Vanishing Trials,

Vanishing Juries,

Vanishing Constitution[1]

Honorable William G. Young[2]

Okay. We're trying a short case. Four days long. It's the second day of trial. A juror is driving into Boston from the South Shore. She's on the Southeast Expressway, one of the city's arteries. The road's six-lanes are crowded. It's rush hour. The gas pump in the juror's car fails. Her car has enough momentum that she can steer it into the breakdown lane. Once there, she's stranded. She wraps a handkerchief on the antenna and stands outside the car. It being New England, no one stops. Hundreds of cars pass by. Eventually, the safety net kicks in. A Massachusetts State Trooper pulls his cruiser into the breakdown lane behind her. He puts on the yellow flashing warning lights. Gets out. She's already walking back to the cruiser, and she says, "I'm a juror in federal court. Take me to the courthouse." My God! The

1. As part of Suffolk University Law School's Donahue Lecture Series, Judge Young delivered a speech entitled "Vanishing Jury" at Suffolk University Law School on October 19, 2005. Each year, the Suffolk University Law Review hosts several distinguished lecturers as a tribute to the Honorable Frank J. Donahue, Justice of the Massachusetts Superior Court, and a former faculty member, trustee, and treasurer of Suffolk University. The lecture series addresses contemporary legal issues and exposes the Suffolk University community to outstanding authorities in various fields of law. *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, in this volume, memorializes the subject of Judge Young's remarks and expands upon observations he expressed previously in a number of his published opinions and public appearances. *See e.g.*, United States v. Kandirakis, 441 F. Supp. 2d 282 (D. Mass. 2006); Miara v. First Allmerica Fin. Life Ins. Co., 379 F. Supp. 2d 20, 69-70 (D. Mass. 2005); Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 79-82 (D. Mass. 2005); In Re Relafen Antitrust Litig., 231 F.R.D. 52, 89-93 (D. Mass. 2005); United States v. Green, 346 F. Supp. 2d 259, 269-70, 280 (D. Mass. 2004), *vacated in part on other grounds*, United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005), *vacated and remanded*, United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006); Radford Trust v. First Unum Life Ins. Co. of Am., 321 F. Supp. 2d 226 (D. Mass. 2004); United States v. Reid, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002); Berthoff v. United States, 140 F. Supp. 2d 50, 66-71 (D. Mass. 2001); Gonzalez v. United States, 135 F. Supp. 2d 112, 115 n.5 (D. Mass. 2001); Ciulla v. Rigny, 89 F. Supp. 2d 97, 100-02, 102 n.6 (D. Mass. 2000); Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998); In Re Acushnet & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 994, 1004 n.18, 1005-06 (D. Mass. 1989); Hon. William G. Young, *An Unspoken Consequence*, CIVIL ACTION (Nat'l Ctr. for State Courts, Williamsburg, Va.), Spring 2005, at 4, *available at* http://www.ncsconline.org/Projects_Initiatives/Images/CivilActionSpr05.pdf; Hon. William G. Young, Address to the Spring Meeting of the American College of Trial Lawyers (Mar. 6, 2004) (transcript on file with author).

2. United States District Judge, District of Massachusetts.

trooper puts the juror in his cruiser, turns on the blue flashers, activates the siren, and pushes his way through to the city. He radios ahead. At the federal district court, we learn the juror is on her way. She is a heroine. Finally, she arrives. We delayed starting the trial by fifteen minutes. Up the elevator. Slow elevators in the old courthouse. She runs along the hall. My clerk tries to calm her down, saying, "It's all right. It's all right." She says, "Well, I've got Triple A. I just have to call and have them tow the car."

My lobby is by the jury room. So I step out of the lobby, and the juror goes in to call. And, of course, you know what happens: Triple A won't tow the car because she's not there. She's at the courthouse.

At this point, I must confess. I take the phone. "Give me that phone! . . . Do you know who this is? . . . Chief Judge, federal court . . . I'll have an order to show cause . . . Get someone out there! . . . Tow that car!"[3]

I. INTRODUCTION

This story is true. The juror's devotion represented something of an epiphany for me. I write on her behalf and that of the hundreds of thousands of citizens like her.

The jury is, after all, one of two defining features of our legal system.[4] Nearly all civil jury trials and ninety percent of criminal jury trials on the planet take place in the United States.[5] Additionally, we stand alone among the nations of the world in entrusting first instance constitutional litigation to trial judges.[6] Most countries have constitutional courts.[7] These foreign systems feature either a supreme court or a special constitutional court, but none allows lower courts to interpret the Constitution. In America, constitutional challenges are as close as the nearest federal district court and, for that reason before all others, our Constitution lives as a vital expression of our rights and liberties.

These two aspects of our legal system are inextricably intertwined, and the tale of the empowered juror illustrates both the Framers' *vision* of the American jury and the *reality* of the institution today.

3. Adapted from Hon. William G. Young, Address to the Spring Meeting of the American College of Trial Lawyers (Mar. 6, 2004) (transcript on file with author).

4. Consider that the adversary system is *not* the defining aspect of the American legal system. English-speaking people throughout the world employ an adversary system as skilled and sophisticated as our own. *See e.g.*, RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 21 (1996); William T. Pizzi, *The American "Adversary System"?*, 100 W. VA. L. REV. 847, 847-48 (1998).

5. HON. WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 153 (2002).

6. As of 2004, 667 permanent authorized district court judgeships exist throughout the United States. Administrative Office of the Unites States Courts, Table: U.S. District Courts, Additional Authorized Judgeships 1, *available at* http://www.uscourts.gov/history/authorized_district.pdf (last visited Oct. 27, 2006).

7. *See* SUPREME COURT OF JAPAN, JUSTICE IN JAPAN (2002) (on file with author).

II. THE VISION: "THE PUREST EXAMPLE OF DEMOCRACY IN ACTION THAT I HAVE EVER EXPERIENCED."[8]

The most stunning and successful experiment in direct popular sovereignty in all history is the American jury. Properly constrained by its duty to follow the law, the requirement of jury unanimity, and evidentiary rules, the American jury has served the republic well for over two hundred years.[9] It is the New England town meeting writ large.[10] It is as American as rock 'n' roll.

The American jury "must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy."[11] No other legal institution sheds greater insight into the character of American justice. Indeed, as an instrument of justice, the civil jury is, quite simply, the best we have. "[T]he greatest value of the jury is its ability to decide cases correctly."[12] We place upon juries no less a task than discovering and declaring the truth in each case. In virtually every instance, these twelve men and women, good and true, rise to the task, finding the facts and applying the law as they, in their collective vision, see fit. In a very real sense, therefore, a jury verdict actually embodies our concept of "justice." Jurors bring their good sense and practical knowledge into our courts. Reciprocally, judicial standards and a respect for justice flow out to the community.[13] The acceptability and moral authority of the justice provided in our courts rest in large part on the presence of the jury. It is through this process, in which the jury applies rules formulated in light of common experience to the facts of each case, that we deliver the best justice our society knows how to provide.

The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government. According to one scholar, "the jury achieves symbolically what cannot be achieved practically—the presence of the entire populace at every trial."[14] Through the jury, we place the decisions of justice where they

8. Hon. Raymond J. Brassard, *Juries Help Keep Our Democracy Working*, BOSTON GLOBE, May 1, 2003, at A19 (quoting letter author received from juror).

9. Young, *supra note 1*.

10. *See, e.g.*, In Re Relafen Antitrust Litig., 231 F.R.D. 52, 89 (D. Mass. 2005).

11. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 499 (1966).

12. CHARLES W. JOINER, *From the Bench*, *in* THE JURY SYSTEM IN AMERICA 146 (Rita James Simon ed., 1975).

13. *See* Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 59 (1977).

14. PAULA DIPERNA, JURIES ON TRIAL: FACES OF AMERICAN JUSTICE 21 (1984). The jury's role has been recognized generally as "an organ of the people's original sovereignty." Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 474 (1997); *see also* HON. SAM SPARKS & GEORGE BUTTS, *Disappearing Juries and Jury Verdicts*, American Board of Trial Advocates (forthcoming Fall 2006) (on file with author).

rightly belong in a democratic society: in the hands of the governed.

The very structural bedrock of our constitutional form of government confirms the centrality of the jury's role. According to Article III, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[15] Further, the Constitution provides but a single limit on Congress's broad powers to establish and disestablish inferior courts, expand and trim their jurisdiction,[16] and move jurisdiction from one such court to another: the American jury. The Constitution states that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."[17] Additionally, the Constitution demands that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[18] As Professor Akhil Amar of Yale University reminds us, the words "shall" and "all" in Article III once "[m]eant what they said."[19]

The Founders' jury-and-venue rules have deep roots. While jury trials protected the defendant's rights, they also ensured the public's participation in the judiciary branch. In effect, the people themselves had a right to govern through the jury. As Professor Amar explains,

> [E]ach of the three branches of the federal government featured a bicameral balance. In the legislature, members of Congress's lower house—more numerous than senators, more localist, with shorter terms of office and more direct links to the electorate—would counterbalance the members of the upper house. In the executive branch, local citizen militias would counterbalance the central government's professional soldiers, and local citizen grand jurors would counterbalance the central government's professional prosecutors. So, too, within the judiciary, trial jurors would counterbalance trial judges.[20]

15. U.S. CONST. art. III, § 1.

16. For example, a recently proposed federal bill seeks to limit federal courts' jurisdiction over questions arising under the Defense of Marriage Act. Marriage Protection Act of 2005, H.R. 1100, 109th Cong. § 2 (2005). Knowledgeable observers predict these bills will go nowhere. *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 646 (2005). The reason may lie, however, not in a lack of congressional will or doubts as to these measures' constitutionality, but rather in the fact that if Congress strips the federal courts of jurisdiction in any of these areas, it will leave these fields entirely to the judiciaries of the fifty states—judiciaries that the Congress plays no institutional role in confirming or funding. *See, e.g.*, Murphey v. Lanier, 204 F.3d 911, 914 (9th Cir. 2000).

17. U.S. CONST. art. III, § 2, cl. 3.

18. U.S. CONST. amend. VII. Efforts to water down the Constitution's plain language continue to this day. *See* Development in the Law, *The Civil Jury*, 110 HARV. L. REV. 1408, 1493-1503 (1997) (discussing proposals to limit jury's role in complex civil cases); *see also* Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1686 (2005) (suggesting the United States has "outgrown" the Seventh Amendment's philosophic underpinning).

19. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 236 (2005).

20. *Id.* at 237.

So it was, Professor Amar concludes, that "a criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of trying cases, just as the Senate sitting without the House was not a duly constituted federal legislature capable of enacting statutes."[21]

These constitutional commands, moreover, necessarily require the existence of jury trial courts to give them effect. Thus, the American jury, that most vital expression of direct democracy extant in America today, functions as well as a practical and robust limitation on congressional power. It is as crucial a feature of the separation of powers among the Congress (Article I), the President (Article II), and the Judiciary (Article III) as is the Supreme Court.[22] Indeed, within her proper fact—finding sphere, an American juror is a constitutional officer—the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.

One could scarcely imagine that the Founders would have created a system of courts with appointed judges were it not for the assurance that the jury system would remain.[23] In a government "of the people," the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville put it so elegantly, "[t]he jury system . . . [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."[24] Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from which our freedom is woven. Yet while liberty flourishes through the rule of law, "there can be no universal respect for law unless all Americans feel" the law is theirs.[25] Through the jury, the citizenry partakes in the execution of the nation's laws and, in that way, each citizen can claim rightly that the law belongs partly to him or her.

21. *Id.* at 236.

22. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991) (calling the constitutional mandate of criminal trial by jury "a command no less mandatory and structural" than other Article III commands); Rachel E. Barkow, *Recharging the Jury: the Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34 (2003) (observing "[f]rom the outset, the criminal jury was designed to be part of our elaborate system of checks and balances, placing a check on the legislature and executive to ensure that no one received criminal punishment unless a group of ordinary citizens agreed"); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 377 (2005) (noting "[t]he jury can serve . . . as a structural protection within the constitutional scheme");; Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 689 (1995) (describing jury as the "single most important check on overweening government power" and "a vital institution for putting the People in charge of the administration of government").

23. *See* THE FEDERALIST NO. 83, at 495-96 (Hamilton) (Clinton Rossiter, ed., 1961).

24. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 283 (Phillips Bradley ed. 1980).

25. Irving R. Kaufman, *A Fair Jury: the Essence of Justice*, 51 JUDICATURE 88, 91 (1967) (emphasis in original).

Only because juries may decide most cases may we tolerate the reality that judges decide some. However highly we view the integrity and quality of our judges, the jury—the judges' colleague in the administration of justice—is the true source of the courts' glory and influence. The involvement of ordinary citizens in a majority of a court's tasks provides legitimacy to all court actions. When judges decide cases alone, they remain surrounded by the recollection of the jury. Judicial voices, although not directly those of the community, echo the values and the judgments judges learn from observing the working jury. In reality, our system is not one in which judges cede some of their sovereignty to the jury, but rather, it is a system in which judges borrow their fact-finding authority from the jury comprised of the people.

The result of this concert between a powerful jury system and a trial judiciary indisputably has been the growth of an independent trial judiciary that is the envy of the world. Indeed, the federal trial court in Massachusetts—the historic United States District Court for the District of Massachusetts—illustrates this truth perfectly.[26] In 1808, district Judge John Davis, in *United States v. The William*,[27] without referring to *Marbury v. Madison*,[28] asserted in dicta that a single United States district judge has the authority to hold an Act of Congress unconstitutional.[29] In the years following *The William*, courts came to accept that issues of constitutionality are appropriately first addressed at the trial level. Indeed, the holding in *The William*—now constitutional bedrock—"probably affected the history of the nation to a greater degree than any judicial opinion ever rendered in this Commonwealth."[30]

The trial court's power to decide constitutional issues crystallized further in the 1862 case *The Amy Warwick*.[31] In that case, District Judge Peleg Sprague declared confidently that President Lincoln could exercise war powers unilaterally to meet immediate exigencies without Congress's express consent.[32] When the Supreme Court affirmed this ruling in *The Prize Cases*,[33] it confirmed the President's power to make instantaneous war in the national interest and established a precedent of vital interest today.[34]

26. Now in its 217th year of continuous sitting, the District of Massachusetts shares with the Southern District of New York the distinction of being the oldest federal district court in the nation.

27. Case No. 16,700, 1808 U.S. Dist. LEXIS 5 (D. Mass. Sept. 1808).

28. 5 U.S. 137 (1803). The record of the decision in *The William* contains such a citation, but some commentators believe it was added later. HON. WILLIAM G. YOUNG, OF IRON MEN AND WOODEN SHIPS WHO WENT TO SEA WITH SAILS: FAMOUS ADMIRALTY CASES IN THE FEDERAL DISTRICT COURT IN MASSACHUSETTS, *in* LEGAL CHOWDER: LAWYERING AND JUDGING IN MASSACHUSETTS 186-87 (Hon. Rudolph Kass, ed. 2002) [hereinafter OF IRON MEN].

29. *The William*, 1808 U.S. Dist. LEXIS at *7; *see also* OF IRON MEN, *supra* note 28.

30. Charles Warren, *The Early History of the Supreme Court of the United States*, *in* Connection with Modern Attacks on the Judiciary, 8 MASS. L.Q. (No. 2) 1, 20 (1922).

31. 1 F. Cas. 799 (D. Mass. 1862), *aff'd*, 67 U.S. 635 (1862).

32. *Id*. at 802, 804.

33. 67 U.S. 635 (1862).

34. *See id*. at 218; *see also* John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 584 (2006); Hon. William

The congruence between the trial judiciary's independence and the jury's fact-finding role is palpable. In the wake of World War II, Americans turned to law as never before to solve society's ills. Their faith in law drove the great expansion of constitutional criminal procedure,[35] the courageous dismantling of our "separate but equal" doctrines,[36] and our largely-peaceful civil rights revolution. To make the notion of "equal justice under law" a reality for our citizens, the number, jurisdiction, and role of our federal district judges expanded. This expansion invited record numbers of Americans into our courts to participate directly in government through service on the nation's juries.

III. THE REALITY: "[T]HE AMERICAN JURY SYSTEM IS DYING OUT—MORE RAPIDLY ON THE CIVIL THAN ON THE CRIMINAL SIDE OF THE COURTS AND MORE RAPIDLY IN THE FEDERAL THAN IN THE STATE COURTS—BUT DYING NONETHELESS."[37]

In the new millennium, however, that impulse appears largely spent. In fact, the "civil jury trial has all but disappeared."[38] For some time now, circumstantial and anecdotal evidence has been mounting that jury trials are, with surprising rapidity, becoming a thing of the past. Institutionally, federal courts today seem unconcerned with jury trials.[39] Moreover, the federal judiciary demonstrates a willingness to "accept a diminished, less representative, and thus sharply less effective civil jury."[40] Echoing this reality, Judge Patricia Wald started her tribute to Professor Charles Alan Wright with this striking sentence: "[f]ederal jurisprudence is largely the

G. Young, Amy Warwick *Encounters The Quaker City: the District of Massachusetts and the President's War Powers*, 74 MASS. L. REV. 206, 216, 218-19 (1989); Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1829, 1829 n.81 (2006).

35. *See generally* CONSTITUTIONAL CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT (Jerold H. Israel et al. eds., West 1989). *But see* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1361-65 (2004).

36. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

37. *See* United States v. Reid, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002).

38. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142-43 (2002) (citing statistics of the Administrative Office of the United States Courts showing decline in number of jury trials).

39. *See* Edmund V. Ludwig, *The Changing Role of the Trial Judge*, 85 JUDICATURE 216, 216-17, 252-53 (2002) ("Trials, to an increasing extent, have become a societal luxury . . . . [Although, w]hen cases are handled in a package or group instead of one at a time, it is hard, if not impossible, for the lawyers or the judge to maintain time-honored concepts of due process and the adversary system")

40. *See* Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 137-52 (1977) ("decrying failure of Judicial Conference to restore twelve-person juries in civil cases"); Development in the Law, *The Civil Jury*, 110 HARV. L. REV. 1408, 1466-89 (1997) (same); *see also* AM. COLL. OF TRIAL LAWYERS, REPORT ON THE IMPORTANCE OF THE TWELVE-MEMBER CIVIL JURY IN THE FEDERAL COURTS (2001), *available at* http://www.actl.com/PDFs/Importance12Member-Jury.pdf (on file with author).

product of summary judgment . . . ."[41] Judge Wald is right—and note the compelling inference—that today we are more concerned intellectually with the procedural mechanism that blocks jury trials than we are with the trials themselves.

Levels of civil and criminal litigation in the federal courts continue to rise, and, on the civil side, the ratio of trials to settlements and pretrial adjudications remains roughly constant.[42] Yet, the simple fact is that with ever more work to do in the federal courts, jury trials today are marginalized in both significance and frequency. Hard evidence confirms this observation. From 1989 to 1999, the number of civil jury trials declined by twenty-six percent, and the number of criminal trials dropped by twenty-one percent. Between 1994 and 1999, overall jury trial days fell twelve percent.[43] Furthermore, funds budgeted for jurors in the federal system in fiscal year 2001 declined by nearly six percent as compared to fiscal year 2000, in order to adjust to the declining number of jury trial days.[44]

On the criminal side of our federal courts, manipulation of the U.S. Sentencing Guidelines has the consequence of imposing savage sentences upon those who request the jury trial guaranteed them under the U.S. Constitution. These sentences are five hundred percent longer than sentences received by those who plead guilty and cooperate with the government.[45] Small wonder that the rate of criminal jury trials in the federal courts is plummeting.[46]

41. Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998).

42. *See* Hon. William Rehnquist, *The 1999 Year-End Report on the Federal Judiciary*, THIRD BRANCH, Jan. 2000, at 1 (Admin. Office of U.S. Courts, D.C.), *available at* http://www.uscourts.gov/ttb/jan00ttb/jan2000.html; Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000).

43. *See* D. Williams, Decline in Petit Juror Days, Table 2 (Sept. 2, 1999) (unpublished Dist. Ct. Admin. Div. document, Admin. Office of the U.S. Courts, Washington, D.C.) (on file with author).

44. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE JUDICIARY: CONGRESSIONAL BUDGET SUMMARY FISCAL YEAR 2000 at 50 (2000).

45. *See* Berthoff v. United States, 140 F. Supp. 2d 50, 67-68 (D. Mass. 2001).

46. *See id*. at 69 n.34; *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 84-102 (2003) (arguing mandatory sentencing regime marginalizes American criminal jury unconstitutionally). Indeed, the most striking abandonment of jury fact finding is found in the area where one would last expect it—our criminal laws. As Professor William J. Stuntz of Harvard Law School observed:

> [federal criminal trials are] rare events. Trials are the system's Potemkin village, a piece of pretty scenery for display on Court TV while real cases, and lives, are disposed of more casually off-camera. That effect leads to another: a sharp decline in transparency. In a healthy system, the law is what it appears to be. The rules applied in court are the same as the rules on the street, and courts apply those rules often enough that citizens can tell what they are. In our system, substantive law is a tool for evading inconvenient procedures, and courtrooms are used for guilty pleas. [Federal c]riminal punishment is allocated behind closed doors, where the lawyers dicker over charges and sentences. Criminal codes do not describe the behavior that will actually land one in a prison cell, and sentencing rules do not accurately predict how long one will stay there. Instead, the law of crimes and sentences serves as a menu of threats for police and bargaining options for prosecutors. The real law—the law that governs individual cases—arises from discretionary decisions to order off

Remarkably, the press today likens "military detention" to a "parallel [track]" to indictment in federal court.[47] Indeed, the very act of establishing military tribunals reduces the American jury to merely a "parallel track."[48] This shift in our legal institutions is the most profound one I have seen in my lifetime, and, most remarkably, it has occurred without engaging any broad public interest whatsoever.

IV. WHAT HAPPENED?

To answer this question fully requires an historical and societal analysis that is, frankly, beyond my competence. I can, however, advance some general observations. It is appropriate to note that a jury is quintessentially a local institution. Indeed, the locale of federal trials is a matter of constitutional dimension.[49] This fact is hardly surprising since the era of the Founders

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the menu: police officers' arrests and lawyers' plea bargains. That law is invisible to outsiders.

William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 817-18 (2006) (footnotes omitted). Reflecting the triumph of plea bargaining over trial, federal courts today routinely make the most crucial decisions about a citizen's liberty on a "mishmash of data including blatantly self-serving hearsay largely served up by the [government]." United States v. Green, 346 F. Supp. 2d 259, 280 (D. Mass. 2004), *vacated in part on other grounds*, United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005), *vacated and remanded*, United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006). *See generally* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000). Indeed, the parties may freely bargain for an alternate reality that renders the rhetoric about "real offense sentencing" mere sophistry and bears so little relation to the facts as to mock our trial processes. U.S. SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 4-5 (2005). Make no mistake. Whatever the Attorney General may say, the bargaining over facts continues apace, even in the wake of *United States v. Booker*, 543 U.S. 220 (2005). *See, e.g.*, United States v. Bleidt, No. 05CR10144-WGY, Plea Hearing (Dec. 5, 2005) (aged and vulnerable nature of many victims omitted to secure plea); United States v. Fuller, No. 05CR10082-WGY-2, Plea and Sentencing Hearing (Nov. 16, 2005) (fraud loss amount understated to secure plea); United States v. Montilla, No. 04CR10160-WGY-3, Sentencing Hearing (Oct. 18, 2005) (drug quantity understated to secure plea); United States v. Arco, No. 04CR10372-WGY-2, Plea Hearing (Sept. 6, 2005) (same); Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice"*, 90 CORNELL L. REV. 237, 252-59 (2005). Moreover, the First Circuit embraces a regime in which such omissions are never brought to the attention of the judge. United States v. Yeje-Cabrera, 430 F.3d 1, 27-29 (1st Cir. 2005) (asserting "the costs of monitoring compliance with . . . a mandatory [factual] disclosure system are high, and many of the efficiencies created by plea bargaining would be lost . . . . [Fact bargaining, therefore,] transgresse[s] no norm, constitutional or legal"). Judicial efforts to enhance the fact-finding process are met with resistance from a government that considers such efforts to be an "unfair obligation on [it]." *See* United States v. Duverge, No. 05CR10265-WGY-1, Mot. to Recons. Re Proof of Enhancements [Doc. No. 37] (concerning trial and sentencing procedures). Of course, "[i]f fact bargaining is acceptable, then the entire moral and intellectual basis of the Sentencing Guidelines is rendered essentially meaningless. If 'facts' don't matter, neither does 'judging' contribute anything to a just sentence." *Berthoff*, 140 F. Supp. 2d at 66.

47. Thanassis Cambanis, *New Federal Security Act Remains Largely Unused*, BOSTON GLOBE, June 23, 2002, at B1.

48. *See* Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14.

49. *See* U.S. CONST. art. III, § 2, cl. 3. ("[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed"); U.S. CONST. amend. VI (stating "[i]n all criminal prosecutions, the accused shall enjoy the right to a

exalted local community institutions and distrusted centralized power. The fiery trial of our Civil War altered the balance of government in favor of national institutions. More recently, the expansion of individual civil rights frequently took place against the backdrop of hostile local juries, marking another turn of the national consensus away from purely local institutions.[50]

Capitalizing on this trend, it is fair to observe that for decades, business and insurance interests have disparaged our civil juries while the courts have failed to defend the single institution upon which their moral authority ultimately depends. As a result of their assault, the bipartisan majorities in the Congress have restricted access to the American jury severely.[51] The most sophisticated recent analysis has led one commentator to conclude that "a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests."[52] But let us put that argument aside.

Consider the judicial role in the decline of the American jury. Part of the picture is substantive. In *Patton v. United States*,[53] the Supreme Court held that the "framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused."[54] In so holding, the Court essentially read Article III's jury mandate out of the Constitution.[55] Today, our federal criminal justice system is all about plea bargaining. Trials—and, thus, juries—are largely extraneous. An accused individual who requests a trial may, as a functional matter (though we obstinately deny it), be punished severely for requesting what was once a constitutional right.[56] Moreover, offenders today are routinely and severely punished for crimes with which they have never been charged,[57] and, even more incredibly, for crimes for which a jury has acquitted them.[58]

Our pre-emption jurisprudence, long a matter for narrow construction, today is applied so broadly as to oust state courts (and juries) of their traditional areas

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law").

50. I am indebted for these insights to Professor Amar, who lectured at the Social Law Library in Boston on February 8, 2006.

51. *See* Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998) (explaining Congress, in enacting Private Securities Litigation Reform Act, impeded plaintiff's access to jury); Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1997) (explaining how Employer Retirement Income Security Act limits jury access).

52. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 226-27 (2000).

53. 281 U.S. 276 (1930), *abrogated on other grounds by* Williams v. Florida, 399 U.S. 78 (1970).

54. *Id.* at 297.

55. *See* Amar, *supra* note 22, at 1196-99 (arguing Supreme Court reached wrong result in *Patton*); Gardina, *supra* note 22, at 375-84 (same).

56. *See* Berthoff v. United States, 140 F. Supp. 2d 50, 68-69 (D. Mass. 2001).

57. *See* Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 176 (1995).

58. *See* Watts v. United States, 519 U.S. 148, 156 (1997).

of adjudication and replace them with less-protective federal standards,[59] or no remedy at all.[60] The Supreme Court has even preempted older, more comprehensive federal civil rights statutes with newer, more restrictive statutes.[61] The Court also allows federal agencies to trump state laws that interfere with their domain.[62]

The judicial system's preference for arbitration also threatens the American jury. The Supreme Court, in building on a decisional edifice that most

59. The sweeping nature of recent Supreme Court preemption jurisprudence has been the subject of considerable comment, much of it critical. *See* Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 561 (1997) (commenting "corporations have attempted to turn [federal statutes] from regulatory swords into *private shields*") (emphasis added); Calvin Massey, *"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) (commenting Supreme Court's preemption jurisprudence has reduced the *"presumption against preemption*" into merely a "*ceremonial federalism*") (emphasis added)*;* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 229 (2000) (noting that "conservative advocates of federalism and liberal advocates of government regulation have joined in arguing that *the current tests for preemption risk displacing too much state law*") (emphasis added); David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 412 (2003) (observing "[d]espite the best efforts of courts and commentators to bring order to the chaos, the law on federal preemption has *obstinately refused to set anchor in enduring principles*") (footnote omitted) (emphasis added); Judith Resnick, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 309 n.460 (2003) (noting majority of Supreme Court *willing to override state law in preemption cases*) (emphasis added); Donald P. Rothschild, *A Proposed "Tonic" with Florida Lime to Celebrate Our New Federalism: How to Deal with the "Headache" of Preemption*, 38 U. MIAMI L. REV. 829, 830 n.3 (1984) (noting "*present preemption doctrines interfere with a state's right to supplement federal regulation in order to afford greater protection for citizens residing within its borders"*) (emphasis added).

60. *See, e.g.*, Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 53 n.20 (D. Mass. 1997) (expressing frustration with ERISA preemption and stating court "had no choice but to pluck [the plaintiff's] case out of the state court in which she sought redress (and where relief to other litigants is available) and then, at the behest of [the defendant], to slam the courthouse doors in her face and leave her without any remedy").

61. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assn., 453 U.S. 1, 19-21 (1981). This doctrine is potent, indeed recognized as such, and soundly condemned. *See* Robert L. Glicksman, *Federal Preemption and Private Legal Remedies for Pollution*, 134 U. PA. L. REV. 121, 148 n.135 (1985) (describing Supreme Court's analysis in *Nat'l Sea Clammers Assn.* as "not fully persuasive"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1306 n.463 (1982) (criticizing *Nat'l Sea Clammers Assn*. decision for barring damages actions that promote efficiency in statutory tort scheme); Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 395-96 (1982) (observing "[c]arried to its logical limit, [*Nat'l Sea Clammers Assn.*] would lead to a rule that the creation of an explicit enforcement mechanism invariably extinguishes the private right of action under section 1983"); Eric H. Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 513 n.67 (1985) (arguing "*Nat'l Sea Clammers Assn.* represents yet another effort by the Court to the restrict scope of § 1983 liability in order to limit the number of actions which can be brought in federal court"); Myron D. Rumeld, Note, *Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 82 COLUM. L. REV. 1183, 1199 (1982) (criticizing *Nat'l Sea Clammers Assn.* decision as too restrictive); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.8 (4th ed. 1994) (noting *Nat'l Sea Clammers Assn.* has spawned disunity among lower court decisions).

62. Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, the administrator's judgments are subject to judicial review only to determine whether the administrator exceeded his statutory authority or acted arbitrarily. *See* United States v. Shimer, 367 U.S. 374, 381-82 (1961). According to the Supreme Court, "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law . . . ." Fidelity Fed. Sav. & Loan Ass'n. v. Cuesta, 458 U.S. 141, 154 (1982); *see also* New York v. Fed. Energy Regulatory Comm'n., 535 U.S. 1, 18 (2002).

commentators consider shaky if not outright wrong, has interpreted the Federal Arbitration Act to supplant juries with arbitrators whenever possible.[63] So, today, citizens cannot trade on the stock exchange,[64] have long distance telephone service,[65] or be employed in many necessary jobs and industries unless they surrender statutory[66] and procedural[67] rights (specifically, relinquishing the right to a jury decision and submitting instead to arbitration).

Part of the picture is procedural. The traditional demarcation between trial judges and juries is well known: trial judges teach the law and, within the legal framework, juries alone decide the facts.[68] Today, however, strong scholarly analyses suggest that trial judges overuse summary judgment to take triable cases away from juries.[69] The same research shows that appellate judges revise

63. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 11, 16 (1984) (holding Federal Arbitration Act applies in state courts and preempts conflicting state law). One critic observed that the Court's decision in *Southland Corp.*

> is widely held to be an illegitimate exercise in judicial lawmaking, flatly inconsistent with congressional intent in enacting the FAA. Commentators have lined up behind Justice O'Connor, whose dissent derided the [Chief Justice Burger's] majority opinion as an "exercise in judicial revisionism" that ignored the "unambiguous" legislative history of the FAA as a procedural statute applicable only in federal court.

Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 103 (2002).

64. *See* Fin. House, Inc. v. Otten, 369 F. Supp. 105 (E.D. Mich. 1973); 15 U.S.C. § 78o-3 et seq.

65. *See* Boomer v. AT&T Corp., 309 F.3d 404, 423 (7th Cir. 2002). *But see* Ting v. AT&T Corp., 319 F.3d 1126, 1148-49 (9th Cir. 2003).

66. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132-33 (2001). *But see* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175-76 (9th Cir. 2003) (holding arbitration agreement between employer and employee procedurally unconscionable under California law where employee had no meaningful opportunity to opt out and no power to negotiate its terms), *cert. denied*, 540 U.S. 1160 (2004), *aff'd on subsequent appeal*, 408 F.3d 592 (9th Cir. 2005).

67. *See* Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1210 (2002). Reilly explains that in addition to waiving their right to trial by judge or jury, individuals who agree to submit disputes to arbitration waive

> (1) their rights under Article I and Article III of the Constitution;(2) their rights under the 5th, 7th, and 14th Amendments; (3) their rights to demand that [federal statutory claims] be adjudicated in a federal district court under the Federal Rules of Civil Procedure and the Federal Rules of Evidence by a judge, appointed under Article III of the Constitution, who will provide instruction as to the applicable law to a jury chosen in a fair, objective, and non-discriminatory manner; and (4) their right to appeal an adverse verdict to a U.S. Court of Appeals or to petition for certiorari to the U.S. Supreme Court.

Id.

68. *See* MacNeill Engineering Co., Inc. v. Trisport, Ltd., 126 F. Supp. 2d 51, 62 n.4 (D. Mass. 2001); MediaCom Corp. v. Rates Tech., Inc., 4 F. Supp. 2d 17, 22-23 (D. Mass. 1998). *See generally* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000).

69. *See generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding our Way in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

jury verdicts freely.[70]

Moreover, for civil cases the federal judiciary abandoned the traditional twelve person jury in favor of six person juries.[71] In adopting this measure, the federal judiciary "faded from dynamism into stasis in [its] willingness to accept a diminished, less representative, and thus sharply less effective civil jury."[72] Ironically, many sociological studies show that the most effective small group decision-making occurs in groups of ten to fourteen people.[73]

Of paramount importance, however, is a matter neither of substance nor procedure, but *culture*. We federal trial judges appear no longer to revere the jury trial as the central and paramount goal of our American system of justice. We have so "deconstructed the role of the trial judge" that today far too many judges do not understand the concept.[74] Between 1980 and 2002, average on-

70. *See generally id.* (noting instances when appellate courts reverse jury determined awards completely).

71. FED. R .CIV. P. 48.

72. *See* Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998); *see also* Resnik, *supra* note40, at 137-52 (criticizing Judicial Conference's failure to restore twelve-person juries in federal civil trials); Development in the Law, *supra* note 40, at 1466-89 (1997) (same).

73. *See* MICHAEL J. SAKS, SMALL-GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS 26, 30 (1981).

74. *See* Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 627-28 (2004). Butler recalled that

> [I] was a law clerk for a trial judge who hated trials. I describe her as a trial judge for the irony, and because conducting trials was part of her job description. In reality, however, a "coerced settlement" or "enter-my-courtroom-and-I'll-make-you-pay" or "anti-trial" judge would be a more accurate moniker. This jurist was happiest in her business suit, at her desk in chambers, in conference with trial attorneys, cajoling and imploring and yelling. She was never thrilled to find herself draped in a robe, in a courtroom, sitting on high. The judge's distaste for trials was a bit about efficiency, but not much . . . . The judge's problem with trials was more spiritual: she didn't believe in them. Trials created "win/lose" scenarios, whereas the judge thought that "win/win" or "not win so much/not lose so much" were possible and better alternatives. With trials, outcomes are contingent on unpredictable jurors and "wooden" rules of evidence. And yes, trials cost money and, especially, time. In the judge's view, their costs far outweighed their benefits.

Id. (footnotes omitted). Professor Resnik of Yale University recalled attending a professional meeting where she heard a federal judge remark that "he regarded the eight percent trial rate as evidence of 'lawyers' failure.'" *See* Resnik, *supra* note 42, at 926 (discussing trial judges who assert settlements preferable to trials). In a recent lecture, the Hon. Nancy Gertner of the District of Massachusetts observed that

> [j]udges are rule followers. And if you are not afraid of being labeled liberal or activist, or arrogant, there are other pressures to keep you in line. In baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, "here's how you get rid of these cases!" "Here's how you get rid of these cases?" I could have sworn it was about justice, not digging for an excuse to close the case. When I was a baby judge we had more courses on case management, and mediation, than on opinion writing. Think about [it]. If the parties settle the case, you cannot be faulted. Indeed, the Administrative Office of the Courts, and even the press, measure us by how many cases we can resolve, not by the pithiness of our decisions. The more cases you settle, the better your statistics, and better yet, no one criticizes you.

Hon. Nancy Gertner, United States District Court for the District of Massachusetts, A Quasi-Independent

bench time among active district judges declined from 790 hours to 490 hours.[75] Indeed, some knowledgeable commentators observe that we "trial" judges appear no longer very interested in doing our jobs.[76]

The results of our own indifference toward jury trials are already sadly apparent. Because we no longer seem very interested in using our courtrooms, we are losing them.[77] Further, the institutional judiciary seems bent on dismantling the superb professional teams so essential to sustained trial operations.[78] Somehow, we seem to be forgetting that the very reason for our judicial existence is to afford jury trials to our people pursuant to the United States Constitution.[79] Ironically, our ability to control our dockets to avoid the quotidian details of daily jury trials and save ourselves instead for "really big" constitutional adjudication insures that such cases will come our way less frequently.[80]

The shift from trials as the central icon of the federal courts to a "settlement

Judiciary, Address Before the Massachusetts Bar Foundation (Jan. 26, 2006) (on file with author).

75. *See* THE AD HOC COMMITTEE ON THE FUTURE OF THE CIVIL TRIAL OF THE AMERICAN COLLEGE OF TRIAL LAWYERS, THE VANISHING TRIAL: THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM (2005), http://www.actl.com/AM/template.cfm?=section=A1/publications&template=cm/contentdisplay.cfm&contentfileid=57 (on file with author); REP. OF THE FED. JUDICIAL CTR., CHART, AVERAGE TRIAL AND NONTRIAL TIME REPORTED ON THE JS-10 BY JUDGES WHO WERE ACTIVE DISTRICT JUDGES ALL YEAR AND REPORTED TIME FOR AT LEAST 11 MONTHS (on file with author). Consider also "since its peak in 1985, the number of tort trials terminated in U.S. district courts has declined 79%." THOMAS H. COHEN, FEDERAL TORT TRIALS AND VERDICTS, 2002-03, BUREAU OF JUSTICE STATISTICS BULLETIN 2 (2005).

76. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1405-07 (2002) (expressing "concerns over trial numbers" and noting "decline in trials" and "attending decline in participation of lay citizens . . . in our justice system"); Leonard Post, *Federal Tort Trials Continue a Downward Spiral*, 27 NAT'L L.J. 2005, at P7 (quoting Professor Stephen Burbank as saying "federal judges now give more attention to case management and non-trial adjudication than they give to trials," and "it is quite clear that 'trial' judges ought to spend more time on that activity from which the[ir] name is taken"); AMERICAN COLL. OF TRIAL LAWYERS, THE "VANISHING TRIAL": THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM, at 4-5 (2004) (observing "[t]he number of civil trials in federal court over the 40 years from 1962-2002 has fallen, both as a percentage of filings and in absolute numbers . . . . These numbers are particularly startling in light of the enormous increase in litigation over the same 40 year period").

77. JUDICIAL CONFERENCE OF THE UNITED STATES, SECURITIES AND FACILITIES COMMITTEE, U.S. COURTS DESIGN GUIDE ch. 4, at 41 (4th ed. 1997) (propounding sharing of United States District courtrooms).

78. Today, federal judges speak openly of this being "the last generation of court reporters." *See* Miara v. First Allmerica Fin. Life Ins. Co., 379 F. Supp. 2d 20, 69 n.57 (D. Mass. 2005) (expressing concern over marginalization of official court reporters in federal court); *see also* Enwonwu v. Chertoff, 376 F. Supp. 2d 42, 82 n.34 (D. Mass. 2005) (critiquing effectiveness of federal court system's PACER database); Letter from Hon. William G. Young to Hon. John R. Tunheim (on file with author) (noting the cutting, without discussion, of court reporter transcript income by nearly one-third to establish, at public expense, a costly internal transcript payment mechanism duplicative of private systems already serving same need at no public cost); Hon. John Richardson, Remarks to the Annual Meeting of Chief United States District Judges (Apr. 26, 2005) (urging personnel reductions in docket clerks now that they have served to implement the federal courts' electronic docketing system—a system sometimes referred to as "pathetic PACER") (on file with author).

79. U.S. CONST. art. III,§ 2.

80. *See In Re Relafen Antitrust Litig.*, 231 F.R.D. 52, 90-91 (D. Mass. 2005); *see also* JOHN W. KEKER, *The Advent of the "Vanishing Trial": Why Trials Matter*, CHAMPION, Sept.-Oct. 2005, at 32-33, *available at* http://www.nacdl.org/public.nsf/championarticles/A0509p32 (arguing "[j]udges led the change to fewer trials and now they regret it").

culture" may be traced back to the tenure of Chief Justice Warren E. Burger.[81] This "settlement culture" reached its apogee between 1990 and 1995, when the Hon. William W. Schwarzer served as Director of the Federal Judicial Center. A distinguished judge and author, Judge Schwarzer is an outspoken advocate of managing cases toward settlement.[82]

Having set themselves adrift from their constitutional partner—the American Jury—federal trial judges now find themselves bereft of the central wellspring of their moral authority. Public disparagement and Congressional disdain follow in the wake of this trend.[83]

Partisan political attacks on an independent judiciary are as old, and as healthy, as the republic.[84] We learn from our history, and recoil from extremism. Each generation must strike anew the balance between Congress, the President, and the Judiciary.

Today, the most sophisticated attack comes replete with lengthy intellectual credentials.[85] The doctrine known as "popular constitutionalism" is a well-

81. *See* Chief Justice Highlights Needs and Achievements in Year-End Report, THIRD BRANCH, Feb. 1984, at 1, 10 (calling for increased use of arbitration); *see also* Martin J. Newhouse, *Some Reflections on ADR and the Changing Role of the Courts*, BOSTON BAR J., Mar.-Apr. 1995, at 15, 17 (noting "former Chief Justice Burger has consistently been a vocal advocate of ADR").

82. *See generally* William Schwarzer, *Managing Civil Litigation: The Trial Judges Role*, 61 JUDICATURE 400 (1978). *See also* D. Marie Provine, Settlement Strategies for Federal District Judges (Federal Judicial Center 1986) (criticizing academics and praising "[s]ettlement-oriented judges" who have a "fundamental commitment to enhancing settlement opportunities in federal courts"). *But see* Kenneth P. Holland, *The Twilight of Adversariness: Trends in Civil Justice*, *in* THE ANALYSIS OF JUDICIAL REFORM 17 (Philip Dubois, ed. 1982); David S. Clerk, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 150-52 (1981) (arguing "extent that the trend toward administration alters the traditional mode of adjudication, it may threaten the effectiveness of the courts"); Owen M. Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (asserting movement away from litigation-centered legal education to alternative dispute resolution "rest[s] on questionable premises"); Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442, 1443 (1983) (contending "bureaucratization" of judiciary "tends to corrode the individualistic processes that are the source of judicial legitimacy"); Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 488 (1980) (noting advocates of alternative dispute resolution have "ignored the aims and values of the adversary process they seek to alter"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1, 30-35 (1984); Dale Arthur Oesterle, *Dangers of Judge-Imposed Settlements*, LITIG., Spring 1983, at 29, 29; Dale Arthur Oesterle, *Trial Judges in Settlement Discussion: Mediators or Hagglers?*, 9 CORNELL L.F. 7 (1982) (on file with author); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 424 (1982) (asserting insufficient data exists to show "managerial judging reduces courts' and litigants' costs");; Carrie Menkel-Meadow, For and Against Settlement: For What Purpose the Mandatory Settlement Conference? 14 (June 26-30, 1985) (unpublished paper presented at the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, Charlottesville, Va.) (on file with author).

83. *See* Hon. Sandra Day O'Connor, Remarks to the American Academy of Appellate Lawyers (Nov. 7, 2005), *available at* http://www.appellateacademy.org/events/oconnor_remarks_110705.pdf; Gertner, *supra* note 74.

84. *See generally* MARK R. LEVIN, MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA (2005).

85. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

argued critique of judicial review that apparently contends that a non-party who disagrees with a court's constitutional ruling is free to ignore the ruling.[86]

The doctrine emboldens the Congress to act unilaterally. Congress, by adjusting the jurisdiction of the lower federal courts, effectively strips disfavored classes from full access to justice. As a consequence, it restricts, if not extinguishes, cherished individual rights and liberties.[87] This congressional maneuvering is known as "courts stripping."[88] Because the practice does not implicate the American jury directly (it would be unconstitutional had it done so), Congress accomplishes it largely below the public's radar and without public debate.

86. Larry Alexander and Lawrence B. Solum issued a devastating riposte of "popular constitutionalism" in the Harvard Law Review, in which they expose the concept as nothing more than rule by executive fiat. Larry Alexander & Lawrence Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005); *see also* Michael Stokes Paulson, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 291 (1994) (arguing "the power of juries has a stronger claim to legitimacy than does that of judges" because "the jury's interpretative supremacy is substantively conferred by the Constitution").

87. The Antiterrorism and Effective Death Penalty Act of 1996, Pub L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.), and its cousin, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of the U.S.C.), are "recent examples of 'courts stripping' legislation, a legislative technique that descends directly from bills proposed in the 1980s to strip federal courts of jurisdiction over abortion and busing." Gonzalez v. United States, 135 F. Supp. 2d 112, 115 n.5 (D. Mass. 2001); *see also* Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1552 (2001).

> As commentators have noted, "courts stripping" is, in effect, "rights stripping" because it removes, in a single stroke, the nuanced views of the [663] federal district judges from the rich common law tradition of evolutionary statutory interpretation and leaves the matter solely to twelve circuit courts of appeal and the Supreme Court. While society—acting through Congress—recoiled from thus rights stripping women and blacks, it had no such hesitancy concerning felons and aliens. Sadly, . . . resort[ing] to this technique [has] become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect.

See Gonzalez, 135 F. Supp. 2d at 115 n.5; Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129 n.1, 129-30 (1981) (arguing such measures unduly burden constitutional rights). *Contra* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 261-69 (1988) (discussing study on parity of state and federal courts). *Enwonwu v. Chertoff* provides a stark and stunning example of "courts stripping" that confirms Alexander and Solum's observation that, practically, "popular constitutionalism" is nothing more than a euphemism for rule largely by executive fiat. *See* 376 F. Supp. 2d 42 (D. Mass. 2005). Most recently, the Detainee Treatment Act of 2005 attempted—but failed—to strip the federal courts of the jurisdiction to review the situation of the Guantanamo detainees. *See* Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006). *See generally* Lauren C. Bell & Kevin M. Scott, *Policy Statements or Symbolic Politics? Explaining Congressional Court-Limiting Attempts*, 89 JUDICATURE 196 (2006).

88. As the former House Majority Leader Tom Delay recently remarked, "[w]e set up the courts. We can unset the courts." Sheryl Gay Stolberg, *Delay Asks House Panel to Review Judges*, N.Y. TIMES, Apr. 14, 2005, at A1.

V. RESTORING THE VISION: "TRIAL JUDGES OUGHT TO GO ON THE BENCH EVERY DAY AND TRY CASES."[89]

Today, there is something of a backlash within the judiciary against the further marginalization of the American jury. In the nation's highest Court, a majority led by Justices Stevens and Scalia is reemphasizing the constitutional requirement[90] that the jury play the central role in applying our criminal laws. In *Apprendi v. New Jersey*,[91] Justice Stevens, writing for a five-person majority, declared that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[92] In *Blakely v. Washington*,[93] Justice Scalia, writing for that same five-person majority, pointed out that

> [O]ur decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment . . . . Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbors," rather than a lone employee of the State.[94]

In *United States v. Booker*,[95] speaking through Justice Stevens, the Supreme Court applied the principle explained in *Blakely* to invalidate what in reality was mandatory sentencing without jury fact-finding under the United States Sentencing Guidelines.[96]

89. Hon. John Meagher, Senior Active Justice, Massachusetts Superior Court (1978).
90. U.S. CONST. art. III, § 2.
91. 530 U.S. 466 (2000).
92. *Id.* at 490.
93. 542 U.S. 296 (2004).
94. *Id.* at 313-14 (internal citations omitted).
95. 543 U.S. 220 (2005).
96. *Id.* at 233-37, 243-44. While the majority failed to hold together when considering the "remedy" for

The emerging constitutional principle is this: "if the law identifies a fact that warrants deprivation of a defendant's liberty or an increase in that deprivation, such fact must be proven to a jury beyond a reasonable doubt."[97] Nothing less gives effect to the structure of our government ordained by the Constitution.

The American Bar Association emphatically urges the restoration of the twelve person jury.

> In light of history and the empirical data these Principles seek to encourage a return to the twelve person jury in all non-petty criminal cases and in all civil cases wherever feasible. Studies have established that there are significant differences between the effectiveness of six and twelve member juries . . . . Larger juries deliberate longer, and have better recall of trial testimony . . . . Thus, they are more likely to produce accurate results . . . . The smaller the size of the jury, the less representative it becomes . . . . A jury of one's peers must be representative of the community lest it become a means of tyranny by the majority. Maintaining the representative nature of the jury is essential to preserving its fairness and legitimacy in the eyes of the public . . . . Twelve person juries are significantly more likely to facilitate representation of minority voices.[98]

Judges who recognize the inadequacies of the federal six-person civil jury routinely empanel twelve-person juries in every civil case.[99] Walter Smith, Chief Judge of the Western District of Texas, and my own colleague, Douglas Woodlock in the District of Massachusetts are prominent examples of such practitioners. Every federal judge can do likewise because no rule restricts this practice. We all should.

I trace the reawakening of our interest in traditional trial processes to a moving speech given by the Hon. Joseph F. Anderson, Jr., of the District of South Carolina at the 2003 annual meeting of the chief district court judges on April 26, 2003.[100] In his speech, Chief Judge Anderson called upon trial judges to devote themselves to the core function of the judicial office, namely the fair

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the constitutional violation, the "remedial" opinion announced no new constitutional doctrine and is widely viewed simply as a vehicle to pose the issue for the Congress. *See* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 201-04 (2005).

97. *See* United States v. Kandirakis, 441 F. Supp. 2d 282, 303 (D. Mass. 2006).

98. AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS: AMERICAN JURY PROJECT 18-19 (citations omitted), *available at* http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf (last visited Sept. 29, 2006); *see also* Stephan Landsman & Davis McCord, *12-Member Juries and Unanimous Verdicts*, 88 JUDICATURE 300, 304 (2005) (conceding, even as an opponent to twelve-member juries, that "smaller-jury verdicts are less predictable, that is, have a greater tendency to depart from the mean [whereas] 12-person juries . . . contain a greater variety of viewpoints; . . . are more likely to include traditionally under represented groups; and . . . give more citizens the opportunity to serve on juries")

99. Prominent examples of judges who employ this practice are Walter Smith, Chief Judge of the Western District of Texas, and my own colleague, Douglas Woodlock, in the District of Massachusetts.

100. The Hon. Joseph F. Anderson is Chief Judge of the District of South Carolina.

and impartial trial of cases.[101] Echoing a similar theme, Alex Sanders, one of America's foremost jurists, minces no words: "[t]rial judges should return to being trial judges, instead of docket managers. They should start treating jury trials as a vindication of the justice system rather than a failure of the justice system. They should revere and respect the jury trial as the centerpiece of American democracy."[102]

Imagine if we actually celebrated the essential function—the trial of a federal case—that sets the United States District Judge apart from other judicial officers.[103] What would such a system look like? Can we identify our "best" federal trial courts and learn from them? In one sense, we can. The Administrative Office of the United States Courts keeps records of the number of trials completed (on average) in each district court and ranks them accordingly. According to data from 2003 and 2004,[104] the top ten federal district courts (actually eleven in 2003, due to tie scores) are as follows:

101. *See* Hon. Joseph F. Anderson, Jr., *Jury Service as the "Palladium of Liberty"*, STATE (Columbia, S.C.), Aug. 8, 2004 (on file with author).

102. Alex Sanders, former Chief Justice, South Carolina Court of Appeals and former President of the College of Charleston, Ethics Beyond the Code: The Vanishing Jury Trial, Address to the American Trial Lawyers Association (Dec. 2, 2005) (on file with author); *see also* Ad Hoc Committee on the Future of the Civil Trial of the American College of Trial Lawyers, *The "Vanishing Trial": The College, The Profession, The Civil Justice System*, 226 F.R.D. 414 (2005); (stating "[t]he number of civil trials in federal court over the 40 years from 1962-2002 has fallen, both as a percentage of filings and in absolute numbers. . . . These numbers are particularly startling in light of the enormous increase in litigation over the same 40 year period."); Higginbotham, *supra* note 76, at 1405-07 (expressing "concerns over trial numbers" and noting "the decline in trials" and "the attending decline in participation of lay citizens . . . in our justice system"); Keker, *supra* note 80, at 32-33 (asserting "[j]udges led the charge to fewer trials and now they regret it."); Post, *supra* note 76, at 7 (quoting Professor Stephen Burbank as saying "federal judges now give more attention to case management and nontrial adjudication than they give to trials" and "it is quite clear that 'trial' judges ought to spend more time on that activity from which [their] name is taken"); Nathan Koppel, *Trial-less Lawyers: As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates' Courtroom Skills*, WALL ST. J., Dec. 1, 2005, at B1 (quoting Hon. David Hittner as saying, "we are losing sight of the basic right to trial by jury," and quoting Professor Marc Galanter as saying, "more and more judges begin to say, 'We are really losing the trial as a societal institution,' many of them may become less prone to push for settlements"); Hon. William G. Young, *An Open Letter to U.S. District Judges*, FED. LAWYER, July 2003, at 30.

103. According to one judge, the Southern District of Iowa embodies this ideal. Hon. Mark W. Bennett, et al., *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 306-08 (2005).

104. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL COURT MANAGEMENT STATISTICS (2003& 2004), *available at* http://www.uscourts.gov/fcmstat/index.html.

2003				
Rank by Trials Completed	*Court*	*Trials Completed in 2003*	*Rank by Total Filings*	*Total Filings in 2003*
1st	Montana	42	66th	387
2nd	Iowa (N.D.)	41	22nd	534
3rd	Tennessee (M.D.)	39	40th	482
4th	Pennsylvania (M.D.)	38	42nd	480
5th	Florida (N.D.)	37	39th	486
6th	Iowa (S.D.)	33	51st	436
6th	Kansas	33	57th	421
8th	Louisiana (M.D.)	32	56th	424
8th	Nebraska	32	40th	482
8th	Texas (S.D.)	32	5th	709
8th	Virginia (E.D.)	32	21st	550

2004				
Rank by Trials Completed	*Court*	*Trials Completed in 2004*	*Rank by Total Filings*	*Total Filings in 2004*
1st	Montana	44	65th	
2nd	Louisiana (M.D.)	42	59th	
3rd	Kansas	41	60th	
4th	Nebraska	37	12th	
5th	Florida (N.D.)	36	49th	
6th	Iowa (S.D.)	35	46th	472
7th	Tennessee (M.D.)	33	44th	477
8th	Indiana (S.D.)	32	10th	673
9th	Virginia (E.D.)	31	22nd	564
10th	Pennsylvania (M.D.)	30	20th	574

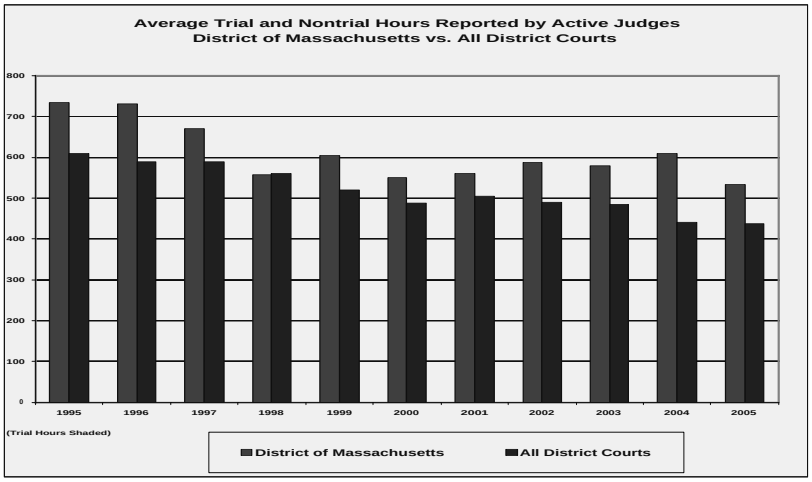
Are these courts really the finest of our federal district courts? Certainly it must be clear that, within limits, sustained trial operations are a matter of culture, not caseload, and all of us can, and should, learn from their success.[105]

Unfortunately, the Administrative Office has substantially diluted the value of its statistical record because its definition of "trial" is not limited to a jury or jury-waived proceeding that leads to a verdict or final decision. Instead, the

105. It is no accident that with one exception (the Southern District of Texas), the courts with the heaviest caseloads are missing from this list. These courts are simply swamped with cases and, having served three such courts as a visiting judge, I do not see how they can possibly mount sustained trial operations. Obviously, the Southern District of Texas has much to teach us all.

Administrative office defines "trial" simply as an evidentiary proceeding.[106] Thus, any evidentiary fragment of a case—such as a motion to suppress, *Daubert* hearing, or *Markman* hearing—counts as a separate "trial" for statistical purposes.[107] For example, a criminal case that involves a motion to suppress, a genuine jury trial, and an evidentiary sentencing hearing[108] counts as three "trials" even though it may involve only one defendant. This calculation method leads to a substantial overcount of trials held. Applied to the District of Massachusetts, it yields an inflation of at least thirty-three percent. It is unclear who the Administrative Office is trying to fool with this inaccurate nomenclature—perhaps the judiciary and the public.

Another method of identifying our finest trial courts is to look at the hours actually spent in court on trial. This approach would seem a fine measure of trial culture, professional expertise, and quality of justice. Using this approach, the District of Massachusetts appears to shine:



This chart, however, shows only that we beat the national average by a substantial margin.[109] Actually, the District of Massachusetts ranks twelfth

106. Monthly Report of Trials and Other Court Activity (Form JS-10) (explaining "for the purposes of [reporting proceedings] . . . a *trial* is defined as a contested proceeding before a court or jury in which *evidence is introduced*") (emphasis added in part, original emphasis omitted in part).

107. *But see* Phillips v. AWH Corp., 363 F.3d 1207, 1211-12 (Fed. Cir. 2004), *vacated*, 376 F.3d 1382 (Fed. Cir. 2004) (en banc), *on reh'g granted*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc) (suggesting, with emphasis on patent claims and specifications, evidentiary *Markman* hearings may be waning).

108. Evidentiary hearings are definitely on the rise in this post-*Booker* era in which judges have more freedom to engage in genuine fact-finding when determining sentences. One such proceeding in the District of Massachusetts, held to determine drug quantity, lasted eleven trial days. *See* United States v. Osorio-Norena, Crim. A. No. 00-10224-12 (D. Mass); United States v. Arango, Crim. A. No. 00-10224-13 (D. Mass).

109. REPORT OF THE CLERK, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS 2 (on file with author).

overall and (depending on the year) first or second among district courts with six or more active judges.[110]

Which state tops the rest, and why? How can we learn from their more efficient use of judicial time? These questions cannot be answered presently because the Committee on Judicial Resources has foreclosed the sharing of this data, even within the judiciary, on the ground it would be "misunderstood." Say what? The very data we ought celebrate and emulate lies beyond the reach of the courts that could benefit from it most.

Members of Congress could, of course, obtain this information in a heartbeat. But none ask. They recognize, if only viscerally, that as the jury trial function of America's great trial court atrophies, so too does the court's independence and its moral authority to secure the genuine separation of powers the Constitution envisions.

VI. REMEDYING THE VANISHING JURY TRIAL PROBLEM

I have argued that federal trial judges ought to spend their days doing what the Constitution demands and the public expects: trying federal cases (and to a jury, wherever the Constitution so commands). In view of the myriad non-trial tasks federal judges face, I must advance a few modest suggestions for accomplishing this goal.

First, we must want to try cases and recognize that because we are the only Article III judicial officers, trying cases is the highest and best use of our time. While we must hear certain pre-trial motions, hold management and settlement conferences, and sentence convicted offenders, we ought to devote most of our time to adjudication. To this end, we must manage our dockets with a view toward maximizing the time we spend on the bench trying cases.

How can we accomplish this goal?

In large districts, where jurors must travel significant distances to reach the courthouse, many judges sit long hours on trial to maximize juror utilization but sit only four days a week, reserving one day per week for other matters. In Massachusetts, following the lead of Judge Rya W. Zobel, most of us sit on trial from 9:00 A.M. until 1:00 P.M., and handle all other matters thereafter. This day is not a relaxed one. A study conducted in this session of the court confirms that judges who start promptly at 9:00 A.M. and reserve extended lawyer argument for the afternoon will be within forty transcript pages of a "full" trial day's evidence. The beauty of this approach is that it can be

110. "The highest average number of trial hours for active judges in a district court is 448.0 and the tenth highest is 295.5." The District of Massachusetts "is 12th among the 94 district courts, with an average of 281.2 trial hours per active district judge. These data are based on active judges who have served on the bench the full 12 months ending June 30, 2005." E-mail from Steven Schlesinger, Chief, Statistical Division, Administrative Office of the United States Courts, to Hon. William G. Young, United States District Court for the District of Massachusetts (Sept. 26, 2006) (on file with author).

continued day after day without let up or burnout, either by the jurors or the judge.

The key management tool I employ is the "running" trial list, which forsakes specific trial dates and, instead, requires parties in civil suits to stand in line while the cases before them either settle or go to trial. Coupled with the negotiation of reasonable time limits for the trial of civil cases (an innovation that improves the quality of justice significantly and which juries appreciate), the "running" trial list is manageable, fair to litigants, and provides a steady stream of trials that enable me to remain on trial indefinitely. Moreover, the "running" trial list allows me to control the rate of trials in order to render prudential and reflective opinions and orders without becoming overwhelmed.

Understandably, lawyers and litigants who do not receive a fixed trial date under my "running" trial list approach require a firm and fair continuance policy. I have developed one. At the initial case management conference, counsel choose a month in which to commence trial that is not more than thirteen months in the future. The case goes on the running trial list on the first Monday of the chosen month. I schedule all interim dates—such as those for motions for summary judgment and the final pre-trial conference—relative to the parties' chosen trial month. When I call the case for trial, I grant a continuance only if one of the parties' lawyers is on trial somewhere else or if an individual litigant has died between the final pre-trial conference and the trial (an event that necessitates the appointment of someone to represent the estate and serve as the lawyer's client). If I do not reach the trial during the parties' agreed upon month, a trial lawyer's vacation is also grounds for a continuance.

That's it.

The "running" trial list entire system is simple, credible, understandable, and, most importantly, it works. Further, I believe it is the most efficient and just system I can employ because it increases the "through-put" of cases, reasonably foreshortens the time between filing and trial, and maximizes the number of on–bench hours I spend presiding over trials. Further, once the rhythm of daily trials sets in, both judge and staff will find that the system runs more smoothly and effectively, and promotes more satisfaction than when the court "cranks up" for a trial as though its holding one were an oddity.

The District of Massachusetts' reputation for high on-bench trial hours for every active judge is born not only out of a culture that reveres the American jury trial as the epitome of humankind's passion for justice, but also from the judges' willingness to staff the courthouse for sustained trial operations.

Here in Massachusetts, we take full advantage of the flex-time work and compressed day-off schedules available under Judicial Conference Regulations. Effective management of a "running" trial list—and its settlements, pleas, sliding trial dates, and attendant management issues—requires the Courtroom Deputy Clerk and my daily attention. Because we also devote our traditional

work day to trials and hearings, we find that an early morning schedule works best. This way, I may issue the previous day's court notes, judgments, and orders in a timely manner.

In a similar vein, our Court Reporter Plan assigns a particular reporter to work with an individual judge every day the judge sits. We find that minimizing "pooling" maximizes professionalism because it enables the judge and Court Reporter to develop information management systems particular to the judges' courtroom that both sustain trial operations and benefit the court and judicial system as a whole.

For example, the Court Reporter in our session maintains a database of judicial charges I have given in every case over the past twenty-one years, updates the database to reflect changes in the law, and, using what I call "build-a-charge" software, prepares the initial draft charge in every case. The Court Reporter prepares the sentencing excerpts attached and transmitted electronically with every criminal judgment-and-commitment order. Additionally, the Court Reporter maintains a sentencing database that recalls instantly every like sentence I have imposed in the preceding twenty-one years. I consult this dataset before I take any plea or impose any sentence, and I make it fully available to the bar.[111] Last, the Court Reporter provides electronic copies of every disputed motion to the law clerks and the judge; this daily resource is invaluable because, today, cutting-edge issues arise most often upon motion.

Tying everything together is the court's Docket Clerk who, like the Courtroom Deputy Clerk and Court Reporter, is assigned to each active judicial session. An expert on civil and criminal practice and procedure, the mores of a particular court session, and the intricacies of electronic filing, the Docket Clerk is frequently the Court's public face to the bar because he answers the phone and provides advice when the Courtroom Deputy Clerk is pinned down in the courtroom with the judge. The Deputy Clerk's support is crucial to sustained trial operations because attorneys on deck or in the queue need to know the fate of cases that precede them.

In contrast to the staffing model the District of Massachusetts employs so successfully, many courts rely on a session staffing model that gives a district judge a case administrator who operates an electronic recording device—and nothing else. Although proponents of this model argue that administrative tasks demand bureaucratic efficiency and not judicial involvement, the model fosters mismanagement. More critically, it stifles professionalism and ignores the central reason Congress established the district courts: to give the American people access to justice and a jury of their peers.

111. *See* Donald E. Womack, Official Court Reporter, http://www.donwomack.com (last visited Oct. 27, 2006).

VII. CONCLUSION: "A POCKET OF RESISTANCE"[112]

The future, of course, is unpredictable. But this much I know is true: history will not deal kindly with that generation of jurists that allowed the American jury to fall into desuetude. Lincoln said it best: "[w]e cannot escape history . . . . [It] will light us down, in honor or dishonor, to the latest generation."[113]

How will history "light us"?

I know not how the institutional judiciary will respond. Here in Massachusetts, we will go on trying jury cases in accordance with our jurisdiction and the United States Constitution. And when you come into our court at that crucial moment when a courtroom deputy clerk faces an American jury and says, "Ladies and gentlemen of the jury, harken to your verdict as the court records it," you will know—with an incontrovertible shiver down your spine—that you are part of something truly great: the practical exercise of the purest form of democracy known to humankind.

AFTERWORD

Justice John Henry Meagher was the senior justice of the Massachusetts Superior Court when I first came to the bench. His simple admonition–"This is a trial court. Trial judges ought go on the bench every day and try cases"[114]—is the best advice I have received as a judge because it reminds me that whatever our other obligations, our major efforts ought to be directed to the trial of cases. This is actually a variant, adapted to the judicial role, of Lord Nelson's tactical instruction that "[n]o captain can do very wrong if he places his ship alongside that of an enemy."[115] It has, for twenty-nine years, been the lodestar of my own judicial practice and largely explains the emphases of this article.

I am told that Justice Meagher's grandfather was a color bearer in the 28th Massachusetts, which was an Irish regiment and part of the famed Irish Brigade. When I look at Don Troiani's "Faugh-a-Ballagd," I like to think it is Justice Meagher's grandfather carrying that great green flag with the gold harp up against Longstreet's men along the stone wall on Marye's Heights. This image reminds me that our constitutional precedents are but a great experiment in human arrangements and that each generation must learn anew the values the language of our written constitution serve. While Justice Meagher's

112. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1273 n.63 (2005) (calling District of Massachusetts a "pocket of resistance" to the settlement culture).

113. Abraham Lincoln, Annual Address to Congress (Dec. 1, 1862).

114. Hon. John Meagher, Senior Justice, Massachusetts Superior Court (1978).

115. C.S. FORESTER, LORD NELSON 324 (1929).

admonition is the first and most important of the principles that have governed my judicial practice, there are a number of others. I set them out in full below so that the reader may better evaluate the main text's observations and proposals.

Have the courage of your own error.

~ The Honorable Vincent Brogna, Justice, Massachusetts Superior Court (1978).

This statement is more profound than it sounds. Of course, we must do our best to get it right and, of course, we must not hesitate to correct our errors. We must, however, *decide*. Failure to act is oft-times as injurious to justice as judicial error.

You have to listen to the bastards, Austin. They just might have something.

~ The Honorable Francis H. Ford, United States District Judge, District of Massachusetts, to Austin W. Jones, Courtroom Deputy Clerk (1969).

Judges are society's teachers of law.

As Professor William Christianson has said, "[t]eaching is a very special kind of caring."[116] In everything we judges do and say, society expects us to epitomize and articulate its most basic values.

The working judge is not and never has been a philosopher. He has no coherent system, no problem solver for all seasons, to which he can straightaway refer the normative issues. Indeed, if he could envision such a system for himself, he would doubt that, as a judge, he was entitled to resort to it; he would think he must be less self-regarding.

~ The Honorable Benjamin Kaplan, Justice, Massachusetts Supreme Judicial Court, *writing in Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1849 (1983).

A trial judge bears the unique obligation of providing the fairest possible trial, hearing, and decision.

Appellate courts set minimum requirements. This is where we start. It is our special challenge to go much further and conduct the fairest proceedings humanly possible.

Go at your own pace and do not allow yourself to be rushed.

116. Quote spoken by Professor William Christianson in a conversation with the author.

> More injustice and error can be traced to misplaced attempts at speed and cutting corners than any other single cause.

As a District Judge, you possess within yourself a portion of the very sovereignty of the United States. Above all, do no harm.

> Two ideas coexist here. First, while our concept of justice requires us to declare the law faithfully and in keeping with the views of Congress and the appellate courts, frequently we must act interstitially without controlling law or precedent. In such cases, our duty to construe the Constitution and the laws is identical to that owed by a Justice of the Supreme Court. Second, in making judicial decisions, avoiding or minimizing harm is an appropriate guiding principle.

A new and valid idea is worth more than a regiment, and fewer men can furnish the former than command the latter.

> ~ HON. OLIVER WENDELL HOLMES, JR., JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 181 (Harry C. Shriver, ed.) (1936).

Judging is choice. Choice is power. Power is neither good nor evil except as it is allocated and used. Judging in a legal system is professional. Professionals, including judges, represent interests other than their own. One who accepts a professional role in a legal system accepts an obligation to confine the exercise of power within the limits of authority. For each professional role the limits of authority are defined by law. One cannot fully understand the conduct of a professional without fully understanding the defined professional role. The quality of judging in a legal system depends on commitment. It depends first on commitment to the aim of justice; second, it depends on commitment to professionalism. The declared beliefs of all professionals in the system, including advocates, counselors, and the academic critics, as well as the judges, affect the quality of judging in the system. Third, the quality of judging depends on commitment to method. Judicial choice at its best is reasoned choice candidly explained.

> ~ Hon. Robert E. Keeton

Judicial temperament is a lack of arrogance born of self-confidence, of a sense of self; it is an intuitive respect for all who appear before you; it is both measured restraint and measured intervention; it is fairness; it is equal treatment and open consideration of all participants in the process.

> ~ Hon. Rya W. Zobel, J., United States District Court, District of Massachusetts (May 11, 2005).