

## Law, Reality, and the Ever-Widening Gap in Between

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*“When we [Americans] talk about the rule of law, we assume that we’re talking about a law that promotes freedom, that promotes justice, that promotes equality.”*

—U.S. Supreme Court Justice Anthony Kennedy,  
Interview with ABA President William Neukom (2007)

### INTRODUCTION

The right to a fair trial is considered a basic tenet in any respectable body of law and has been declared as such in the United Nations’ the Universal Declaration of Human Rights<sup>1</sup>, the Council of Europe’s international treaty of the European Convention of Human Rights<sup>2</sup>, and the Sixth Amendment to the United States Constitution<sup>3</sup>. Yet for all of this acknowledgment, there is a price to be paid by lawmakers and the public alike. The right to a fair trial creates the impression that even if the law does not prevent an individual or group from being wronged, at the very least these laws would dispense justice to an aggrieved party. Even when said laws would function as intended, the stark reality is that many cannot afford to pursue their rights even when they have been blatantly wronged. A right that cannot even be applied can hardly be called a ‘right’, and more troubling is that the ‘winner’ is dictated by the one who can bear the financial burden of pursuing legal action. The right to a fair trial is neither a right nor is it fair. This paper will be exploring this disengagement between law and reality that has led to a grossly encumbered and costly litigation system.

### THE RULE OF LAW

The rule of law has always greatly emphasized equality and the fair application of law no matter the individual. It draws elements from the Magna Carta that established the foundation of due process, the principle that everyone was entitled to a fair hearing by a jury of one’s peers.<sup>4</sup> Famously expressed by John Adams in Article XXX of the Massachusetts Constitution as “In the government of this commonwealth... to the end it may be a government of laws and not of

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<sup>1</sup> Commission on Human Rights. (1948, December 10). Universal Declaration of Human Rights Article 10. In *United Nations*. Retrieved January 3, 2014, from <http://www.un.org/en/documents/udhr/>.

<sup>2</sup> Council of Europe. (1953, September 3). European Convention of Human Rights Article 10. Retrieved January 3, 2014, from [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>3</sup> *U.S. Const. amend. VI*.

<sup>4</sup> Magna Carta Article 29.

men.”<sup>5</sup>, the rule of law embodies the ideal that by the authority of the law, and not of influential individuals, may the supreme law of the land impose order upon the nation. This is further agreed with and put into practice by U.S. Supreme Court Justice Frankfurter in the case *United States v. United Mine Workers of Am.*, 67 S. Ct. 677, (1947),<sup>6</sup> “There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.”

In order to further promote the principle of the rule of law, the United Nations has kept it as an item of interest since 1992 and has established a support network at the national level.<sup>7</sup> The United Nations Secretary-General says the rule of law is referring to the “...principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated... ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law... and procedural and legal transparency.”<sup>8</sup> With 48 countries signing the United Nations’ Universal Declaration of Human Rights into international law and the 47 signatures for the Council of Europe’s European Convention of Human Rights, undoubtedly there is a considerable force being spent in protecting basic rights by enforcing the rule of law.

In consideration of that, if the right to a fair trial becomes threatened then one of the most basic elements of the rule of law has been undermined. This ultimately undermines the authority of any given organization in maintaining the ability to defend the rule of law. A body of law that cannot function at the most basic level will only continue to increase instability in the nation and cause public unrest. A nation and its body of law, its rule of law, exist only as long as its people accept it as such, for it is an agreement. The various countries around the world facing political turmoil experience the breaking down of this agreement and become reminders of the importance of a balanced rule of law.

## **LAWS AND LITIGATION**

The previous section was concerned with the consideration of the right to a fair trial as a basic right and with its importance to the rule of law. In continuation of that concept, this section

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<sup>5</sup> John Adams. Constitution of the Commonwealth of Massachusetts Article XXX. In *The 188th General Court of the Commonwealth of Massachusetts*. Retrieved January 5, 2014, from <https://malegislature.gov/Laws/Constitution>.

<sup>6</sup> Id. quoting from the court’s decision in *United States v. United Mine Workers of Am.*, 330 U.S. 258, 312, 67 S. Ct. 677, 705, 91 L. Ed. 884 (1947).

<sup>7</sup> United Nations and the Rule of Law. (n.d.). In *United Nations*. Retrieved January 5, 2014, from <http://www.un.org/en/ruleoflaw/>.

<sup>8</sup> Secretary-General. (2004, August 23). The rule of law and transitional justice in conflict and post-conflict societies. In *United Nations Security Council*. Retrieved January 5, 2014, from <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>.

will begin to concern itself with how this right is being violated and disenabled, and the consequences that this has as a whole.

At face value, the right to a fair trial seems to be a transparent and basic protection of a human being. Ideally, this would be the case for then the laws that are passed would work as intended and prevent or discourage undesirable behavior. Realistically though, the process is made so overwhelmingly complicated that navigating through the system of laws and procedures can only meaningfully be done with lawyers, time, and money. Whoever should run out, or simply not have any, of one or more of the three is placed at a serious disadvantage. The heart of the problem is best captured in the Litigation Cost Survey of Major Companies' report:

“Rule 1 of the Federal Rules of Civil Procedure frames the purpose of the Rules: ‘the just, speedy and inexpensive determination of every action and proceeding.’ Every day, corporate and defense counsel must confront the fact that although well - intentioned, the Rules are falling far short of this goal. The reality is that the high transaction costs of litigation, and in particular the costs of discovery, threaten to exceed the amount at issue in all but the largest cases.... Clearly, the U.S. costs and processes are both higher than necessary (and higher than elsewhere) and demonstrate an unacceptable level of inefficiency.”<sup>9</sup>

Closer reading of the Federal Rules of Civil Procedure reveals more information on the skyrocketing costs of litigation. Comparing respondents' outside litigation costs in year 2000 versus year 2008 has revealed that cost per respondent has increased 73% to rest at 115 million. More recent studies are in agreement and the results that they drew are even more dramatic. The U.S. Chamber of Commerce Institute for Legal Reform compared litigation costs on an international level. It was determined that the United States by far had the highest liability costs at over 2 and a half times the average level of Eurozone economies.<sup>10</sup> The high cost of litigation has also had a direct impact on the U.S. economy with foreign investors being hesitant, if not outright refusing, to invest in the U.S. in fear of legal liabilities. The International Trade Agreement went on to write that the U.S. was also losing its hold as the most desirable nation for foreign direct investment.<sup>11</sup>

Law professors A. Mitchell Polinsky and Steven Shavell illustrate this problem: “In other words, for society to use the tort system to transfer money to victims is analogous to a person

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<sup>9</sup> Lawyers for Civil Justice, ., Civil Justice Reform Aid, ., & U.S. Chamber of Institute for Legal Ground, . (n.d.). Litigation Cost Survey of Major Companies. Retrieved January 5, 2014.

<sup>10</sup> Institute for Legal Reform. (2013, June 14). International Comparisons of Litigation Costs: Europe, the United States and Canada. In *U.S. Chamber of Commerce*. Retrieved January 5, 2014, from [http://www.instituteforlegalreform.com/uploads/sites/1/ILR\\_NERA\\_Study\\_International\\_Liability\\_Costs-update.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf).

<sup>11</sup> International Trade Administration. (2008, July). Assessing Trends and Policies of Foreign Direct Investment in the United States. In *U.S. Department of Commerce*. Retrieved January 5, 2014.

using an ATM at which a withdrawal of \$100 results in a service fee of \$100. Actually, there is a sense in which the tort system is even more expensive than this.” The actual amounts rewarded usually are averaging at about less than 50 cents per dollar.<sup>12</sup> Clearly, such a system cannot continue.

## PROPOSALS OF REFORM

Calls for reforms are presented in the White Paper: Reshaping the Rules of Civil Procedure for the 21st Century, drawn by the Lawyers for Civil Justice, DRI —The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.<sup>13</sup> The White Paper proposes several reforms that the Litigation Cost Survey of Major Companies report condenses into the following:

*Pleadings* - The White Paper recommends promulgating a pleading standard to include more than mere notice pleading, and demonstrates from a historical perspective the need for pleading standards appropriate to modern litigation in the information age.

*Limited Discovery* - The White Paper proposes a rule that focuses the scope of discovery where it should be focused – on the claims and defenses in the action. It also requires that discovery requests must be in proportion to the stakes and needs of the litigation and that specific categories of electronically stored information are presumed not to be discoverable in most cases. By emphasizing proportionality in discovery and placing limits on the extent of e - discovery, it strikes at the heart of current practices that fuel runaway discovery costs.

*Preservation* - The Rules should be amended to permit spoliation sanctions only where willful conduct was carried out for the purpose of depriving another party of the use of the destroyed evidence and the destruction results in actual prejudice to the other party. Clear standards must be included governing the preservation of information even prior to commencement of litigation in order to counteract inconsistent case law on this subject, including some cases suggesting sanctions for negligent preservation.

*Cost Allocation* - The purpose of discovery is to permit parties to access information that will enable fact finders to determine the outcome of civil litigation. Having rules that encourage the parties to police themselves and focus on the most efficient means of obtaining the truly

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<sup>12</sup> A. Mitch Polinsky and Steven Shavell, *THE UNEASY CASE FOR PRODUCT LIABILITY*, 123 Harv. L. Rev. 1437 (2010).

<sup>13</sup> WHITE PAPER : Reshaping the Rules of Civil Procedure for the 21 st Century The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure Submitted to the 2010 Conference on Civil Litigation Duke Law School, May 10-11 2010, On behalf of Lawyers for Civil Justice DRI – The Voice of the Defense Bar Federation of Defense & Corporate Counsel International Association of Defense Counsel, May 2, 2010.

critical evidence is the best way to achieve that purpose. Therefore, the Rules should be amended to require that each party pay the costs of the discovery it seeks, which will encourage each party to manage its own discovery expenses by shifting the cost - benefit decision onto the requesting party – the best cost avoider.<sup>14</sup>

## CONCLUSION

By and large, the current issues and shortcomings of the litigation procedure have been widely acknowledged. By the Supreme Court, it was said that: “It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest.”<sup>15</sup> In addition, the workers practicing the law stated, “Although the civil justice system is not broken, it is in serious need of repair. In many jurisdictions, today's system takes too long and costs too much. Some deserving cases are not brought because the cost of pursuing them fails a rational cost - benefit test while some other cases of questionable merit and smaller cases are settled rather than tried because it costs too much to litigate them.”<sup>16</sup>

The difficulty in reforming such an extensive and complex legal system is a hefty task that will require the cooperation of its many participants. This is the beginning step in sealing the cracks in a system that has too long promoted “justice” to those who could not afford it, but the success of this is doubtful.

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<sup>14</sup> Lawyers for Civil Justice,., Civil Justice Reform Aid, ., & U.S. Chamber of Institute for Legal Ground, . (n.d.). Litigation Cost Survey of Major Companies. Retrieved January 9, 2014.

<sup>15</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546, 127 S. Ct. 1955, 1959, 167 L. Ed. 2d 929 (2007).

<sup>16</sup> THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, (2009, March 11). Final Report O N THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM. In *Institute for the Advancement of the American Legal System University of Denver*. Retrieved January 9, 2014, from <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>.