The Present Plight of the United States District Courts: Is the Managerial Judge Part of the Problem or of the Solution?

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My purpose in this brief essay is to lift up for examination weaknesses of the federal trial courts and to offer possible responses by the judges themselves, the appellate courts, and the Congress. In isolating issues for separate examination we risk failure to confront their collective impact. And, as we will see, 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

A thesis that the federal trial courts are seriously flawed demands a baseline of operating normality. The first demand of regularity is that it operate within its constitutional traces–Articles III and I; that it discharge its duty to decide all cases or controversies supported by a legislative grant of jurisdiction. This means civil and criminal cases and review of a wide genre of administrative decisions, as well as collateral review of state criminal cases. These duties come with firm expectations for their discharge in the form of congressionally-stated rules of process and expedition as well as expectations of bench and bar rooted in tradition and custom. These expectations, traditions, and customs will disintegrate progressively as we lower levels of generality–as we carve out specific issues.

Against this general backdrop I will lift up charges that federal trial courts are more administrative agency than trial court in their present efforts to discharge their duty to decide cases or controversies; that we are witnessing the death of an institution whose structure is as old as the republic. I will describe these charges, tease them up for discussion of their validity, and

then turn the focus to their consequences. Finally, there are remedial responses. Throughout, the role of the trial judge as an agent of this change will surface. In our discussion we will be collegial, keeping in mind that collegiality is much like Will Rogers's definition of diplomacy, the fine art of saying "nice doggie, nice doggie," while looking for a rock.

The reality is that 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. We need this picture ever in mind because it is the most salient feature of the federal trial courts today or as I see it, manifestation of the illness we will discuss. Some do not see it that way. It signifies as we turn to causes, consequences, and remedies, at least those addressable by rule, that federal trial judges are now conflicted over whether the demise of trials is good or bad–disagreeing over the normative standard itself–that is whether a well-tried case is a failure of a trial court or its crowning achievement. This is the dominating antecedent question. A want of common understanding of what the work of a federal court ought to be when it is performing at its optimal level is fatal to rule change aimed at its achievement.

II

The Present Picture

Over the past two decades awareness of the decline of trials crept slowly into our collective judicial awareness. What most judges passed over as temporary phenomenon of dynamic dockets or geographically locked circumstances came clear as an across the board change, albeit one that came on slowly, at first. We have validated by study early alarums and

puzzled over causes and remedies, and whether this was a good or a bad thing. The latter because the question of public good cannot be separated from 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" pretty much the same. They are not. A clear picture of the fullness of the change is essential in this our reflection upon future pathways for federal rule making as well as the identification of rules in need of immediate discard or repair.[1]

The faces of these courts are fading: Judge Tjoflat reports that lions of the bar confided to him as Chief Judge of the Eleventh Circuit that they are unable to see the federal district judge before whom their cases are pending, for as long as a year even in complex litigation; at best they are trundled off to a magistrate judge. Grants of summary judgment without any live appearance by counsel, with no opportunity to bring life to papers with oral argument, are commonplace. The papers are filed. Some time later a written order issues. This is no lonely pixel. It is fueled by the present centrality of the motion for summary judgment, it having displaced the trial as the destination point for litigation. Today it is unlikely that a trial date will ever be set, rarer still a trial date with any meaning to the court and hence to the parties. While in part anecdotal, this assertion gains a measure of validation by its breadth and the naked fact that on annual average a United States District Judge tries 14 cases, civil and criminal, of an average length of between

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[1] Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); *see also* Patrick E. Higginbotham, *A Few Thoughts on Judicial Supremacy: A Response to Professors Carrington and Cramton*, CORNELL L. REV. 637, 649 (2009); 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); Patrick E. Higginbotham, *Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501 (2006). [and add citation to ABA litigation section report].

three and four days.[2] This leaves more than 300 days with no trials. Now the suggestion is not that these judges are not working. It is rather to inquire just what that work is. And what that means for rule making.

Paper courts increasingly shrink the range of lawyers and citizens in the courtroom to persons being sentenced, and they most often are the only ones present who are not employed by the federal government. The district court has simply become more remote, more detached from people. With the sentencing guidelines fewer criminal cases are being tried. 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. For the occasional civil trial to a jury there will be only six to eight jurors. The size of civil juries was reduced in the face of virtually all serious studies concluding that changes in size works changes in the dynamics of deliberation in undesirable ways. The story of how this was accomplished is not pretty. I will return to this later.

On any given day across the country a walk through the courthouse is likely to find most

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[2] Higginbotham, *Ainsworth Lecture*, *supra* note 1, at 1405–06 (citing statistics from 2001). According to the latest figures from the Administrative Office of the United States Courts, this number has apparently remained unchanged. Administrative Office of the United States Courts, Director's Annual Report, 2008, Judicial Caseload Profile, *available at* http://jnet.ao.dcn/cgi-bin/cmsd2008.pl. As I noted in the *Ainsworth Lecture*, the Administrative Office's figures are not limited to trials in the conventional sense–bench or jury trials. *Ainsworth Lecture*, supra note 1, at 1406. It includes any contested matter in which the judge takes evidence. *Id.* This accounted for the difference, in 2001, in its average of 20 and my count of 14. *Id.* The Administrative Office's count for 2008 is also 20, as it was in 2001, so it is reasonable to assume the actual number of trials in the conventional sense remains approximately 14.

of the courtrooms dark. That a courtroom is not to be closed except in the most limited circumstances is a constitutionally-footed principle. But dark courtrooms by definition defy the objective of openness in government. Of course some few courts are not captured by this description. Yet these exceptions offer validation, not detraction 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 firm trial settings and access to the judges of the district. The result was in an influx of complicated litigation as defendants and plaintiffs sought its benefits, filing there rather than in one of the major metropolitan areas with its more convenient air travel–a result that also points a small arrow toward cause and effect.

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 the demands for discovery have increased. Rising costs of "litigation" directly reflect increases in discovery. I will come to causes and remedies, but it is helpful to our task to invert the frequent tender of increasing costs to explain the declining trial. 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, we must test the hypothesis that the increase is responding to the decline in trials. Consider the loss of a vital sense of relevance and discipline attending preparation in the shadow of a meaningful trial date. Add in a generation of "litigators" who with no trial experience are ill-equipped to sort relevant information in discovery burdened both with fear of missing something,

since the something is not cabined by usefulness at trial, and economic incentives to check behind every button, where the worth of this to the case will never be tested by a trial.

We know that Rule making has failed to slow this economic fountain. Unable to control discovery, the regulatory response has been to attempt to set gates for accessing it. Witness the rise of particularized pleading. Confrontational to rule processes it is, but at the least it swipes at the problem. If for no other reason we should welcome the response by its implicit recognition that there is a problem. That said, efforts to construct gates for access must address the marriage of notice pleading and discovery that was fundamental to the 1938 Federal Rules, 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 do that. Commendably, it does move toward greater judicial control of access to the full engine of discovery, or perhaps a smaller engine for smaller jobs, a direction we must explore. For now we have a perverse regime directed at cases where there is likely to be an imbalance among parties holding needed evidence. It is a mistake to approach containment of discovery costs as largely a difficulty of private litigation that parties could avoid by contracting out and as blighted by economic incentives of hourly paid counsel or extortionate tactics of strike suit lawyers. While we do have such abuses, particularized pleading is a poorly tailored response. Access to discovery, and a lot of it, is often a necessity in suits by private attorneys-general, this in a country so dependent on the supporting enforcement of federal normative standards by "private" suits. Recent events have laid bare the consequences of under-enforcement of federal regulatory schemes. It seems odd to now impede their efficacy. Rather, control of access to

discovery as a step back from the underpinnings of the 1938 rules must be balanced to serve the role of private attorneys general litigation. That is, a gate must be able to screen by merit. Perhaps we could move toward an initial opening to limited discovery followed by a look at likely merit for greater or full access. Regardless, access presents itself as the only effective control.

III

Causation Patterns

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As trials declined private arbitrations grew exponentially. At the same time alternative dispute resolution gained a life of its own. The relationship among these three phenomena is complex. It is tempting to describe their relationship in causal terms: that ADR with its emphasis upon consent based dispute resolution accounts for x reductions of trials and its efforts to escape the adversarial processes of trial systems either fueled arbitration or fed on similar perceived costs such as indeterminancy and loss of control over risks and outcomes; that the distribution among district courts, ADR, and arbitration reflect the votes of litigants. For now I will treat the three as distinct competitors of the public model for the business of dispute resolution, albeit not fully sharing common objectives. Arbitration after all does accept an arbiter to impose a solution; it does not wholly decry the adversarial process. Rather, it hopes to reduce indeterminancy by moving to a resolution system that offers the opportunity to choose arbiters knowledgeable in ways important to the case such as technology, and to reduce costs by reduced discovery.

There is evidence that control over arbiters' decisionmaking by prospects of future appointment is afoot. However widespread such abuse is, the effort is to regain executive control

over litigation, control that would be relinquished at the courthouse door. Make no mistake. Privacy is also a large part of corporate America's move from the courthouse. In short something like the public model but without a few of its unwanted costs.

Much of ADR has similar fuel but is nonetheless different in critical respects. Some may see ADR as the creature of business. Perhaps, but much of its rationale is from the academy, ironically serving the self-interest of business. Economic costs including indeterminacy are driving forces but at its heart ADR is a rejection of the adversarial system with its accent on judicial disinterest and attorney championed contests. The accent here is on "relationships" and subscription to a philosophy that disputants should resolve their dispute, the process serving both instrumental and intrinsic goals. There is nothing new here. Dr. Laura Nader has described tribal systems from diverse places that rest on similar impulses.[3] What is new is that courthouse players became more 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–some seeing the effort as just a way of increasing the number of settlements–more accurately of maintaining a rate of disposition that would approximate that of an active trial court without the distraction of that enterprise; approximate because historically nine of ten civil cases will settle when a trial will occur absent settlement. Whatever its impetus for ADR, the result was that the state and federal judiciary began to order "mediation" creating a large business for lawyers and former judges.

The forces driving the growth in arbitration obviously overlap ADR in part but it has

[3] *See generally* LAURA NADER, LAW IN CULTURE AND SOCIETY (U.C. Press 1969).

distinct origins and is impelled by different concerns. They share the reality that both enjoy judicial support, much of it enthusiastic if not representative. The Supreme Court embraced arbitration shed of its caution, near hostility when the Arbitration Act first came on the scene. It warmed to private resolution of disputes that arrived sans large social issues. This mind set paralleled its success in gaining discretion to decide what it will decide, an effort that began in 1925 with a full-court press and has continued to present. The basic concept under girding arbitration is that, with narrow exceptions, persons should be free to contract with one another regarding the handling of any dispute that may arise in its performance. That much cannot be gainsaid. But the Arbitration Act does not operate entirely in the private world. Rather it drafts the federal courts to enforce these private decisions and to escape them when the contract has been materially breached.[4] The point here, lightly made but salient, is that arbitration and ADR are relevant to our self examination not so much for their abstract value but for their play to the strengths and weaknesses of the federal trial courts and as significant parts of the milieu in which we ponder our difficulties and their ease.

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The decline in trials has another defining characteristic: it is a machine that would go of itself—creating over time a judiciary and a bar with a new and shared culture–civil cases are to be

[4] The Supreme Court has already reigned in the scope of private contracting by finding party agreements regarding the scope of review by federal courts impermissible under the Federal Arbitration Act. *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.").

settled if summary judgment is not granted. With fewer trials there are fewer lawyers with trial experience and fewer lawyers taking the bench with trial experience. When Clyde LaPorte and Attorney-General Hebert Brownell set the experience required for appointment to the federal district court their letter agreement insisted that the American Bar Association would not find a person qualified who lacked "substantial trial experience"; that trial experience was also important to the qualification of a prospective nominee to the court of appeals.[5] This understanding could not be enforced today. Only prosecutors and criminal defense lawyers regularly try cases. On the criminal side, cases historically plead at rates just under 90%, a rate that moved upward with mandatory sentencing guidelines. This, a docket where pleas are under the shadow of trial. How the return to a measure of trial court discretion in sentencing will impact the trial rate is uncertain. It appears that the guidelines had pushed the decline of criminal trials as they largely escaped the forces of ADR, discovery costs, the loss of twelve-person juries, and mediation as a business. Criminal cases are correctly see 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 trials and a steady stream of them such that settlements are in the shadow of trials, we lose the determinant of law applied. And we lose the stream of citizens into the courthouses for jury service. After all, from 1787 forward, the expectation was that the state would furnish the courthouses and the staff to offer public dispute resolution.

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[5] *See* HERBERT BROWNELL & JOHN P. BURKE, ADVISING IKE: THE MEMOIRS OF ATTORNEY GENERAL HERBERT BROWNELL 185 (U. Kansas Press 1993).

The relevant point is that as we compare our civil and criminal sides of the docket we must not slight the public interest frustrated by dark courtrooms by an unquestioning subscription to an unqualified right of persons to contract out from the courthouse. Particularly so with its potential for softening rules of law into guidelines for relationship. This undervaluing of both the public role of civil litigation and the hunger of "law" for life, sustainable only by application, 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 roles in promoting ADR.

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The Loss of the Twelve-Person Jury

Our willingness to accept six-person juries runs counter to another view; that is, the sense that there are questions too complex and too important to be left to the discretion of a random and drafted jury of fellow citizens, but which can be well-handled by a single judge–that juries are just unpredictable .

The flow from the courthouse rests in part on this notion, 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 to that end. A return to twelve-person civil juries[6] would return the district court two things it has lost in the interim: a lessening of the specter of uncertainty often associated with juries and a validation of the public-as-arbiter model. And it would stand on the correct side of the empirical data–research teaching that twelve is indeed better than six, and

[6] With 10-2 verdicts.

better in ways that over time might tilt a private attorney general's or corporation's cost-benefit calculus in favor of trials. That six-person juries of today are more likely to render less predictable and reliable decisions, and are less representative of society than the traditionally-sized juries of not so long ago has been widely accepted in jury studies.

The effort of the Rules Committee in the mid-1990s to require an initial empaneling of twelve jurors was based on salient data showing that a jury of twelve is greatly preferable over one of six. For instance, it is wrong to assume that a population as increasingly diverse and heterogeneous as ours can be truly represented by a six-person jury. Numerous studies show a significant increase in minority presence on juries of twelve as compared with juries of six.[7]

In turn, this increase in representativeness is one reason why a jury of twelve decides more reliably than its six-person counterpart, for with greater diversity comes a greater number and greater breadth of viewpoints.[8] 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.[9] With six jurors, that corrective mechanism is diminished; it follows that the likelihood of uncorrected error will be lower if there are twelve persons deliberating, rather than six. We also know that the group deliberation process benefits from pooled memories of the

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[7] *See, e.g.*, Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 645 (1975). *See generally* Richard S. Arnold, *The Constitutional Rights to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 5-11 (1993) (collecting and discussing such studies).

[8] *See id.*

[9] *See, e.g.*, Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 Law & Contemp. Probs. 205 (1989); R. HASTIE, S. PENROD & N. PENNINGTON, INSIDE THE JURY 88 (1983).

evidence presented at trial.[10] A greater number of members allows the jury as a whole to better recall the evidence, or, conversely, having fewer jurors might leave 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 have an ally of opinion.[11] Apart from these disadvantages, a system of smaller civil juries also arose as we were in the process of entrusting the enforcement of much of our public law to private actors, a characteristic that is now considered critical to the modern regulatory state. I attach a report of a special task force appointed by the American Bar Association's Section of Tort and Insurance Practice filed February 1990 and adopted by the House of Delegates, stating the official policy of the Association. This report is succinct and states the issues well. The report contains charts of the large impact of reduced representativeness of civil juries. This is simple math. It can be ignored. It cannot be refuted.

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The Drift of Federal Courts to the Civil Law Model–
Their Capture by the Administrative Model

If our federal trial courts are changing and no longer look like trial courts, it is instructive to ask what they do look like. In doing so we may bring more light to the patterns of

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[10] *See Ballew v. Georgia*, 435 U.S. 233, 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.").

[11] *See* Hans Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 710 & 720 (1971).

causation—what brings us here and what here is. Let me start with Professor Carrington's description of the now:

> The Article III judge was thus removed 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 controlling law.[12]

As the districts moved to judge-management of cases, retreating from party-managed cases, Congress was persuaded to give assistance to district judges, subordinate magistrate judges. At first they were magistrates, but soon Congress changed their title to judge and these new judges in turn enlisted assistance of law clerks in their assisting role. This paralleled the path of hearing examiners to administrative law judges. This cadre was simultaneously lobbying the Congress to bring the army of administrative law judges into the circle of Article III with independence from the agencies they served. Senator Heflin, former Chief Justice of Alabama, listened and gave serious consideration to this urging. Administrative Law Judges decide more "cases" than do Article III judges, even with their Article I assistants.[13] This administrative model makes extensive use of paper submission and were in their early development markedly

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[12] 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).

[13] Higginbotham, *Mahon Lecture*, supra note 1, at 506 (comparing the number of "cases" decided by district courts in 2001 with the number decided by administrative law judges during the same year) (citing 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 2 (Aspen Law & Business, 4th ed. 2002)).

different from the Article III trial judges. Over time the administrative judges moved toward the Article III model as they changed titles and gained staff. At the time the federal courts were looking more like administrative agencies–a remarkable confluence.

And district courts were quickly delegating work to magistrate judges. The immediate handoff included the "processing" of large volumes of prisoner petitions, both § 1983 suits and § 2254 habeas petitions as well as Social Security cases. These cases moved from the pens of magistrate law clerks to those of district judges. Appellate courts in turn delegated the work to large offices of staff counsel–approximately 60 in the Fifth Circuit. There are practical reasons for this means of deciding these largely pro se cases and its processes are not the immediate concern. It is rather that the federal courts have grown accustom to this paper process and to delegation of judicial duty. Trial courts are no more vulnerable to this weakness of excessive delegation of judicial work than are appellate courts. Judges of the United States Courts of Appeals now have four law clerks in chambers. Far too many of these judges write no opinions, putting their names on the work of bright young lawyers. The sorry scene of appellate judges competing for the brightest of clerks is telling. The law schools and some judges have tried to reign in this annual embarrassment by establishing times for application, interviews and job offers only to see them ignored or gamed by too many judges. This raises serious questions of judicial competence at both the trial and appellate levels. It plainly allows seats to be 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 long virtually non-delegable. Only the judge was on the bench. And the bar quickly was aware of the judge's abilities. The bleed is quickly into the

selection process for federal trial judges who for lack of relevant trial experience re-enforce delegation. Keep in mind that it is the absence of trials that permits delegation by federal district judges and seeds the move toward the administrative model.

IV

Roles For Rules

Here we must confront the question of what the federal trial courts should be. We begin with the constitutional demands of independence, a status the founders sought by Article III's provision for life tenure upon good behavior and for salary protection. Unfortunately the latter has not been realized given the steady erosion of inflation. This narrows the pool of nominees best qualified and has produced unprecedented flight. While beyond the reach of the rules process, I lift up this reality because it hovers over any corrective course.

The proposition that trial courts should try cases seems a given, yet the reality is that federal district courts have moved so far from those tasks that it is an open question. At the outset I observed that many judges do not agree that trial ought to be their main work. By that few a trial occurs only when the judge cannot get a case settled–by mediation and by just not setting the case for trial–one explanation for increases in time to trial as trials have decreased in number. That said, a return to a model in which the principal work of the trial judge is to try civil and criminal cases does not step on opportunities for privately elected methods to settle the case. Historically firm trial settings with pretrial access to the judge who tries the case produces a 90% settlement rate with shorter time from trial to disposition. Our objective is not be more competitive with private mediation or arbitration. It is to support the role of the federal trial

courts and provide litigants with a forum that is fair, unshakable by public opinion, even handed to all, and affordable. As I have observed, the flight from the courthouse appears to have been fueled in the main by high costs of indeterminancy and discovery, as well as efforts for private control. In the case of juries, indeterminancy, beyond that inherent in any third-party arbiter, is heightened by reducing jury size and the seeming indeterminancy of questions we put to juries and judges such as whether a product is defective. On the latter point indeterminancy of an abstract legal rule, take 402 of the Restatement of Torts, becomes concrete –determinate–in the context of a fact pattern at trial. Without trials we lose this important ingredient of judicial enforcement of legislative norms.

V

Conclusion

The present state of affairs makes plain that we are not on the correct path. Returning to a trial model would be a return to long held expectations of federal trial courts; that much of the present difficulty lies with seductive notions that there is a better way.

Our first step is to describe the district court operating at an optimal level. I have described a picture of the United States District Courts as they now exist. While I cannot capture local variations, its accuracy is supported by available data. Turning to the picture presented, there are three possible levels of response:

1. The picture is inaccurate. Federal district courts are today operating at their optimal level.
2. The picture is a fair approximation and we should leave it be–accept the change in

roles of the district courts, as leading to an optimal model for a United States District Court.

3. a. Conclude that the principal work of a district court is to try cases, including the offer of a reasonably prompt trial–bench or jury as the law allows and the parties choose.

b. Chart a course to implement this conclusion by:

i. Supporting the cost-benefit calculation of parties by:

- Restoring twelve-person juries, and 10-2 verdicts in civil cases;
- Prescribing early case control by the district court, including judicial control of party access to discovery in two initial steps: a court hearing on access and a court hearing on access with a "peek at the merits." The latter being an effort to reinforce a determination that a claim has been stated and if there is a reasonable basis for accessing further discovery.

ii. Requiring the filing of likely controlling issues of fact and law before the hearing on access to discovery and with required supplementation at designated points.

To these eyes, the United States District Courts are the most vital judicial institution in the United States. Their history of courage and willingness to protect constitutionally-protected minority claims has both earned their great prestige as well as a necessary role in governance. There is a powerful argument that this status cannot be held when federal trial courts become indistinguishable from state highway departments, and on its present trajectory that is its destination–where life tenure cannot be defended and the Article III "trial" court will be blended with the thousands of administrative law judges. GS 15 is then just over the horizon.

You may conclude that all is well except some excess in discovery; that the larger role of private reconciliation of disputes responds to a welcome social movement–away from the adversary state. You may–but I urge you not to do so. It is fair to ask whether the changes in procedure and focus urged here are adequate responses to the ongoing sea changes of the federal district courts. The response is that it is a trajectory we are moving, where a small turn leads to a quite different destination.

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