of disappearance. "Trial" evokes many images, most of which are highly idealized and unrepresentative of the vast majority of trials.

Focus first on the mythical aspect of "trials" in TPKATVT, TPKATVT has great mythic power because of the mythic character trials themselves have in our popular and ***169** legal cultures. Stanford Law School Prof. Lawrence M. Friedman provides a wonderful portrayal of perhaps the most common myth of trial:

> To the ordinary person, the word "trial" has a sharp and very definite meaning. It conveys a dramatic image. There is O.J. Simpson in the dock, charged with murder. There is Scott Peterson, accused of killing his wife and her unborn baby. The image is the image of the big trial--the trial of the Hernandez brothers, the trial of the Boston nanny, and all the other headline trials, past and present. It is the trial the ordinary person sees on television and in the movies. There is a definite image about every aspect of the trial, even what the courtroom is supposed to like: the jury sits in its box, the judge sits on his or her high bench in a robe with an American flag in the background, the witnesses come in and sit on the witness chair; they raise their right hands and swear; the lawyers and the defendant sit at tables facing the judge. The trial begins with elaborate voir dire--the meticulous process of selecting a jury. The lawyers battle and squabble, trying to stack the jury with people who will vote the way they want. The trial itself gets going with opening arguments and statements from the lawyers. The trial itself is long, tense, and full of excitement. The lawyers joust with each other. There is clever and dramatic cross-examination. Lawyers jump up and cry, "I object"; they fight to prevent the jury from hearing material they think is unfavorable to their side, they posture and exclaim. They end the trial with impassioned arguments. Then the judge instructs the jury, the jury retires to a locked room, and a spinetingling period of waiting begins. Finally, the door opens, a hush comes over the crowd in the courtroom, and the jury comes in and announces its verdict. Lawrence M. Friedman, "The Day Before Trials Vanished," 1 J. Empirical Legal Studies 689, 690-91 (2004).

This myth resonates with nostalgia for a golden age of trials. Friedman argues that "[w]hat has vanished, then, is not only the trial in terms of numbers, but also the trial as it should be, the classic trial, the trial of the good old days."

Friedman, a legal historian, shows that this mythic portrayal "is not the norm, and [has] not been the norm for quite some time." This is an image of a criminal trial--and even for criminal cases, the criminal trial rate has been declining since 1800 as the vast majority of criminal matters are resolved by plea bargaining rather than contested trials.

Before trials allegedly "vanished," most trials were quite different from this myth. Felony trials, according to Friedman, typically were "quick, slapdash" proceedings with little or no voir dire, lawyers, cross-examination, objections, or attention to "the niceties of due process or the law of evidence," or time spent in jury deliberations. Trials of misdemeanors were dispatched even more summarily, "without anything that looked

like a 'trial.'" The situation for civil cases is "more or less analogous." Although the trial rates have declined, trials "were the exception, never the rule."

There are other-trial myths as well. An inspiring myth of trials is as vehicles for justice in which the little guy overcomes odds and prevails in the end. This myth sometimes extends to the legal system generally, with courageous appellate judges issuing controversial rulings that establish precedents to help people get justice in the future. Presumably these myths are appealing to many people who are concerned that trials are vanishing.

Yet another mythic portrayal is of a Kafkaesque trial, a trap that ensnares innocent people and produces injustice rather than justice. Some people view trials as full of absurd technicalities that prolong the conflict, aggravate adversarial tensions, and produce inscrutable results. These latter myths are favorites within the dispute resolution community and are often used as justifications for alternatives to trial. Although all these myths reflect some measure of reality, more typical experiences are probably more routine and less dramatic.

This brief discussion deconstructs the mythic element "The" in TPKATVT. Trials are incredibly variable phenomena, changing significantly over time and even at any given time differing in myriad ways.

SOMETHING HAS GONE WRONG

The active ingredient in TPKATVT is "Vanishing." That word implies that something has gone terribly wrong with the legal system, which is on the brink of losing an essential element. This phrase, along with "trial implosion," also used in Galanter's report, suggests that "the trial" is about to disappear or is at least a candidate for the endangered species list. The phrases "vanishing trial" and "trial implosion" have foreboding connotations.

Like Mark Twain's reported death, accounts of the impending demise of the trial are exaggerated. Empirical data from Marc Galanter's report shows that there continue to be many trials in the state courts, which have substantially higher trial rates than federal courts. A recent analysis by the National Center for State Courts reports that in 1999, "state courts of general jurisdiction resolve nearly 28 times as many civil cases and 82 times as many criminal cases as federal district courts." Brian J. Ostrom et al., "Examining Trial Trends in State Courts: 1976-2002," 1 J. Empirical Legal Stud. 755, 757 (2004).

The report analyzes data from 22 states between 1976 and 2002, and shows that the civil trial rate dropped by more than half, primarily because the number of filings more than doubled during that period. "The number of [civil] bench trials rose from approximately 500,000 in 1976 to ***170** 667,000 in 1983. They then varied between 600,000 and 700,000 for the next 15 years before falling to less than 470,000 by 2002."

The total number of civil dispositions in these courts increased fairly steadily, from about 1.5 million cases in 1976 to about 3.1 million cases in 2002. As a result, the trial rate dropped from 36.1% to 15.8%. Even so, the lowest state court civil trial rate is substantially higher than the highest federal civil trial rate since 1962, which is 11.5%. Similarly, the number of state court trials dwarfs the largest number of federal civil trials shown in Galanter's report, which was 12,529 trials in 1985.

Contrary to imagery of trials vanishing and leaving courts as virtual ghost towns, Galanter's report shows that, facing growing caseloads, courts have been quite busy and shifted some of their efforts from trials to pretrial work. The workload of federal district judges has grown substantially as the caseload of district judges "more than doubled, from 196 in 1962 to 443 in 2002," writes Galanter.

He also states that, "Clearly, courts are more involved in the early resolution of cases than they used to be." He cites data showing that the decrease in the trial rate has been accompanied by an increase in the rate of summary judgments from about 1.8% to 7.7% in the period from 1960 to 2000. A recent major study found that federal judges are actively involved in holding pretrial conferences, setting pretrial schedules and trial dates, setting limits on discovery, and ruling on motions. In more than half the cases, the judges described their level of pretrial management as moderate or intensive.

Galanter's report does not present evidence of adverse effects commensurate with the amount of reduction in trial rates or the degree of alarm expressed about them. In addition, the data covers such a wide range of subjects that some broad generalizations are based on fairly thin empirical data masking a great deal of variation by geography and type of dispute. Galanter masterfully pieces together the limited data available and provides a nuanced interpretation of the data. The picture he produces is not enough, however, to support the mythic implications of TPKATVT.

ALTERNATIVE MYTHS

The problem with myth of the vanishing trial is not that it is a myth. The problems are that this myth is misleading and, more important, that it teaches the wrong lessons. The implication of TPKATVT is that society would restore a golden age of trials if we could reverse the processes causing trials to vanish. Although virtually no serious analysts would endorse this formulation-- and Galanter makes no such predictions or prescriptions--this seems to be the clear implication.

This is similar to other myths that portray disputing processes as embodiments of good or evil. For example, many liberals remember fondly the Warren Court era as a demonstration of the virtue of courts as instruments of justice. For many in the dispute resolution field, the field's growth and legitimacy has demonstrated multiple virtues of ADR procedures. Those who believe that good citizens and businesses are being

overrun by an explosion of frivolous suits view trials, and litigation generally, as a plague on society.

Some ADR critics see it as a covert mechanism to roll back gains won in the courts and disempower the disadvantaged in society. In all these myths, litigation or ADR is the hero or villain--choose one--of the story.

This seems bizarre. Procedures are inanimate phenomena that should be means to ends, not ends in themselves. Yet many of us make fetishes of our favorite procedures as if they have some extra measure of goodness or that others are social evils. These procedures are incredibly malleable and can yield better or worse effects depending on many things, especially how people use them. For example, TPKATVT can just as easily be framed as a story of dangerous decline of civilization or innovative adaptation to changing conditions.

Rather than anthropomorphizing the procedures into being the protagonists in these stories, we should celebrate humans and their wise and caring actions when working with conflict. This includes judges and lawyers who choose between the various procedural options--including, but not limited to, trials--to promote appropriate goals for litigants and societies.

Judges can make some of their best contributions by helping design and manage disputing systems as well as trying cases.

We should celebrate prosecutors and other government officials who investigate and prosecute wrongs including the full range of illegal acts including human rights abuses, corruption, discrimination, and violence.

Mediators and arbitrators are often heroes, helping people work through conflicts. So are inside counsel who mediate between business executives and outside counsel to manage conflicts effectively.

And so are many unsung heroes who manage conflict every day with little public recognition. These include military and police officers, legislators, organizational, community, and religious leaders, teachers, parents, and countless others.

Although one can find examples of such stories, they do not seem to predominate as the myths that resonate most for many people in the legal and dispute resolution fields. Instead of investing so much of our cultural resources in myths that canonize or demonize our most--or least--favorite procedures, we should invest more in realistic stories honoring people who work together in the challenging struggles in offering a range of procedures to manage conflict in our society.

* * *

The Journal of Empirical Studies articles discussed in this article are available at www.blackwell-synergy.com/toc/jels/1/3.

[FNa1]. The author is an associate professor and director of the LL.M. Program in Dispute Resolution at the University of Missouri-Columbia School of Law. This article is based on his article, "Shifting the Focus From the Myth of 'The Vanishing Trial' to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution From Marc Galanter," which was set for publication last month in 6 Cardozo Journal of Conflict Resolution (2005). The author also wrote on this subject in "'The Vanishing Trial' Report: An Alternative View of the Data," Dispute Resolution Magazine 19 (American Bar Association Section of Dispute Resolution Summer 2004).