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## Panel Discussion I

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## PANEL DISCUSSION I

*Justice Scott Brister, Justice Nathan L. Hecht, William V. Dorsaneo, III, Mike Hatchell*

Moderator: Justice Patrick Higginbotham

*Former Chief Justice Thomas Phillips:*

We have just heard a rather diverse group of addresses, looking at judges and juries from different perspectives. Here to lead the speakers in exploring each other's topics, we are privileged to have Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit.

Judge Higginbotham is a graduate of the University of Alabama and its law school. After graduation, he spent three years in the JAG Corps and then came to Dallas, Texas, where he practiced law with great distinction for eleven years before Gerald Ford appointed him to the federal district bench in 1975. Seven years later, President Reagan elevated him to the Fifth Circuit, where he remains today after twenty-three years. I wish Justice Priscilla Owen were here to hear this: he was confirmed by the Senate just ten days after his nomination to the district court and just twenty-six days after his appointment to the circuit court. He has won just about every honor that can be graced upon a lawyer or judge, and served on numerous committees and commissions to improve the law and the courts.

Judge, this is a pretty unruly group; I don't know how you're going to moderate them.

*Judge Patrick Higginbotham:*

Well, I don't know how I'm going to do this either. It is kind of hard to ride one thoroughbred and you get a whole covey of 'em here. I guess you can have a covey of thoroughbreds, can't you? We are going to have a fun problem. It's a fun problem because they all have ideas about this topic.

What we are going to talk about is a great current topic and one

which you students will be living with in your career. The reality is that you're going to be looking at a court system, certainly on a federal level, and I think predictably so, with the state level, that is quite different than the courts, especially the trial courts, were during the years that I was trying lawsuits, the years I was on the trial bench, in fact my whole career. It is changing. But it's been changing for some time and what I want to do is take a couple of minutes and just introduce the changing picture, give you a little data and then I want to bring this panel in, and we will talk about this phenomena. Everybody has judgments, speculations, and inferences about what is going on and what are their implications for the future.

In a nutshell, for the past thirty plus years, there has been a marked decline in the trial of cases. Sometimes that is formulated as a demise of jury trials. I first noticed this somewhat by happenstance a few years ago in looking at some data that was put forward as justification for the creation of two new district courts in the federal system. It was my task in the bureaucracy of the courts to sign my name to that and send it on, but I didn't. The judge that sent it up to me at the district court didn't tell me much about what was going on and so rather than go back and ask him for some data, I called the clerk and said, "Give me some more stuff, I want to prove this, but I need some more material behind it." And then when I started looking behind it, it wasn't there. I began to pull this string on this thread and the sweater fell off. And then I took the opportunity to put this out there and then I published it in a formal lecture.<sup>1</sup> Now the academy has gratefully picked up on this and there is a raging storm. People have realized something that has been going on for some period of time. Someone likened it to having a beautiful home only to discover that it is riddled with termites; suddenly, it is an empty shell.

I entitled a lecture I gave several years ago as: *Why Do We Still Call Them Trial Courts?*<sup>2</sup> Let me give you some quick data to put this question in perspective. Starting thirty years ago, in every category of case in the United States district court and in every category of case in which the Administrative Office of the United States Courts keeps data, there has been a decline. You chart this and it started in the upper left-hand corner and it moved in all those categories. All those lines moved together down toward the lower right corner of the graph. Civil and criminal. Now, I said, "Well, gee." I looked at this

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1. Patrick E. Higginbotham, *The Changing Times of the U.S. District Courts*, Address at the 78th American Law Institute Annual Meeting (May 15, 2001).

2. Patrick E. Higginbotham, *Why Do We Still Call Them Trial Courts?*, 55 SMU L. REV. 1405 (2002).

stuff and I can kind of surmise that maybe what's going on here with the criminal side had to do with when the sentencing guidelines came in. It gave it a lot of power to the district attorney and pushed the guilty pleas up to ninety-nine plus percent, in criminal cases. But, civil jury trial cases are also going away. The last couple of years, the average United States district court judge tried thirteen cases of an average length of two days. In other words, twenty-six trial days out of the entire year. That's average, which means there are some districts that are trying more, but there are some trying less.

And you say, "What's going on? What's happening to this system?" We are going to explore this and work with Dr. Deborah Hensler, who was formerly the head of the Institute of Justice Studies at RAND and is now professor of law at Stanford. She not only has a law degree, although she's a professor of law now, but she has a doctorate in economics and social science from MIT. She is a brilliant woman who has done a great deal of empirical work over this data, and she began to raise questions about the state system as well. Others have explored it, and we are finding, although it's preliminary, that there are significant parallel movements. So it is a given that that is happened. That's no longer disputed. Now, the question is: why is this going on? It has been going on steadily for thirty years. You can put it beside the exponential growth of arbitrations. If you go back and take a snapshot five years ago and if you ask the question: "What do the arbitration numbers look like?" What you'd find is that moved over the preceding ten years from roughly 40,000 to 60,000 or 70,000, then to 100,000, and now well over 140,000. I don't remember the precise numbers, but a huge exponential jump in arbitrations. Quite plainly, it is moving in the opposite direction from public litigation.

Quite plainly, the people are dialing out of the trial courts. Some of this is accounted for in the growth in mediation, ADR, et cetera. Now, ADR and private litigation are not the culprits. They are the beneficiaries of what's going on. They are not the cause. I raise this question with you. In the federal side, what we have seen is a disconnect between trials and pretrial. The moving point in federal litigation now in the civil side is summary judgment. It is not trial. There's little expectation a case will be tried. Increasingly, as this happens over time, we start to ask the question: "Well, what does this mean?" What happens when you have trial judges and then the trial bar increasingly in a culture where there's not an expectation of trial. What are the consequences? Let me just go to the panel and I'd like to hear each one of the panel offer their judgment about what they think is the single most important factor for this change.

Now, in many discussions, we have talked about this very practical picture. One thing we know in sources put before us is that dispute resolution in this country for the past 200 years has been publicly owned. It belongs to the people. It belongs to the government. The courthouse belongs to the government. The people who staff it, the judges, the prosecutors, and the court reporters all are employees of the state. The lawyers there are licensed by the State. It is a public facility. The doors—except in rare circumstances—are open. You can go in and you can see. It is a system that has a democratic component to it and people participate in the form of jury participation. Now, that's the picture. Public litigation launched by government. What this picture suggests is that we're moving to private litigation, where disputes between major players can be resolved privately with no disclosure. We have large fights in the federal rules of whether a federal judge can enter a sealing order to resolve litigation that's being settled so that the public will not know what's been generated. Well, that's very interesting, except that now with a lot of this litigation, with a lot of critical information involving major publicly-held companies, is being held and being tried by neutrals in a private forum. Is that a good thing? Is that a bad thing? Let us talk first about why.

#### QUESTION AND ANSWER SESSION

*Judge Patrick Higginbotham:*

Let me just start down with Justice Nathan Hecht. Nathan, let's start off with this question: What's the single most important contribution? What do you think is causing this?

*Justice Nathan Hecht:*

As I said a little earlier, the numbers in Texas in the state system are about what they are in the federal system. You said thirteen trials per court federal system; we're down to fifteen in the state system. We're down much more in civil cases than in criminal cases. I think that indicates that the important thing that's going on is that the results in civil cases have been unacceptably unpredictable and that has not happened as much in the criminal system. Guilt and innocence sentences are still within the same ranges they pretty much always were.

*Judge Patrick Higginbotham:*

Getting on that point, does that mean then that juries on the civil side are not the culprit since all these criminal cases have been tried by juries or . . . ?

*Justice Nathan Hecht:*

Well, I think it means that in civil cases, at least, whether it's the perception or the reality, the inability to predict the result within tolerable standards has moved people to consider arbitration and mediation and other places where risks can be predicted more accurately.

*Judge Patrick Higginbotham:*

How does a lawyer predict what a jury's going to do with a case when he's only tried five in his career?

*Justice Nathan Hecht:*

Well, it's impossible. This spirals in on itself because the fewer lawyers that have tried jury cases or any kind of case, the fewer who are going to try them in the future. So, it's a problem that becomes a vortex.

*Judge Patrick Higginbotham:*

So, you think, Nathan, it is the lack of certainty.

*Justice Nathan Hecht:*

I think its uncertainty among a huge number of repeat litigants like the securities industry or people who say, "Okay, we're going to take our litigation business to the private sector. We can predict more carefully what arbitrators will do."

*Judge Patrick Higginbotham:*

Predictability. Now do you attribute that to juries or to judges, or to both?

*Justice Nathan Hecht:*

I think it is mostly juries, but I think it's perceived as being both. I mentioned a study this morning about whether juries or judges are more likely to find liability in a tort case, or more likely to award damages. The answer seems to be that judges are more likely to find liability, less likely to award bigger damages.

*Judge Patrick Higginbotham:*

Well, that's interesting. The data is exactly the opposite of that under the Federal Tort Claims Act, where judges do try the cases with no jury and what you find is very high awards being entered by judges, greater than juries. One of the explanations put forward is that you have twelve lay people there and the evidence, you have a quadriplegic, you've got someone seriously injured on a government-owned or managed lake and the government is sued for turning the water loose from the dam, for example. It is tried to a judge and the judge listens to this evidence that the economist spins about his income, it's going to be over twenty years or thirty years life expectancy and spends it out in some of the cases, we want \$9 million in damages and the judge says that's rational, that makes sense. These numbers add up and so he awards \$9 million. The expert says to that the jury and the jury says, "How much?" So, the data shows that judges, in fact, award more.

Let me give you one of the datum and get some other question on that. As the numbers of trials have come down, there is a flip of the relationship between the relative numbers of bench trials versus jury trials. Before this period of time, two-thirds of the cases tried were bench trials, one-third were jury. It's the opposite now. Two-thirds of those that actually tried are to juries and only one-third of them are bench trials. Now, you can let that kind of hang out there. Bill, what do you think about that? What is the cause? It's still on the question of "cause." What's the phenomena here?

*William Dorsaneo:*

About the bench trial switch?

*Judge Patrick Higginbotham:*

No.

*William Dorsaneo:*

Just in general?

*Judge Patrick Higginbotham:*

No, I put that out there to kind of complicate the picture, but I really want to go around the panel to get everybody's notion about what's going on here.

*William Dorsaneo:*

Frankly, with respect to the federal system, when I started practice a long time ago, we used to go to the federal court because we thought the judges were maybe better in some sense. They had more helpers.

*Judge Patrick Higginbotham:*

Some are. (With a smile).

*William Dorsaneo:*

And I think that certainly the attitude has changed where I am.

*Judge Patrick Higginbotham:*

Well, are you suggesting this phenomena is limited to federal courts? The data is suggesting the opposite.

*William Dorsaneo:*

I think it's probably a larger federal phenomenon. I also have some disbelief on Nathan's statistics. I'm not sure the same sort of thing is going on everywhere. I also wonder if the number of trial days is also gone down.

I'm not surprised that the federal courts have less to do because of the nature of the federal pretrial practice and the non-user friendly quality of that system. I teach federal civil procedure, but I have not been to federal court very much in many years, at least not willingly. Certainly, my attitude has changed dramatically about that.



*Judge Patrick Higginbotham:*

So, what is the cause? What are you saying?

*William Dorsaneo:*

Not just attitude. There's lack of predictability. Maybe too much power and unpredictable.

*Judge Patrick Higginbotham:*

Is there is such a thing?

*William Dorsaneo:*

Well, of course, no one is more powerful than a federal judge in a limited jurisdictional sphere.

*Judge Patrick Higginbotham:*

Well, their congressman didn't think that.

*William Dorsaneo:*

And I would really wonder whether the same sort of phenomena is happening in the state system or if it is happening for the same reasons.

*Judge Patrick Higginbotham:*

Well, let us assume that Nathan's data is correct and Dr. Hensler's data is correct and this is a phenomena that is not confined to federal courts. Then what is happening?

*William Dorsaneo:*

Well, we have certain devices. We have a lot more dispositions in the state system on other basis other than a full-scale trial than we used to. We have a lot of cases where we get dispositive or nearly dispositive rulings early on and maybe that would facilitate the elimination of the case from the field, either because the summary judgment was granted or because the rulings indicate that the trial

wouldn't be necessary.

*Judge Patrick Higginbotham:*

So, you say the possibility of summary judgment.

*William Dorsaneo:*

Procedural changes that make the trial less important as a method for disposition of the controversy.

*Judge Patrick Higginbotham:*

You figure the difference between the state and the federal court on that?

*William Dorsaneo:*

Not here now.

*Judge Patrick Higginbotham:*

Why wouldn't that really make it a more determinant and a more certain system than the trial itself if this is being caused by the uncertainties of trial and they have never been disposed of without trial? Yet it's going on. How do you explain that?

*William Dorsaneo:*

Well, because they can be. They can be disposed of without trial and that would be a way to deal with them. Now, we also have alternative dispute resolution and maybe that has picked up some of the freight, but I really doubt that.

*Judge Patrick Higginbotham:*

Well, let me ask you a question. Is the growth of ADR the cause of it or is it the beneficiary of it? Why are people leaving the system to go to ADR? Let somebody else jump in here.

*Justice Scott Brister:*

Well, I agree with Judge Hecht. Sometimes you hear people say, "Well it's the cost and the delays of court system that leads people to ADR" Certainly there are some cases where that's true. You are never going to get a small case to trial and so you have to settle it, but I think plenty of people I've talked to seem to think that arbitration is not any faster. In a lot of cases that I, as a trial judge, referred to arbitration it seemed like it would take a year to pick the arbitrators. We hadn't even figured out who's going to be the judge yet. I'd say, "Look, I can have this tried before you all even find out who's going to do this this week." And I remember at one of the Fifth Circuit conferences, Steve Susman's favorite quote, "If you hire three arbitrators and tell them, we'll pay you \$350 an hour to arbitrate this case, you can bet it is going take a long time to do that arbitration."

*Judge Patrick Higginbotham:*

Well, Steve is getting \$700 an hour.

*Justice Scott Brister:*

It can't be just costs or delays. Arbitrators make mistakes just like everybody else and there is no appeal; people are shocked by this. They want to come back into court and say, "Undo this."

*Judge Patrick Higginbotham:*

Well, now you're telling us that arbitration may be not so desirable, but the fact is they are fleeing to arbitration.

*Justice Scott Brister:*

Well, some of them are, the ones who would like to go before the arbitrator because it's too expensive for the other side and they might believe they'd have a better shot at arbitration panels than they would trying cases to average people. In the arbitration cases that I know of, some of my friends and their clients are dragged unwillingly to arbitration, not because they want to go. The attitude of the state and federal system is that arbitration is a great thing. That's a new attitude. That wasn't the attitude that existed when I went to law school. It was regarded as kind of an invasion of the right to a public

trial.

*Judge Patrick Higginbotham:*

But you disagree with Justice Kennedy's observation in *Circuit City*<sup>3</sup> about the values of arbitration and summary disposition? What about the cost?

*Vikram Amar:*

Well, let me say one or two things about the cause and then a word about the consequences. I think one of the reasons why jury trials are more unpredictable and may be encouraging people to vote with their feet is because of the way we have structured the process of jury selection. I mean, we heard this morning from a jury consultant—everybody needs a jury consultant. We have made this thing a game. Juries don't really look like America because we make such a science of using peremptory challenges. We don't pay jurors. We don't provide childcare. We encourage people to shirk.

*Judge Patrick Higginbotham:*

On the federal side, you only get six now.

*Vikram Amar:*

Six dollars. In California, we just raised it to \$15 from \$6. But if you really want juries to look and act like America, then you wouldn't be structuring them this way. As Justice Brister pointed out earlier, we do not focus as a society on why we have juries in the first place. So, then the kind of popular conception of juries doing silly, crazy things, encourages people not to want to be on them. I think these are kinds of mutually-reinforcing downward spiral trends.

*Judge Patrick Higginbotham:*

Well, let me ask you one finite point just a little bit. Are you saying that people believe that the juries are, in fact, unpredictable, or is it simply that the lawyers, trying to cover their rear, are telling their clients that it is better not to try the case to a jury?

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

*Vikram Amar:*

The later, because the lawyers have not tried cases.

*Judge Patrick Higginbotham:*

Well, the juries are unfair. Where is this coming from? What is the objective empirical data that they are “unpredictable”?

*Vikram Amar:*

Well, I guess you are right. I mean, the fewer trials that any lawyer does, the less the lawyer is more expert in the system than a layperson who is getting his information from these headlines and these kind of popular conceptions. I think that lawyers may overstate the unpredictability of jurors because of these conceptions. More generally, I don't know any of my friends who would ever be on a jury unless they absolutely couldn't get out of it. So, both things are operating at once. There is a reality and then there's a perception of reality; they're both along parallel tracks.

And when it comes to the consequences, as a law professor I see it. Especially in some of the traditional common law areas like contracts and torts and property, if you look at the modern case books in some of these areas, they are devoid of state supreme court opinions in the last decade or two. There's really not that much contract law being generated because all major commercial disputes are being resolved by private arbitration that never sees the light of day. And I wonder, in the long run, if we are starving our appellate courts. Obviously, there are summary judgment cases and other things that get to the appellate courts, but if we're starving the appellate courts of a lot of cases that used to go to trial, is that going to shape substantive areas of law in unpredictable ways going forward?

*Judge Patrick Higginbotham:*

So, in a nutshell, then what, in your view, is the cause of this decline in trials?

*Vikram Amar:*

I don't know that there is a single cause. I mean, part of it's a lack of education and a lack of awareness, as Justice Brister told us. We

don't talk about this stuff enough. But I do think we've designed the rules too much for picking juries, too much for the benefit of judges and lawyers. I think that we don't take into account why we have a jury when we think about things like preemptive challenge, or juror pay, or child care, or whether jurors should take notes or ask questions of the witnesses and the like. You know, judges have a predictable incentive to want to aggrandize their own power. They're just people as well.

*Judge Patrick Higginbotham:*

Well, let me ask a question about this perception of lack of reliability or predictability with juries. Why then do we put a man on trial for his life with a jury if we won't trust them with the trial's civil damage cases? Why are juries suddenly more predictable when you're trying criminal cases?

*Vikram Amar:*

I don't know that they are more predictable in criminal cases. You heard the district attorney in Los Angeles a few weeks ago call the jury that acquitted Robert Blake a bunch of morons. You have got a national outcry when O. J. Simpson got acquitted.

*Judge Patrick Higginbotham:*

Who was the moron?

*Vikram Amar:*

Well, like I say, I am not sure whether it was the district attorney or the jury that was really at fault there.

*Judge Patrick Higginbotham:*

That was not the smartest statement a public district attorney might make.

*Vikram Amar:*

I totally agree with that.

*Judge Patrick Higginbotham:*

He may have thought that.

*Vikram Amar:*

Let me give you an example, again, it's from the criminal context, since you brought it up. In the Scott Peterson case, it took six months and 3,000 jury questionnaires to pick a jury that convicted him in a couple of hours. That tells me something is wrong with the way the system is put together.

*Judge Patrick Higginbotham:*

Right. Okay. Good.

*Justice Nathan Hecht:*

Let me add one other thing. Nobody just knows empirically what's likely to happen in a jury trial. You had to go try people. Back in the old days, people would try to settle cases and the plaintiff would keep asking for a little more and the defendant keep offering a little less. Finally, somebody would get peeved and they'd go try five or eight or ten or twelve cases and then you would see what the verdicts were coming in at. Then it would recalibrate and everybody would start back finding out where the middle was until it got off. I don't think that happens much any more.

*Judge Patrick Higginbotham:*

One of the concerns out there is the indeterminacy that comes from the absence of settlements and the shadow of trial that distinguish from settlements that are worked and conducted in mediation. Michael, you are wearing an appellate hat an awful lot of times, but you're no stranger to this.

*Mike Hatchell:*

I need to be very careful in what I say because I am probably not the best person to comment on this. Since August of 1965, I have done nothing but work in the appellate courts and I haven't observed the progress of trials, but I have some feelings about it that are largely

anecdotal. I would phrase it differently from what Justice Hecht says. I think things are too predictable. It is an unfortunate by-product. I can tell you exactly how a case is going to come out before it goes to a jury in many parts of this state. I don't want to go into the reasons why I can do that. I can also pretty much tell you how a case is going to come out on appeal. What I think is happening, at least I see this anecdotally, is that those two predictabilities are canceling one another out so that parties are much more willing to settle, short of a trial. The other component is that discovery is now so expensive.

*Judge Patrick Higginbotham:*

Well, Michael, let me take you up on that point. Are the parties willing to settle because they don't want any part of the court?

*Justice Nathan Hecht:*

Yeah. Well, I think that is probably a backwash from the same factors that I'm talking about and that would be, frankly, that cases are so expensive to try that the prospect of litigation makes sense particularly for large corporations to settle. The other factor is that, because of the predictability of the appellate outcome, parties who are representing plaintiffs are more willing to downsize their expectations and are downsizing their clients' expectations. Frankly, what I find is cases either being resolved after they have been filed or resolved in the negotiating stage for what is largely defense costs, and that is a lot of money today.

*Judge Patrick Higginbotham:*

Is it important that the case be settled on a trial docket, as distinguished from being settled in a mediation process? Is there a difference? Let me frame the question a little finer. The suggestion is that what is going on is not a competition between trials in the court system inasmuch as trials outside the court system, it is because there aren't trials. It is rarely is the competition between pretrial systems. Do I want to proceed in the federal court, for example, or the state court in a pretrial process or do I want to go through a pretrial process outside the court towards a settlement? As one general counsel told me, "That's a no brainer." He had 600 lawyers answering to him in a national insurance company and was very heavily involved in mediation. Cost was the simple reason. We know pretty much what



the general dimensions of a dispute are, but it costs a lot of money to take it from where we know the general dimensions of a dispute and bring in outside counsel and then go to discovery, with the documents and all the other legal activity and then have the counsel come back and say: "This case needs to be settled. The juries are unpredictable. The courts are unpredictable and this case needs to be settled." If I'm going to be told that, I'd rather go ahead and pay the check now and I don't have all that cost. The observation is: Defense people don't like that. Plaintiffs' lawyers do like that. Now, Do you have any further thoughts about causation?

*Justice Nathan Hecht:*

Well, I would say, of course you can't intelligently settle a case if you don't know what it's about. So, you are gonna have to engage in some exchange of information to get there. But one of the disadvantages of the litigation system is that there just does not seem to be any end to that. Particularly, it makes it possible for lawyers who just don't want to get to judgment day to push that off with lots of discovery, it makes it possible for lawyers to harass people to where they just say, "Look, the games not worth the gamble."

*Judge Patrick Higginbotham:*

Let us talk about this lack of predictability for a moment. The assumption has been, as I understand your comments, that unpredictability of the system is a cause and the unpredictability attributed to the uncertainties—either certainty or absolute certainty of a judge or a jury—or the uncertainty of it either way. It focuses on those decision-makers themselves.

Let me raise another question with you. To what extent is this uncertainty generated by the indeterminacy of the standards for liability that we put to a jury? Take this example and in most typical products' liability case tried across this country, what happens is when the trial judge turns to the jury and says: "Ladies and gentlemen of the jury, the first question you must answer is whether, did the plaintiff prove that the evidence the product was defective? Please answer this question yes or no. In answering the question of whether or not this product was defective, I instruct you that a product is defective if its danger outweighs its general utility. Now, if you have answered the first question yes, then answer the next question. Was the defect that you have found in answering question number one a producing cause

of injury? If the answer is yes, answer the next question. What sum is reasonable to compensate the plaintiff for the injury you found in this case?"

Those are the questions that are put in a Rule 49 submission in a products liability case. Now, when you turn to six persons and ask them the question of weighing the social utility against cost, is the uncertainty of the outcome inherent in the jury structure of laypersons deciding these questions, or does it adhere in the standards under which judges ask those laypersons to resolve the question? What is your thought about it? What does the indeterminacy of our standards have to do with it?

*William Dorsaneo:*

Well, it seems clear to me that the prevailing liability theory, let's say from Judge Calvert's period,<sup>4</sup> is really a negligence liability standard that involves a complete bar of defense contributory negligence. Quite frankly, as a tort teacher knows, the negligence liability theories are a particularly good vehicle for juries to resolve car wrecks and even premises liability cases. Juries can operate within the general standard and decide the particular case as well, or probably better, than a judge. Once we get into the late 1960s, and I guess really into the 1970s, with strict product liability as an accompanying theory in other complex theories, I am quite sure that juries had a harder time with those cases. I'm also sure that the lawyers, who hadn't tried very many of any kind of cases, had a hard time presenting them to the juries. We used to think you could do a federal securities case without a great deal of difficulty. If you were a good lawyer, you could present the case, no matter what the liability theory. But you are talking about experienced trial lawyers who have spent a lot of time trying cases in general. So, there's no doubt that these changes in the substance of law must have a significant impact on whether you want to go to the courthouse to begin with.

*Judge Patrick Higginbotham:*

Consider punitive damages. Till recently, this was a real wildcard in the game. For example, I was mediating the breast implant cases. The problem, we didn't have a history of litigation. These are trial

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4. Robert W. Calvert served in the Supreme Court of Texas from 1950 to 1972 and was Chief Justice from 1961 to 1972.

lawyers. Question, how do you value these cases? They said, "Well, . . ." I said, "Why don't we try five cases?" So, they did and the lawyers predicted in one case that was going to go to trial that the jury would range the verdict if liability is found will be \$750,000 to a million, two or three. Liability was found. They were absolutely right. Liability hit right in the middle of that predicted zone of return. The difficulty was that the jury came back with \$25 million in punitive damages because the only thing they asked the jury was: "What sum if now, would be reasonable to deter, da, da, da." And you had this something bordering on a standard list of discretion for shifting liability, etcetera. Now, the court is going to rein that in, but what do you say? Is it the jury or the way we are managing the system that is inherently unstable? Is it the institution, or is it the question we put? If you ask a stupid question or an open-ended question, why do you blame the people who give the answer? What standard do you hold them to? That's one of the questions. You have any comment about this part of the indeterminacy business?

*Vikram Amar:*

I guess I would say two things: One, again, if we are not constituting juries the right way, then it is tough to ask the question you asked. In other words, the real question is: If we had juries that were picked by a more sensible process, would they be more responsible kind of repositories of the trust that we're giving them. I don't know enough about torts to know whether modern product defect law is really that much more open-ended than traditional negligence law. I mean, maybe it is a harder thing for juries to get their hands around, but even if it is, the question I would come back with is: Assuming we had a better way of gathering twelve kinds of common sense minds, would we rather have one judge decide how to conduct that kind of societal weighing between cost and benefits, or would we rather have the input of twelve people? And even if it is a hard question, it's not clear to me that we want to relegate it to just a few judges.

*Judge Patrick Higginbotham:*

Well, your comment goes to a judgment that you don't like what is happening and what I'm trying to get at is why is it happening without making a value judgment about whether one system is good or not. The fact that we can't escape is that a lot of people think that

it's better. Now, playing a little more with causation. One of the suggestions made by Dorsaneo had to do with the pretrial determinations causing earlier disposition in both federal and state systems. When I first looked at this data, I thought we had the trilogy of summary judgment cases on the U.S. Supreme Court on the federal side, which traditionally are viewed as encouraging trial court to grant a summary judgment. I thought, well, looking at that trilogy, we should be seeing an upsurge in the numbers of cases that are determined on the ground of summary judgment. That would explain some of the declines in trials. But when I looked at the data, it was flat. Professor Burbank<sup>5</sup> up at Penn has done much more refined empirical work and he finds that there is a little increase, but it's just a blip. It still does not account for the decline in jury trials. So, at least in the federal forum, the procedural mechanism does not necessarily explain this phenomena.

*Vikram Amar:*

For example, it took my state of California maybe ten or fifteen years to kind of follow some of the lessons of *Celotex* and the summary judgment trilogy. I actually think that, in California, summary judgment adjudication now is more common than it was a decade or two decades ago. So, I think, as you mentioned earlier, each system might have its own nuances to be taken into account.

*Judge Patrick Higginbotham:*

I thought that on the federal side. The data just, unfortunately, is not quite as compelling as that.

*Justice Nathan Hecht:*

We changed our rule what five years ago, six years ago to essentially . . .

*Judge Patrick Higginbotham:*

More closely track the federal side.

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5. Stephen Burbank.

*Vikram Amar:*

Yes. And summary judgments are down.

*William Dorsaneo:*

But there may be more summary judgment hearings. Maybe that has to do with the expense.

It seems to be that this is kind of a pogo thing. Seeing the enemy, it's us. It has a lot of different attributes that would have to be the key thing, expense and delay. I think when I first started practicing law in 1970, I think my hourly rate was \$25 an hour and I don't know what that is in 2005 dollars, but I know it was low in comparison.

It has got to be the expense, got to be the major factor. To the extent that people can get out of the system and think that gives them a substantive or a procedural advantage, of course, they try to do that. And that has been facilitated by decisions. Arbitration might be even more expensive, but they want to go there anyway.

*Judge Patrick Higginbotham:*

Let me get you to comment on another thing.

*William Dorsaneo:*

To answer another question myself, expense is probably the key thing.

*Judge Patrick Higginbotham:*

Comment on this phenomena. One of the suggestions here is that we are involved with what is a large attitude change about the law itself. There's a large ideological push toward different forms of resolution that's clearly hostile to a yes/no answer. I sometimes teasingly tell people, "everybody gets a trophy," this ideological approach to litigation is a solution to our problem that stems from soccer moms. The point being that, unquestionably, there is a large ideological push behind some of this, but having said that, if you look at some other data, not only are we seeing a movement away from courts in general, but an enormous upsurge on the administrative side. I tell my students in federal courts that we look at Article III and we think this is exclusivity—sort of an exclusive franchise from federal

side. The reality is that most of these federal disputes are decided by federal judges, but not federal judges as you think of them. They are administrative law judges. Let me give you a couple of pieces of data here.

The Department of Health and Human Services for the year 2000 employed more than 800 administrative law judges—that's the approximate number of federal district judges—and they adjudicate more than 320,000 cases each year, more civil cases than all federal districts combined. Similarly Social Security disposes of 280,000 cases annually. So that is just two agencies resolving 600,000 cases annually. Now, only about 10,000 of those end up flowing into the federal courts. You can multiply that out. Most of the administrative work was originally in courts themselves. We know that historically and it has been moved out of courts into the administrative agency. As you move to a court system where there is little anticipation of trials, you have a managerial judge looking and walking and talking very much (1) like the administrative side and (2) very much like the European civil law system. This is increasingly true on the state side as well. One can play with this and say that this is part of a larger phenomena where we are seeing transnational influences because the market will not stop at political boundaries, but remember that arbitration has its birth and genesis in transnational arbitration itself.

With that kind of a predicate, what is your reaction to the observation that the United States district courts today are really functioning as an administrative agency? Understand that over half of the cases that go to the United States Court of Appeals from the district court in every circuit in the country now are filed by prisoners. They come through a system to a magistrate law system with law clerks, they go up to the district clerk, the law clerk, they come to the Fifth Circuit in New Orleans. We have sixty lawyers on the New Orleans' staff counsel to process these. So, what I'm saying is that there's a huge volume of cases and in almost none of these cases will there or could there be a trial. They are processed administratively. So, you have a system that is increasingly fueled with cases that are never going to trial. What is your comment, Professor Amar, about the observation that we are now moving toward an administrative system, like it or not?

*Vikram Amar:*

I think it poses a number of challenges. I think you are right that there are broader, even international trends going on. I guess I would

say two things. One of the things I'm going to talk about this afternoon in my presentation are the sentencing guideline cases—*Blakely*,<sup>6</sup> *Booker*<sup>7</sup> and *Fanfan*<sup>8</sup>—where the court seems to reject a kind of bureaucratic administrative convenience and ease in the name of enforcing some hard vision of the Sixth Amendment. Now, there may be some differences between the Sixth and Seventh Amendments, but if the vision of the jury that Justice Scalia sketches out in *Blakely* is to be meaningful, then maybe there is going to have to be some checks drawn on this increasing bureaucratism. Going back to what Justice Brister said earlier, maybe the demographics and the economics of it are just moving in an irresistible way towards this different kind of model, a more European model. Pretrial makes the most sense, given our initial objectives, and to try to retain it in those areas and concentrate on that.

*Judge Patrick Higginbotham:*

Well, I think former Chief Justice Phillips, in his own subtle way, would like us to wrap this up. I thank the members of the panel for a fun and lively discussion.

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6. *Blakely v. Washington*, 542 U.S. 296 (2004).

7. *United States v. Booker*, 542 U.S. 738 (2005).

8. *United States v. Fanfan*, 125 S. Ct. 12 (2005).