



2002

# Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts

Patrick E. Higginbotham

Follow this and additional works at: <https://scholar.smu.edu/smulr>

---

## Recommended Citation

Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts*, 55 SMU L. Rev. 1405 (2002)  
<https://scholar.smu.edu/smulr/vol55/iss4/5>

This Essay is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

JUDGE ROBERT A. AINSWORTH, JR.  
MEMORIAL LECTURE, LOYOLA  
UNIVERSITY SCHOOL OF LAW: SO WHY  
DO WE CALL THEM TRIAL COURTS?<sup>†</sup>

*Patrick E. Higginbotham\**

INTRODUCTION

OVER the past several years it became clear to me that the daily work of our judges of the United States District Courts in the Fifth Circuit, and perhaps in other places, was changing. Judges seemed to be spending more time on matters other than trials. I watched as a whole new segment of legal business was born—mediation and Alternative Dispute Resolution (“ADR”). As my friends at the bar explained, this is now a paying business. I saw local rules encouraging settlement efforts, and magistrates detailed to the task. I also watched as the numbers of arbitrations exploded.

It happened that I had the task of reviewing a request for additional judgeships by several of our districts in the circuit on its prescribed path through the Judicial Council of the Circuit. Each submission pointed to the filings of cases and the number of filed cases per judge as compared with national figures. I asked for the number of cases that were being tried, thinking as a former trial judge that this was where the tale was best told.

The answers were puzzling. The large increases in filing were substantially affected by the filing of pro se suits of various types by state and federal prisoners, cases that are by definition almost never tried. Yet both the rate *and* absolute number of cases actually tried were declining. As I gathered data, it became clear that this decline in trials was neither recent nor local—that it included both civil and criminal cases and every category of civil case.

To cut to the chase, last year each United States District Court judge presided over an average of just over fourteen trials a year.<sup>1</sup> Over half of

---

<sup>†</sup> © All rights reserved.

\* The Honorable Patrick E. Higginbotham was appointed to the United States District Court, Northern District of Texas, in 1975 and to the United States Court of Appeals, Fifth Circuit in 1982. Judge Higginbotham received his B.A. and LL.B. degrees from the University of Alabama.

1. Administrative Office of the United States Courts (“AO”), *Director’s Annual Report, 2001, Judicial Business of the United States Courts* tbls. C-4 & D-4 (2001), available at

these trials lasted three days or less in length, and 94% were concluded in under ten days.<sup>2</sup>

At the outset, I must explain that the Administrative Office of the Federal Courts offers an average of 20 cases per judge, itself not a comforting figure.<sup>3</sup> However, that count is not limited to trials in the conventional sense—bench or jury trials. It includes any contested matter in which the judge takes evidence. This accounts for the difference in its average of 20 and the count of 14. This is a word of caution because not all the record-keeping is transparent. That is not for any illicit reason. The expansive count was adopted at the behest of district judges who felt that trials alone did not fully capture their work on the bench. This is undoubtedly so, and I do not suggest otherwise. Perhaps it would have been preferable to count those non-trials as “other contested matters,” but it is of no moment here because we do have the separate numbers for both categories. Other contested matters are the difference in the count of 14 and 20 per year. Their inclusion boosts the number of reported trials by 43%. Taken together, traditional trials and “other contested matters” averaged a day or less in length.<sup>4</sup>

When asked three years ago to deliver the Ainsworth lecture at Loyola University, named for my former colleague Judge Robert Ainsworth, I took the opportunity to explore my concerns over the trial numbers. Then in May 2001 I revisited the subject in a luncheon address to the American Law Institute. This essay is the product of these efforts, assisted by the insightful writings and comments of Professor Judith Resnick of the Yale Law School and Professor Debra Hensler of the Stanford Law School.

### AINSWORTH LECTURE

A society's dispute resolution machinery is a window into its makeup. The fairness of its processes and its ability to enforce the rule of law are fair measures of the freedom and quality of life the society offers. Americans have long regarded their judicial system as the model for the world. This vision draws upon the United Kingdom while claiming that it is uniquely American in its fundamentals, in the ways governmental power is dispersed. At a high level of generality, this mantra is undeniably sound. Relevant here, from the Articles of Confederation through the

---

<http://jnet.ao.dcn/library/judbus2001/contents.html> [hereinafter *2001 Annual Report*]. Table C-4 shows that the total number of civil trials was 5401, while Table D-4 reveals that the number of criminal trials was 4231, for a total of 9632 trials. Divided by the number of authorized judgeships, 665, the statistic becomes 14.5 trials per judgeship. Although a number of vacancies reduced the lot of active judges well below 665, 665 is not too high an estimate of the number of total judges trying cases, as almost three hundred senior judges were still on the bench in 2001. AO, *Judicial Business 2001* tbl. 12 (2001), available at <http://jnet.ao.dcn/library/judbus2001/front/2001artext.pdf>.

2. *2001 Annual Report*, *supra* note 1, at tbl. T-2.

3. AO, *Federal Court Management Statistics-2001* (2001), available at <http://jnet.ao.dcn/library/stat.html>.

4. *2001 Annual Report*, *supra* note 1, at tbl. C-8.

adoption of the Constitution and the Bill of Rights, throughout our history, we have insisted upon open trials in public courthouses, a subscription to the belief that law, with all its complexity, rests upon natural principles of fairness and justice knowable by every man. In this essay, my purpose is to identify and examine the beginnings of a large change in our federal trial courts, a most important piece of the American judicial system. It is a change of an order that differs from all past changes, a change in its very architecture. Lacking a provable etiology, the changes are most easily described as a syndrome with two conspicuous symptoms: the decline in trials, and the high parallel surge in private dispute resolution. These symptoms are further defined by the attending decline in participation of lay citizens and the state in our justice system.

While there have been changes over the past 213 years in the way civil and criminal trials are conducted, their large trappings have changed little. The state supplies professional judges to preside over trials held in public courthouses and conducted in the adversary mode with professionals as champions of the disputants. It has been a lawyer-dominated system operated as an instrument of government—heavily subsidized by public money with lay citizen participation. At both the state and federal level this stability is the more impressive because it has been achieved in the face of significant changes in the ethnic and cultural makeup of this country. The assimilation of rich and distinct cultural strands of Eastern Europe, Mexico, Spain, India, China, and our Native Americans has proceeded under this common justice system. It is stunning that in the main all have conformed to the one system while the system has changed little in response. In short, the reality that, writ large, our justice system has been constant in its essentials overarches this essay. True enough, changing values and changing attitudes have changed laws, coloring our perceptions of fairness in matters of race and gender for example. Yet the dispute system that channeled these changes into forms for resolution has stayed in place as a conservatory for settled expectations and as a facilitator of progressive activity. Much of this is a testament to the power of the common law, but there is more.

The story of the decline in trials is not a brief tale for the bar or an inside story about courthouse statistics. Rather, it is a story about large changes in vital components of the federal judicial system. The accepted tradition and constitutional command of open trials and direct lay participation have been a given of the American justice system. This centrality is evidenced by the elaborate supports built to sustain it, including large bodies of law such as the law of evidence—in no small part defined by its task of bridging the roles of the professionals and the laymen.<sup>5</sup> But I am in this introduction getting ahead of my description of the changes to their causes and consequences. First, the numbers.

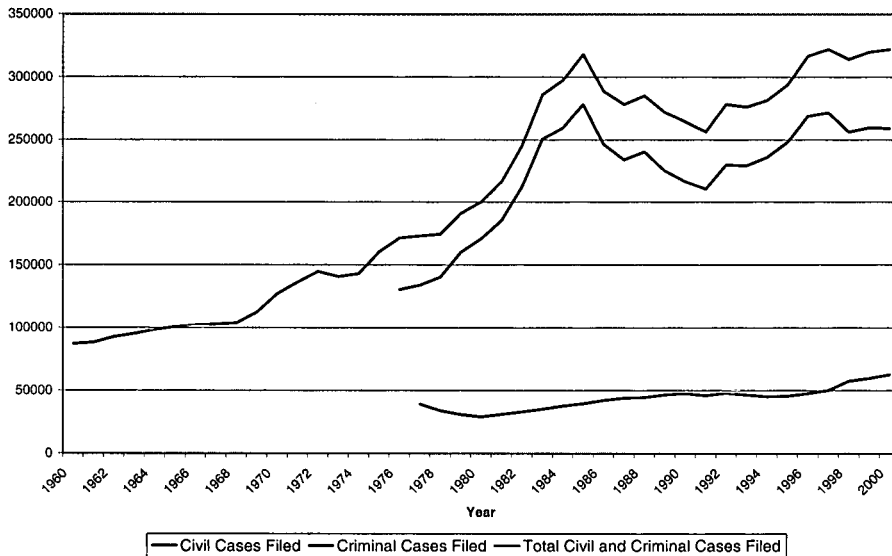
---

5. An enterprise that is itself one of many anchors to the debilitating winds of bureaucracy and byzantine specialization.

## I

Numbers mark the outlines of the change, providing the narrative line: In the 30-year run from 1970 through 1999 the total number of civil cases

CHART 1: TOTAL CIVIL AND CRIMINAL FILINGS, 1960-2000



rose by 152% and in the same time period, in the face of that increase, the number of cases that were tried dropped by 20%. It is the case that historically only a small percent of the cases filed on the criminal and civil dockets has proceeded to trial. The decline in the absolute number of trials over the past 30 years is also seen in the marked decline in the rate of trials, from approximately 12% in 1970 to 3% in 1999.

This decline has occurred on the criminal side as well. The trial rate in criminal cases dropped for the same time period by 10% with the greater reduction since 1989.<sup>6</sup> It appears that this decline parallels an increase in the rate of pleas of guilty which increased from 85% of all criminal defendants in 1976 to 95% in 2001.

The decline in criminal and civil trials is not explainable by case mix. For example, on the criminal side there has been a 300% increase in drug and immigration cases since 1989, but the rate of decline exclusive of these cases is at 14%.<sup>7</sup> On the civil side, a decline in the rate of trials is visible across all categories.<sup>8</sup>

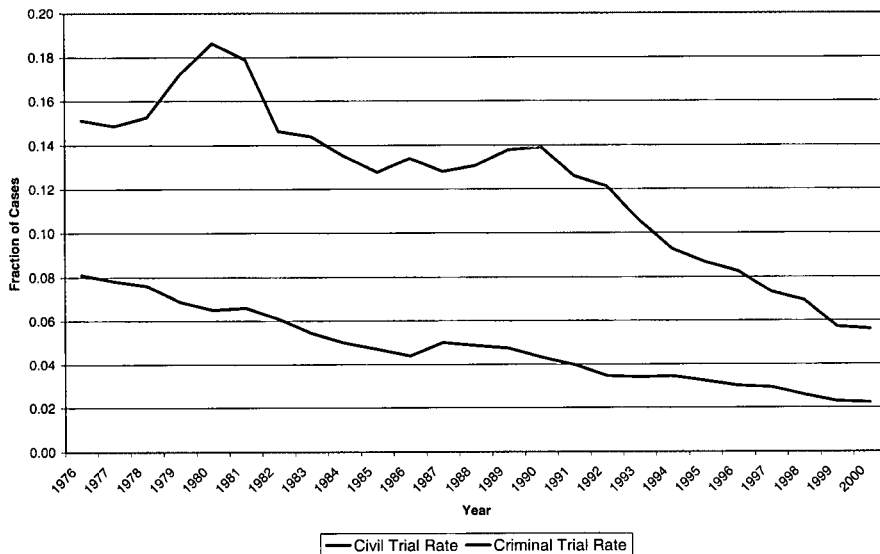
In recent years civil suits filed by prisoners have flooded the federal courts. They now account for over one half of all appeals in the United

6. These general figures are drawn from various publications of the AO, as well as information provided by the AO on file with the author.

7. See Charts 3 and 4, *infra*.

8. See Chart 5, *infra*.

CHART 2: CIVIL AND CRIMINAL TRIAL RATES



States Courts of Appeal. Prisoner suits also have a distorting effect upon the traditional measures of workload and must be kept in mind when examining case filings. For example, if we back out the prisoner suits, the numbers of appeals in civil cases have recently declined and the yearly climbs of civil filings in the District Courts have been blunted; and in many districts filings are declining from earlier years. This decline, sans prisoner cases, parallels the increasing diversion of cases to arbitration and other alternative dispute processes.<sup>9</sup> These changes were from the inside and were obscured by the surge of prisoner cases, which each year has perpetuated the image of understaffed courts in distress.

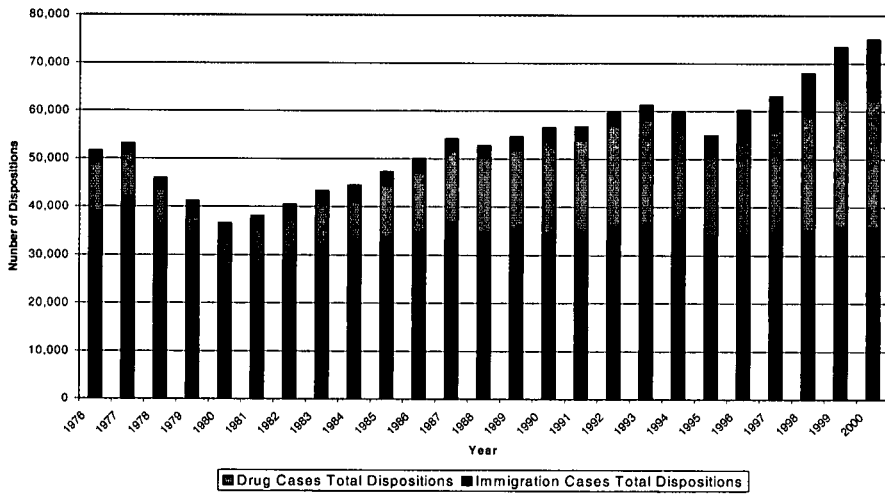
Nor are regional influences a factor. The same phenomenon is being experienced in all regions with both civil and criminal cases. In 1991: 8,161 civil cases reached trial out of some 219,541 filed cases. The number of cases filed had increased to 259,234 by the end of 2000, but only 5,780 of those cases were tried. Curiously, in recent years bench trials have declined at a far more rapid rate than jury trials.<sup>10</sup> This may be read to suggest that ADR, including arbitration, is not offering an acceptable alternative to the perceived values of trial by jury. It may also be read to suggest that ADR offers an alternative to the perceived weakness in jury trials.

It bears emphasis that the decline that I have described so far is not facially attributable to a diversion of disputes from the federal courts. To this point, the data is from the history of cases that *were* filed in the United States District Court.

9. See Chart 6, *supra*.

10. See Charts 7 and 8, *infra*.

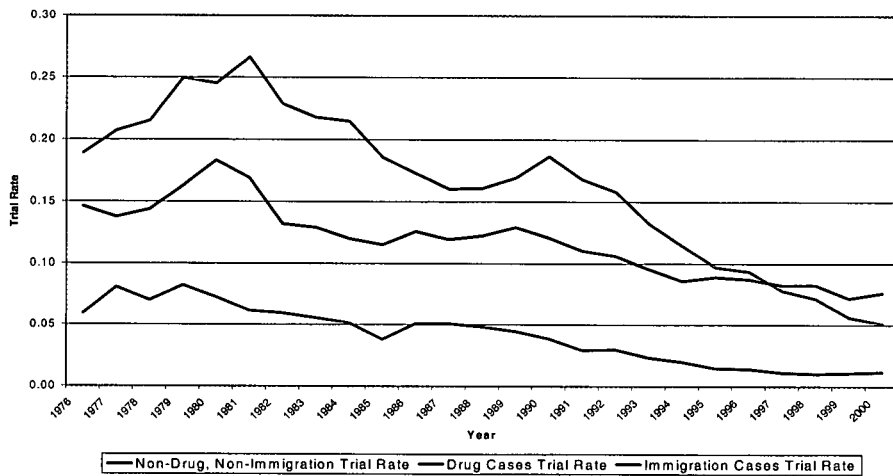
CHART 3: CONTRIBUTION OF DRUG AND IMMIGRATION CASES TO TOTAL DISPOSITIONS



II

I will not dwell for long on the possible causes of the decline in criminal trials. The jump in pleas of guilty in the post-1989 data must be associated

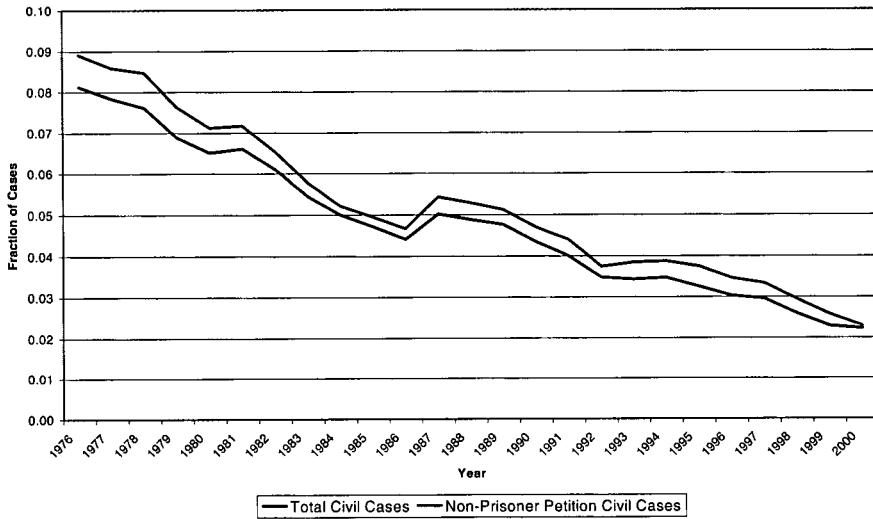
CHART 4: CRIMINAL TRIAL RATES BY CATEGORY



in part with adoption of the Sentencing Reform Act of 1984 and the adoption of Guidelines and minimum sentencing in 1986 and 1988.<sup>11</sup> As the AO has observed, this was also a period of large growth in federal prosecutorial staffs, including supporting investigative resources. This

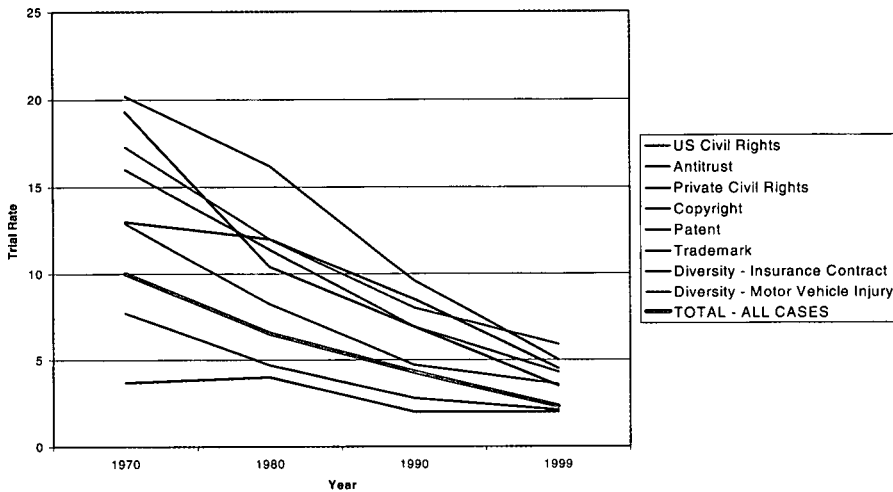
11. See Chart 9, *infra*.

CHART 5: TRIAL RATE FOR NON-PRISONER PETITION CIVIL CASES



suggests more cases and better developed cases. Coupled with the bargaining chips the guidelines gave to prosecutors, there is little to counter the self-nominating explanations. The civil cases are more of a puzzle.

CHART 6: JURY AND NON-JURY TRIAL RATES IN SELECTED CIVIL CATEGORIES

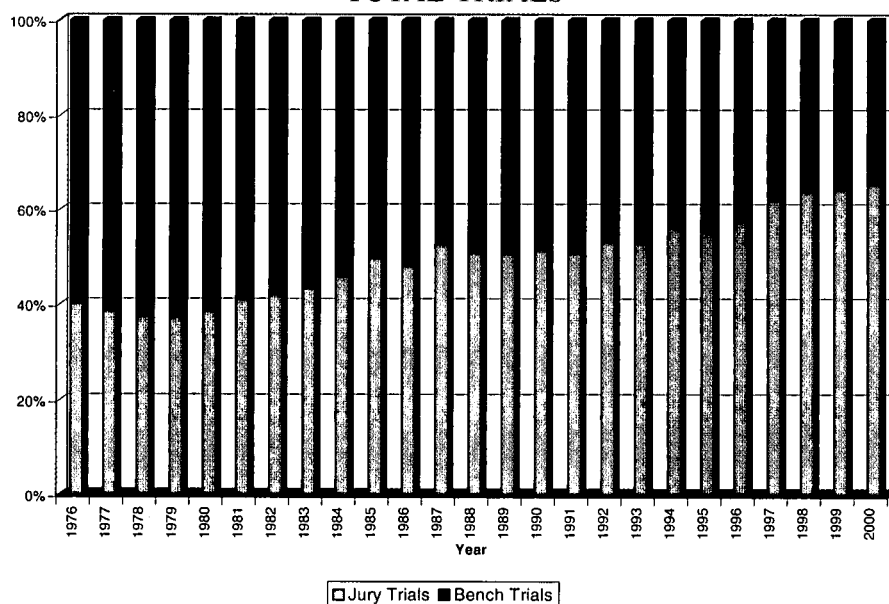


III

The explanation for the persistent and steep decline in trials of civil cases is elusive. There are many possible causes. Most are common-sense



CHART 7: JURY TRIALS AS A PERCENTAGE OF TOTAL TRIALS



intuitive judgments, likely with explanatory value even though empirical linkage has yet to be made.

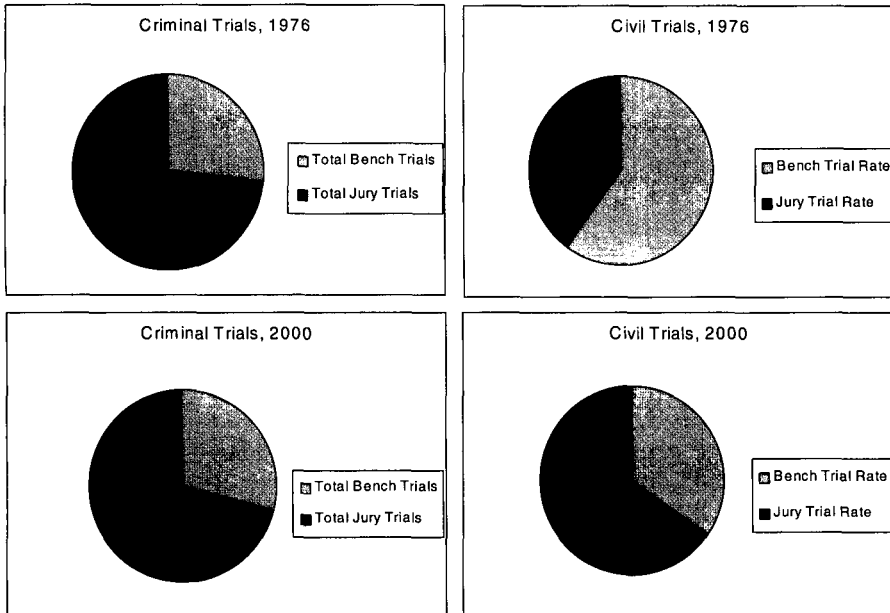
Many thoughtful commentators, reflecting on the growing flight to private resolution, identify the same phenomenon: including costs, delay, crowded dockets, and perceptions that the system is random and unpredictable.<sup>12</sup> Some focus on a specific element of the system, such as the jury, but all implicate costs.<sup>13</sup>

Recall that the decline in trials I am pointing to is supported by data that looks at the disposition of cases filed in the United States District Courts over the past 30 years. The suggestion that diversion of disputes to private resolution through agreement by the parties is a possible explanation can have force within this set only if the “diversion” occurred after suit was filed, since only filed cases appear in the data set. Diverting cases before filing could have an impact on the described rate of decline only if the diverted disputes were more likely to go to trial than the mix of cases that were filed. And we know that the decline in trials in federal court

12. See, e.g., Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745 (2000); Donna K. McElroy, *Compulsory Arbitration Agreements . . . Issues Concerning the Enforcement of Compulsory Arbitration Agreement Between Employees and Employees*, 31 ST. MARY'S L.J. 1015 (2000).

13. Kent D. Syverud, Dean at Vanderbilt Law School, observed, “I do believe that there is a perception, [he believed it ill-founded] on the part of businesses and governments, that there is less predictability, and greater variance, in the results of fact finding by a civil jury than in dispute resolution by other methods.” Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1943 (1997).

CHART 8: DIVISION OF TRIALS BETWEEN BENCH AND JURY, 1976 AND 2000

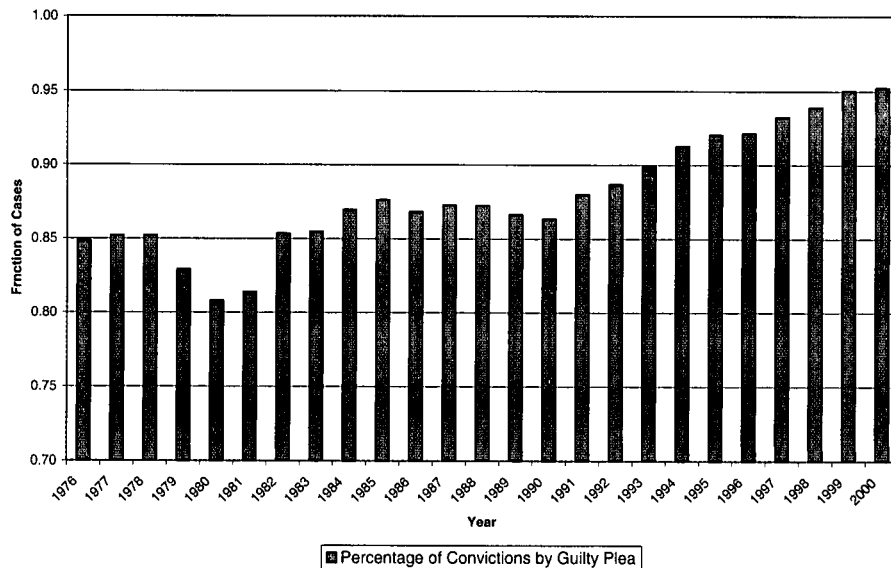


cuts across all categories of cases. Some of the dismissals of filed cases will reflect cases diverted to private resolution. Whether an arbitration clause is enforceable may be contested, and an agreement to deal out of the courthouse could follow an initial filing. The numbers of such cases, as best I can learn, are small.<sup>14</sup>

Diverting cases to private resolution without filing suit alone offers little direct explanation of the rate of decline of trials in filed cases, although reducing the number of filings obviously will affect the absolute number of cases tried. That does not deny the relevance of the phenomenon to the decline in the number of trials. The dimensions of the use of private resolution and the relative sophistication of the actors reinforces suggestions that the reasons that lead to a preference for private litigation may be similar to the reasons that lead parties to elect to settle their cases rather than proceed to trial. In short, the drawing power of private dispute resolution is plainly significant to our inquiry. To the extent that the decreased number of trials is a product of increased settlement rates, the diversion of cases could be skewing the reported decline by making it appear to be less of a decline than it actually is. This will be the case to the extent that the decision to not go to trial and the decision to opt out of the system are influenced in significantly similar ways. We need then to have before us at least a general picture of the emerging flight to private adjudication.

14. See Chart 10, *infra*.

CHART 9: PERCENTAGE OF CONVICTIONS BY GUILTY PLEA



## IV

The popular label of “ADR” covers several alternatives to a trial in the courthouse, but arbitration is the most easily categorized and examined. The total arbitrations filed with the American Arbitration Association rose from 55,520 in 1989 to 95,143 in 1998. In 1999, filings exceeded 144,000.<sup>15</sup>

The Supreme Court’s enthusiasm for arbitration in its recent decision in *Circuit City Stores*<sup>16</sup> will move significant numbers of cases from both state and federal courts. A majority of five justices were of the view that “arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.”<sup>17</sup> This validates formal rejections of the courthouse, a sea change from the hostility of the judiciary to arbitration that lay behind the passage of the Federal Arbitration Act in 1925.<sup>18</sup> This change in attitude was not confined to the court. As I will discuss, the Congress in 1999 required districts to adopt plans for mediation and arbitration, with consent of the parties. Without pausing to detail its many forms, it is sufficient for now to simply observe that the federal government and the private bar have embraced ADR.

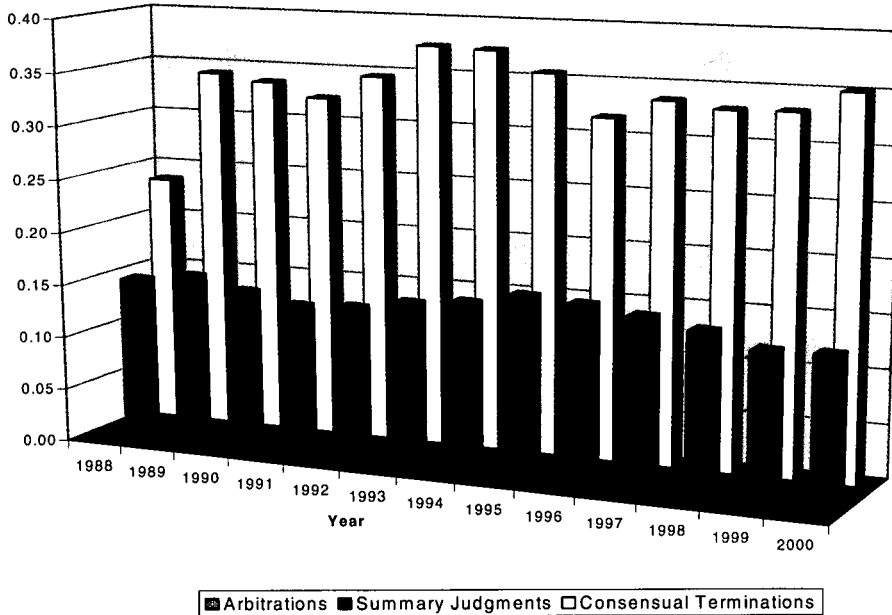
15. Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001).

16. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

17. *Id.* at 123.

18. 9 U.S.C. § 1 *et seq.* (2001).

CHART 10: TRENDS IN NON-TRIAL DISPOSITION



## V

The large users of private dispute resolution appear to be corporate America, historically the largest users of diversity jurisdiction. And the first impulse is to see this exodus as a migration of commercial disputes between corporations, such as breaches of contract, disputes over sales of securities and the like where cost-benefit assessments play larger roles in the parties' appraisal of litigation. On reflection, we realize that this is only part of the flight. Recall the Supreme Court's recent blessing of arbitration of employment suits. These suits present claims of statutorily protected civil rights. Nor is the genre, commercial disputes, devoid of public interest. Large commercial disputes have consequences for investors and communities dependent on their presence and success, not to mention their safety record and good citizenship. And the marker of arbitration is "privacy."

In sum, in validating agreements to opt out of the courthouse in any future dispute, the Supreme Court does not stand alone. Nor is the support for ADR limited to efforts to influence the choice of the parties. Both state and federal courts not only sponsor mediation and settlement, many require participation of the parties. These new channels for cases invite the filing of suits seeking access to mediations, well aware that there is little likelihood of ever facing the relatively rigorous process of trial. Here mediation becomes the handmaiden of the separating spheres of pre-trial and trial, which I will come to.

Encouraging and even ordering private dispute resolution undoubtedly has had large effects. Regardless, with many cases it is the parties who are choosing alternatives and the large question is why those choices are increasingly to avoid the public courthouse. I turn to that question.

—

The Federal Rules of Civil Procedure adopted in 1938 held out the great hope that full and early disclosure of facts would facilitate settlement. Its very ambition was to reduce the number of trials by granting easy access to an opponent's possible evidence by procedures freed of arcane limits and traps of common law and equity pleading. The rules brought the trial judge into the preparation stage in a small step toward the civil law system. The process itself put the parties in substantial contact over extended periods of discovery largely conducted in private settings albeit under the general superintendence of the district court. All of this plainly enhances the chances for settlement and undoubtedly reduces the number of trials. But it does not explain the steady decline in trials we are experiencing.

There is little question but that civil litigation is expensive, beyond the means of most persons. Without contingent fee contracts, few persons could afford to pursue a civil claim to trial. Yet an actual trial is not the main cost in a large number of cases. Rather, it is the preparation for a trial that is a virtually non-occurring event. Dean Syverud's description is to the point:

Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact finder and the choreography of the trial. But few litigants or courts can afford it . . . . We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle.<sup>19</sup>

—

The most costly feature of federal practice, by most accounts, is the discovery process, the centerpiece of reform of the 1938 Federal Rules of Civil Procedure. My own experience is that this ranking is probably justified. Yet there is a lack of meaningful empirical examination of discovery costs. As one recent work on the subject stated:

The actual costs of discovery have rarely been quantified in empirical studies, and the studies reviewed are too dated on this point to be directly applicable to current conditions. Comprehensive cost studies are complicated by different fee arrangements and particularly by the methodological question of how to treat discovery costs incurred

---

19. Syverud, *supra* note 13, at 1942.

by lawyers in zero-or low-recovery contingent fee cases.<sup>20</sup>

One of the few existing studies on the subject indicates that discovery costs are an appreciable component of total fees across different categories of cases, and are especially high for certain categories of cases, such as antitrust and patent disputes. A 1978 study also determined that lawyers generally devote more time to discovery than any other category of activity engaged in by a lawyer, although it was only 16.7% of the total time devoted to a case. More contemporary accounts of discovery costs tend to be anecdotal in nature, describing the high costs inflicted by the 1938 rules. Aside from the direct monetary costs to clients imposed by these rules, discovery can lead to other, less tangible costs, such as lost productivity and lost business advantage.

The difficulties posed by discovery have been identified for years, but have not been directly confronted. The Advisory Committee on the Civil Rules has studied the problem of discovery abuse and has managed several ameliorating limits. The discovery beast has yet to be tamed, however. The reality is that lawyers too often lack incentive to curb pretrial preparation. There is the reality of time billing and the advocate's tendency to over-prepare for a trial that increasingly he has little experience to conduct. The truth is that parties, and judges, expect that the case will settle—an expectation largely being fulfilled by the new class of lawyers, called litigators, few with substantial trial experience. As trials disappear, discovery is only a path to settlement. “ADR” becomes a choice between the expensive arm wrestling of discovery or more direct paths to agreement. Not surprisingly, the parties increasingly choose mediation and arbitration, not over a trial but as preferred alternatives to the settlement process launched by the 1938 Rules of Civil Procedure. After all, if the uncertainty of trials were the dominant reason for their dwindling numbers, settlements would come in filed cases after discovery—the vision of the 1938 Rules. To the extent that is not the case, it is evidence that the parties flee the courts to escape the machinery of federal discovery. Only in this perverse sense is discovery “facilitating” settlement.

This thinking is not a wholesale rejection of the fundamental premise of the 1938 rules, that free discovery will facilitate settlement. Rather, it is a rejection of what discovery became. In sum, the effect of the civil rules today is less facilitation of settlement and more the fueling of flight from the courts.

It bears emphasis, as I have been suggesting, that trial and pre-trial have become distinct worlds—with pre-trial dominating. This estrangement set the stage for “private” resolution. After all, discovery is almost exclusively conducted as a private matter away from the courthouse. The original Advisory Committee charged with the drafting under the 1934 enabling act could not have foreseen that its means would become the end; it did not foresee that the loss of trials carried a loss of basic rele-

---

20. Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 796-97 (1998).

vance, that with Xerox, and now computers, a limited examination of records or oral depositions was difficult to contain. The 1938 Rules envisioned an open public courthouse; its drafters never saw its perverse effects of nailing shut the door to the courthouse. It was, in short, designed to prepare cases for trial, channeled and disciplined by that path. We are learning the painful lesson that it does not work as a stand-alone.

---

Now, the virtual disconnect between pre-trial and trial has been institutionalized. Not only have we failed at reining in discovery, we have created the magistrate judges system for its care and nurture. A look at the torrent of opinions published in F.R.D. and F. Supp. about what ought to be the most routine of discovery problems is illuminating. This should be no surprise. The risk that the magistrate system would experience the expressways effect was plain but ignored. Instead of cutting the Kudzue, we have engaged an army for its care and nurture.

There are now even larger questions about the magistrate judge system to which I will return. For now, we need to keep in mind that the combination of routing the large number of pro se filings to magistrates with a Congressionally-mandated directive to create mediation and arbitration possibilities has put large numbers of magistrates in the position of managing the pre-trial of cases for which trial was never a realistic possibility—a natural fit with their management of pro se cases.<sup>21</sup>

---

Many contend that the decline in trials is explained in part by the increased use of summary judgment. Here, the evidence is anecdotal and indicates a rise in the frequency of summary judgment.<sup>22</sup> One commentator has observed that, between 1973 and 2000, courts have become increasingly willing to evaluate such indeterminate standards as intent and “reasonableness as a matter of law” on summary judgment.<sup>23</sup> It is suggested that courts may also have become more willing to decide credibility issues on summary judgment, as well as to invoke procedural violations to preclude a non-movant from responding to a summary judgment motion.<sup>24</sup>

Some have speculated that the 1986 *Celotex* trilogy may have been instrumental in facilitating this trend.<sup>25</sup> The trilogy re-cast the traditional summary judgment burdens and signaled a more receptive judicial atti-

---

21. See 28 U.S.C. § 1651.

22. See Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEXAS L. REV. 1897, 1916-17 (1998).

23. See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 167-73 (2000).

24. *Id.* at 173-80.

25. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

tude towards the Rule 56 procedure.<sup>26</sup> Informal surveys of the case law in the years following the trilogy appear to indicate an increased willingness by lower courts to employ summary judgment on a routine basis.<sup>27</sup> Data from the AO indicate that there has been no discernible change in the rate of summary judgment disposition between 1981 and 1997.<sup>28</sup> This evidence that the grants of summary judgments explain little is compelling.

A recent study of the published appellate opinions regarding summary judgment contends that the summary judgment rate has increased since 1973.<sup>29</sup> The author, Paul Mollica, based this conclusion on the fact that there were 136 summary judgment appeals published in the 1973 edition of the *Federal Reporter*, whereas the 1997-98 volume contained 470—an increase of 246%.<sup>30</sup> He contrasts this figure with the steady drop in the number of published appeals from trial decisions. This study suffers from numerous methodological failings, however—principally, its reliance on published appellate opinions. The publication rate of summary judgment appeals may have increased over time. Likewise, the rate at which summary judgments have been appealed may have risen, exaggerating any increase in the summary judgment rate.

In short, the data from the AO rejects the assertion that more aggressive use of summary judgment is a major contributor to the decline in trials.

—

As I will urge, the indeterminacy of normative rules now deployed in civil trials may be its most costly feature. During the last thirty-one years of declining trials, the normative rules we ask judges and juries to apply have been increasingly indeterminate. They offer a rule at a level of generality that erodes predictability of results and produces random outcomes.

Section 402 of the Restatement of Torts is a good example. We ask a judge or jury to decide if a product is defective with an instruction to weigh its social utility against the risk of injury in its use. We gloss over ranges of results as inherent in the jury process with the offhand remark that these are case-specific results. While true as far as they go, the fact is that the expectations of lawyers about the likelihood of outcomes have long brought these airborne standards to groundbased on the experience of trials. One need only compare the asbestos cases with the breast implant cases to see the force of this phenomenon. The loss of trials removes this grounding experience, leaving the standards open. We must

---

26. See Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 *YALE L.J.* 73, 79, 88-89 (1990).

27. *Id.* at 88-89, 91-94.

28. See Chart 11, *infra*.

29. Mollica, *supra* note 23.

30. *Id.* at 143-44.



ask: By what measure will the alternative dispute processes now being deployed resolve these disputes?

This indeterminacy has been exacerbated by the wild card of punitive damages. These sets of cases in areas where trial lawyers can make informed judgments have, in recent years, been overlaid with an increasingly unguided standard for the award of punitive damages. It is of little moment if, in a negligence case or a products liability case or securities fraud case, trial counsel can make reasonable judgments about the likely range of verdicts if the wild card of punitive damages introduces a risk that a defendant cannot take. Fortunately, state legislatures and the courts appear to be reining in punitive damages. In the meantime, juries do not deserve the criticism of their efforts, given the questions we ask them to answer—largely open-ended and unguided.

The relevant point is that the decline in trials is created in part by the high cost of indeterminacy and in turn reinforced by declining trials—a growth that feeds on itself. All this is part of a larger picture suggesting that if “non-adversarial justice” is the goal, it ought not fly under the flag of a court whose very power is confined to “adversarial justice.” We are left with the nagging fear that in the long haul the vision ADR offered the federal trial courts may be a mirage and a dangerous one with a high price tag at that.

—

I have described trial courts that are losing their business, a phenomenon in place for the past 31 years. Yet it has been largely unnoticed until recently—despite the profound questions it raises. So far in this description I have assumed that the flight from the courts represents choices by parties—a market at work. Another force has taken hold. Mediation and arbitration have become major areas of practice for lawyers. A substantial segment of the bar now has a vested financial interest in the new “litigation model.” And one need not be able to try a case to play. As I detailed, the trial judges have embraced ADR on the federal side. The Congress has also pushed it and federal judges see magistrates as always available. Merit aside, ADR now has legs of its own—and this “market,” if it ever was, no longer appears to be unregulated and free. This raises basic questions of its ability to correct itself and puts at issue the extent to which its success is evidence of its merit.

## VI

I have described a decline in the number of trials in the federal courts.<sup>31</sup> Accepting that this is the present condition of things, and after 31 years of steady decline that is at least reasonable, we must ask if it is a good or a bad condition, and inquire into the consequences of what has

---

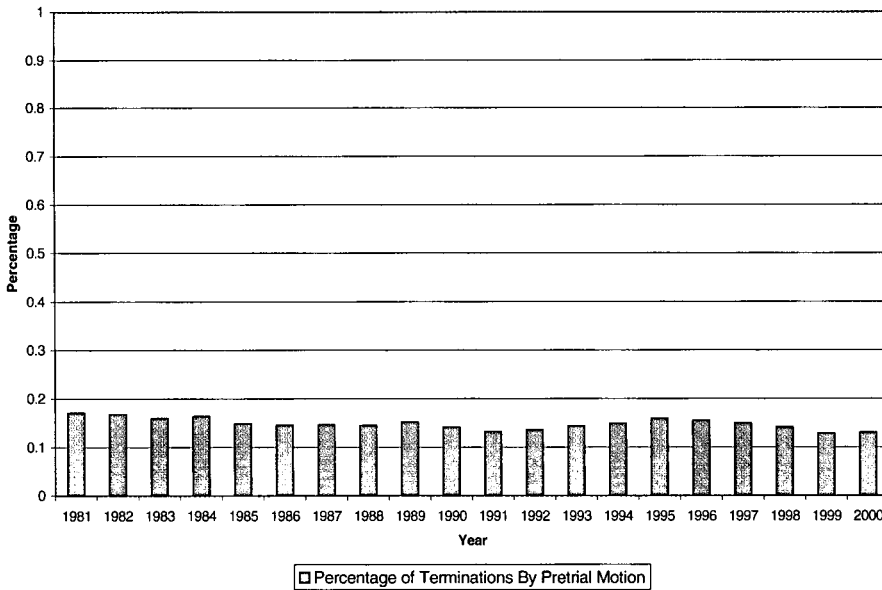
31. I do not have the data to consider the state courts although declines that appear to be similar in some of the state courts of California have been the subject of study.

happened and what will happen if we remain on this course. Some concerns have emerged in my effort to describe. There are others. I turn to them in no particular order.



Jury trials have held their own against bench trials but have, of course, declined both in absolute number and rate, even after accounting for prisoner cases, few of which are tried to a jury. Their success as against bench trials, however, does not alter the shrinking lay presence in the federal courthouse. The decline in the number of jury trials is accentuated by the use of six person juries. In fact the number is more often seven. Regardless, this is seven per trial. And we must not forget the rise of pleas in criminal cases. The difficulties of managing the summoning of persons for jury duty and managing them in the courthouse are consider-

CHART 11: SUMMARY DISPOSITIONS



able. This burden is being eased, just as the “burden” of trial judges would be eased, by having no cases to try. If we are to examine the system in terms of costs and benefits, we must assign weight to political values. This is not the place to sing the praises of juries. It is the time to recall that the presence of the jury in the courthouse as contemplated by the United States Constitution reflects a profound allocation of power both in who decides your case as well as where it is decided.

Commentators have suggested that the flight from the courthouse is, in the main, a flight from the jury. The assertion is that the cost of trying a case to a jury, the randomness of their verdicts and their general inability to comprehend complex data lie behind the rising opt outs. The decline

in trials has not reflected the premise of a preference for a bench trial over a jury trial. Rather, the data presents a compelling picture that bench and jury trials stand equally accused. So, in a sense there is some vindication of the jury trial but the overall picture of flight remains. And the departure of trials means the absence of the lawyers who try them. This signals a change both in the mix of the members of the bar and the time they are in the courthouse. This is akin to the concerns provoked by the recurring calls for the end of diversity jurisdiction, occasionally joined by a United States District Court Judge.<sup>32</sup>

---

The justification for creating the office of federal magistrates was to relieve U.S. District Court judges from administrative and pre-trial chores, freeing them to preside over trials. This history of the magistrate system has been an expanding role for magistrates in the face of declining trials. The district court is increasingly a blend of two courts now engaged mainly with administrative tasks with large bureaucratic staffs. This blend in function calls into question the need for Article III tenure itself, and obvious questions of space and facilities—not only the number of judges needed, but the number of courtrooms and court reporters. The list is endless. Magistrates are now essential. The rising number of pro se filings has been met with large increases in staffs at every level. My own court now employs approximately fifty lawyers, whose work is overwhelmingly devoted to this docket. And it is important to understand that a high percentage of these cases are filed by prisoners. Mediation and arbitration have virtually no role here—beyond an effort to free judicial personnel from “traditional” suits.

The influence of pro se suits, largely prisoner suits, is large. They have an exponential growth rate and are almost never tried. Their management exacerbates the estrangement of pre-trial and trial. In trying to locate where we are going and how far we have strayed, it is useful to keep in mind that at some point it is misleading to continue to refer to the district courts as trial courts.

---

There should be grave concern for the type of work we will be asking our trial courts to do. At the present rate—twenty trials and trial-like proceedings with an average length of one day over the course of a year—there will soon be little need for the skills of a trial judge. To my eyes, the federal trial judge has over the last half century been the single most important person in the system, demanding the widest range of skills and training. A sense of proportion and measured use of great

---

32. Most with whom I have discussed that topic realize that removal of diversity jurisdiction means removal of a large segment of the private bar, and increased isolation of the federal district courts.

power coupled with unquestioned integrity have been their hallmarks. The Frank Johnsons, Robert Merighes, Sam Pointers, Lowell Jensens, and so many others have made large contributions. As the demands of the job change, so also will the persons who hold them. Stated another way, these district courts have operated with a package of duties. Changing the package can work larger changes in the very efficacy of the institution itself. We have long insisted that trial judges have considerable trial experience, a prerequisite to appointment. Its necessity is no longer apparent.

There is one final caveat. Settlements in civil cases and pleas of guilty in criminal cases are good results. Very high percentages of civil and criminal cases have historically settled—along a path to trial. It would be a mistake to assume that I do not see that circumstance as a public good. It is that good that this essay supports. Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.



# Articles

