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# Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services

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# Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services

EMERY G. LEE III\*

*The high cost of legal services presents a significant access-to-justice problem. In this Article, I argue that this problem is actually two distinct problems—one affecting primarily low- and moderate-income persons, and one affecting primarily deep-pocketed corporate defendants. Because the problems are different, they are probably not amenable to a single solution. Most significantly, the Article applies Baumol’s “cost disease” to the rising cost of legal services, thus placing the debate over rising legal costs in a wider economic context.*

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The inability of the unskilled litigant to prepare pleadings, conduct adequate investigation, work with the rules of evidence, research decisional law, or persuasively argue the case in court render fair and expeditious disposition of most civil litigation virtually impossible.

—The Honorable Jack B. Weinstein<sup>1</sup>

## I. INTRODUCTION

Judge Jack Weinstein has been active on the issue of access to justice for low- and moderate-income persons for a very long time. As Suffolk County Attorney in the 1960s, for example, he led the movement to establish “Nassau County Legal Services, one of the first community legal services ‘storefronts’ in the nation.”<sup>2</sup> He managed to secure funding for the organization from the Kennedy Administration,<sup>3</sup> but the

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\* Senior Researcher, Federal Judicial Center. Institutional affiliation provided for identification purposes only. The views expressed in this Article represent those of the author and not those of the Federal Judicial Center or any other entity within the judicial branch.

1. JEFFREY B. MORRIS, LEADERSHIP ON THE FEDERAL BENCH: THE CRAFT AND ACTIVISM OF JACK WEINSTEIN 196 (2011) (quoting Hon. Jack B. Weinstein, All People are Entitled to the Assistance of Lawyers in Civil as Well as Criminal Matters, Speech at the Association of the Bar of the City of New York 3 (Mar. 30, 1976)).

2. *Id.* at 52 (citation omitted).

3. *Id.*

effort faced stiff opposition. Some opponents of the plan even attempted to have Weinstein disbarred.<sup>4</sup> But he prevailed and kept his license, of course. As judge and then chief judge of the Eastern District of New York in the 1980s, he often spoke and published on this issue.<sup>5</sup> In addition, he set in motion a process to establish a panel of lawyers to represent formerly self-represented persons on a voluntary basis, secured funds to support the Eastern District Pro Bono Panel and the Eastern District Civil Litigation Fund, and provided training for lawyers interested in representing low-income litigants.<sup>6</sup> Much more could be said about his efforts on this front in the years since.

This Article will discuss access to justice as a function of the cost of civil litigation. Framing the issue in this way, justice as a function of cost, it is worth noting that justice and cost are two of the three goals referenced in Rule 1 of the Federal Rules of Civil Procedure, which states: “These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>7</sup> The Federal Rules of Civil Procedure, in positing these three goals to guide the construal and administration of the rules, however, do not provide any framework or method for balancing the goals in the event that they conflict.<sup>8</sup> And it is very likely that the goals clash in a significant percentage of cases. Once one concedes—as the Federal Rules of Civil Procedure do—that justice both costs money and takes time, but also that time is money<sup>9</sup> and that delay detracts from justice, then the trade-offs among money, time, and justice become difficult to resolve. Indeed, it is likely that one can strive to achieve two of the goals but rarely all three at the same time. Thus, it is easy to imagine a rules regime in which there are speedy and inexpensive determinations of matters that are far from just. Or a rules regime in which there are speedy and just outcomes that are quite expensive. It is the third combination of the goals that is harder to imagine: inexpensive and just, but not speedy.

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4. *Id.* at 53.

5. *See id.* at 195.

6. *See id.* at 197.

7. FED. R. CIV. P. 1.

8. *Cf., e.g.*, Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 327–34, 340 (2008) (calling for substantive theory to guide rulemakers in designing effective rules).

9. In litigation, time is indeed money. *See* EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS, REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5, 7 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf) (finding that, all else equal, a 1% increase in disposition time was associated with a .32% increase in costs for plaintiffs and a .26% increase in costs for defendants).

To the empirical researcher, the three goals of Rule 1 also present a measurement problem. One of the goals is ridiculously easy to measure; “speedy” must be closely related to disposition time, so it can be measured simply as time from filing to final resolution. Time to disposition is an important metric that the courts often use to gauge performance.<sup>10</sup> Another of the goals, justice, is almost impossible to measure in an objective fashion, especially across a broad range of cases.<sup>11</sup> That leaves a third goal that *seems* possible to measure—the cost of litigation. As anyone who has ever tried to study the cost of litigation will tell you, though, it is a very difficult thing to do well.<sup>12</sup> For one thing, the ultimate information is in the hands of the parties to the litigation, and asking attorneys, although relatively common, has its limits. And the parties themselves may not actually know the total cost of the litigation in which they are involved.<sup>13</sup> There is also disagreement among researchers whether to use dollars—or estimated dollars—or some other measure of cost, such as attorney hours.<sup>14</sup>

In 2009, my colleague Tom Willging and I released a report on attorney estimates of litigation costs in a large, nationwide sample of attorneys of record in recently closed cases in federal district court.<sup>15</sup> We found, consistent with a long line of previous studies, that most cases in federal court have relatively modest costs.<sup>16</sup> Plaintiffs’ attorneys

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10. For example, the federal courts issue an annual Federal Court Management Statistics report that includes, among other measures, median disposition times. For the most recent report, as of this writing, see *Federal Court Management Statistics, District Courts*, U.S. Cts. (Mar. 2014), <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics/district-courts-march-2014.aspx>.

11. It is worth noting, however, that legal practitioners tend to rate the civil justice produced by the federal courts quite high. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 68–70, figs.42 & 44 (2009) [hereinafter LEE & WILLGING, CIVIL RULES SURVEY], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/FJC%20National%20Case-Based%20Civil%20Rules%20Survey.pdf>.

12. See, e.g., Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 NAT’L CTR. STATE CTS. 1, 1 (Jan. 2013), [http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH\\_online2.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx) (“Complaints about litigation costs have likely existed for as long as the legal profession, but those costs are extremely difficult to measure.”).

13. One of the surprising things revealed in the lead-up to the 2010 Civil Litigation Conference (“2010 Duke Conference”), held at the Duke Law School, was that few large corporations had consistent and reliable information on their own litigation costs. See *2010 Civil Litigation Conference*, U.S. Cts., <http://www.uscourts.gov/RulesAndPolicies/rules/archives/projects-rules-committees/2010-civil-litigation-conference.aspx> (last visited Nov. 10, 2014).

14. See *id.* (criticizing use of attorney estimates of costs and proposing an alternative method of cost estimation based on the amount of time expended by attorneys).

15. See generally LEE & WILLGING, CIVIL RULES SURVEY, *supra* note 11.

16. See *id.* at 35–37, tbls.4 & 5.

reported median costs of \$15,000, and defendants' attorneys reported median costs of \$20,000.<sup>17</sup> Presenting these findings, Willging and I were consistently told that we had to be wrong, that litigation costs are much, much higher than that.<sup>18</sup> Then, though, the *New York Times* cited our report for a different proposition: that the costs of litigation that we had reported were out-of-reach for most low- and moderate-income Americans:

Pursuing a civil action in federal court costs an average of \$15,000, the Federal Judicial Center reported last year. Cases involving scientific evidence, like medical malpractice claims, often cost more than \$100,000. Some people cannot afford to pursue claims; others are overwhelmed by corporate defendants with deeper pockets.<sup>19</sup>

The same reported costs could be both too high and too low. Costs that would seem negligible to a corporate general counsel can present serious access to justice issues to low- and moderate-income Americans. Of course, this is a fact that we have known for a long time. As Bryant Garth pointed out in 1998:

The recent studies of civil discovery by the RAND Institute for Civil Justice and the Federal Judicial Center ("FJC") establish beyond any reasonable doubt that we have two very distinct worlds of civil discovery. These worlds involve different kinds of cases, financial stakes, contentiousness, complexity and—although not the subject of these studies—probably even lawyers. The ordinary cases, which represent the overwhelming number, pass through the courts relatively cheaply with few discovery problems. The high-stakes, high-conflict cases, in contrast, raise many more problems . . . . It is therefore essential to understand the distinction and to try to explain why it operates.<sup>20</sup>

These "two very distinct worlds of civil discovery" actually present two

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17. *Id.*

18. The empirical legal researcher must always remember the advice of Maurice Rosenberg, one of the pioneers of the field:

No matter how carefully the facts or data are gathered to respond to the pivotal questions, there will be great trouble in penetrating made-up minds. Commonly, lawyers, lawmakers, and judges treat systematic data with casual disdain, preferring individualized experience and intuition that they can encapsulate in a war story. Their reaction to systematically gathered data is very often either "It's obvious!" or "It's wrong!" depending on whether it squares with their own viewpoint or experience.

Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989). At Duke, I was often told, "It's wrong!"

19. Binyamin Applebaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), <http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all>.

20. Bryant G. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 B.C. L. REV. 597, 597 (1998) (footnotes omitted).

separate problems. For the sake of simplicity, I will refer to these problems as the Little Guy's problem and the Big Guy's problem. Part II of this Article describes these problems in some detail. In sum, the Little Guy's problem is the increasing cost of civil litigation; he is being priced out of the market for legal services. The Big Guy's problem is too much information and, thus, too much discovery. Part III of the Article links the ongoing debates about litigation costs and discovery to a broader context. It is interesting that at the same time preparations for the 2010 Duke Conference were underway, the United States was embroiled in a much more visible controversy over costs—the cost of health care. But almost no one made the connection. I do so here, using an economic theory—Baumol's cost disease<sup>21</sup>—rarely referenced in legal literature. The cost disease, I argue, is at the heart of the Little Guy's problem, but much less central to the Big Guy's problem. This observation suggests that the solutions to the Little Guy's and Big Guy's problems must be different. The conclusion offers a few brief comments on potential solutions to the Little Guy's problem.

## II. PROBLEMS

Access to civil justice is largely a problem because of the rising cost of legal services. But what many fail to recognize, or perhaps refuse to recognize, is that there are actually two, very different sets of problems related to the cost of litigation.<sup>22</sup>

### A. *The Little Guy*

The Little Guy's problem is simply that he cannot afford to purchase legal services.<sup>23</sup> A potential plaintiff with a large enough and strong enough claim may be able to find an attorney to handle the case on a contingency fee.<sup>24</sup> Just how strong a claim must be, and how large the potential damages must be, is an interesting (empirical) question.

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21. See *infra* notes 64–76 and accompanying text.

22. Cf. Garth, *supra* note 20, at 597 (“One of the challenges for researchers is to get beyond the information that tends to be produced by the elite lawyers themselves or by lawyers and journalists parroting those lawyers.”).

23. By legal services, of course, I primarily mean an attorney's fee: “Our data indicate that in the ‘typical’ case, lawyers’ fees constitute virtually the entire out-of-pocket costs (regardless of whether the disputant is an individual or an organization).” Herbert M. Kritzer et al., *Understanding the Costs of Litigation: The Case of the Hourly-Fee Lawyer*, 1984 AM. B. FOUND. RES. J. 559, 561 (1985).

24. For brevity's sake, the remainder of this discussion will omit statutory fee awards. “Almost 200 civil statutes authorize fee awards to prevailing plaintiffs and, in some cases, prevailing defendants.” ALAN HIRSH & DIANE SHEEHY, *AWARDING ATTORNEYS’ FEES AND MANAGING FEE LITIGATION* 1 (2d ed. 2005), available at <https://bulk.resource.org/courts.gov/fjc/attfees2.pdf>.

The work of Professor Herbert M. Kritzer on contingency fee legal practice is illuminating.<sup>25</sup> Kritzer surveyed Wisconsin plaintiffs' attorneys who accept clients on a contingency fee basis to study, in part, how they screen potential clients.<sup>26</sup> Interestingly, he found that the most common reason (47%) these attorneys provided for rejecting a potential client was lack of liability on the part of the potential defendant(s).<sup>27</sup> Respondents identified "inadequate damages" as only the second most common reason for rejecting a potential client, at 19%.<sup>28</sup> This is particularly surprising when taking into account the small damage awards that the plaintiffs' lawyers in this study were willing to pursue. Kritzer found a median case valuation for cases filed but not going to trial of \$40,000 at the high end and \$15,000 at the low end.<sup>29</sup> For all cases, weighted by disposition, the median value of cases in the study was \$30,000.<sup>30</sup> Given that the typical contingency fee is 33%,<sup>31</sup> plaintiffs' lawyers were willing to file many cases promising a fee of \$5,000 (one-third of \$15,000) and valued the "typical" case at a \$10,000 fee (one-third of \$30,000). The value of cases varied by type, with medical malpractice (median \$500,000 at the high end) and products liability (median \$175,000 at the high end) offering higher potential damage awards.<sup>32</sup> In general, Kritzer's respondents tended to take claims of relatively modest size—i.e., Little Guy problems. But even then, many of the Little Guys contacting these plaintiffs' attorneys were turned away, with an overall acceptance rate for all contacts of 49%.<sup>33</sup>

Kritzer's monograph suggests that about half of all potential clients who contact a contingency fee attorney are turned away. The resulting decision is either to proceed pro se or to forego the claim. The *New York Times* editorialized about this "justice gap" in 2011: "Most low-income Americans cannot afford a lawyer to defend their legal interests, no matter how urgent the issue. Unless they are in a criminal case, most have no access to help from government-financed lawyers either."<sup>34</sup> The result is that low-income Americans often turn to self-representation:

In civil proceedings like divorces, child support cases, home foreclo-

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25. See generally HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

26. See *id.* at 26–27.

27. *Id.* at 85 tbl.3.9(a).

28. *Id.*

29. *Id.* at 38 tbl.2.3.

30. *Id.*

31. See *id.* at 39 tbl.2.4 (showing 60% of fee arrangements as "Flat one-third").

32. *Id.* at 38 tbl.2.3.

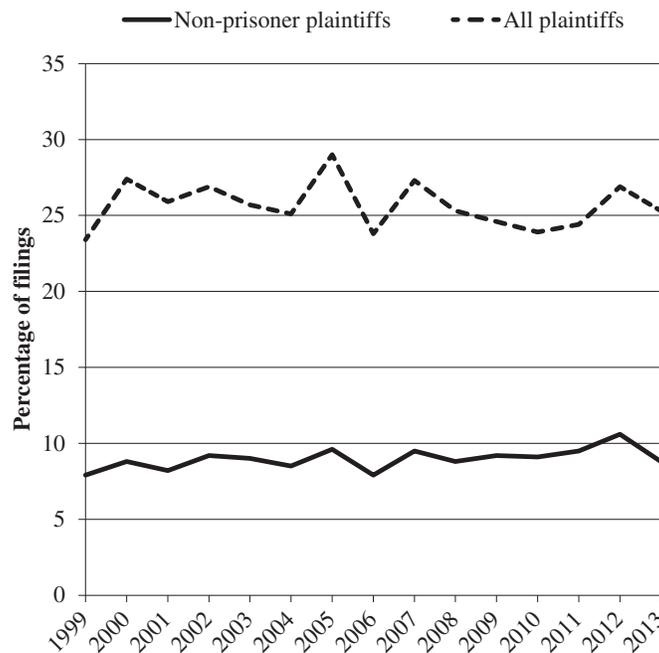
33. *Id.* at 72 tbl.3.6.

34. Editorial, *Addressing the Justice Gap*, N.Y. TIMES (Aug. 23, 2011), <http://www.nytimes.com/2011/08/24/opinion/addressing-the-justice-gap.html>.

asures, bankruptcies and landlord-tenant disputes, the number of people representing themselves in court has soared since the economy soured. Experts estimate that four-fifths of low-income people have no access to a lawyer when they need one. Research shows that litigants representing themselves often fare less well than those with lawyers. This “justice gap” falls heavily on the poor, particularly in overburdened state courts.<sup>35</sup>

There is indeed some evidence that the state courts have experienced an increase in pro se litigants.<sup>36</sup> However, pro se filings have not significantly increased in the federal courts in recent years, at least as a percentage of the civil docket.

FIGURE 1: PRO SE PLAINTIFFS AS A PERCENTAGE OF CIVIL FILINGS, 1999–2013<sup>37</sup>



35. *Id.*

36. See, e.g., Terry Carter, *Judges Say Litigants Are Increasingly Going Pro Se—at Their Own Peril*, A.B.A. J. (July 12, 2010), [http://www.abajournal.com/news/article/judges\\_say\\_litigants\\_increasingly\\_going\\_pro\\_se—at\\_their\\_own\\_](http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se—at_their_own_) (reporting results of an ABA survey of state trial judges). Some of this increase may be because of the economic downturn in 2008. See ABA COAL. FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 10 tbl.2 (2010), available at [http://www.abajournal.com/files/Coalition\\_for\\_Justice\\_Report\\_on\\_Survey.pdf](http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf) (showing that 60% of state trial judges reported that the number of unrepresented parties had increased because of the economic downturn).

37. Figure 1 was generated using the federal courts’ civil Integrated Data Base (“IDB”), hosted by the Federal Judicial Center. See ICPSR, <http://www.icpsr.umich.edu>. The percentage of

According to the IDB, non-prisoner pro se plaintiffs accounted for 8% of civil filings in 1999 and 9% in 2013; during the entire period, it peaks at 11% in 2012. In terms of absolute numbers, non-prisoner pro se filings increased by 65% between 1999 and 2013. In 1999, there were 12,415 non-prisoner filings involving a pro se plaintiff; in 2013, there were 20,576. The non-pro se docket increased 50%. So there has been an increase, but nothing that can be described as an explosion in pro se litigation in the federal courts. Even without an explosion, though, 20,576 cases is a lot.

Non-prisoner pro se litigants appear in around 10% of federal cases. Not surprisingly, slightly more than half of the pro se filings were in the civil rights category (e.g., Section 1983 lawsuits,<sup>38</sup> *Bivens* actions,<sup>39</sup> employment discrimination,<sup>40</sup> and Americans with Disabilities Act cases<sup>41</sup>). Civil rights cases are, of course, a large part of the federal docket. This category represents 14% of represented filings, and is thus the third-largest category amongst represented filings. But the “typical” pro se filer in federal court is a civil-rights plaintiff. Interestingly, torts cases make up the plurality of the represented cases, at 31%, which may reflect the growing multidistrict litigation products liability docket.<sup>42</sup> Contracts cases make up another 17% of the represented cases, compared to just 5% for the pro se filings. Together torts and contracts make

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non-prisoner pro se plaintiffs was calculated by summing the observed values for pro se plaintiff only cases and pro se plaintiff and defendant cases but excluding the small number of pro se defendant-only cases. For the non-prisoner numbers, I excluded the nature of suit codes generally associated with prisoner litigation (510–555), but it is likely that a very small number of prisoner cases were miscoded (440) and thus included in the non-prisoner series. I included the line for all pro se plaintiffs to provide a sense for the volume of prisoner litigation in the federal courts. Most years, fifteen percent of all federal civil filings are filed by incarcerated persons. From 1999 through 2013, there were more than 800,000 prisoner cases filed in federal district court. These cases account for more than seventy percent of all pro se filings. See FED. JUDICIAL CTR., FEDERAL COURT CASES: INTEGRATED DATA BASE, ICPSR STUDY NOS. 34881 (2014), 33622 (2013), 30401 (2012), 4382 (2012), 25002 (2012), 22300 (2011), 4685 (2011), 4382 (2013), 4348 (2011), 4026 (2012), 4059 (2012), 3415 (2012), 8429 (2012). All FJC data sets are available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/series/00072/studies?archive=NACJD&sortBy=7>.

38. See 42 U.S.C. § 1983 (2012) (providing the ability to bring a civil action against a state actor for “deprivation of any rights, privileges, or immunities”).

39. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (holding that a cause of action exists for a violation of one’s Fourth Amendment rights).

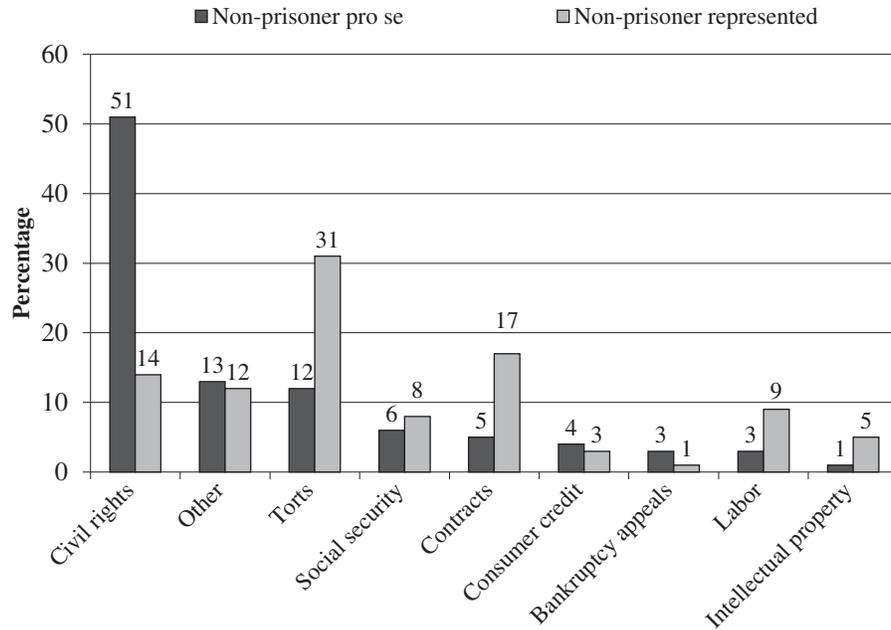
40. See 42 U.S.C. § 2000e-2 (detailing “unlawful employment practices”).

41. See 42 U.S.C. § 12101(b) (2012) (declaring that the purpose of the act is “to ensure that the Federal Government plays a central role” in policing “discrimination against individuals with disabilities”).

42. For a detailed examination of the growth of multidistrict litigation, see Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775 (2010).

up about half (48%) of the represented filings but only 17% of the pro se filings.

FIGURE 2: NON-PRISONER PRO SE FILINGS COMPARED TO NON-PRISONER REPRESENTED FILINGS, BY NATURE OF SUIT CATEGORY, 1999–2013<sup>43</sup>



I included a few additional categories in Figure 2 after examining an earlier iteration of the “Other” category—Social Security appeals, bankruptcy appeals, intellectual property, and Labor (mostly Fair Labor Standards Act (“FLSA”) and Employment Retirement Income Security Act (“ERISA”) cases). Not surprisingly, intellectual property cases account for a small percentage of the pro se filings, and the presence of a specialized FLSA bar can be inferred from the 9% of the represented federal docket that these cases comprise. Social Security appeals account for about the same percentage of the pro se and represented filings—although they comprise a slightly larger share of the represented docket.<sup>44</sup> Generally, I would not break out bankruptcy appeals into its own category, but it does account for 3% of the pro se filings during the

43. Using the civil IDB data on filings from 1999–2013, and excluding prisoner filings, Figure 2 compares these filings based on nature of suit category.

44. Remember that all categories of non-prisoner filings are much more likely to be represented than pro se, so it is not informative to say that Social Security appeals are “more likely to be represented than pro se.”

study period. Finally, it is worth noting that the “Other” category here includes, and this is especially true for represented cases, many of the most-discussed kinds of federal cases—securities and antitrust, most prominently. Those cases tend to feature Big Guy problems, to which I now turn.

### B. *The Big Guy*

The Big Guy is a deep-pocketed corporation, for the most part. Its problem is that it can afford legal services, and the plaintiffs’ attorneys suing it know this. These plaintiffs’ attorneys either represent a plaintiff with a substantial claim, a class of similarly situated plaintiffs, or a large inventory of clients with similar claims, but who are not certifiable as a class. The liberal discovery rules in federal court mean that the opportunities for discovery are ample, especially with the advent of electronic discovery. The incidence of the “leveraged” settlement is certainly exaggerated,<sup>45</sup> but no one doubts that there is *some* level of discovery abuse in the system. My own research suggests that approximately 2 to 3% of civil cases settle because of the costs of discovery; however, increasing discovery costs do clearly affect settlement decisions, even when they are not the “but for” cause of settlement.<sup>46</sup>

In the recent hearings before the Advisory Committee on Civil Rules, several representatives of major corporations testified generally in support of the proposed amendments. How did they describe their problems?

Donald Lough, the assistant general counsel for the Ford Motor Company, testified in Dallas, Texas. Mr. Lough stated that Ford has approximately 10,000 new disputes per year, and therefore it must have a “fair and efficient” system for resolving those disputes.<sup>47</sup> The focus of

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45. See, e.g., John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 551–52 (2010) (“This system incentivizes abusive discovery tactics that can provide a competitive advantage. Such tactics include coercing a settlement by increasing an opponent’s costs through unnecessary information requests and compelling an opponent to produce confidential, proprietary, or embarrassing information.”). Of course, the urtext must be Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635 (1989).

46. LEE & WILLGING, CIVIL RULES SURVEY, *supra* note 11, at 32–33, fig.19. Judge Weinstein, in critiquing this definition of discovery abuse, wrote: “This type of abuse may well occur, but . . . litigation is so complex that without empirical data we cannot say that the myriad incentives actually produce this behavior in any substantial number of cases.” Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear’s The Barrister and the Bomb*, 69 B.U. L. REV. 649, 654 (1989). I leave it to the reader to gauge whether two to three percent of civil cases is a “substantial number.”

47. Donald Lough, Assistant Gen. Counsel, Ford Motor Co., Testimony at Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules 248 (Feb. 7, 2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf>.

the bulk of his comments was on the problem of “over discovery,”<sup>48</sup> and the proposed amendments to Rule 26.<sup>49</sup>

Bradford Berenson, who described his job as being “in charge of litigation for the General Electric Company,”<sup>50</sup> expanded on similar themes but focused more on the preservation issues and Rule 37. General Electric (“GE”), he testified, is “involved at any given moment in time in literally thousands of civil cases all across the world.”<sup>51</sup> Mr. Berenson provided some truly staggering numbers: “We have the largest Outlook email system in the world. There are 450,000 unique mailboxes across 141 servers in eight global locations, so we know a thing or two about the complexity, difficulty, burden and expense of trying to manage preservation and discovery.”<sup>52</sup> To provide “a somewhat richer factual record,” Mr. Berenson gave a concrete example of the preservation and production issues involved in GE’s complex cases:

My predecessor back at the Duke mini conference in [2010] went through three specific examples of cases, and one thing that we did in preparation . . . was to update those three examples . . . .

The second of the three examples he provided, . . . he reported that we had spent \$5 million to preserve and collect documents from 250 unique custodians.

Three years later, today, those . . . custodians have become 815 across the [European Union] and the United States where the documents were preserved. [For] four hundred fifteen of these custodians, there has actually been a collection of documents, and ultimately documents were produced to the other side from only 85, or about 10 percent, of those whose documents were originally preserved.

Of the documents produced there are 340,000 unique documents, 6 million pages. When the case finally reached trial all of the documents fit in a couple of binders that both sides designated and used as exhibits. There were 194 of those.

So .1 percent of the documents that were actually produced at the end of this huge funnel actually found their way into trial, and were documents that one side or the other considered necessary to the accurate determination of the case in a court of law.

The overall cost over seven years of discovery in that case, \$22

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48. *Id.* (“[T]oo often discovery causes delays, drives up costs, and actually impedes trials.”).

49. *See id.* at 250–52 (The “proportionality requirements of Rule 26 . . . are in great need of strengthening and enforcement.”).

50. Brad Berenson, Gen. Elec. Co., Testimony at Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules 111–12 (Feb. 7, 2014), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2014-02-07.pdf>.

51. *Id.* at 112.

52. *Id.*

million.<sup>53</sup>

Mr. Berenson described another case in which GE has spent approximately \$11 million on discovery, but in which “[thei]r best most objective good faith assessment of the fair settlement value of this case is \$4 million.”<sup>54</sup> Mr. Berenson’s testimony includes a definition of nuisance settlements from the perspective of the Big Guy: “nuisance value nowadays can mean multi-million dollar settlements.”<sup>55</sup>

The Big Guy can bury you with big numbers, but that’s in the nature of the Big Guy. A more difficult question is how to put these large numbers into context. The cases described by Mr. Berenson and other representatives of large corporations are clearly not “inexpensive” in any meaningful sense of the word—setting aside, for a moment, the issue of discovery abuse. But compared to the resources of a global corporation like GE, how expensive is this litigation? One point of frustration I had at the 2010 Duke Conference is that the law-trained mind seems to have difficulty dealing with numbers—large numbers, in particular. A report submitted by Lawyers for Civil Justice, and others, made quite a statement: “Among the 36 survey participants who [reported aggregate costs], the total aggregate spen[t] on litigation in 2008 was \$4.1 billion.”<sup>56</sup> Of course, aggregate numbers are just that. If a major corporation like Ford has 10,000 new disputes a year, the aggregate cost of those disputes will be a substantial sum. Moreover, the report as a whole did put the litigation costs into context. The report showed that respondent companies’ litigation costs averaged less than one percent of the companies’ annual U.S. revenues.<sup>57</sup> The Big Guy’s problem in a nutshell: major corporations are spending billions on litigation out of trillions in revenue.

As the brief excerpts from the recent hearings make clear, the Big Guy wants less discovery in civil litigation. Thus, those representing the interests of major corporations back rules amendments to limit discovery. This is not a new phenomenon. Discovery abuse as a concept has been with us a very long time. In 1958, Professor Rosenberg wrote that “courts are conscious that federal discovery is often used abusively, sometimes deliberately so. Abuses take the form of running up expenses,

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53. *Id.* at 113–14.

54. *Id.* at 115.

55. *Id.* at 116.

56. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 4 (2010), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf>.

57. *Id.* at 10 fig.6.

[and] delay . . . .”<sup>58</sup> Discovery abuse was a problem addressed by the Pound Conference, in 1976, before anyone but the most farsighted was discussing preservation of electronically stored information.<sup>59</sup> Professor Richard Marcus, longtime reporter to the Advisory Committee on Civil Rules on discovery issues, published an article entitled *Discovery Containment Redux* in 1998.<sup>60</sup> The first sentence of that article? “Here we go again.”<sup>61</sup> As the former chair of the Standing Committee and the Advisory Committee on Civil Rules, Judge Lee Rosenthal, has pointed out: “The discovery rules have been revised more frequently than any other section” of the civil rules.<sup>62</sup> Many, if not most, of these rules amendments have been targeted at limiting—or, in Marcus’s more neutral term, containing<sup>63</sup>—discovery.

### III. THE COST DISEASE: HEALTH CARE AND LEGAL SERVICES

Any discussion of litigation costs should take into account the work of economist William J. Baumol and his dreaded “cost disease.”<sup>64</sup> In work dating back to the 1960s, Baumol has argued that the post-Industrial Revolution economy can be roughly divided into two sectors. In one sector, massive productivity gains are achieved through the actions of “inventors and entrepreneurs” (“the progressive sector”).<sup>65</sup> The progressive sector “has all but eliminated famine in wealthy countries, created technology unimaginable in earlier eras, given us ever-rising standards of living, and greatly reduced poverty in both extent and severity.”<sup>66</sup> In the other sector (“the stagnant sector”), productive gains have been made *but*, relative to the more productive progressive sector, the productivity gains are insignificant.<sup>67</sup>

Economic activities in the stagnant sector tend to be activities that

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58. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 495 (1958).

59. See, e.g., A. Leo Levin & Russell R. Wheeler, *Epilogue to THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 289 (A. Leo Levin & Russell R. Wheeler eds., 1979) (noting “growing concern over what many perceived to be abusive and overly extensive discovery procedures”).

60. Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 747 (1989).

61. *Id.*

62. Lee H. Rosenthal, *From Rules of Procedure to How Lawyers Litigate: ‘Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 229 (2010).

63. See, e.g., Marcus, *supra* note 60, at 747, 748, 753.

64. WILLIAM J. BAUMOL, *THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN’T* (2012).

65. See *id.* at 5 (“This unprecedented productivity growth [has been] carried out primarily by the partnership of inventors and entrepreneurs and expanded to a large scale by companies, governments, and non-profits . . . .”).

66. *Id.* at 5.

67. See *id.* at 20–22 (explaining that a “new production process” may allow a factory to realize significant gains in productivity, whereas the only way to meaningfully increase output in a

have so far proven difficult to mechanize or automate, and often involve what might be called “‘personal services,’ which usually require direct, face-to-face interaction between those who provide the service and those who consume it. Doctors, teachers, and librarians all have jobs that require in-person contact.”<sup>68</sup>

The cost disease results from the different growth rates in productivity:

When growing productivity raises wages throughout the economy, it should be clear how differing productivity growth rates lead to rising real costs in some industries and relatively declining real costs in others. Take, for example, manufacturing—if wages in this sector rise by 2 percent, the cost of manufactured products need not rise because increased output per worker offsets the higher wages. In contrast, the nature of many personal services makes it very difficult to introduce labor-saving devices. A 2 percent wage increase for teachers or police officers is not offset by higher productivity and therefore must lead to equivalent increases in municipal budgets. A 2 percent wage increase for hairdressers must lead beauty salons to raise their prices.

In the long run, wages for all workers throughout a country’s economy tend to go up and down together. Otherwise, an activity whose wage rate falls seriously behind will tend to lose its labor force. Auto workers and police officers will see their wages rise at roughly the same rate in the long run, but if productivity on the assembly line advances while productivity in the patrol car does not, then the cost of police protection will increase—relative to manufacturing. Over several decades, the two sectors’ differing cost growth rates add up, making personal services enormously more expensive than manufactured goods.<sup>69</sup>

Over time, accumulated productivity gains in the progressive sector and lagging gains in the stagnant sector, coupled with a general increase in wages across both sectors, mean that modern economies spend a growing percentage of their wealth on personal services. This is a major reason, Baumol posits, that health care costs are rising not just in the United States but in other developed countries, regardless of whether health care is distributed by private markets or government agencies, or some combination of the two.<sup>70</sup>

The cost disease is an explanation for cost increases in the stagnant

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“personal service” business, such as a doctor’s office, is to increase the labor hours dedicated to the service—or perhaps decrease the quality of the service being provided).

68. *Id.* at 20.

69. *Id.* at 21–22.

70. *See id.* at 9–12. “The universality and persistence of the problem—the fact that it has endured for more than four decades and affects countries throughout Europe, North America, and

sectors, but Baumol is careful to distinguish between cost levels and cost increases.<sup>71</sup> Health care offers a useful illustration:

[T]he disease condemns the costs of health-care and other services to rise at a disturbingly rapid rate in *all* countries in which productivity is growing rapidly. As long as productivity growth continues, these growth rates will not slow down.

But although the growth rates are beyond our control, the data for the different affected countries do show that the level of health-care costs can be restrained. Many countries have costs much lower than ours, even if they are still increasing just as quickly. Certainly it would be a good thing if health-care spending in the United States could be reduced to much lower levels.<sup>72</sup>

In short, while the cost disease is largely unavoidable, it does not foreclose meaningful reform of cost levels. Indeed, Baumol advocates several reforms that could reduce the levels of health care spending in the United States, including better measurement of the effectiveness of various treatments,<sup>73</sup> avoidance of unnecessary treatments,<sup>74</sup> and greater use of preventive medicine.<sup>75</sup>

Baumol has written much less about legal services, but the application of the cost disease to legal services is clear. Legal services are decidedly in the stagnant sector: “the Bureau of Labor Statistics’ price index for legal services suggests that between 1986 and 2008 lawyers’ fees outpaced inflation by about 1.5 percent each year.”<sup>76</sup> Although the modern law office, with its computers and access to court through electronic filing, would look like magic to Daniel Webster, the differences in legal practice between Webster’s time and our own are not as great as the productivity gains in other areas. Thus, we pay much less for some things and more for legal services.

The cost disease is relevant to both the Big Guy’s problems and the Little Guy’s problems. In relation to the former, it is likely that the cost disease is part of the explanation for the repeated “failures” of previous rules amendments to end complaints about discovery abuse in the federal courts. Although I am not aware of any reliable data on the subject,

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Asia—indicate that its roots go far deeper than America’s particular administrative or institutional arrangements.” *Id.* at 12.

71. *See id.* at 154–55 (“It is important to emphasize the distinction between the *current magnitude* of health costs and the *speed* with which those costs are rising.”). Further, note that “[o]f these two attributes, cost levels and cost increases, the cost disease deals *only with the latter.*” *Id.* at 155.

72. *Id.* at 155.

73. *Id.* at 156.

74. *Id.* at 158.

75. *Id.* at 166.

76. *Id.* at 28.

it is very likely that major U.S. corporations have found themselves spending more and more on litigation, especially compared to falling costs in other parts of their operations.<sup>77</sup> This has led them in turn to put pressure on the law firms that provide legal services to cut costs, making those firms less profitable.<sup>78</sup> In addition, it has led them, and groups representing their interests, to advance proposals to address the *perceived* causes of these rising costs—discovery abuse, most prominently. But still, the Big Guy’s problems are probably more related to the levels of permissible discovery than to increasing costs per se.

In relation to the Little Guy, the cost disease *is* his problem.<sup>79</sup> As discussed above, in general, it is not the levels, or amount, of discovery that keep the Little Guy out of court.<sup>80</sup> Most of the Little Guy’s cases are not going to be discovery-heavy, and reforms designed to reduce discovery levels are unlikely to help the Little Guy.<sup>81</sup> A long line of empirical inquiry suggests that, for the Little Guy, discovery costs are not a major driver of the cost of litigation. Legal services may cost too much for the Little Guy, but discovery is not the primary reason why.<sup>82</sup> The 1960s Columbia Project study estimated discovery costs at 19 to 36% of total litigation costs, depending on whether the party was only requesting or requesting-and-producing in discovery.<sup>83</sup> The 1970s Civil Litigation Research Project estimated that, in ordinary litigation, 16.7% of attorney time (their measure of cost) was spent on discovery.<sup>84</sup> The 1990s RAND Corporation study reported that “lawyer work hours on discovery are

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77. See, e.g., Beisner, *supra* note 45, at 563 (“The advent of electronic discovery has significantly raised the stakes in discovery abuse. . . . These developments have pushed discovery [costs] to the forefront of litigation concerns for American businesses.”) (emphasis added).

78. See, e.g., Noam Scheiber, *The Last Days of Big Law: You Can’t Imagine the Terror When the Money Dries Up*, NEW REPUBLIC, Aug. 5, 2013, at 24, 26–27 (“The most profitable partners steadily discarded their underachieving colleagues, because they didn’t want to share the spoils. . . . The overwhelming majority of these [‘Big Law’ firms] still operate according to a business model that assumes, at least implicitly, that clients will insist upon the best legal talent instead of the best bargain for legal talent.”).

79. One feature of Baumol’s argument that rings true here is that, when personal services become too expensive, the alternative is often a form of “do-it-yourself.” See BAUMOL, *supra* note 64, at 40. The increase in pro se litigants, then, is a symptom of the cost disease.

80. See *supra* notes 73–75 and accompanying text.

81. See Kritzer, *supra* note 23, at 593–94 (“[T]he important implication of our analysis is that the impact of discovery reform or discovery restrictions would be relatively modest in *most* cases filed in our courts; major impacts would occur only for that very small number of cases in which what might be characterized as ‘discovery wars’ occur.”) (footnote omitted).

82. The remainder of this paragraph draws heavily on Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779–80 (2010), which summarizes the same literature.

83. See WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 180 tbl.43 (1968).

84. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 tbl.3 (1983).

zero for 38 percent of general civil cases, and low for the majority of cases,” such that discovery was “not a pervasive litigation cost problem for the majority of cases.”<sup>85</sup> Analyzing just those civil cases with disposition times greater than 270 days, post-filing discovery accounted for just over a third (36%) of attorney work hours, RAND found.<sup>86</sup> Indeed, the highest estimate of discovery costs as a share of total litigation costs is found in a 1997 FJC report—the median estimate of the surveyed attorneys was 50% for both plaintiffs’ and defendants’ attorneys.<sup>87</sup>

These findings make a lot of sense. For one thing, lawyers working on a contingency fee have little incentive to engage in unnecessary discovery. Here’s how one plaintiffs’ attorney put it at the fall 2013 hearing on the proposed rules amendments:

I get paid a percentage of what my client receives, if anything. When I take a deposition, I don’t get paid by the hour. In fact, I pay the expenses of the deposition out of my own pocket. I have zero incentive to take unnecessary depositions. Likewise, once I get the information I need in deposition, I have no incentive to take an extra minute of deposition, much less fill up seven hours. If the proposed rule changes are intended to stop contingency fee attorneys from conducting unnecessary discovery, don’t bother. Economics already does.<sup>88</sup>

“Economics already does.” The Little Guy has simply been priced out of the market for legal services. Reducing discovery levels is unlikely to solve this problem.

#### IV. CONCLUSION: LAW WITHOUT LAWYERS

If I am right, and the Little Guy and the Big Guy have very different problems, then the solutions to those problems must also be different. Perhaps some calibration of discovery levels can mitigate the discovery costs experienced by the Big Guys. But, as I have argued, such solutions are unlikely to address the Little Guy’s problems. Moreover, Baumol’s cost disease seems to suggest that the problem of increasing costs will continue to worsen. In one of the more sobering passages in Baumol’s book, he writes:

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85. JAMES S. KAKALIK ET AL., THE INST. FOR CIVIL JUSTICE, DISCOVERY MANAGEMENT: FURTHER ANALYSIS OF THE CIVIL JUSTICE REFORM ACT EVALUATION DATA XX (1998), available at [http://www.rand.org/pubs/monograph\\_reports/MR941.html](http://www.rand.org/pubs/monograph_reports/MR941.html).

86. *Id.* at xxi tbl.S.2.

87. See Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 548 tbl.4 (1998).

88. Altom M. Maglio, Testimony at Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Judicial Conference Advisory Committee on Civil Rules 28 (Nov. 7, 2013), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/public-hearings/civil-hearing-transcript-2013-11-07.pdf>.

A disturbing moral of the story is that the products most vulnerable to the cost disease include some of the most vital attributes of civilized communities: health care, education, the arts, police protection, and street cleaning, among others. All of these services [*Author*: and one could easily include legal services] suffer from cost increases that are both rapid and persistent. They threaten the strained budgets of families, municipalities, and central governments . . . . As financial stringency inevitably becomes more pressing, spending on these services is apt to be cut back or, at best, increased by amounts that are barely sufficient to stay abreast of overall inflation. As a result, the supply of these services may fall in both quantity and quality.<sup>89</sup>

What, then, is to be done?

There is a growing literature on “civil *Gideon*,”<sup>90</sup> the view that there is a constitutional right to legal representation in civil litigation, paralleling the right in criminal proceedings established in *Gideon v. Wainwright*.<sup>91</sup> Given the current political environment, any large-scale move<sup>92</sup> to civil *Gideon* seems extremely unlikely.<sup>93</sup> Similarly, any substantial increase in spending on legal aid for low-income persons on a national scale also seems unlikely. State and local bar organizations and legal aid will continue their laudable efforts along these lines, of course, but it is unlikely that they will meet the unmet needs of low- and moderate-income persons.<sup>94</sup>

There are some interesting possibilities on the horizon, however.

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89. BAUMOL, *supra* note 64, at 27.

90. See, e.g., Stan Keillor et al., *The Inevitable, if Untrumpeted, March Toward “Civil Gideon,”* 64 SYRACUSE L. REV. 469, 474 (2014) (criticizing the Supreme Court’s approach to the issue as not recognizing that “the right to counsel [is] not just an incremental additional procedural safeguard” of individual rights because “American government is lawyer-dominated and litigious”); Thomas D. Rowe, Jr., *If We Don’t Get Civil Gideon: Trying to Make the Best of the Civil-Justice Market*, 37 FORDHAM URB. L.J. 347, 347–56 (2010) (arguing for market-oriented alternatives to civil *Gideon*).

91. *Gideon v. Wainwright*, 372 U.S. 335 (1963). See also Noam Scheiber, *The Case for Socialized Law*, NEW REPUBLIC (Feb. 3, 2014), <http://www.newrepublic.com/article/116424/socialized-law-radical-solution-inequality>.

92. In 2012, San Francisco established a local “right to civil council.” See Mike Rosen, *Testing Civil Gideon*, CAL. LAWYER (June 2012), <https://www.callawyer.com/clstory.cfm?pubdt=201206&eid=922767&evd=1>. More information about the pilot program can be found on the website of the Bar Association of San Francisco, <http://www.sfbbar.org/jdc/legal-services/rtcc/right-to-civil-counsel-pilot-program.aspx>.

93. The Fordham Urban Law Journal held a symposium in fall 2013 entitled, *Until Civil Gideon: Expanding Access to Justice*. The panels can be accessed at <http://urbanlawjournal.com/until-civil-gideon/>.

94. See, e.g., Rowe, *supra* note 90, at 347 (“During my service [as president of a local Legal Services Corporation] it became clear to me how unlikely it is, I would guess even with a more liberal President and Congress, that leading sources of civil legal services . . . will ever fill more than a modest or moderate fraction of the perceived needs.”).

Technology may provide some hope.<sup>95</sup> Already, following the leadership of Judge Weinstein, the state and federal courts provide many resources to self-represented litigants,<sup>96</sup> many of which are free and available on the Internet. But we are probably only at the beginning of technology's potential to transform the legal market.<sup>97</sup> Automation may yet hold the key to providing for effective self-representation.

Judge Weinstein once commented “that the courts were ‘really not busy enough.’”<sup>98</sup> If automation and technology have the potential to service the “latent legal market,”<sup>99</sup> then the good judge may someday get his wish.

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95. See generally RICHARD SUSSKIND, *TRANSFORMING THE LAW: ESSAYS ON TECHNOLOGY, JUSTICE AND THE LEGAL MARKETPLACE* (2000).

96. For a useful summary of federal efforts, see DONNA STIENSTRA ET AL., *ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES* (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/\\$file/proseusdc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf).

97. For a *tour d'horizon* of the growing literature on this topic, see generally Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 *EMORY L.J.* 909 (2013). This is not to say that there are not legal and ethical impediments to some possible transformations. See, e.g., Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 *OHIO ST. L.J.* 1, 5 (2012) (“Lawyer discipline and professional conduct rules that forbid corporations from owning or investing in a law firm or law practice . . . compromise[ ] access to the law.”) (citation omitted).

98. MORRIS, *supra* note 1, at 196.

99. Susskind calls the unmet legal needs of low- and moderate-income persons “the latent legal market.” See SUSSKIND, *supra* note 95, at 113.

