THE PRESENT PLIGHT OF THE UNITED STATES DISTRICT COURTS

PATRICK E. HIGGINBOTHAM†

TABLE OF CONTENTS

INTRODUCTION

The faces of the United States district courts are fading. Judge Gerald Tjoflat reports that, during his tenure as chief judge of the Eleventh Circuit, several lions of the bar confided to him that they were unable to see the federal district judge before whom their cases were pending for as long as a year—even in complex litigation. These venerable trial lawyers stated that they were, at best, trundled off to a magistrate judge. Grants of summary judgment without any live appearance by counsel were commonplace, depriving trial attorneys of the opportunity to bring papers to life with oral argument. Instead, the papers were filed, and, some time later, a written order was issued. This is no lonely pixel. The phenomenon is fueled by the

† Senior Judge, United States Court of Appeals for the Fifth Circuit.

centrality of the motion for summary judgment, which has displaced the trial as the destination point for litigation. Today it is unlikely that a trial date will ever be set, and rarer still that a trial date will have any meaning to the court and hence to the parties. Though in part anecdotal, these assertions gain a measure of validation based on the frequency of such complaints and the fact that, on average, a U.S. district judge tries fourteen cases, civil and criminal, per year, which last an average of between four and five days.[1] Therefore, the average district judge has nearly three hundred days each year with no trials. I highlight these figures not to suggest that these judges are not working but rather to inquire as to what type of work they are doing—and what the answer means for rulemaking.

My modest purpose in this brief Article is to lift up for examination certain weaknesses of the federal trial courts and to offer possible responses that could be implemented by the judges themselves, by the appellate courts, or by Congress. I recognize that isolating issues for separate examination risks failure to confront their collective impact, given that the present circumstance of the federal district courts is the product of a powerful synergism. I will attempt to mitigate this difficulty by presenting the full picture before turning to the pixels.

I. NORMATIVE FOUNDATIONS

A thesis that the federal trial courts are seriously flawed requires a baseline of operating normality. The first demand of regularity is that federal courts operate within their constitutional traces—Articles I and III. They must discharge their duty to decide all cases or

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, 1405–06 (2002) [hereinafter Higginbotham, *Ainsworth Lecture*] (citing statistics from 2001). According to the latest figures from the Administrative Office of the United States Courts, this number has remained unchanged. *U.S. District Court—Judicial Caseload Profile*, U.S. COURTS, http://www.uscourts.gov/cgi-bin/cmsd2009.pl (follow "Generate" hyperlink) (last visited Sept. 5, 2010) (noting that from 2007 to 2009, each judge completed twenty trials on average during each twelve-month period ending September 30). As I noted in the *Ainsworth Lecture*, the Administrative Office's figures are not limited to trials in the conventional sense of bench or jury trials; they include any contested matter in which a judge takes evidence. Higginbotham, *Ainsworth Lecture*, *supra*, at 1406. This definition accounted for the difference, in 2001, in its reported average of twenty and my count of fourteen. *Id.* The Administrative Office's count for 2009 is also twenty, as it was in 2001, so it is reasonable to assume the actual number of trials in the conventional sense remains approximately fourteen.

controversies that fall within a legislative grant of jurisdiction,[2] including civil cases, federal criminal cases, collateral review of state criminal cases, and a wide genre of administrative decisions. These duties come with firm expectations arising from congressionally stated rules of process and expedition, as well as traditions and customs of the bench and bar. Remarkably—and troublingly—adherence to these expectations, traditions, and customs progressively disintegrates as one lowers the level of generality and carves out specific issues for examination.

In reality, trials are an increasingly small part of the daily routine of the federal trial courts. Most district courts now try very few civil or criminal cases—a documented phenomenon I will not rehearse here. One must keep this picture ever in mind because it is the most salient feature of the federal trial courts today—and as I see it, the manifestation of the illness I will discuss. Some do not see it this way, however,[3] and before turning to causes, consequences, and remedies, I must note that federal trial judges are conflicted over whether the demise of trials is good or bad. Indeed, judges disagree over the dominating antecedent question of the normative standard itself—whether a well-tried case is a failure of a trial court or its crowning achievement. A want of common understanding about what the work of a federal court ought to be when it is performing at its optimal level is fatal to rule changes aimed at that achievement.

Against this general backdrop, I will argue that federal trial courts are now more like administrative agencies than trial courts in their present efforts to discharge their duty to decide cases or controversies, and that we are witnessing the death of an institution whose structure is as old as the Republic. I will describe these charges, discuss their validity, and then turn my focus to their consequences. Finally, I will discuss remedial responses. Throughout, the role of the trial judge as an agent of this change will be revealed. This discussion will be collegial, keeping in mind that collegiality is

2. U.S. CONST. art. III, §§ 1–2 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . .").

3. *E.g.*, D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG 2D 453, 467–68 (2007) (arguing that for the modern litigant, trials are sources of unacceptable risk and expense).

much like Will Rogers's definition of diplomacy: the fine art of saying "nice doggie, nice doggie," while looking for a rock.[4]

II. THE PRESENT PICTURE

On any given day, a walk through a typical federal courthouse is likely to find most of its courtrooms dark. That a courtroom is not to be closed except in the most limited circumstances is a constitutionally footed principle,[5] and these dark courtrooms by definition defy the objective of openness in government. Of course, some few courts do not fit this description, but the exceptions validate rather than detract from this bleak picture of a bureaucratic-looking judiciary. The Eastern District of Texas was once a sleepy district relative to its urban neighbors of Dallas–Fort Worth and Houston. But there, Judge T. John Ward, a prominent defense lawyer when appointed, followed a "traditional" process of having firm trial dates and access to the district judges.[6] The result was an influx of complicated litigation, as defendants and plaintiffs sought the benefits of these changes and filed in the Eastern District rather than in one of the major metropolitan areas with convenient air travel—a development that points a small arrow toward cause and effect.

Over the past two decades, awareness of the decline of trials has crept slowly into the collective judicial consciousness. What most judges passed over as a temporary phenomenon brought on by dynamic dockets or by circumstances in a particular geographic region has now been recognized as an across-the-board change, albeit one that came on slowly at first. Empirical studies validate early alarums, and the bench and bar have puzzled over causes and remedies, and whether this decline is a good or a bad thing. The latter question—about the public good—cannot be separated from the issue of why trials are being displaced by paper filings. Nor can the want of trials be viewed as an insular, contained alteration that left the federal district courts otherwise the same. They are not. A clear picture of the

4. *See* JONATHON GREEN, THE CYNIC'S LEXICON: A DICTIONARY OF AMORAL ADVICE 165 (1984) (quoting Will Rogers).

5. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564–575 (1980) ("From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.").

6. *See* Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES, Sept. 24, 2006, at B1 ("[T]he rules [adopted by Judge Ward] put patent lawsuits on a strict timetable, laying out when key documents must be handed over and setting firm trial dates.").

fullness of the change is essential to reflect upon future pathways for federal rulemaking, as well as to identify rules in need of immediate discard or repair.[7]

This move toward paper courts has increasingly shrunk the categories of persons appearing in open court—other than federal employees—to defendants being sentenced. District courts have become more remote and more detached from people. With the sentencing guidelines, fewer criminal cases are being tried.[8] And the bar has lost its significant role in court-appointed cases, displaced by federal public defenders. This leaves the criminal side of the docket to federal employees and a narrow range of private counsel who appear for the few defendants who can pay. In the occasional civil jury trial, there will be only six to eight jurors—a reduction from twelve-member juries enacted despite virtually all serious studies finding that changes in jury size alter the dynamics of deliberation in undesirable ways.[9]

---

7. *See* Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261, 271 (1980) (arguing that "[w]e must respond to the pressure to accommodate the increasing number of disputes flowing from a burgeoning federal government" while remaining "wary of proposals that tamper with the basic structure of the federal courts that has served us so well"); *see also* Patrick E. Higginbotham, *A Few Thoughts on Judicial Supremacy: A Response to Professors Carrington and Cramton*, 94 CORNELL L. REV. 637, 649 (2009) ("The plain fact is that this system has promoted private litigation. In brief, the 1938 Rules took much of the case away from the courthouse and brought it to the conference rooms of law firms."); Higginbotham, *Ainsworth Lecture*, *supra* note 1, at 1407 ("Lacking a provable etiology, the changes are most easily described as a syndrome with two conspicuous symptoms: the decline in trials, and the nigh 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."); Patrick E. Higginbotham, *Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501, 505 (2006) ("When we widen our lenses, we find disturbing trends, such as the decline of trials with federal trial courts looking like European courts. We also find a suspiciously parallel flow of dispute resolution to the administrative agencies.").

8. *See, e.g.*, Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (observing the prevalence of guilty pleas under the federal sentencing guidelines).

9. The Advisory and Standing Committees of the Rules Committee in 1996 recommended a return to the twelve-person jury in civil trials, which was ultimately rejected by the Judicial Conference in a close vote. *See* ADVISORY COMM. ON CIVIL RULES, JUDICIAL CONFERENCE OF THE U.S., MEETING OF OCTOBER 20–21, 1994, DRAFT MINUTES 17–19, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-1994.pdf ("Many scholars agree that 12-member juries are better. The vast weight of history and tradition creates a strong presumption in favor of 12. A 12-person jury, moreover, makes it much more probable that any single jury will include representatives of significant minority groups. The importance of representativeness has been underscored by recent decisions that limit the use of peremptory challenges for the purpose of striking minority members from a jury; it is ironic that one of the surest safeguards of representativeness should be sacrificed in the name of expediency. Smaller

Finally, it is telling that the decline in cases tried has not shortened the time from trial to disposition. Rather, the time has lengthened, and demands for discovery have increased. Increases in discovery costs have contributed to the rising costs of litigation,[10] leading many commentators to tender the increasing costs of discovery as an explanation for the declining trial. But accepting that discovery is the single most powerful explanatory variable in explaining the rising costs of civil litigation and that these costs have paralleled the decline in trials, one must test the hypothesis that the increase is responding to the decline in trials. One might invert the hypothesis and contend that the decline in trials is responsible for the increased demands of discovery. Consider the loss of the vital sense of relevance and discipline when preparing a case in the shadow of a meaningful trial date. Add in a generation of litigators who have no trial experience and are ill equipped to sort through relevant information in discovery. Young attorneys without trial experience may insist on excessive discovery out of fear of missing something, because they cannot know what will be useful at trial, and in accordance with their economic incentives to check behind every button when the prudence of their actions will never be tested by a trial.[11]

Rulemaking has failed to slow this economic fountain. Unable to control discovery, the regulatory response has been to attempt to

---

jury verdicts, moreover, are more erratic, less stable, for a variety of reasons. In many ways, the capacities and behavior of a group of 6 are different from those of a group of 12. It is more difficult for a single aggressive juror to dominate a larger group. Larger juries bring broader ranges of experience and values to the deliberation, and are better able to recall trial evidence.").

10. *See* AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM app. A (2008), *available at* http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=3650 (observing that "[o]ver 87% of [surveyed American College of Trial Lawyers] Fellows indicated that e-discovery increases the costs of litigation" and that "[o]ver 75% of Fellows agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery").

11. Higginbotham, *Ainsworth Lecture*, *supra* note 1, at 1417 ("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.").

limit access to it—witness the rise of particularized pleading.[12] Heightened pleading standards are less measured, less targeted, and less predictable than rule processes, but they at least swipe at the problem of rising discovery costs. This response is welcome only for its implicit recognition that there is a problem. Efforts to construct gates for access to discovery must address the marriage of notice pleading and discovery that was fundamental to the 1938 Federal Rules of Civil Procedure, confronting both the difficulties it has wrought and its instrumental role in enforcing legislative and constitutional norms. Insisting that a plaintiff plead more specifically before accessing discovery does not adequately confront these challenges. Commendably, it does move toward greater judicial control of access to the full engine of discovery, or perhaps toward prescribing a smaller engine for smaller jobs. For now, however, particularized pleading has created a perverse regime directed at cases in which there is likely to be an imbalance among parties in access to needed evidence. It is a mistake to approach discovery costs as unnecessary excess that parties could limit or avoid by mutual agreement, or as solely a product of perverse economic incentives for hourly paid counsel or extortionate tactics of strike-suit lawyers. Though such abuses do exist,[13] particularized pleading is a poorly tailored response.[14] Broad access to discovery is often a necessity in

12. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 61–62 (2010) ("*Twombly* justified establishing plausibility pleading on the basis of assumptions about excessive discovery costs for [large corporate and government defendants] and the threat of extortionate settlements.").

13. *See, e.g.*, Jeff Sovern, *Reconsidering Federal Civil Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?*, 104 F.R.D. 143, 173 (1985) ("The second policy motivating Rule 9(b) is the prevention of strike suits."); Damian Moos, Note, *Pleading Around the Private Securities Litigation Reform Act: Reevaluating the Pleading Requirements for Market Manipulation Claims*, 78 S. CAL. L. REV. 763, 763–64 (2005) ("In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995[, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scatted sections of 15 and 18 U.S.C.),] . . . to address the serious flaws in the private securities litigation system. Courts, Congress, and many commentators agreed that the chief evil plaguing the system was strike suits, suits 'based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement.' Strike suits prevailed in private securities claims because, irrespective of the merits of the claim, it was usually less costly for defendants to settle than fight the allegations." (footnotes omitted) (quoting BLACK'S LAW DICTIONARY 679 (2d pocket ed. 2001))).

14. *See* Crawford-El v. Britton, 523 U.S. 574, 595–96 (1998) (noting that the "indirect effort to regulate discovery" through heightened pleading standards "employs a blunt instrument that carries a high cost, for it[] . . . also imposes a heightened standard . . . upon plaintiffs with bona fide constitutional claims"); *id.* at 597–601 (suggesting a variety of ways that a district court may limit pretrial costs without invoking heightened pleading requirements); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 554 (2002) ("[T]he resurgence and

suits by private attorneys general, especially in a country so dependent on private suits to enforce federal normative standards. Recent events have laid bare the consequences of underenforcement of federal regulatory schemes. It seems odd to now impede the efficacy of this vital method of enforcement. Rather, controls on access to discovery—particularly controls that are inconsistent with the underpinnings of the 1938 Rules—must be carefully balanced to preserve the enforcement role of private attorneys general. That is, a gate restricting access to discovery must be able to screen by merit. Perhaps a more appropriate system might be to allow an initial opportunity for limited discovery, followed by an examination into the likely merit of the suit before granting access to greater discovery. Regardless, once one moves from trial to paper courts, limits on access become the only effective cost-control tool.

III. CAUSATION PATTERNS

A. The Rise of Arbitration and Alternative Dispute Resolution

As trials have declined, private arbitrations have grown exponentially. At the same time, alternative dispute resolution (ADR) has gained a life of its own. The relationship among these three phenomena is complex.[15] It is tempting to describe their relationship in causal terms: that ADR, with its emphasis upon consent-based dispute resolution, accounts for the reduction in the number of trials; that litigants' efforts to escape the adversarial processes of trial systems either fueled arbitration or fed on perceived costs of trial such as indeterminacy and loss of control over risks and costs; and that the distribution among district courts, ADR, and arbitration reflects the preferences of litigants. For now I will treat ADR and arbitration as competing with the public model for the business of dispute resolution, even if they do not fully share common

resilience of heightened pleading jeopardizes a procedural balance carefully forged by the drafters and embodied in the Federal Rules.").

15. *See* DAVID B. LIPSKY & RONALD L. SEEBER, CORNELL/PERC INST. ON CONFLICT RESOLUTION, THE APPROPRIATE RESOLUTION OF CORPORATE DISPUTES: A REPORT ON THE GROWING USE OF ADR BY U.S. CORPORATIONS 5 (1998), *available at* http://digitalcommons.ilr.cornell.edu/icrpubs/4/ ("One of the foremost trends in corporate America in the 1990s has been the shift from traditional litigation and government agency resolution of disputes toward the use of alternative dispute resolution (ADR)."); Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution*," 1 J. EMPIRICAL LEGAL STUD. 843, 843 (2004) (examining "the relationship between ADR and court trial").

objectives. Arbitration, after all, does rely on a neutral arbiter to impose a resolution; it does not wholly abandon the adversarial process. Rather, it hopes to reduce indeterminacy by moving to a resolution system that offers the opportunity to choose arbiters with specialized knowledge and to reduce costs by limiting discovery.

There is evidence that corporate defendants exercise some influence over arbiters' decisionmaking through the prospect of future engagements following favorable outcomes.[16] However widespread such abuse is, the preference of corporations for private arbitration represents an effort to regain executive control over litigation—control that would ordinarily be relinquished at the courthouse door. The promise of keeping disputes private and outcomes confidential also motivates a large part of corporate America's move from the courthouse.[17] In short, corporations are choosing arbitration to remain close to the adversarial model but to eliminate some of its unwanted costs.

ADR has prospered for similar reasons, but it is nonetheless different in critical respects. ADR is often seen as the creature of business, although much of its rationale originated in the academy and, ironically, has been repurposed to serve business's self-interest. Economic costs like indeterminacy are driving forces, but at its heart, ADR is a rejection of the adversarial system's emphasis on judicial disinterest and attorney-championed contests. The turn here is to "relationships" and subscription to a philosophy that disputants themselves should resolve their disputes, with the process serving both instrumental and intrinsic goals. This concept is not new; Dr. Laura Nader has described various tribal systems that rest on similar impulses.[18] What is new is that courthouse players have become more

16. And arbitration does not always offer a neutral arbiter. Some elect arbitration to capture a bias. *See generally* Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUSINESSWEEK, June 16, 2008, at 72 (describing the National Arbitration Forum as a for-profit arbitration company catering to, and often advantaging, large companies).

17. *See* Union Oil Co. of Cal. v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property . . . ."); *supra* note 15 and accompanying text.

18. *See* Laura Nader, *Styles of Court Procedure: To Make the Balance*, *in* LAW IN CULTURE AND SOCIETY 69 (Laura Nader ed., 1969) (describing the Zapotec strategy for settling disputes outside the court system). For further discussion of tribal systems in which an "adjudicator, judge, [or] arbitrator[] is absent," see P.H. Gulliver, *Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania*, *in* LAW IN CULTURE AND SOCIETY, *supra*, at 24, 25.

receptive as the reality of ADR's distinct economic opportunities for bench and bar became apparent. Judges not wanting to try cases, for whatever reason, were receptive—perhaps seeing ADR as a way to provoke settlements and reduce their caseload—thus maintaining a rate of disposition that would approximate that of an active trial court[19] without the distraction of that enterprise. Whatever the impetus for ADR, the state and federal judiciary began to order mediation,[20] creating a large business for lawyers and former judges.[21]

The forces driving the growth in arbitration overlap in part with those underlying growth in ADR, but ADR has distinct origins and is impelled by different concerns. Both systems enjoy judicial support, much of it enthusiastic if not representative. Though American courts were often hostile to arbitration in the years before the enactment of the Federal Arbitration Act (FAA),[22] the Supreme Court has since warmed to private resolution of disputes that are free of large social issues, and it now embraces arbitration. This changing mindset paralleled the Court's success in gaining discretion to decide what

19. I say "approximate" because, as I read the historical research, and in my experience, roughly nine of ten civil cases will settle when a trial will occur absent settlement. *See, e.g.*, Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) ("Of the hundreds of thousands of civil lawsuits that are filed each year in America, the great majority are settled; of those that are not settled, most are ultimately dismissed by the plaintiffs or by the courts; only a few percent are tried to a jury or a judge.").

20. *See* Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 62 (2002) ("'Court-annexed mediation' is that which has specifically been ordered by a court absent any solicitation by the parties for such an order. In all jurisdictions, litigants are free to conduct mediation of their own volition. It is almost uniformly encouraged. However, in some jurisdictions, judges and/or elected lawmakers have taken it upon themselves to do more than just suggest mediation as an alternative and have adopted procedures for court-annexed mediation.").

21. Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 81 ("Whereas once citizens were called upon to volunteer as mediators in community justice centers outside the courts, now mediation is a line of business for lawyers whose customers are sent to them by the courts.").

22. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2006); *see also* Hall St. Assocs. v. Mattel, Inc., 128 S. Ct. 1396, 1408 (2008) (Stevens, J., dissenting) ("Prior to the passage of the FAA, American courts were generally hostile to arbitration. They refused, with rare exceptions, to order specific enforcement of executory agreements to arbitrate."); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111 (2001) ("Congress enacted the FAA in 1925. As the Court has explained, the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice."); Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1425–32 (2008) (describing the metamorphosis of the FAA from a statute with restrained reach into the "broadly sweeping, muscular statute we know today").

cases it will decide, an effort that began in 1925 with a full-court press and has continued to present. The basic concept undergirding arbitration is that, with narrow exceptions, persons should be free to contract with one another regarding the handling of any dispute that may arise during the performance of their agreements. This basic proposition cannot be gainsaid. But the FAA does not operate entirely in the private world. Rather, it drafts the federal courts to enforce these private decisions to arbitrate while at the same time allowing parties to escape the courts' review of whether the contract has been materially breached.[23] The point here, lightly made but salient, is that arbitration and ADR are relevant to this examination of the vanishing trial not so much for their abstract value but for their insights upon the strengths and weaknesses of the federal trial courts and as significant parts of the milieu in which we ponder the courts' difficulties and private dispute resolution's ease.

B. The Decline in Attorneys with Trial Experience

The decline in trials has another defining characteristic: it has created over time a judiciary and a bar with a new shared culture, which takes as a given that civil cases are to be settled if summary judgment is not granted. With fewer trials there are fewer lawyers with trial experience and, consequently, fewer judges taking the bench with trial experience. When Clyde LaPorte and Attorney General Herbert Brownell set the experience required for appointment to the federal district court, their letter of agreement insisted that the American Bar Association (ABA) should not find a person who lacked "substantial trial experience" to be qualified to preside over a trial court, and that trial experience was also important for a prospective nominee to the court of appeals.[24] This

23. The Supreme Court has already reined in the scope of private contracting by finding party agreements regarding the scope of review by federal courts impermissible under the FAA. *See* Vaden v. Discover Bank, 129 S. Ct. 1262, 1276 (2009) ("The text of § 4 [of the FAA] instructs federal courts to determine whether they would have jurisdiction over 'a suit arising out of *the* controversy between the parties'; it does not give § 4 petitioners license to recharacterize an existing controversy, or manufacture a new controversy, in an effort to obtain a federal court's aid in compelling arbitration."); Preston v. Ferrer, 128 S. Ct. 978, 987 (2008) (holding that where there is an agreement to arbitrate, the FAA supersedes any state law lodging primary jurisdiction in other forums, either administrative or judicial).

24. *See* Letter from Dwight D. Eisenhower to Lord, Day & Lord (Sept. 30, 1965), *in* HERBERT BROWNELL & JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 185 (1993) ("As guidelines for such selection[, Herbert Brownell and I] established, between us, certain criteria for the appointment of all Federal

understanding could not practically be enforced today, given that only prosecutors and criminal defense lawyers regularly try cases.

Even on the criminal side, where pleas are under the shadow of trial, more than 80 percent of cases historically resulted in plea agreements, and this rate increased to almost 90 percent under mandatory sentencing guidelines. The guidelines appear to have pushed the decline in criminal trials, given that criminal adjudication has largely escaped the forces of ADR, discovery costs, the loss of twelve-person juries, and mediation as a business. How the return to a measure of trial court discretion in sentencing will impact the trial rate is still uncertain.

Criminal cases are correctly seen as "public" as distinguished from "private" litigation, although this generalization understates the vital public interest in private litigation. The want of trials feeds indeterminacy of civil laws. Without a steady stream of trials—so that settlements, when they occur, only do so in the shadow of trials—the public loses sight of the law clearly and consistently applied. The decline in trials also reduces the stream of citizens into the courthouses for jury service. These changes have come to pass even though, from 1787 forward, the expectation was that the state would furnish the courthouses and the staff to offer public dispute resolution.

In short, the public interest is frustrated by dark courtrooms and by an unquestioning subscription to an unqualified right of persons to contract out from the courthouse, especially given the potential for private dispute resolution to soften rules of law into mere guidelines for relationships. This undervaluing of both the public role of civil litigation and the need for visible adjudication to bring life to the law underlies our willingness to accept six-person juries for civil cases while clinging to twelve-person juries for felony prosecutions. Indeed, it underlies much of the judicial and congressional acquiescence in the promotion of ADR.

Judges. . . . No prospective appointee would be selected until his qualifications had been reported as satisfactory by both local and national echelons of the American Bar Association. . . . Later we added another: except in unusual circumstances no one would be appointed to the Supreme or Appellate Courts unless he had experience in a lower Federal court or in a State Supreme Court.").

C. The Loss of the Twelve-Person Jury

The courts' willingness to accept six-person juries is in tension with the well-established view that there are questions which, though too important and too complex to be left to the discretion of a random jury of fellow citizens, can be well-handled by a single judge. That is, the courts have accepted six-person civil juries even though at other times they apparently maintain that juries are too unpredictable.

The flow from the courthouse rests in part on this notion of unpredictability and has been hastened by the high Court's dismantling of the twelve-member jury in civil cases and the legal establishment's continuing acquiescence in this change. A return to twelve-person civil juries—with 10-to-2 verdicts—would help to restore two values of which the district courts have lost sight: first, it would lessen the specter of uncertainty often associated with juries; and second, it would validate the public-as-arbiter model. Further, it would stand on the correct side of empirical data demonstrating that twelve jurors are indeed better than six, and better in ways that over time might tilt a private attorney general's or corporation's cost-benefit calculus in favor of going to trial.[25] Jury studies now widely agree that six-person juries are more likely to render less-predictable and less-reliable decisions and are less representative of society than are traditionally sized juries.

The effort of the Judicial Conference Rules Committee in the mid-1990s to require an initial empaneling of twelve jurors in civil trials was based on salient data showing that a jury of twelve is greatly preferable over a jury of six. For instance, it is wrong to assume that an increasingly diverse and heterogeneous population can be truly represented by a six-person jury. Numerous studies show a significant increase in minority presence on twelve-person juries as compared with six-person juries.[26] A jury of twelve is likely to produce more-

25. *See* Ballew v. Georgia, 435 U.S. 223, 230–39 (1978) (plurality opinion) (stating the empirically demonstrated differences between six- and twelve-person juries); Robert H. Miller, *Six of One Is Not a Dozen of the Other: A Reexamination of* Williams v. Florida *and the Size of State Criminal Juries*, 146 U. PA. L. REV. 621, 682–83 (1998) (summarizing the social science research and explaining that "six- and twelve-person juries are not functionally equivalent").

26. *See, e.g.*, Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 668–69, tbl.1 (1975) ("[T]he presence of jurors with viewpoints, abilities, quirks, or racial identities that characterize only a minority of the population is more likely with larger juries."). *See generally* Richard S. Arnold, *Trial by*

reliable decisions than its six-person counterpart, for with greater diversity comes a greater number and greater breadth of viewpoints.[27]

Similarly, studies show that, during the course of trial, jurors are exposed to different interpretations and understandings of the evidence and tend to correct each other's errors.[28] With six jurors, that corrective mechanism is diminished; it follows that the likelihood of uncorrected error will increase if there are six persons deliberating, rather than twelve. Research also suggests that the group deliberation process benefits from pooled memories of the evidence presented at trial.[29] Having a greater number of members allows the jury as a whole to better recall the evidence, whereas having fewer jurors might result in more gaps in the collective knowledge base. Jury outcomes and the quality of deliberation are likewise sensitive to jury size: in a smaller jury, there is greater likelihood that a majority will exert pressure against a juror who disagrees with the rest of the panel, whereas in larger juries, a minority member is more likely to find an ally of similar mind.[30] These disadvantages are all the more troubling because the system of smaller civil juries also arose as responsibility for enforcement of much of the public law was entrusted to private actors—a characteristic now considered critical to the modern regulatory state. In 1990, a special task force appointed by the ABA's Section of Tort and Insurance Practice filed, and the House of Delegates adopted, a report charting the large impact of the reduced representativeness of civil juries and adopting the official position

Jury: The Constitutional Right to a Jury of Twelve in Civil Trials, 22 HOFSTRA L. REV. 1, 29–32 (1993) (collecting and discussing such studies).

27. *See* Arnold, *supra* note 26, at 31 (discussing studies showing that the quality of juror discussion and deliberation is better in larger groups than smaller groups, partly due to the greater number of viewpoints).

28. *See, e.g.*, REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 88 (1983) (discussing the rates of error correction in a study of jury deliberation); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 217 (Autumn 1989) (noting that in a study of mock jury deliberations, "errors of fact generally were corrected").

29. *See Ballew*, 435 U.S. at 233 (1987) ("As juries decrease in size, then, they are less likely to have members who remember each of the important pieces of evidence or argument.").

30. *See* Hans Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 720 (1971) (noting that hung juries are more common in twelve-member juries because a person holding the minority view is more likely to have an ally).

that federal trial courts should reinstate twelve-person civil juries.[31] This simple math can be ignored, but it cannot be refuted.

D. The Drift of Federal Courts to the Civil Law Model and Their Capture by the Administrative Model

If federal trial courts are so changed that they no longer look like trial courts, it is instructive to ask what they do resemble. Doing so may reveal patterns of causation—what brings us here and what "here" is. Professors Paul Carrington and Roger Cramton describe the current state of federal trial courts thus:

> The Article III judge was thus moved off the trial bench for most of his or her service, and into an executive office to give directions to subordinates. In lieu of trials, the district judges and their staffs tend to practice "managerial judging," a process by which they seek, by diverse methods, to facilitate settlements and avoid the necessity of making decisions that might burden a court of appeals with the need to review their judgments. Or, if a decision on the merits must be made, to render it in the form of a summary judgment, ruling one party's proposed evidence to be legally insufficient and hence unworthy of being heard, a procedure that spares the trial judge the need to see and hear witnesses, but still enables him or her to expound the controlling law.[32]

As the districts moved to judicial management of cases, retreating from party-managed cases, Congress was persuaded to give assistance to district judges in the form of subordinate magistrate judges. At first, these preliminary arbiters were known simply as magistrates, but Congress soon changed their title to judge, and these new judges in turn enlisted law clerks to assist them in their assisting role. This change paralleled the path of hearing examiners, who later became administrative law judges. District courts were quick to delegate work to magistrate judges, including large volumes of prisoner petitions—both § 1983 suits and § 2254 habeas petitions—and social security cases. These cases moved from the pens of district-judge law clerks to those of magistrate judges.

---

31. ABA, Resolution Adopted by the House of Delegates (Feb. 12–13, 1990) (on file with the *Duke Law Journal*) (supporting legislative efforts to restore the size of the federal civil jury to twelve persons).

32. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 627–28 (2009).

The same cadre was simultaneously lobbying Congress to bring the army of administrative law judges into the circle of Article III, granting them independence from the agencies they served. Senator Howell Heflin, former Chief Justice of the Alabama Supreme Court, gave serious consideration to this urging. Administrative law judges decide more "cases" than Article III judges, even with the assistance of magistrate judges,[33] but the administrative model makes extensive use of paper submission. Though administrative law judges were, in their early development, markedly different from Article III trial judges, over time administrative judges moved toward the Article III model as they changed titles and gained staff. At the same time, federal district courts began to look more like agency adjudicators—a remarkable confluence.

As the district courts outsourced their work to magistrates and administrative law judges, appellate courts in turn delegated their work to large offices of staff counsel. The Fifth Circuit, for example, employs approximately sixty staff attorneys. Appeals courts have adopted this method of deciding largely pro se cases for practical reasons that go beyond the concerns relevant here. It is significant, however, that the federal courts have grown accustomed to this paper process and to delegation of judicial duty. Appellate courts are just as vulnerable to the temptation of excessive delegation of judicial work as are trial courts. For example, federal court of appeals judges now have four law clerks in chambers. Far too many of these judges write no opinions, instead putting their names on the work of bright young lawyers. The sorry scene of appellate judges competing for the brightest clerks is telling. Law schools and some judges have tried to rein in this annual embarrassment by establishing times for application, interviews, and job offers—only to see the rules ignored or gamed by judges. This state of affairs raises serious questions of judicial competence at both the trial and appellate levels. It plainly suggests that many judicial seats are being held by persons unable or unwilling to do the work themselves.

The relevant point here is that the bulk of the work of federal district judges was for many years virtually nondelegable. Only the judge was on the bench, and the bar quickly became aware of the judge's abilities. Federal trial judges selected today, however, often

33. Higginbotham, *Mahon Lecture*, *supra* note 7, at 506 (noting that Department of Health and Human Services administrative law judges adjudicate more civil cases each year—320,000—than all federal district courts combined).

lack relevant trial experience, thereby reinforcing the need for delegation, while the absence of trials permits this delegation and seeds the move toward the administrative model.

IV. A RETURN TO ROLES

Having discussed the ways federal trial courts have strayed from their proper path, I now confront the question of what federal trial courts should be. One must begin with the constitutional demand of independence, a status the Framers sought to protect by providing for life tenure upon good behavior and for salary protection. Unfortunately, the latter has not been realized in light of steady erosion through inflation. This rapid decline in the value of judicial salaries narrows the pool of highly qualified nominees and has provoked an unprecedented flight from the judiciary. Although beyond the reach of the rules process, I mention this reality because it inevitably bears on any effort to restore the vitality of federal trial courts.

The proposition that trial courts should try cases seems a given, yet the reality is that federal district courts have moved so far from this task that it is an open question. At the outset I observed that many judges do not agree that conducting trials ought to be their primary function. Judges who subscribe to this philosophy hold trials only when they cannot persuade the parties to settle their case through mediation or through protracted delays before scheduling a trial. Such attempts at stalling as a means to provoke settlement provide one compelling explanation for the increase in time to trial even as trials have decreased in number. But a return to a model in which the principal work of the trial judge is to try civil and criminal cases need not take away from opportunities for litigants to privately elect methods to settle their disputes. Historically, setting a firm trial date and providing pretrial access to the presiding judge has produced a 90 percent settlement rate with a shorter time from trial to disposition.[34] My concern is not that trial courts must be more competitive with ADR or arbitration. Rather, it is to support and maintain the important role of the federal trial courts, offering litigants a forum that is fair, independent from public opinion, evenhanded, and affordable. As I have observed, the flight from the courthouse appears to have been fueled in the main by the high costs

34. *See supra* note 19.

of discovery, the indeterminacy of the trial process, and corporate litigants' seeming preference for exercising private control over their disputes. In the case of jury trials, indeterminacy has been heightened—beyond that level inherent in any third-party adjudication—by reducing jury size and the increasingly broad and open-ended questions we put to juries, such as whether a product is "defective." On the latter point, indeterminacy of an abstract legal rule—take, for example, Section 402 of the *Restatement (Second) of Torts*[35]—becomes determinate only in the context of a fact pattern at trial. Without trials we lose this important ingredient of judicial enforcement of legislative norms.

CONCLUSION

The present state of affairs makes plain that the federal district courts are not on the correct path. Returning to a trial model would be a significant step toward fulfilling the traditional expectations for the federal courts. Much of the present difficulty arose from seductive—but ultimately misguided—notions that there is a better way.

The United States district courts are the most vital judicial institution in this country. Their courageous history of protecting the constitutional rights of the disfavored and the downtrodden has earned their great prestige and solidified their venerable role in American governance. Federal trial courts cannot maintain this status if they become indistinguishable from state highway departments; but on the present trajectory, this is their destination. If this bleak picture comes to pass, life tenure cannot be defended, and Article III "trial" courts will become indistinguishable from the thousands of administrative law judges. Civil service is just over the horizon.

The first step toward remedying this problem is to realize what it means for the district courts to operate at their optimal level. I have described the federal district courts as they now exist, and though this general description cannot capture every local variation, its broad accuracy is supported by available data. There are three possible responses to this troubling picture. First, one might conclude that the

35. RESTATEMENT (SECOND) OF TORTS § 402 (1965) ("A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the dangerous character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.").

picture is inaccurate and that federal district courts are in fact operating in their intended way. Second, one might determine that the picture is a fair approximation but that it should be left alone. Those with this reaction would accept the change in the role of the district courts and view it as an optimal—or at least more desirable—model for the federal courts. Finally, one might conclude that the principal work of a district court is to try cases and to offer litigants the opportunity for a reasonably prompt and impartial trial.

As one who firmly believes the district courts have lost their way, I have sought here to chart a course by which Congress or the judiciary could restore district courts to their proper role as trial courts. First, they should make federal trials more attractive to litigants by restoring twelve-person juries in civil cases and by prescribing early case control by the district court, including judicial control of party access to discovery. Judges—not the parties—should control access to discovery through a two-step process, with an initial hearing on whether to allow limited, preliminary discovery and later a second hearing to "peek" at the merits and decide whether there is a reasonable basis to grant access to full-fledged discovery. Further, courts should require parties to identify the necessary issues of fact and law and should permit only such discovery as is necessary to these issues, allowing the parties to supplement their list of issues as necessary at designated points in the litigation.

Some may conclude that all is well with the district courts except for some excesses in discovery, or that the increased role of private dispute resolution is a welcome response to a movement away from the adversary state. I strongly urge against this conclusion. Some others may ask whether the modest changes in procedure and focus urged here respond strongly enough to the ongoing sea changes in the federal district courts. To those I respond that although there is a clear trajectory on which the courts are moving, the trajectory is such that a small turn may lead to a quite different destination.

In many respects, the present trajectory summons images of civil law countries before the revolutions of the 1770s.[36] Civil law litigation abjured live testimony. Judges did not see any witnesses; instead, they read written "testimony" prepared by other persons. There was no untidy association with the people. There was no event in the life of a

36. *See generally* Mauro Cappelletti & Bryan G. Garth, *Introduction—Policies, Trends, and Ideas in Civil Procedure*, *in* 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 5–6 (Mauro Cappelletti ed., 1984).

case that brought all stakeholders or evidence together. Perhaps the most frightening image of all is that of paper over people and denial of resolution through delay and costs. Escape finally came with the oracular movement, riding the violent force of the French Revolution. This is not an image to which the United States should aspire.