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WHAT'S SO GREAT ABOUT A TRIAL ANYWAY? A REPLY TO JUDGE HIGGINBOTHAM'S ELDON B. MAHON LECTURE OF OCTOBER 27, 2004

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United States Circuit Judge Patrick E. Higginbotham, in his October 2004 Eldon B. Mahon lecture at the Bass Hall in Fort Worth, once again identified and criticized a phenomenon in American jurisprudence that has been of great concern to him for several years. Judge Higginbotham's identification of and "take" on this development can be fairly summarized by referring to the title of a similar lecture he delivered at Loyola University School of Law, which was published in the Fall 2002 SMU Law Review: *So Why Do We Call Them Trial Courts?*[1] My reply today, entitled *What's So Great About a Trial Anyway?*, is an effort, and a risky one on my part given his status as compared to mine, to join issue with my friend and colleague on the bench on whether the decline in trials in America, and especially in federal district court, is a positive or a negative development, or, perhaps something in between.

I have no dispute with Judge Higginbotham on whether we have seen a decline in the number of trials generally and especially in federal district court. His statistics are valid. But before I can go further, I must summarize for you, especially for those unable to be present at the Mahon Lecture in October, Judge Higginbotham's address. He began by noting that:

> 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. . . . from the Articles of Confederation through the 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.[2]

But Judge Higginbotham sees a society that is losing its commitment to open trials in public courthouses.[3] This loss of commitment is, he

1. 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).

2. *Id.* at 1406–07.

3. *Id.* at 1407.

insists, demonstrated by the decline in trials, both jury and nonjury, and a parallel surge in private dispute resolution.[4]

Noting that there are many possible causes, most of which are commonsensical and intuitive on Judge Higginbotham's part rather than supported by empirical data, he joins what he calls "thoughtful commentators" in identifying these culprits: "costs, delay, crowded dockets, and perceptions that the system is random and unpredictable."[5]

Judge Higginbotham acknowledges that the settling of cases by private resolution, without ever filing suit, alone offers little explanation for the rate of decline of trials in filed cases.[6] But "[t]he dimensions of the use of private resolution and the relative sophistication of the actors reinforces suggestions that the . . . [impetus for preferring] . . . private litigation may be similar to . . . [that which] . . . lead[s] parties to elect to settle their cases rather than proceed to trial."[7] He concludes that the appeal of private dispute resolution is plainly significant to his inquiry.[8]

Judge Higginbotham is clearly troubled by the rise of arbitration in final dispute resolution. He predicts that the Supreme Court's enthusiasm for arbitration in its 2001 case of *Circuit City Stores v. Adams*[9] will move significant numbers of cases from both state and federal courts.[10] He sees this as a validation by the high court of formal rejections of the courthouse.[11] To make matters worse by his way of thinking, Congress joined in with its Civil Justice Expense and Delay Reduction Act of 1990, which required all 96 federal districts in America to adopt plans for alternative dispute resolution, including especially mediation and arbitration.[12] So, he laments, the federal government and the private bar have embraced ADR.[13] Adding insult to injury for those who see intrinsic value in federal trials, he notes that apparently the largest users of private dispute resolution are American corporations, historically the parties most likely to take advantage of a federal court's diversity jurisdiction.[14] Not only do both state and federal courts sponsor mediation and settlement, but many also require participation of the parties.[15] Even so, in many cases, he observes, it is the *parties* who are choosing these alternatives.[16]

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4. *Id.*
5. *Id.* at 1412.
6. *Id.* at 1413.
7. *Id.*
8. *Id.*
9. Circuit City Stores, Inc.v. Adams, 532 U.S. 105 (2001).
10. Higginbotham, *supra* note 1, at 1414.
11. *Id.*
12. *See id.*; 28 U.S.C. § 471–82 (2000).
13. Higginbotham, *supra* note 1, at 1414.
14. *Id.* at 1415.
15. *Id.*
16. *Id.* at 1416.

Why, Judge Higginbotham asks, are parties increasingly choosing to avoid the public courthouse? He first suggests that discovery is to blame, and that the 1938 Federal Rules of Civil Procedure, designed to reduce the number of trials by granting easy access to an opponent's evidence, has, perversely, nailed shut the door to the courthouse.[17] This is so, he explains, because the cost and complexity of our civil process before trial is something few litigants can afford.[18] "'We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle.'"[19]

Judge Higginbotham examines the role of summary judgments but quickly dismisses them as a culprit based on data from the Administrative Office of the U. S. Courts showing no discernible change in the rate of summary-judgment disposition between 1981 and 1997.[20]

A less obvious contributant to the reduction in trials may be what Judge Higginbotham calls "the indeterminacy of normative rules now deployed in civil trials."[21] For example, he cites Section 402 of the Restatement of Torts, under which "[w]e 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."[22] Add to this the exacerbating availability of punitive damages.[23] Judge Higginbotham thinks "[i]t 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."[24]

He believes another factor in the decline of trials is this truth: "[m]ediation 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.'"[25]

In concluding, Judge Higginbotham admits that we must ask if the decline in trials is a good or a bad condition.[26] He admits that high percentages of civil and criminal cases have historically settled—along a path to trial—and he acknowledges that circumstance as a public good.[27] But he believes that, and I quote:

> We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear [so] that persons

17. *Id.* at 1416–18.
18. *Id.*
19. *Id.* at 1416 (quoting Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1942 (1997)).
20. *Id.* at 1418–19.
21. *Id.* at 1419.
22. *Id.*; RESTATEMENT (SECOND) OF TORTS § 402 (2005).
23. Higginbotham, *supra* note 1, at 1420.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1423.

> 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.[28]

Despite having just heard myself restate Judge Higginbotham's public policy underpinning for a steady stream of trials, I find myself asking, once again, "what's so great about a trial anyway?" What is it about a trial in any court and especially in the federal courts, that the public, if it knows what's good for it, will clamor for the opportunity to seek the resolution of its disputes by a federal judge or, better yet, by a jury of its peers?

The public, as a body, may be perceived to understand and appreciate the need for grounding our normative standards, but I do not believe individual litigants or their lawyers understand and appreciate that at all. To the individual litigant, including the individuals who appear as representatives and officers of corporations, a trial is, well, just that—a trial. It abides in their psyche as an awful contest to be avoided if at all possible. And who can say that they are not justified? Litigants enter the courtroom with episodes of Law and Order[29] and Boston Legal[30] running through their minds, expecting Judge Judy[31] to browbeat them into silence if they utter a single displeasing syllable.

The courtroom I call my own took my breath away when I first entered at its rear door, despite the fact that I had in my hand a piece of paper signed by President Bush (the elder) giving me authority to preside there! What must a mere mortal sense upon entering that—or any—courtroom knowing that something very important to him is at stake? This is not to mention the sure belief that many litigants must have, that their every word on the stand, under oath, will be dissected like a rat in anatomy class by a skilled lawyer trained in a law school section named "Circumvention and Convolution 101." And this takes no account of the possibility, nay *probability* from what I have seen, that many litigants know that when they take the stand, they will violate their oath to tell the truth, the whole truth, and nothing but the truth, and that they might just get caught in that lie—right there, on the record, and in public! What greater deterrent to going to trial can there be than this? How pleasant and appealing must a settlement—especially a fair one—be to someone so afflicted?

We have yet to note that the litigants, terrifyingly for their lawyers, lose control of their fate at trial. Judge Higginbotham suggests that lawyers fear trial because of lack of confidence in their trial skills—

28. *Id.*

29. *Law & Order* (NBC television series 1990–present).

30. *Boston Legal* (ABC television series 2004–present).

31. *Judge Judy* (CBS Studios Inc. series 1996–present).

this, another bad consequence of the decline of trials.[32] While many lawyers do undoubtedly lack confidence in their forensic skills, I believe lawyers fear more than anything else the loss of ability to control the outcome of their cases. They have this control in varying degrees at all prior stages of every dispute. But at trial they can no longer say: "NO! We will not accept that result!" Again, who can blame a litigant and his lawyer for preferring mediation and settlement to the uncertainties of trial—uncertainties that cannot be avoided in the best courtroom with a great jury, presided over by the best trial judge in the land.

I do not believe that trials can ever be made appealing to very many litigants. They are, after all, descended from and now are a substitute for trial by battle. They have replaced the settlement of disputes by force; but like campaigns and elections, which are our civilization's substitute for conquest by force, they are warfare by other means. It is not possible to make war pretty or pleasant for the warriors.

Now, I will address some of Judge Higginbotham's particular points. First, though I said I did not quarrel with his statistics proving a decline in federal and state trials, I do wish to say that at least anecdotal data and a little of my own statistical sampling suggests an alternate, and less depressing theory: trials as we know them are alive and well, and are more frequent when less is at stake and less frequent when more is at issue. In conversations recently with two of Tarrant County's three county-court-at-law judges, I discovered that each is in trial almost constantly and that each tries between 60 and 80 personal-injury lawsuits and around 100 suits on debts per year. These are courts that have jurisdiction from $500 up through $100,000.[33] As one climbs up the food chain of litigation and litigation complexity, it seems to me that it is only logical and predictable that there would be fewer trials.[34] In county court, where a typical auto-accident award is about $7,000, there is little need for discovery or ADR, and little risk at trial. So, it goes to trial. But, if the case involves an auto accident caused by the blow-out of a Bridgestone-Firestone tire and a whole family is killed in the ensuing rollover, *that* case will need extensive deposition and production discovery and will be amenable to mediation in order for both sides to seek certainty and control—with trial in federal or state district court being the ultimate, looming solution, if all else fails.

32. *See* Higginbotham, *supra* note 1, at 1417.

33. TEX. GOV'T CODE ANN. § 25.0003(c)(1) (Vernon 2004); *see also* United Servs. Auto. Ass'n v. Brite, 161 S.W.3d 566, 571 (Tex. App.—San Antonio 2005, pet. filed).

34. *See generally* CPR Inst. for Dispute Resolution, *Why Are Fewer Cases Going to Trial?*, 22 ALTERNATIVES 187, 188 (2004) (discussing the ABA's *Vanishing Trial Project* and the many reasons for decline in trials, including cases' cost and complexity).

Private dispute resolution, which worries Judge Higginbotham, concerns me less. I believe that our mediators have developed more than a cottage industry and have instead become professional facilitators reaching a result that both sides in a dispute can agree to. And if the parties are satisfied, who am I to say that they wimped-out or that they should have gone to trial in order for the common law to grow and have better normative grounding?

Citing "thoughtful commentators," Judge Higginbotham, once again, identified "costs, delay, crowded dockets, and perceptions that the system is random and unpredictable," as prime suspects for the cause of a decline in the number of trials.[35] My observation from the trial bench is that the costs associated with dispute resolution are proportionate with the complexity of the case. No doubt some cases are overworked by the litigators, thereby needlessly increasing the costs. But, it is not clear to me how this is to be avoided—short of returning to trials by ambush where there is little or no discovery and experienced trial lawyers run roughshod over the occasional litigator.

As for delay and crowded dockets, it simply is no longer true, thanks to the changes Judge Higginbotham laments,[36] that in federal court it takes longer to get to trial. If you file suit today in my court, I can get you to trial as quickly as you want to go. If you and your opponent want little or no discovery, you may so indicate in the joint status report and I will give you a trial date certain within three to six months of your filing date. On cases requiring discovery, at the conclusion of that discovery, the schedule for which the lawyers set themselves, I will give you a trial commencing on a date certain, again, within three to six months. Usually, it is the lawyers' schedule that is the impediment to a prompt setting, not the courts'.

As for the system being perceived as random and unpredictable, I can only say that to the extent that the system is so perceived, it has always been so. Fallible human beings in the form of judges and juries resolve disputes at trial and only so much can be done to reduce the randomness and unpredictability of our dispute-resolution system.[37] And, has it not been the purpose of the discovery and the ADR processes to *reduce* that unpredictability by, in discovery, giving the parties a clear view of the strengths and weaknesses of their cases, and by, in mediation and court-required settlement meetings, affording the parties a structured opportunity to let those views produce an agreed-to result?

I do have one area of agreement with Judge Higginbotham that I want to single out: I believe that the rise of arbitration as a substitute

35. Higginbotham, *supra* note 1, at 1412.

36. *Id.* at 1414.

37. *See* John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 477 (2002) (discussing a "jury's relative lack of accountability to the legal system, the public and the parties in the case").

for trial in the federal and state district courts is a trend fraught with danger.[38] Arbitration proceedings are conducted in private and before a privately paid arbitrator, beholden to some extent to those who bring him business, and who has not faced the vetting of the public at state election or the confirmation process of a federal judge.[39] There, the rules of evidence, which are the product of a thousand years of trial experience, are relaxed if not ignored. And, from what I hear, arbitration is not necessarily less expensive.[40] Further, the placement of arbitration clauses in many contracts will eventually, I believe, be held to create adhesion contracts where the bargaining power of the parties is widely disparate—as is the case in many consumer contracts today.[41]

Another area of agreement is "the indeterminacy of normative rules now deployed in civil trials."[42] Judge Higginbotham's example in the Restatement of Torts, Section 402 is a good one, I can attest, from a case I tried about three years ago where I—not a jury—was charged with making that weighing of social utility against the risk of injury. I can tell you first-hand that there was no predictability to my decision because at the conclusion of the trial I had no idea which way to rule. Imagine the difficulty a jury would have had. Judge Higginbotham did not offer a solution to this problem. And I am not sure I have one either, other than to insist that our legislatures, both state and federal, write the law with a view to providing their citizens with *statutory* law that offers clear standards of decision for both judges and juries.

To be fair, let me note that Judge Higginbotham is in good company when he sounds the alarm about the decline in trials. The American Bar Association Section on Litigation undertook in 2003 a project called *The Vanishing Trial* that culminated in a two-day symposium and the entire issue of the 2004 Journal of Empirical Legal Studies of Cornell Law School.[43] Many of the themes sounded by Judge Higginbotham are found thoroughly articulated there.[44] But there is one article in that journal that is in line with much of my thinking on the

38. Higginbotham, *supra* note 1, at 1420.

39. *See* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 154 (1995); 9 U.S.C. § 5 (2000).

40. *See generally* Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 176 (2005) ("The fact is arbitration has become as, if not more, expensive as its adjudicative cousin – court-supervised litigation."); Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employees are Compelled to Waive Jury Trials*, 7 U. PA. J. LAB. & EMP. L. 767, 769 (2005) (discussing that in many employment cases "key rulings make trials less expensive, while arbitrations are more costly").

41. *See* Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 226 (1998).

42. Higginbotham, *supra* note 1, at 1419.

43. Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

44. *See id.*

supposedly vanishing trial. Its author is Lawrence M. Friedman, Professor of Law at Stanford Law School, and it is entitled, *The Day Before Trials Vanished.*[45] In it, Professor Friedman says he wants to make two rather simple points:

> The first point is that the "trial" was never the norm, never the modal way of resolving issues and solving problems in the legal system. In a way, then, we can argue that "vanishing" is an illusion. There was never much to vanish. There never was a regime of full trials. The second point is this: insofar as the "trial" did exist, it served a function that the legal system no longer cares to fulfill, at least not in the traditional way. This function was a didactic or theatrical or educational function. . . .
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> [Some learned observers tell] us that the "judicial role today is not what it used to be." Judges used to rely on the parties "to frame disputes," at which point the judges would resolve issues on the basis of "legal standards." But today "overcrowded dockets and overzealous litigants have led judges to stray from this passive role." Now judges take an "active, largely discretionary approach to pretrial case management."
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> [This] description would strike most social scientists who study law as, shall we say, a bit naive. [They have] a picture in [their] mind of what a trial is supposed to be; and [they feel] that the modern trial falls far short from the ideal. But both critics and friends of the modern trial operate from some notion of what the ideal trial is like. To many legal scholars . . . there was a kind of golden age of trials, a time when trials lived up to this ideal. This was before the Federal Rules and discovery and pretrial and diversion and ADR changed everything. These procedural events transformed the trial, made it what it is today. What 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.
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> [This] image is not that different, in essentials, from the popular image of a 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 look 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

45. Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689 (2004).

> people they feel 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 spine-tingling 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.
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> Now, all of us who are in the law business, as lawyers, judges, or teachers, know that this picture of a trial is, in the first place, not entirely accurate; but in any event, big, full trials of this kind, whether or not they are vanishing more rapidly today than before, are not the norm, and have not been the norm for quite some time.[46]

Having said all this, which, taken together, is an argument that the decline of trials, at least in major cases, is a natural and evolutionary progression dictated by the marketplace, I do want to finish with this thought: Judge Higginbotham is right that a well conducted trial is the crowning achievement of our legal system. Without the trial sitting at the top of the pyramid, there would be no discovery, no mediation, and no settlement. There would be dispute resolution, but only in the ancient sense. Consequently, our courts are open and ready, willing and able to try your lawsuit if that is what you want to do.

46. *Id.* (quoting, in part, Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 103 YALE L.J. 27, 29 (2003)).