

Advocacy Under the Federal Rules of Civil Procedure After 75 Years

University of Kansas Law Review Symposium

Outline of Remarks of Robert P. Burns

“Advocacy in the Age of the Vanishing Trial”

1. I have taught practicing lawyers litigation skills with NITA for thirty years and law students those skills for about the same time.
2. I am reluctant at this stage to concede defeat and to completely reimagine the way lawyers should conceive of a lawsuit.
 - a. Given the low percentage of civil cases which go to trial—less than two percent in the federal system, I wouldn’t blame anyone from reaching that conclusion.
3. For the foreseeable future, however, it will be important for litigators to have some imagination for the structure and experience of the trial. Effective deposition practice, for example, requires a understanding of necessary foundations for personal knowledge, authentication, and the hearsay exceptions. Some experience of evidence law as it actually functions at trial is necessary for conducting a deposition effectively on those issues. (Summary judgment motions have to be supported by *admissible* evidence.) More broadly, it is still true that the entire structure of civil procedure has been built up as a path to an adversary trial, with its combination of narrative and argumentative elements. It’s hard to understand much of civil practice—how to conduct interview, identify important documents, or conduct depositions—without understanding the trial. (I have always thought that it makes more sense for a law student or a young lawyer to take a trial practice course or CLE seminar first, and only then a deposition course or seminar.) Trying cases gives provides an imagination for what is a compelling story and what elements it contains. That imagination allows for effective pre-trial and even appellate practice. A basic principle of effective advocacy is “Facts persuade; conclusions don’t.” That holds true at all levels, but one can understand it more deeply if one has had some experience in the trial courtroom.
4. There may come a time—and it may already be happening—that the way in which we conduct civil litigation changes because of the vanishing trial. There is some evidence—

studies are ongoing¹—that *Iqbal* and *Twombly* have led a significant number of district court judges to dismiss more cases as pleading “implausible” claims. That would probably lead defense counsel to devote more resources to those motions, just as the “Summary Judgment Trilogy” seemed to have some effect on summary judgment practice some time ago.

For example, I would think that deposition practice may also change. I am the Program Director for the Midwest Regional Deposition practice program for NITA (National Institute for Trial Advocacy). We have traditionally taught deposition practice with two overarching goals: exhaustive discovery on those points which prior legal and factual analysis indicates important and the creation of a clear and unambiguous transcript which can be used to control witnesses at trial or in lieu of testimony with some witnesses and only secondarily in support of summary judgment motions. My suspicion is that deposition practice may be somewhat reconceived with achieving and resisting summary judgment more at the core of deposition practice. Without identifying all the ways in which this could occur, let me note several. It seems that the traditional advice offered to clients in witness preparation, to give the most limited fair answer to questions, should be rethought. It may be that it will become harder and harder to supplement limited answers at depositions with supplemental (sometime called “sham”) affidavits which substantially change the import of a witness’s testimony. It may become more important that a witness’s deposition testimony be complete because counter-affidavits may not be effective at the summary judgment stage and there will be no opportunity to tell a fuller story at trial. (It has, in the past, to conduct an “impeachment by omission” on a point omitted from deposition testimony an included at trial, though this form of impeachment is relatively difficult to do effectively.) Additionally, it may be that deposition will focus more on the sort of adverse examination which creates a transcript in support a summary judgment motion aimed narrowly on a single element of the plaintiff’s claim, rather than a broader “information gathering” strategy. After all, the vanishing trial will reduce the likelihood of being surprised at trial.

5. My summary of the vanishing trial phenomenon:

¹ Joe S. Cecil, et al., “Motions to Dismiss for Failure to State a Claim After *Iqbal*: Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center (March 2011) (rates of filing of defendants’ filing motions to dismiss have generally increased, but the rates of dispositive rulings dismissing cases has not increased); *but see* Note: Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery (Jonah B. Gelbach) (effects of the two cases has been much greater than the simple grant rates would suggest).

Marc Galanter and Angela Frozena have recently updated previous work to bring the data up to 2009. With regard to civil trials in the federal courts, they concluded that there is “no news” and “big news.” The “no news” is that the half-century downward trend lines continue. The “big news” is “that the civil trial [in the federal courts] is approaching extinction.” Here is a brief summary of the most illuminating statistics from both Galanter’s earlier and more recent work. In 1938, about 20% of federal civil cases went to trial. By 1962, the percentage was down to 12%. By 2009, the number sunk to 1.7%. The percentage of jury trials in federal civil cases was down to just under 1%, and the percentage of bench trials was even lower. So between 1938 and 2009, there was a decline in the percentage of civil cases going to trial of over 90% and the pace of the decline was accelerating toward the end of that period until very recently, when there was almost literally no further decline possible....One more localized study of six federal district courts found that in 1975, twice as many civil cases were resolved after trial than by summary judgment; by 2000, in the same districts three times as many cases were resolved by summary judgment than by trial. So in those districts the rate of cases “disposed of,” to use a telling metaphor, by summary judgment rose 350%. “What Will We Lose If the Trial Vanishes?” 37 Ohio Northern L Rev. 575 (2011)

The trial is the only part of the legal system that is shrinking...

6. The face-to-face trial—especially the jury trial—has characteristics which no other “dispute resolution method” has
 - a. James Boyd White called it the sun around which all the planets in our procedural world revolve.
 - b. Thomas Greene, writing in the context of English criminal law, argued that the face-to-face trial preserved at least some memory that the legal system was in some way about justice.

I believe that trial courts, appellate courts, and legislatures should resist the trial’s disappearance.

7. What are some of the characteristics of the trial and the forms of advocacy appropriate to it?

What is a trial like? It is easy to forget the concrete aspects of an American trial.

It has a number of features.²

² There is a much fuller inventory at ROBERT P. BURNS, A THEORY OF THE TRIAL (TOT) (1999), 126-41.

1. The rules of the trial force the conversation down to the “concrete and specific features of the case.

Recall Sandburg’s account;

“Do you solemnly swear by the everliving God that the testimony you are about to give in this cause shall be the truth, the whole truth and nothing but the truth?”

No, I don’t. I can tell you what I saw and what I heard and I’ll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if you summoned Christ as a witness in this case what he would tell you would burn your insides with the pity and mystery of it.”

Carl Sandburg, *THE PEOPLE, YES* (1936), 193.

2. Dramatic events occur through a temporary sequence; time’s sequence of “Nows” has been called the “moving likeness of eternity.” Each can be the key to the entire case.
3. Temporal compression in the American trial” allows for holistic grasps
 - a. Compression of issues as the case winds down toward the most important questions
4. Postponement of judgment: continuous presentation with continuous interruption
--judge almost never summarizes in American practice
5. Courtroom drama as lens and metaphor

“Characteristics of the trial, then, force the mind downward toward the concrete, intensify the competition over the meaning of the events being tried, and cultivate the suspension of judgment until all the aspects of the situation are explored.” TOT 132

It gives the jurors the opportunity to see the truthfulness of the witnesses—in a very broad sense; lawyers have to have a sense of fairness, truthfulness of a public or diplomatic sort. (We used to call it “trial diplomacy.”)

Aural medium: we become the other person, but at a distance beyond touching distance: so that we have the conditions for justice: sympathy and detachment

Dramatic performance can mediate between public norms and the “particular details of the individual case” TOT137

Milner Ball: “Live presentation ... may give more urgent reality to the particular acts that establish distance between a given case and general rule or that expose a given case to competing rules.” Milner S. Ball, *The Promise of American Law* (1981) at 61.

The Dramatic tensions within the trial “function positively to reveal, in ways that are only partially articulated, what is at issue in the case: “At its best, the presentation of a case is a coincide of reality and illusion, not in the sense of perjury, but in the sense of theatrical metaphor—the reenactment of relevant and material elements for reflection and judgment”. Id. at 50.

“[T]he little ritual of performance, given just a modicum of competence, can lend to the events represented another dimension, a more urgent reality.” Id at 58, quoting ERIC BENTLEY, THE THEATRE OF COMMITMENT AND OTHER ESSAGES ON DRAMA IN OUR SOCIETY (1967), 207.

A trial lawyer is the producer and director of and an actor in an extremely demanding and engaging drama. It requires an understanding of human sensibilities and a craftsman’s care for language.

The loss of those sensibilities is not the primary reason to reverse the decline in the trial. But it is collateral damage from the wound to our public culture to which trial lawyers may be especially aware.

5. John Martin quotes Marc Galanter:

“In a realm of ever-proliferating legal doctrine, the opportunities for arguments and decisions about the law are multiplied, while arguments and decisions become more detached from the texture of facts—at least from facts that have weathered the testing of trial. The general effects of judicial activity are derived less from a fabric of examples of contested facts and more from an admixture of doctrinal exegesis, discretionary rulings of trial judges, and the strategic calculations of the parties. Contests of interpretation replace contests of proof. Paradoxically, as legal doctrine becomes more voluminous and more elaborate, it becomes less determinative of the outcomes produced by legal institutions.”

Think back to the way in which deposition practice might change. The practice would be more mechanical, more legalistic: more of the effort would go into trying to fit the evidence, as shaped by pretrial practice, into or outside of the legal categories, with relatively less concern for either the whole story or even the factual details.

Galanter’s point is that the latter really doesn’t enhance the rule of law, because multiplying legal issue increases the range of discretionary determinations

Somewhat paradoxically the trial is more likely to product determinate “right answers” to cases than are other procedures which purport to be a more mechanical application

of the “law of rules” by judges. The latter allow for a broader range of judicial discretion than is exercised by the jury after trial.

James Boyd White has described the question before us in the kind of language we use in the legal order: “[T]here is always the question whether we fall find ways to insist on our own freedom and responsibility in a world of constraint, to respect the humanity and reality of other people and their experience, and to contribute to the formation of a culture and a polity that will enhance human dignity—or whether we shall instead live lives imprisoned in dead modes of thought and expression that deny the value of ourselves and other people, and the activities of life we share.”³ White argues that American courts are “under more pressure than the rest of use to speak in dead, mechanical, or bureaucratic ways, and that they should resist these forces strenuously...”⁴ It seems to me that keeping the American trial from vanishing it an important element of that resistance. (Judge Patricia Wald argued some time ago that the development of law even at the appellate level would be disfigured without the kind of full factual development that can occur only through the trial, and not through summary proceedings.)

³ JAMES BOYD WHITE, *LIVING SPEECH: RESISTING THE EMPIRE OF FORCE* (2006), xi.

⁴ *Id.* at 11.