Fact or Fiction:
Are There Less Jury Trials & Trial Lawyers?
If So, What Do We Do About It?

by David W. Elrod
and Worthy Walker
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ELROD
RESULTS DRIVEN TRIAL ATTORNEYS℠

Elrod, PLLC
500 N. Akard, Suite 3000
Dallas, Texas 75201
(214) 855-5188
www.elrodtrial.com

> We need trials, and a steady stream of them, to ground our normative standards – to make them sufficiently clear [so] that persons can abide by them in planning their affairs – and never face the courthouse – the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as failure of the system. A well conducted trial is a crowning achievement
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> - *Justice Patrick E. Higginbotham*[1]

Just what is happening to the jury trial? Statistics show that, as time passes, less and less of these curious things occur. While many judges and commentators have opined on the causes and implications of this decline, most seem to agree that it is occurring more rapidly. As lawyers, should we be concerned?

There has been debate over what has frequently been described as the "vanishing trial." Regardless of the side of the debate on which you find yourself, this issue should be great importance to you. Doubtless many experienced lawyers have found themselves and their firms taking many less cases to trial than in the past. "Young" lawyers, almost without exception, admit that they have very little trial experience. Whether you think a decline in jury trials is a good or bad thing, it is a reality, and as lawyers, we should be discussing the issue.

A. Introduction

The passage found at the top of this page was spoken by Justice Patrick E. Higginbotham during his landmark lecture in 2002 on the "disappearing" or "vanishing" trial. The passage was his answer to the question of whether a decline in trials was a good or bad thing; a question many academics and judges have been asking in recent years.

Justice Higginbotham gathered statistics showing a stark decline in the number of jury trials between 1970 and 1999, in spite of steady increase in the number of cases filed on the whole. He opined that the statistics were a mere sampling of a larger picture of change in the judicial system. Many commentators

[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, 1423 (2002).

have agreed with Justice Higginbotham, while other have expanded on his observations, and even argued competing views.[2]

For example, accepting many of the premises set by Justice Higginbotham to be true, U.S. District Judge Terry R. Means has argued that "the decline of trials, at least in major cases, is a natural and evolutionary progression dictated by the marketplace..."[3] Similarly, Stanford University Professor Lawrence Friedman has also taken a different position, opining that "trial" was "never the norm, never the model way of resolving issues and solving problems in the legal system."[4] Professor Friedman concluded, therefore, that "we can argue that 'vanishing' is an illusion."[5]

In an interesting analogy, Justice Scott Brister has noted that public use of the U.S. Mail is also declining, asking whether trial by jury, like the post office, is simply facing new and stiffer competition.[6]

With gratitude to the hard work and strong thinking performed by these judges, professors and commentators, this article discusses the issues surrounding this increasingly important issue.

B. A Brief History of the Jury Trial

> [T]he only anchor yet imagined by man by which a government can be held to the principles of its constitution
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> - *Thomas Jefferson*[7]

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[2] *See* Symposium, *The Vanishing Trial*, 1 J. Empirical Legal Stud. 459 (2004); Higginbotham, supra note 1; Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. Tex. L. Rev. 163, 181 (2005); Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. Tex. L. Rev. 191 (2005); Sam Sparks, George Butts, *Disappearing Juries and Jury Verdicts*, 39 Tex. Tech L. Rev. 289 (2007); Terry R. Means., *What's So Great about a Trial Anyway? A Reply to Judge Higginbotham's Eldon B. Mahon Lecture of October 27, 2004,* 12 Tex. Wesleyan L. Rev. 521 (2006);

[3] Means, supra note 2, at 521.

[4] Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. Empirical Legal Stud. 689 (2004).

[5] *Id.*

[6] Brister, supra note 2, at 192.

[7] 3 The Writings of Thomas Jefferson 71 (Washington ed., 1861).

The foundation of the American legal system is the adversary system. It is uniquely based on the fundamental right to present evidence to a jury of neutral peers, and to have them decide the issues based on the evidence presented. The U.S. Supreme Court has stated that the right to a jury trial is such "a basic and fundamental feature of our system of federal jurisprudence" that it "should be jealously guarded by the courts."[8] Although the federal guarantee does not extend to state courts, state statutes and constitutions guarantee trial by jury in civil cases as well "almost without exception."[9]

The concept of a trial or judgment by jury or by one's peers originated in Europe during feudal times, and was brought to England with the Norman Conquest in 1066.[10] The Magna Carta stated that "no free man shall be taken or imprisoned or disseised…exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land."[11] In the United States, the right to trial by jury is ultimately guaranteed by the Sixth and Seventh Amendments to the Constitution.[12]

What may come as a surprise to many domestic lawyers is that the United States is essentially the only country in the world that commonly uses juries in civil trials. Professor Neil Vidmar of Duke University found that fifty-four countries world-wide provide trial by jury, but fifty-three of them provide juries in criminal cases only.[13] This leaves the United States as a solemn and unique protector of the civil jury trial.

While it may not exist among trial lawyers, some debate still exists as to the value of a jury trial in the public. While some profess that the jury trial is "the lamp

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[8] *Jacob v. City of New York*, 315 U.S. 752, 753 (1942).

[9] *See* George D. Braden, et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis 57 (1977).

[10] *See* Art Thibault, *The Erosion of the Right to Trial by Jury: United States v. Soderna*, 2 T.M. Cooley J. Prac. & Clinical L. 285, 288 (1998).

[11] Magna Carta, paragraph 39.

[12] *See* U.S. Const. Amend. VI, VII.

[13] Neal Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in World Jury Systems 1, 3 (Neal Vidmar ed., 2000).

that shows freedom lives," others have referred to it as "a dozen dimwits gathered at random."[14]

C. Statistics

Justice Higginbotham's 2002 lecture provided alarming statistical data. He cited statistics that showed that – between 1970 and 1999 – the number of civil cases that went to trial dropped by 20%, even though the number of civil cases filed rose by 152%.[15] Between both civil and criminal cases, Justice Higginbotham found that the rate of trials dropped from approximately 12% in 1970 to 3% in 1999.[16] Higginbotham also notes that as a percentage of all civil dispositions, the number of trials has dropped from 11.5 percent to 1.8 percent.[17] The U.S. Department of Justice, Bureau of Justice Statistics has found that the number of tort cases filed in 15 states alone increased by 19% between 1985 and 2003.[18]

Other data presented in other articles has been similar. In Justice Hecht's 2005 article, he provided statistics on Texas civil cases obtained from the Texas Office of Court Administration.[19] Those statistics indicated that between 1986 and 2004, the number of civil jury trials in Texas fell by 49%, while the number of civil jury trials per court dropped 58.2%.[20]

Interestingly, the statistics cited by Hecht also showed the number of summary judgments to have declined in Texas district courts over the same period, casting substantial doubt on most theories that summary judgment is to blame for the decline in trials.[21] On this issue, Justice Higginbotham similarly found that the

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[14] Patrick Devlin, TRIAL BY JURY 164 (1956); Mark Cammack, *The Jurisprudence of Jury Trials: The No Impeachment Rule and the Condition for Legitimate Legal Decisionmaking*, 64 U.Colo.L.Rev. 57 (1993).

[15] Higginbotham, supra note 1, at 1408.

[16] *Id.*

[17] *Id.*

[18] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Civil Justice Statistics, Summary Findings (State Courts)*, found at http://www.ojp.usdoj.gov/bjs/civil.htm.

[19] Hecht, supra note 2, at 166-70.

[20] *Id.* (citing Office of Court Admin., Texas Judicial System Annual Reports, Fiscal Years 1986-2004).

[21] *Id.*

statistics he relied upon showed not discernible change in the rate of summary judgments that could be attributed to the decline in trials.[22]

As the table below indicates,[23] the U.S. Department of Justice, Bureau of Justice Statistics has found that the number of civil trials in the 75 largest counties in the U.S. has gone down approximately 47% between the years of 1992-2001:

Table 10. Trends in civil trials in State courts in the Nation's 75 largest counties, 1992-2001

	Number of civil trial cases, by year			Percent change,
Case type	1992	1996	2001	1992-2001
All trial cases[a]	22,451	15,638	11,908	-47.0%*
All tort cases	11,660	10,278	7,948	-31.8%*
Selected case types				
Automobile	4,980	4,994	4,235	-15.0%
Premises liability	2,648	2,232	1,268	-52.1*
Product liability	657	421	158	-76.0*
Medical malpractice	1,347	1,201	1,156	-14.2
All contract cases	9,477	4,850	3,698	-61.0%*
Selected case types				
Fraud	1,116	668	625	-44.0%*
Seller plaintiff	4,063	1,637	1,208	-70.3*
Buyer plaintiff	1,557	832	793	-49.1*
Employment	468	621	453	-3.2
All real property cases	1,315	510	262	-80.1%*

Note: Detail may not sum to total because of rounding. Data sources: *Civil Justice Survey of State Courts, 1992* (ICPSR 6587),*1996* (ICPSR 2883), and *2001* (ICPSR 3957).
Data can be obtained from the University of Michigan Inter-university Consortium for Political and Social Research (ICPSR).
*1992-2001 difference is significant at the 95%-confidence level.
[a]The number of trials includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.

The types of cases being filed may not be surprising. A study performed by Samuel Gross and Kent Syverud, looked at two samples of jury trials 1985-86 and 1990-91 in the California superior courts.[24] They found that within those two samples, "over 70%" were personal injury cases.[25]

[22] Higginbotham, supra note 1, at 1419.

[23] From U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Civil Trial Cases and Verdicts in Large Counties*, 2001 (April, 2004).

[24] Samuel R. Gross, Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared Toward Settlement*, 44 U.C.L.A. L. Rev. 1, 8-14 (1996).

[25] *Id.* Gross and Syverud found that in the 1985-86 sample, 71.3% were personal injury cases, while in the 1990-91 sample, 73.8% were personal injury cases.

Notably, there does not appear to be any real debate over the statistical data. While Judge Means took issue with some of Justice Higginbotham's conclusions, he was clear in stating that he had "no dispute" as to whether we have seen a decline in the number of trials and "no quarrel" with the statistics proving a decline in federal and state trials.[26]

D. Potential Contributing Factors

Some have argued that Americans believe their civil justice system no longer serves the average person. Many theories have been argued for this change in culture, such as aggressive lawyer behavior, "no holds barred" approaches to litigation, high hourly billing rates and backlogs in courts. Another theory is that our culture promotes a "lottery" mentality, where plaintiffs expect – and defendants fear – that a plaintiff could hit a jackpot with a jury.

Most commentators agree that is likely a combination of many factors. And, although there is generally a constitutional or statutory right to jury trial in civil cases, the U.S. Supreme Court has long recognized that a private litigant may waive its right to a jury.[27] As Justice Brister has noted, alternatives to jury trials seem to be flourishing.[28] Arbitration agreements are universally enforced, forum-selection clauses are prima facie valid, and a jury trial can be waived by contractual agreement. As Justice Brister has stated, it appears that "trial by jury has lost the virtual monopoly it once enjoyed in adjudicating civil disputes."[29]

(1) ADR

To many, it seems obvious that the advent of ADR is inversely related to the decline of civil trials. As Justice Higginbotham noted, the largest users of private dispute resolution appear to be American corporations, which were traditionally the largest users of diversity jurisdiction.[30] The U.S. Supreme Court and the Texas Supreme Court have shown strong preferences for arbitration over litigation.[31]

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[26] Means, supra note 2, at 513.

[27] *See Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 848 (1986); *see also D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (contractual waiver of due process rights).

[28] Brister, supra note 2, at 194.

[29] *Id* at 195.

[30] Higginbotham, supra note 1, at 1415.

Mediation is required and/or guaranteed in nearly every case these days, so it cannot alone be given the blame for fewer trials. There is no doubt, however, that some parties may only become truly aware of the risks – and costs – of going to trial from a neutral third-party such as a mediator.

i. Arbitration

Arbitration agreements may certainly be to blame for less cases being filed, which logically would affect how many cases go to trial. I do not believe that many plaintiffs are happy ending up in arbitration, although some businesses may view it as a preferable "two-way street" to the courtroom, even if they are plaintiffs. Certainly, many companies are afraid they may not be understood in a courtroom, largely because their business may be foreign to a jury panel.

In theory, arbitration does seem to cure many expertise and confidentiality concerns. But what about the cost? Anyone who has handled a significant number of arbitration proceedings will note that the cost *can* be significant, depending on the arbitral forum, the number of arbitrators involved and the level of discovery allowed. The authors of this article have been involved in commercial arbitrations that were every bit as expensive, if not more expensive, than a case in federal or state court.

But many commentators are concerned with the way that arbitration will affect the common law. The common law, which depends entirely on the evolution of case law and precedent, may be stymied by increased arbitration. Several commentators have expressed concern over this issue. A related concept is the lack of a right to appeal. Absent "manifest disregard of the law," there is really no appeal from an arbitration ruling, even if the arbitrator got it wrong. In many cases, the arbitrator may not even give the parties a reason for his/her decision, which again could destroy any precedential value the award could have had.

Notably, Judge Means singled out this topic for agreement with Justice Higginbotham, stating that "the rise of arbitration as a substitute for trial in the federal and state district courts is a trend fraught with danger."[32] Judge Means stated that the evidence rules are relaxed, "if not ignored," and that from what he has

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[31] *See, e.g. In re Dillard Dep't Stores, Inc.*, 198 S.W.3d 778,782 (Tex. 2006).

[32] Means, supra note 2, at 518.

heard "arbitration is not necessarily less expensive."[33] The authors of this article tend to agree with respect to cost, particularly in complex matters involving experts and three-person panels.

ii. Private Judges and Private Trials

Another ADR option which has become more prevalent is the private judge, affectionately referred to as the "rent-a-judge" by some. This is a concept that has been used much more in California than in Texas, but Texas practitioners are certainly familiar with advertisements for private judging services.

The idea is that a case could be litigated and decided on a much more expedited basis by a competent judge that is agreed upon by the parties. This is similar to arbitration, but depending on the agreement of the parties, it may have full discovery, evidentiary rules and might be appealable. Some argue that the cost of the procedure may be offset by the attorneys' fees saved in shorter, more expeditious litigation.

Conceptually, the private judge has some appeal for commercial or unique parties that believe they will not be understood by a jury. The parties have some say in the choice of the judge, and can select a judge with knowledge or experience relevant to the dispute. A clear benefit of this approach would be the judge's attention, which – at least in theory – is not subject to as many other docket priorities.

Of course, there is the issue of paying the private judge. Some critics opine that this procedure may create a "two-tier" justice system, with a private system for the wealthy and a public system for everyone else. While trials may be substantially shorter than a public jury trial, the procedure can be costly, particularly if the private judge allows general discovery. If parties wish to pay for this service, it is hard to argue that should not be able to do so.

[33] *Id.*

(2) Pre-Trial and Discovery

> There is little question that civil litigation is expensive, beyond the means of most persons.
>
> - *Justice Patrick E. Higginbotham*[34]
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> Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details – in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact finder and the choreography of the trial. But few litigants can afford it…We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle.
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> - *Professor Kent D. Syverud*[35]

It almost goes without question that discovery can be the most costly feature of civil litigation. Adversarial fact-finding is expensive. And, over the years, discovery has changed substantially. Although many of the changes in discovery were aimed to make discovery less expensive and more "streamlined," there is almost no question that discovery is more expensive today than in the past. This is, in large part, because of expanded discovery processes, discovery disputes and the often *extreme* cost of electronic discovery.

Justice Higginbotham opined that discovery has now become the "main event – the endgame" in civil litigation.[36] Higginbotham stated that the "excesses" of discovery have made the formal trial process less attractive.[37] Many companies experienced counsel realize it can cost hundreds of thousands of dollars in attorneys' fees alone to try a case to verdict. This will often not include the "soft costs" of

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[34] Higginbotham, supra note 1, at 1416.

[35] Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935, 1942 (1997).

[36] Patrick E. Higginbotham, *The Disappearing Trial and Why We Should Care*, RAND REVIEW, available at http://www.rand.org/publications/randreview/issues/summer2004/28.html.

[37] *Id.*

disruption of business and lost employee time from responding to discovery and depositions over years of litigation.

There can be no doubt that delay and expense are sometimes used as tactics in today's litigation. Costs can be extreme. In response to this concern, however, Judge Means responded that – from his observation – the costs associated with dispute resolution are proportionate with the complexity of the case, which is largely true.[38]

It is unclear how this could be remedied to afford more trials. As Judge Means noted, resorting to "trials by ambush" would allow "experienced trial lawyers to run roughshod over the occasional litigator."[39]

(3) Jury Waivers

A newer potential culprit for the decline in jury trials is the jury waiver, which practitioners are seeing more frequently, particularly in contract disputes. Jury waivers are contractual agreements by which parties agree if a lawsuit is filed, they waive the right to have the dispute decided by a jury. While they do not seem to be as prevalent as forum selection clauses or arbitration agreements, they may be in the future.

The first reported case in Texas to examine a contractual jury waiver was *In re Wells Fargo Bank Minnesota N.A.*[40] There, the 14th court of appeals in Houston held that a jury waiver in a mortgage note was enforceable under Texas law. The *Wells Fargo* court addressed a number of arguments against jury waivers, such as public policy and alleged violations of constitutional rights.[41]

The Texas Supreme Court first addressed the issue in *In re Prudential Insurance Co. of America*.[42] Similar to the *Wells Fargo* court, the Texas Supreme Court found that jury waivers can be valid and enforceable in Texas. The *Prudential* opinion seems to suggest a liberal policy in favor of contractual jury waivers, likening

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[38] Means, supra note 2, at 518.

[39] *Id.*

[40] *In re Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600 (Tex.App.—Houston [14 Dist.] 2003, no pet.).

[41] *Id* at 606-08.

[42] *In re Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004).

them to arbitration agreements. The court made it clear, however, that any such waiver must be "knowing and voluntary." This is a notable difference from precedent on arbitration or forum-selection clauses. Texas appellate courts have held that there is a presumption against jury waivers, and that a party seeking to enforce a jury waiver has the burden to prove that the waiver was "knowing and voluntary."[43]

(4) Fear of the "Runaway Jury"

> [T]he most ingenious and infallible agency for defeating justice that human wisdom could contrive
>
> - *Mark Twain*[44]
>
> Our judicial system operates on a different premise: Trial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost.
>
> - *Samuel R. Gross and Kent D. Syverud*[45]

Critics of the jury trial certainly exist, and some of those critics would certainly argue that less jury trials may be more of a good thing. As several commentators have noted, much of the criticism seems to be based on "anecdotal horror stories, surveys of public opinion or analysis of jury verdicts that employs qualitative second-guessing of jury verdicts by someone who was not present at trial…"[46]

One of the most well-traveled "horror stories" is the case of *Liebeck v. McDonald's*.[47] There, the jury returned a verdict against McDonald's for $160,000

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[43] *Mikey's Houses LLC v. Bank of America, N.A.*, 232 S.W.3d 145 (Tex.App.—Fort Worth 2007).

[44] Mark Twain, *Roughing It* (1872).

[45] Samuel R. Gross and Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared To Settlement*, 44 UCLA L. Rev. 1, *2 (1996).

[46] Larry Lyon, Bradley J.B. Toben, James M. Underwood, William D. Underwood, James Wren, *Straight from the Horse's Mouth: Judicial Observations of Jury Behavior and the Need for Tort Reform,* 59 Baylor L. Rev. 419, 420 (2007).

[47] No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

in compensatory damages and $2,700,000 in punitive damages, when Mrs. Liebeck was burned by scalding hot coffee. While Mrs. Liebeck spent eight days in the hospital and required skin grafts, and the punitive damage award equaled two days of coffee revenue for McDonald's, the case became a cliché for the "runaway jury."[48] Members of the public, in particular, seemed to be polarized by this case.

Commentators have noted that valid arguments can be made that juries are unable to make reasoned decisions in complex cases, or that they are too expensive for many purposes.[49] And, as Justice Higginbotham noted, commentators have suggested that the flight from the courthouse is "in the main, a flight from the jury."[50] In similar fashion, Judge Means stated that he does not believe "trials can ever be made appealing to very many litigants."[51] This is, in large part, because trial is not pleasant, and it is often expensive.

There is also a widely-alleged concern that juries can get out of control, issuing large verdicts at random. Moreover, many litigants view this unpredictability to be unpalatable when coupled with the cost of trying a case to the jury and the jury's alleged inability to comprehend complex information. Judge Means replies that "to the extent that the system is so perceived, it has always been so."[52] He also makes an astute point that the original purpose of discovery and the ADR processes was to ameliorate this unpredictability.[53]

But largely, it appears that many of the fears that surround jury trials may be unfounded. Professor Neil Vidmar has said that, based his research, he has found no "justifiable scientific basis" to support claims of "runaway juries" or a "defective legal system".[54] He has also stated that, based on his research, "jury decisions are, on average, temperate and reasonable."[55] Critics of the jury system often fail to

[48] The damages were also reduced by the trial judge to a total award of $640,000.00.

[49] Sparks, Butts, supra note 2, at 312-13.

[50] Higginbotham, supra note 1, at 1421.

[51] Means, supra note 2, at 518.

[52] *Id.*

[53] *Id.*

[54] *See* Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 Suffolk U. L. Rev. 1205, 1206 (1994).

[55] *Id.* at 1206.

acknowledge that of the hundreds of thousands of suits filed each year in the United States, most are settled, many are dismissed, and only a very small percent are actually tried. And, as Professor Vidmar has noted, "neither journalists nor lawyers are as likely to report verdicts won by defendants or small awards as they are to report mega awards to plaintiffs."[56] He has also noted that much of the research into jury verdicts, based on searches of court records and voluntary submissions by lawyers and journalists, is subject to the same weaknesses as anecdotal examples, since they do not allow conclusions about "typical" verdicts.[57] Justice Hecht noted in his article that while statistical evidence is conflicting, jury awards may be falling rather than rising, and "aversion to jury trials based on unreasonable risk is an unjustified reaction to unfortunately exaggerated media coverage of the occasional big verdict."[58]

Many critics of the jury trial – and also supporters of tort reform – have alleged a "tort crisis." An interesting study performed in 2005 (published in the Baylor Law Review) polled 303 Texas district court judges on their opinions of jury behavior.[59] That study revealed that, as of 2005, 83% of the responding judges did not have a single trial in the prior 48 months in which they felt the verdict returned by the jury was "disproportionately high" in light of the evidence presented.[60] Likewise, 83.2% of the judges did not have a single trial in the prior 48 months in which they felt the exemplary damage award was "disproportionately high" given the evidence presented at trial.[61] That said, seven judges felt that in 76-100% of the jury trials they presided over the prior 48 months, the exemplary damage awards were "disproportionately high." The study's authors suggested that "even these low figures may tend to exaggerate the instance of runaway jury verdicts, because a remarkably low number of judges had felt so strongly about a jury's excessive award to actually grant relief to a defendant during the preceding 48 months…"[62] The authors of the study also found that the results suggest that "far from a tort 'crisis' the vast majority

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[56] *Id* at 1210.

[57] *Id.*

[58] Hecht, supra note 2, at 174.

[59] *See* Lyon, et0000000 al., supra note 46, at 426-27.

[60] *Id* at 427.

[61] *Id* at 428.

[62] *Id* at 429.

of Texas district judges have observed no significant evidence of a need for tort reform."[63]

Furthermore, the study conducted by Gross and Syverud found while that verdicts did increase in dollar amounts on the average between 1985-86 and 1990-91 in California, the majority of punitive damage awards were awarded in non-personal injury cases, which may come as surprise to many.[64] Providing support for the phenomenon that isolated cases can sway the opinion on jury behavior, they found that in the 1985-86 sample, 5% of the cases with the largest verdicts accounted for over 67% of all damages awarded, while that same percentage of the sample accounted for 78% of all damages awarded in 1990-91.[65]

The U.S. Department of Justice, Bureau of Justice Statistics reports that of an estimated 27,000 civil cases that reached trial in state courts of general jurisdiction in 2005, 68% were decided by juries.[66] In 54% of those cases, the jury found in favor of the plaintiff.[67] The median total award for a successful plaintiff in jury trials was $30,500.[68] The Bureau of Justice Statistics also found that in the 32% of cases that ended at a bench trial, plaintiffs actually won 68% of the time, and the median total award for a successful plaintiff was $24,000.[69]

The Bureau of Justice Statistics (the "BJS") has also published data compiled from trials in the 75 largest U.S. counties between 1992 and 2001[70]:

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[63] *Id* at 431.

[64] Gross, Syverud, supra note 24, at *34.

[65] *Id* at 36-37.

[66] *See* Bureau of Justice Statistics, U.S. Department of Justice, *Civil Justice Statistics, Summary Findings (State Courts)*, found at http://www.ojp.usdoj.gov/bjs/civil.htm.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] From U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Civil Trial Cases and Verdicts in Large Counties*, 2001 (April, 2004).

Table 11. Trends in jury trial awards in State courts in the Nation's 75 largest counties, 1992 - 2001

Case type	Median jury award amounts, adjusted for inflation, by year 1992	1996	2001	Percent change in median award amount 1992-2001
All trial cases	$65,000	$40,000	$37,000	-43.1%*
All tort cases	$64,000	$34,000	$28,000	-56.3%*
Selected case types				
Automobile	37,000	20,000	16,000	-56.8%*
Premises liability	74,000	64,000	61,000	-17.6
Product liability	140,000	373,000	543,000	287.9*
Medical malpractice	253,000	287,000	431,000	70.4*
All contract cases	$70,000	$90,000	$81,000	15.7%
Selected case types				
Fraud	88,000	90,000	87,000	-1.1%
Seller plaintiff	44,000	70,000	68,000	54.5
Buyer plaintiff	55,000	55,000	62,000	12.7
Employment	178,000	234,000	127,000	-28.7

Note: In 1992 there were two distinct data collection efforts for civil cases. The first project focused on all civil cases (trials, settlements, and dismissals) disposed in 1992, with no information on awards or punitive damages. In the second civil case project, BJS collected information on jury trials disposed in 1992, including both award and punitive damage data. Because award data were available for jury trials in 1992 and not for bench trials, table 11 includes only jury trial award data.
*1992-2001 difference is significant at the 95%-confidence level.

This data indicates that median jury awards have actually decreased in the largest counties over the years, by up to as much 40% over the years. Other data that has been published by the BJS over the years has suggested that plaintiffs have hovered – and therefore stayed somewhat consistent – with winning percentages at jury trials: 1992 – 51.8%, 1996 - 48.7% and 2001 - 52.6%. [71] It has also suggested that awards over $250,000 have decreased (percentage-wise) over those years, and that the median punitive damages awarded (when awarded) have hovered around $50,000.[72]

Another interesting experimental study by Neil Vidmar and Jeffrey Rice essentially found that awards may not be that different between arbitrators and juries.[73] Using a hypothetical medical malpractice case, they found that 21

[71] From U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Civil Trial Cases and Verdicts in Large Counties*, 2001 (April, 2004); U.S. Department of Justice, Bureau of Justice Statistics Special Report, *Civil Trial Cases and Verdicts in Large Counties*, 1992 (July, 1995) and U.S. Department of Justice, Bureau of Justice Statistics Bulletin, *Civil Trial Cases and Verdicts in Large Counties*, 1996 (September, 1999).

[72] *Id.*

[73] Neil Vidmar and Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 Iowa L. Rev. 883, 891 (1993).

lawyer/arbitrators and 89 lay jurors gave median and mean awards that were, to their minds, statistically indistinguishable.[74] The study did show, however, that the jurors had a higher variance in their individual awards.[75] Individual awards have only so much value, as the jury would be called upon to make a collective decision.

While the fears surrounding jury trials may be statistically unfounded, it goes without saying that many defendants and their attorneys "are fearful – more so than in bygone days – that a jury will hand them a result that is totally disproportionate to anything they rationally ought to be able to expect from an adjudication."[76] Justice Brister has stated that "one can hardly deny that juries sometimes return impossible verdicts, even in relatively simple cases."[77] He also noted, however, that no-one is infallible, including judges, arbitrators and other competitors to the jury.[78]

E. Potential Implications

(1) Less Trials = Less Trial Lawyers?

Logically, Justice Higginbotham noted that with fewer trials, fewer lawyers are being trained on the proper way to try a case. Indeed, he stated that because lawyers and judges are "increasingly unskilled and inexperienced in the mechanics of a trial…" this has contributed to discovery getting out of hand, due the line of relevance becoming increasingly blurred.[79] Justice Higginbotham also expressed his concern that this ultimately leads to less trials, stating that the "the new class of lawyers, called litigators, few with substantial trial experience" are fulfilling many expectations that that cases will settle rather than go to trial.[80]

Other commentators agree. Justice Hecht noted that The American College of Trial Lawyers suggests that the number of trials may be declining because fewer

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[74] *Id* at 893.

[75] *Id* at 897-98.

[76] Hecht, supra note 2, at 174 (citing Am. Coll. of Trial Lawyers, THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM at 18).

[77] Brister, supra note 2, at 196.

[78] *Id.*

[79] Higginbotham, supra note 36.

[80] Higginbotham, supra note 1, at 1417.

attorneys possess the skills and experience to handle a jury trial.[81] The ACTL has suggested that this leads to a "fear of trialing."[82] Justice Hecht opined that this may well be true, because "each helps cause the other:" meaning fewer trials results in less training and experience, which results in fewer trials.[83]

The concern lies mainly with what young attorneys may be learning, and the examples that we, as experienced lawyers, set for them. If the jury trial system is to remain intact, we should be concerned about future generations with only a handful of lawyers prepared to handle trials.

(2) The Horizon

> Whether trial by jury is root or vestige our vibrant culture, its inevitable role in our future justifies making every effort to improve it.
>
> - *Justice Scott Brister*[84]

It seems very unlikely that jury trials will ever disappear, based on their historical and philosophical relation to our country. Clearly, Justice Higginbotham and other commentators advocate changes to ensure that the trial does not "vanish."

The solution is, as discussed in this paper, not immediately clear. One solution may be curb costs by advocating shorter, faster trials. Justice Brister opines that jury trials may even flourish if they "produce better results, at a better price…"[85] There does seem to be a growing momentum toward shorter trials. As Justice Brister noted, the new American Bar Association jury standards urge that "[c]ourts should limit the length of jury trials insofar as justice allows."[86] There is no doubt

[81] Am. Coll. of Trial Lawyers, THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM (2004), p. 12.

[82] *Id.*

[83] Hecht, supra note 2, at 181.

[84] Brister, supra note 2, at 223.

[85] *Id* at 220.

[86] *Id.* (citing Stephan Landman et al., *The New ABA Jury Trial Standards: "Innovations" Go Mainstream?,* 88 Judicature 291, 297 (2005)).

that jurors would appreciate shorter trials, while the specter of cost may also be reduced with the promise of a shorter trial.

Many of the factors discussed here are difficult to change, particularly on the lawyer-level, as many would entail legislative or rule changes. Perhaps the most important thing we *can* control is training the younger and less experienced lawyers. Trial practice will continue to evolve with market forces, and the trial of today may look different than what many of us saw twenty or thirty years ago. We need to continue to train our younger and less experienced attorneys for the next generation of jury trials. Moreover, those skills so clearly carry over into ADR and other facets of our practice, we cannot simply let the next generation hear "war stories" without teaching them skills.

Furthermore, as trial lawyers we have an obligation to do everything within our power to correct misperceptions about trial and a jury's ability to – on the average – make reasonable decisions. While many will argue this varies from venue to venue, the simple fact is that a wholesale notion that juries are "out of control" appears to be entirely incorrect.