


CRISIS IN THE UNITED STATES

The lack of a meaningful justice system for the 99%



By Scott E. Stafne

I.

The only way slavery and genocide can exist openly in a society is with the participation of the government – and indirectly the people. In the United States the final check on tyranny was supposed to be the judicial department, composed of courts governed by judges whose judicial power was intended to be checked by juries of citizens.

But a predictable thing occurred when the judges nixed juries (by employing procedural technicalities to get around their constitutional authority) and mixed with the rich and powerful... The judges took sides; the wrong side — the side of the rich and powerful against providing justice for the people. See e.g. Dahlia Lathwick, [“This Court Erred: The Supreme Court has almost always sided with the wealthy, the privileged, and](#)

the powerful, a new book argues” Slate (September 30, 2014) reviewing 2014 book by Constitutional Law Professor Erwin Chemerinsky, *The Case Against the Supreme Court*. See also “*Do the “Haves” Come Out Ahead over Time? Applying Galanter’s Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*”, 33 Law & Soc’y Rev. 811 (1999); Galanter, Mark, “*Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*” (1994).

As my two previous articles on “the evolution of debt slavery in modern times” assert, American courts have consistently used their Article III judicial power to benefit the rich and powerful at the cost of providing justice for the people. In the *Dred Scott v Sanford* ruling the Supreme Court concluded the entire race of black people was *not* entitled to seek justice in American courts because they were merely *property* which was meant to be bought and sold by wealthy white Americans.

This travesty of judicial review (criticized by President Abraham Lincoln both in the context of constitutional doctrine and with regard to the Dred Scott case specifically) spawned the great Civil War which the people had to fight to undo the injustice of the judicial branch. The War *cost this nation the lives of 620,000 people* simply because a calloused judicial branch turned its back on that basic truth that government’s overriding purpose is to achieve justice by protecting the inalienable rights of all people... And unfortunately American judges have typically had no clue about the difference between good and evil or right or wrong or justice and injustice because of their longstanding and unflinching loyalty to the rich and powerful.

Regrettably... this hasn’t changed.

One of the Supreme Court’s most recent cases perpetuating modern day debt slavery is its unanimous opinion in *Henson v Santander Consumer USA Inc.* In that case the Court held the Fair Debt Collection Practices Act, which was enacted by Congress to prevent “debt collectors” from using unfair and unconscionable debt collection practices against the consumers, including homeowners, does not apply to *debt buyers*. Translation: Debt Buyers can use unfair and unconscionable practices to collect debts they have purchased for pennies on the dollar and cannot be held liable for those injuries such practices cause to the lives, liberties, property, and happiness of the people.

Santander is the modern day moral equivalent of *Dred Scott* in that it treats debtors as property the wealthy can abuse. Santander eschews any notions of justice or equity in order to motivate the sale of bad debt to unethical hedge funds who use every

unconscionable trick in the book to attack and hurt American consumers to collect bad debt.

Congress' goal in enacting the Fair Debt Collection Act was to prevent unscrupulous downstream debt buyers from bombarding Americans with bad faith debt collection practices and then the Supreme Court comes along and tells these creep companies and their soulless lawyers that they can mistreat the people in order to collect purported debts, which often are not owed.

How does *Santander* reflect good public policy consistent with the goals of the the FDCPA? The obvious answer is it does not. *Santander*, just like the *Dred Scott* case, starts from the dubious proposition that: “[i]t is not the province of the court to decide upon the justice or injustice...” and then misinterprets legislation to insure the continued redistribution of wealth to the 1%, which has always been its practice except for a brief period of time when FDR threatened to pack the Supreme Court in order to squelch this habit.

If it is true (and I think it is) that American courts are not about justice, then we as a people must ask do we need (or want) Article III courts at all? For as James Madison so famously wrote in [Federalist Paper No. 51](#):

... Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, *or until liberty be lost in the pursuit.* ...

II.

There is circumstantial evidence the government and Supreme Court knew about (or perhaps was complicit in) planning the 2008 financial collapse which began the transfer of middle class wealth from this Nation's people to Wall Street sociopaths; resulting in one of the one of the most massive genocides ever known. *Cf.* Miller, Pam, Church of the Gardens Press, *El Abandonado*, (2017); The Guardian, “[Mortality rate for homeless youth in San Francisco is 10 times higher than peers](#)” (April 14, 2016); “[Homeless die 30 years younger than average](#) (December 11, 2011)

The circumstantial evidence against the Supreme Court includes, among other things, an unusual change in the Federal Rules of Civil Procedure which occurred in 2007. 28 USC §2072(a) provides the Supreme Court shall have the power to promulgate general

rules of practice and procedure before United States District Courts, but that rule-making process takes time. So rather than take the time to go through this process in 2007 (just before the 2008 financial collapse) the Supreme Court judicially interpreted Federal Rules of Civil Procedure 8 and 12(b) in such a way as to give judges almost absolute power to prevent homeowners' cases from being decided by trial. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S.554 (2009). The Supreme Court determined in these cases that to obtain a trial, including a trial by jury, a party must write a complaint which is *plausible to a federal judge*. Prior to this time it was only necessary to establish a possible claim, not one a judge found plausible. The concern over the Supreme Courts action was palpable and immediately criticised by scholars and state courts alike. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (October 2010). See also Bibliography below, section I.

This Supreme Court's unusual unilateral change in the rules of procedure for United States district courts without the solicitation of public comment was perfectly timed to coincide with the assault by banks and servicers upon the homes of Americans. And it is beyond dispute this rule change in 2007 had an extremely negative impact on the American people as a whole, homeowners particularly. Many of us believe the new rule was perpetrated knowing the genocide which would likely ensue from arbitrarily evicting people into the elements.

By 2011 criticism of the Supreme Court's aggrandisement of power re interpreting Rules 8 and 12 had grown to the point where the Federal Advisory Committee on the Rules apparently felt it was necessary to ask the Federal Judicial Conference to provide "cover" for the Supreme Court's unilateral change in the Federal Rules. The Federal Judicial Center attempted to do so by suggesting that the rule change had not made much of a difference in having cases dismissed, except in the area of financial instruments (cases involving American homeowners). See e.g. *Joe S. Cecil, Et. Al., Fed. Judicial Ctr., Motion To Dismiss For Failure To State A Claim After IQBAL: Report To The Judicial Conference Advisory Committee On Civil Rules (2011)* This is significant because even the Federal Judicial Center had to admit the effect of the instantaneous rule change on homeowners and others litigating financial instruments was devastating. See *Id.*, page 14, Table 4 which substantiates that over 91% of claims filed by lawyers in these type of cases got dismissed under Iqbal/Twombly's judge-centric plausibility standards.

III.

America's 21st century court system doesn't even resemble the judicial department which our forefathers intended we should have. The Constitution clearly indicates the people are entitled to trials by jury pursuant to a traditional common law adversarial judicial system. But we certainly don't have these rights any longer thanks to the Supreme Court, which has systematically usurped these rights to benefit the rich at the expense of the people.

The government has intentionally transformed the American adjudication process into a system of judicial tyranny reminiscent of the **inquisition**, especially for the poor. See Criminalization Justice Policy Program, Harvard Law School, **Criminalization of Poverty** (last accessed on October 12, 2017); Rogayah Chamseddine, SPIN, "**The Criminalization of Poverty**," (February 6, 2017; Cf. Stannard, Matt, Occupy.com, "**Part I: 34 Ways America's Legal System Hurts the Poor**" (April 22, 2017); **Part II** (April 30, 2017)

Indeed, most people get so bludgeoned via abusive federal judicial processes that few can last long enough to ever obtain a trial. See Scott E. Stafne, scottstafne.com, **Scorched Earth Litigation Model**, September 15, 2015. It is no understatement to suggest America's judicial system kills and/or injures those who are forced to encounter its abuse. See e.g., **Caught.net & the Pro Se Way** (last accessed October 10, 2017); Huffer, Karin, **Legal Abuse Syndrome: 8 Steps for Avoiding the traumatic Stress Caused by the Justice System** (2013).

And I am not the only one who has noticed this nation's systematic abuse of America's middle class by the federal and state judicial branches of government. In September of this year well respected Seventh Circuit Court of Appeals **Judge Richard Posner**, actually retired because of the unfair treatment other federal judges gave *pro se* litigants. *Pro se* litigants include those people, *i.e.* most of us who can't afford a lawyer to represent them and therefore must by themselves negotiate the byzantine, bizarre, and corrupt federal judicial gauntlet controlled by judges who do not obviously like the middle class. This certainly was not the kind of fair and just federal judicial department our founders intended to create for Americans.

According to Posner (and consistent with my observations over the last decade) "**most judges regard [pro se litigants who can't afford lawyers] as kind of trash not worth the time of a federal judge.**" Because these arrogant judges believe *pro se* arguments are worthless their appeals are not decided by federal judges or law clerks, but staff

attorneys. According to Posner the judges in the 7th Circuit simply rubber stamp the decisions of “staff lawyers” in *pro se* appeals.

Here is a copy of an [interview with Judge Posner](#) which describes his observations in his own words.

DL: As you’ve explained in several interviews — with the [Chicago Daily Law Bulletin](#), with me [for these pages](#), and with Adam Liptak of the [New York Times](#) — you resigned in part because of your disagreements with colleagues about the Seventh Circuit’s treatment of *pro se* litigants. I know you discuss this in detail in your [new book](#) (affiliate link) — can you offer us a little preview?

RAP [Richard A. Posner]: Pro se litigants, by definition, don’t have a lawyer. This generally means they don’t have money to hire a lawyer. So they have to litigate for themselves. They’re handicapped by not having money and not having a lawyer, and they also tend to have limited education. About [half of our appeals](#) are by pro se’s, and about half of those are prison inmates.

When *pro se* litigants appeal, their appeal papers are given to a staff attorney. We have about 20 staff attorneys who are appointed for two years, and a few supervisors. The staff attorneys tend to be good students from good schools, ***hired right after they graduate. Despite their good credentials, they tend to be hostile to the pro se’s. It’s not their own feelings; it’s that they sense — correctly — that the judges don’t really care much about the pro se’s, find them nuisances, and are not interested in them. So that percolates down to the staff attorneys, and they have a tendency to go against the pro se appeals even when they have apparent merit.***

So very often, a staff attorney memo recommending dismissal of the appeal gives rise to a very short, very rapidly issued order by a judicial panel, not published in the Federal Reporter, that tends to be perfunctory. ***One of my former colleagues thinks that two words are enough for an order dismissing a pro se appeal: “Appeal dismissed.”***

I didn’t think the *pro se* litigants were getting a fair break. I made various [suggestions](#), all of which were rejected. I wasn’t making progress in helping the *pro se*’s. And I didn’t have good relations anymore with the other judges — not really on a personal level, but we just didn’t see eye to eye on the *pro ses*.

So I stepped down from the bench and published my newest book, which is now out: [Reforming the Federal Judiciary: My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments](#) (affiliate link).

(Emphasis Supplied)

Judge Posner, who took the time to review some of these staff attorney's decisions, correctly discerned that delegating judicial power to baby lawyers, without any meaningful supervision by active Article III judges, was improper. To me, this is rather obvious!!!

It is important to understand Judge Posner did not resign until after all the other judges on the Seventh Circuit refused to require (or even allow) these baby "staff lawyers" decisions regarding pro se appeals to be meaningfully reviewed by actual Article III judges, as I believe is required by the Constitution.

The American Bar Association Journal asked the Seventh Circuit for a comment on Judge Posner's accusations. In **response** Dianne Wood, the Chief Judge of the Seventh Circuit (a liberal appointed by Bill Clinton) responded:

"First, while [Judge Posner] is certainly entitled to his own views about such matters as our Staff Attorney's Office and the accommodations we make for *pro se* litigants, it is worth noting that his views about that office are not shared by the other judges on the court, and his assumptions about the attitudes of the other judges toward *pro se* litigants are nothing more than that—assumptions.

In fact, the judges and our staff attorneys take great care with *pro se* filings, and the unanimous view of the eleven judges on the 7th Circuit (including actives and seniors) is that ***our staff attorneys do excellent work, comparable to the work done by our chambers law clerks. We are lucky to attract people of such high caliber for these two-year positions.***"

(Emphasis Supplied)

Significantly, the Seventh Circuit's response concedes Judge Posner's point and establishes the corruption of 21st century american courts. Wood admits on behalf of the Seventh Circuit that staff attorneys are performing the functions of Article III judges in *pro se* appeals without the same type of oversight as is provided a judicial clerk wrestling with an appeal where both sides are represented by an attorney.

This admission has staggering repercussions when one realizes most court cases today involve *pro se* litigants. See e.g. ABA Law Journal, "**86 percent of low-income Americans' civil legal issues get inadequate or no legal help, study says**" (June 14, 2017); Legal Services Corporation, **The Justice Gap: measuring the Unmet Civil Legal**

[Needs of Low-income Americans](#) (June 2017); Lawyerist.com, “[Measuring the Access-to-Justice Gap: Nearly 70% of All Civil Defendants Aren’t Represented](#)” (2016) ; ABA Journal, “[Can the access-to-justice gap be closed](#)” (2016).

The reality that our courts more often than not decide cases where only one side is able to effectively present their side to a judge or jury is at odds with those basic tenets of justice the Revolutionary war was fought to achieve. Clearly, constitutional history establishes that the people who ratified the Constitution were led to believe the Constitution was designed so judges would not become judicial tyrants, unchecked by juries and the Congress. See [Federalist Paper No. 78](#). Yet, that is exactly what has happened. And scholars the world over who observe the American judicial system quickly appreciate america’s courts and judges have little, if anything, to do with justice.

IV.

The “honest to God” truth is America’s Article III judicial department has dismantled those basic constitutional checks on its power which were established to prevent it from devolving into the tyrannical judocracy it has become. Looks at the facts. The facts dispute virtually all the myths our courts perpetuate to make us believe our judicial branch performs its constitutional duties.

- MYTH: “Only the United States makes routine use of jury trials in a wide variety of non-criminal cases.” See [Wikipedia](#).

TRUTH: Less than 5% of cases filed ever get to trial let alone a trial by jury.

- MYTH: America has an adversarial system of justice where both sides are competently represented before a neutral judge and jury.

TRUTH: Over half the cases presented to these supposedly neutral judges (who apparently don’t like or respect 99% of us) are handled by non-lawyers who have no experience with the mostly counter intuitive archaic rules of procedure and evidence which make litigation more a game than a search for truth. See Bibliography, Past IV.

- MYTH: the United States judicial system is based on the common law.

TRUTH : The common law system of precedent has not existed in America for sometime. Compare e.g. *Anastasof v. United States*, 223 F.3d 898 (8th Cir. 2000) (Courts are required to make and follow precedent) with *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001)(Judges can decide when they want and if they want to create precedent) with Judge Posner's observations that today courts need not even explain their reasons for their decisions by simply stating "Appeal Dismissed". See *supra*.

A recent law review, *Unpublished Decisions and Precedent Shaping: a Case Study of Asylum Claims*, 31 Geo. Immigr. L.J. (Fall 2017) considered a decades worth of data following the Supreme Court absolving federal courts of appeal of the responsibility for creating (and apparently following) precedent. According to Professor Scott Rempell, the author of the study:

The federal courts of appeal now publish fewer than twenty percent of their decisions. The effects of depriving so many decisions of precedential value are disputed. Critics believe selective publication harms law development and distorts legal doctrine, while selective publication's defenders are unconvinced that the available evidence demonstrates pervasive problems in need of reform. Accounting for the flaws and limitations of past empirical assessments, this article provides the results of a study that was designed to establish a more concrete understanding of how selective publication impacts development of the body of law. ***The study draws on a comprehensive dataset of all asylum cases in the Ninth Circuit that addressed the issue of persecution over a six-year period. The results show that the court incorrectly perceived how often it reached certain outcomes in past decisions, because many of the outcomes were buried in unpublished dispositions. Additionally, many of the rule statements the court applied in unpublished decisions contradicted rules it promulgated in its public decisions, which indicates the "book law" is not completely settled. The court also reached inconsistent outcomes regarding a significant percentage of its unpublished cases. Finally, panels failed to address highly germane precedents that losing parties raised in their briefs....***

(Emphasis Supplied)

V.

In case No. 3 of the Nuremberg Trials 16 defendants who were former German judges, prosecutors or officials in the Reich Ministry of Justice, were found guilty of committing war crimes and crimes against humanity. The tribunal found, in effect, that while on paper the rights established by the Weimar Constitution were retained by the Nazis, there was a progressive degeneration of the judicial system under Nazi rule and that substantially every principle of justice enumerated by prior German law was violated by the Hitler regime.

The same can be said about about the United States judicial system. Our courts have attacked our constitutionally protected jury system to the point where it is for all practical purposes now extinct. The common law is no longer predictable because judges no longer believe their rulings must be anchored to precedent. Far too many judges act as despots who can berate, belittle, and harm those who appear in their ostentatious court rooms.

Obviously, if as James Madison postulated *justice* is the goal of government, our courts and the other two branches of our government have failed us. We need good competent judges who are paid to ferret out the truth in a pragmatic way; not baby or senile lawyers awed by their power and the courtesan legal cabals which seek their favor. If our constitutional system is now dead let's move on to one that actually attempts to provide justice for a free people.

Ever wonder how many millions of people the american courts have caused to be evicted since the Supreme Court made it so easy for them to do so in 2007? Me too.

Unfortunately, looks like the government doesn't keep very good track of this. See Bibliography, Parts –. The last estimate I recall reading in a non-government article was that as of 2013 over 30,000,000 people had been forced from their homes.

Unfortunately, that article appears to have been scrubbed from the internet. But such numbers are consistent with a May 2015 article in the Washington Post, which states:

The scale of this entire foreclosure migration is deceptively large. The 10 million households that lost their homes dwarf the number that left the Great Plains during the Dust Bowl (that was about 2.5 million people). In fact, it is larger than the 6 million blacks who moved north during the Great Migration — a movement that spanned decades.

Emily Badger, **“How the Housing Crisis Left Us More Racially Segregated,”**
Washington Post, May 8, 2015.

Next question. What happens to the people our courts force onto the streets? Just as you would expect, there are very few recent studies on this as well.

However, way back in 2011 when courts were accelerating foreclosures and homelessness, virtually everyone knew the banks had rigged the system and were blatantly using forged documents to take people’s homes. (see e.g. 2011 **60 Minutes** programs and **Congressional Hearings**). Turns out the courts didn’t care about either the forgeries or the health crises, including deaths, such injustice was causing the people. See Bibliography, Part —

The new research found that the average homeless person has a life expectancy of 47, compared to 77 for the rest of the population: a startling difference of 30 years...

NHS choices; your health, your choices **“Homeless die 30 years younger than average** (December 11, 2011).

So let’s assume based on the data (and lack of data) set forth in Part ___ of the bibliography that at least 30,000,000 people have been evicted by the federal and state governments from their homes. Of that number only a third of these people are able to escape homelessness. Cf. Wall Street Journal, **Many Who Lost Homes to Foreclosure in Last Decade Won’t Return — NAR** (April 5, 2015) This means our courts and governments have robbed these people collectively of 60,000,000 million years of life. This wouldn’t happen in a just society of free people where the banks had already been bailed out of these losses which were a result of their own criminal behavior. Mark Collins, Forbes, **“The Big Bank Bailout”** (July 14, 2015)

I have suggested that American judges treatment of homeowners is similar to the conduct for which German judges were convicted during the Nuremberg trials following World War II. See e.g. Stafne, Scott, **“Free House or Death Sentence ?”**, scottstafne.com (April 27, 2017) , See also Stafne, Scott, **“Happy Thanksgiving – 2016”** scottstafne.com (November 23, 2016) . Cf. Stafne, Scott, **“Judicial Review – A Slippery Slope ”**, scottstafne.com (August 21, 2014). Others have also seen the connection between the American legal system and that of Nazi Germany. They explain one of the reasons American law is so similar to that created by the Nazi Germany to facilitate genocide and war crimes is because Germany’s judges and lawyers used American race law as their example. See e.g. Bill Moyers interview with James Whitman, For the Record, **“Hitler’s American Model: The United States and the Making of Nazi Race Law**

” (October 13, 2017). The interview discusses Whitman’s new book [Hitler’s American Model: The United States and the Making of Nazi Race Law](#) , Princeton University Press (2017)

But no one wants to have to care about their lost neighbors because then we all become complicit in these crimes by the united states against this nation’s own people; our families and neighbors.

In *United States of America v. Alstötter, et al.* (“The Jurists’ Trial”), 3 *T.W.C.* 1 (1948), 6 *L.R.T.W.C.* 1 (1948), 14 *Ann. Dig.* 278 (1948) the Court well stated the gravity of judges relying on false evidence when imposing death and/or severe sentences on citizens, who have been robbed of their freedom.

He [the judge defendant] formed his opinions from dubious records submitted to him before trial. By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. From the evidence of his closest associates as well as his victims, we find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. ***Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.***

Conclusion.

“In a well-functioning judicial system, negotiated resolutions of litigated disputes should reflect not only the interests of the disputants but also a reasonable approximation of the factual and legal merits of claims.” Brooke D. Coleman, “[THE EFFICIENCY NORM](#)” 56 *B.C. L. Rev* 1777 (2015) Just as this observation did not apply in the *Dred Scott* case it does not apply to the vast majority of those of us who find ourselves trapped in court proceedings today. This is because our government views those of us who cannot shell out cash for a court’s favorable ruling as something less than the free people our Constitution intended would be entitled to justice.

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McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 103 (2010) “[T]his court [Washington Supreme Court] would be hesitant to effectively rewrite CR 12(b)(6) based on policy considerations. The appropriate forum for revising the Washington rules is the rule-making process. See *Twombly*, 550 U.S. at 579, 595 (Stevens, J., dissenting). This process permits policy considerations to be raised, studied, and argued in the legal community and the community at large.”

Hawkeye Foodservice Distrib. v. Iowa Educators Corp., 812 N.W.2d 600, 607-608 (2012).

“For the most part, state high courts have declined to adopt the new standard announced in *Twombly* and *Iqbal*. See *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011); *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861, 863-64 (Wash. 2010); *Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 700 S.E.2d 183, 189 n.4 (W. Va. 2010). But see *Doe v. Bd. of Regents*, 280 Neb. 492, 788 N.W.2d 264, 278 (Neb. 2010). These courts have given a variety of reasons for refusing to incorporate the new federal standard in their state rules. For example, the Washington court concluded that the *plausibility* factor adds a

determination of the likelihood of success on the merits, so that a trial judge can dismiss a claim, even where the law does provide a remedy . . . , if that judge does not believe it is plausible the claim will ultimately succeed.

Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Coauthors*, 78 Geo. Wash. L. Rev. 9, 28–29 (2009);

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Alexander A. Reinert, *Pleading as Information-Forcing*, 75 L. & Contemp. Probs. 1, 22–28 (2012);

Hawkeye Foodservice Distrib. v. Iowa Educators Corp., 812 N.W.2d 600, 607-608 (2012).

“For the most part, state high courts have declined to adopt the new standard announced in *Twombly* and *Iqbal*. See *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011); *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 233 P.3d 861, 863-64 (Wash. 2010); *Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 700 S.E.2d 183, 189 n.4 (W. Va. 2010). *But see Doe v. Bd. of Regents*, 280 Neb. 492, 788 N.W.2d 264, 278 (Neb. 2010). These courts have given a variety of reasons for refusing to incorporate the new federal standard in their state rules. For example, the Washington court concluded that the *plausibility* factor adds a determination of the likelihood of success on the merits, so that a trial judge can dismiss a claim, even where the law does provide a remedy . . . , if that judge does not believe it is plausible the claim will ultimately succeed.

Joe. S. Cecil, Federal Judicial Center, “[Of Waves and Water: A Response to Comments on FJC Study Motions to Dismiss for Failure to State a Claim after Iqbal](#),” Draft Posted March 19, 2012. Paper can be downloaded from link.

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Alexander A. Reinart, ABA Human Rights Magazine, “[Lurking in the Shadows: The Supreme Court’s Quiet Attack on Civil Rights: The Supreme Court’s Civil Assault on Civil Procedure](#),” Vol 1, No. (2015);

[Amicus Brief on behalf of Public Justice PC](#) filed with Supreme Court on October 24, 2016 in support of Respondents in *VISA, Inc. v Sam Osborn*, which petition was dismissed as improvidently granted argue Supreme Court has no authority to amend rule of civil procedure without going through rule-making procedure or alternatively interpreting such rules away. 27-29

II. IQBAL/TWOMBLY BENEFITS CORPORATIONS AND THE WEALTHY AT THE EXPENSE OF THE PEOPLE.

Stein, Alex and Parchomovsky, Gideon, “[Empowering Individual Plaintiffs](#)” (2017).

(“[A]s we show in this Essay, in many key sectors of our economy, suits by individual plaintiffs have become a rare phenomenon, if not a virtual impossibility. The architecture of liability, by making causes of action more complex and difficult to prove, while equipping defendants with multiple defenses, coupled with the fact that large corporate defendants enjoy a vast cost advantage over individual plaintiffs on account of superior legal expertise and economies of scale and scope, make it nearly impossible for individual plaintiffs to prevail in court, or even get there. This problem pervades many industries, but, for the reasons we detail, it is particularly acute in the insurance, healthcare, medical, and consumer finance sectors.)

Luke K. Norris, “[LABOR AND THE ORIGINS OF CIVIL PROCEDURE](#)”, 92 N.Y.U.L. Rev. 462 (2017) Article can be downloaded from link

("T]his Article argues that the recent transformations in civil procedure both undermine the economic purposes that were central to the regime's rise and diminish the ability of diffuse economic actors to exercise countervailing power – threatening once-enduring procedural commitments.)

Alexandra D. Lahav, [ARTICLE & ESSAY: THE ROLES OF LITIGATION IN AMERICAN DEMOCRACY](#), 65 Emory L.J. 1657(2016) paper can be downloaded from link.

("As in politics and economics, a system that gives too much control to the one percent risks undervaluing and under-serving the remaining ninety-nine. Using social and political science, the Article argues that the homogenous policy making of one percent procedure creates sub optimal results. The Article concludes that the structures giving rise to one percent procedure must be modified and proposes a set of reforms intended to allow the ninety-nine percent representation in, and access to, the process of constructing our shared civil litigation system.")

Professor [Alexander Reinart interviews Professor Brooke Coleman of Seattle Law about her her article "One percent Procedure"](#) at Cardozo School of Law civil procedure workshop. Link is to recording of that interview.

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The degeneration of the american empire's legal system has been accompanied by litigation models which rely on the disparity of resources between the parties (not the facts or law of any specific case) as the primary basis for resolving cases.

It is my observation that the "Scorched Earth" litigation model, named after General Sherman's infamous military campaign, is used in virtually 100% of all foreclosure

litigation. This model is based on the business premise that banks and servicers should spend whatever money is necessary to win so as to deter homeowners (and any potential lawyers who might be inclined to represent them) from challenging any foreclosure judicially.

I have personally seen this multi-billion dollar industry spend more in litigation costs than the worth of the houses they are foreclosing on. I have been told by servicers' lawyers that their clients do not factor in defense costs for purposes of settling with homeowners (even where the homeowner has obtained a summary judgment of liability against the servicer) because they want homeowners and their lawyers to know that they will spend whatever it takes to win in court.

The point they are making is one Americans should contemplate: Are we now living in a totalitarian society where the courts are rigged and judicial decisions are decided not by the merits, but the money the parties are willing and/or can afford for litigation?

III. JURY TRIALS ARE VIRTUALLY EXTINCT IN THE UNITED STATES NOTWITHSTANDING THEY ARE GUARANTEED BY THE CONSTITUTION.

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Stephen D. Sussman, "35th Annual Conference of American Conference of American Society of Trial Consultants **"Disappearing Civil Trials"** pp. 4-16 (2016);

Suja. A. Thomas, **"THE MISSING BRANCH OF THE JURY"**, 77 Ohio St. L.J. 1261 (2016) Article can be downloaded from link) (" In the past, the Supreme Court has used the doctrines of the separation of powers and federalism to protect the power of the

traditional actors including the branches, while it has not used any similar doctrine to preserve jury authority. At the same time, the power of the jury has eroded. This article argues that the jury is effectively a “branch” of government — similar to the executive, the legislature, and the judiciary — that has not been recognized and protected.”

Brooke D. Coleman, “[THE EFFICIENCY NORM](#)” 56 B.C. L. Rev 1777 (2015)

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Stephen N. Subrin, Thoma O. Main, [THE FOURTH ERA OF AMERICAN CIVIL PROCEDURE](#), 162 U. Pa. L. Rev. 1839 (June 2014)

Andre Guthrie Ferguson, “[The Jury As Constitutional Identity](#)”, 47 U.C. Davis L. Rev. 1105 (April 2014)

Scott E. Stafne, River City Reader, [How Jury Trial Could Have Softened the Blow of the Financial Crisis](#) (May, 2015)

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IV. PRO SE LITIGANTS

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In America, the judiciary has increasingly had to grapple with the question of how far a judge can go in guiding or assisting an SRL in such a way as to avoid the possibly harsh or unjust consequences resulting from their lack of familiarity with the judicial

process? Despite calls for clarification of the judge's role in these circumstances, the current reluctance of the U.S. judiciary to assist SRLs is fostered by both the traditionally passive role of the adversarial trial judge, and by the general rule of non-assistance in U.S. case law. Yet most U.S. trial judges have realized that they must assist SRLs to some extent to avoid the harsh results that can occur when SRLs lacking sufficient legal knowledge represent themselves in court.

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Deborah L. Rhode, **SYMPOSIUM: WHATEVER HAPPENED TO ACCESS TO JUSTICE?**, 42 Loy. L.A. L. Rev. 869 (Summer 2009) ("Equal justice under law' is a principle widely embraced and routinely violated. Although the United States has the world's highest concentration of lawyers, it fails miserably at making their assistance accessible to those who need it most. Litigants who remain unrepresented are less likely to obtain a fair outcome in court. The gap between our rhetorical commitments and daily practices regarding access to justice is a function of inadequate funding, restrictions on cases and activities by government-funded legal aid programs, insufficient concern by courts, overbroad restrictions on nonlawyer services, and inadequate pro bono involvement by lawyers and law students. Narrowing the justice gap will require a coordinated effort by all of the stakeholders-the bench, bar, clients, nonprofits, and legal educators.")

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("This Article calls attention to the breakdown of adversary procedure in a largely unexplored area of the civil justice system: the ordinary, two-party case. The twenty-first century judge confronts an entirely new state of affairs in presiding over the average civil matter. In place of the adversarial party contest, engineered and staged by attorneys, judges now face the rise of an unrepresented majority unable to propel claims, facts, and evidence into the courtroom. The adversary ideal favors a passive judge, but the unrealistic demands of such a paradigm in today's "small case" civil justice system have sparked role confusion among judges, who find it difficult to both maintain stony silence and reach merits-based decisions in the twelve million cases involving unrepresented parties.")

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(It is a shameful irony that the nation with one of the world's highest concentrations of lawyers does so little to make legal services accessible. According to the World Justice Project, the United States ranks 67th (tied with Uganda) of 97 countries in access to justice and affordability of legal services."Equal justice under law" is one of America's most proudly proclaimed and routinely violated legal principles. It embellishes courthouse doors, but in no way describes what goes on behind them. Millions of Americans lack any access to justice let alone equal access. Over four-fifths of the legal

needs of the poor and a majority of the needs of middle-income Americans remain unmet.”)

ABA Commission on the Future of Legal Services.

The Commission presents this compendium of scholarly papers on the future of legal services. With the generosity of the University of South Carolina Law Review and its faculty advisors and members, the papers of leading academicians have been gathered.

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“As a result of these factors, homeless people are three to four times more likely to die than the general population (O’Connell, 2005). This increased risk is especially significant in people between the ages of 18 and 54. Although women normally have higher life expectancies than men, even in impoverished areas, homeless men and women have similar risks of premature mortality. In fact, young homeless women are four to 31 times as likely to die early as housed young women (O’Connell, 2005). ***The average life expectancy in the homeless population is estimated between 42 and 52 years, compared to 78 years in the general population.***”)

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