COMMENTS

ARE THE WOOLF REFORMS AN ANTIDOTE FOR THE COST DISEASE? THE PROBLEM OF THE INCREASING COST OF LITIGATION AND ENGLISH ATTEMPTS AT A SOLUTION

MICHAEL E. STAMP*

1. INTRODUCTION

The ever-increasing cost of litigation and the perceived effects of this cost on limiting access to justice is a perennial concern in modern society. The rising cost of legal services in general, and litigation in particular, is often seen somewhat ominously as at least "a barrier to some and a problem for all litigants." At first glance, this emphasis on the cost of legal services seems well placed. After all, simple intuition tells us that increases in the cost of legal services seem destined to price low income citizens out of the market and lead to a decrease in the ability of those citizens to secure access to justice. However, this Comment will show that the belief that a relative increase in the price of legal services will necessarily cause citizens to lose access to legal services is, in fact,

* J.D. Candidate, 2001, University of Pennsylvania Law School; B.S., 1997, University of Minnesota. I wish to express my gratitude to my parents and grandparents for being a continuing source of inspiration. I also wish to thank the Editors and Board of the University of Pennsylvania Journal of International Economic Law for their thoughtful contributions to this Comment.

incorrect. This belief arises out of a "fiscal illusion" created by changes in relative prices of goods and services. The conception that legal services are quickly becoming unaffordable is at least somewhat illusory because relative price increases do not necessarily imply decreased access to legal services. Simply stated, society can achieve greater abundance of everything, but to do so it must alter the proportion of income devoted to different goods and services.²

By way of putting this problem in context, this Comment considers the recent changes made to English civil procedure as part of the much-anticipated Woolf reforms and asks whether the reforms will achieve their objective of decreasing the cost of litigation.³ While the analysis focuses on the new Civil Procedure Rules, a general result arises that is probably applicable to most legal systems. In particular, this Comment will show that it is unwise to focus too much attention on reducing the cost of legal services, except insofar as efforts are being made to increase legal productivity. Efforts to reduce legal costs may indeed lower costs within the short-term time horizon, but any efforts to reduce the cost of legal services in the long term will ultimately fail unless the reforms are specifically addressed to increasing the productivity of legal services. Moreover, there are certain characteristics of legal productivity that contain "forces working almost unavoidably for progressive and cumulative increases in the real costs incurred in supplying them."⁴ As a result, it is highly unlikely that the legal


³ In 1994, Lord Harry Woolf (now Master of the Roles) was appointed by the Lord Chancellor to review the rules and procedures in civil courts in England and Wales and to make appropriate recommendations. The objectives of this review were, inter alia, to improve access to justice, reduce the cost of litigation, and reduce the complexity of the legal process. This review resulted in the publication of two reports entitled Access to Justice and the Draft Civil Proceedings Rules. See Woolf, INTERIM REPORT, supra note 1; The Right Honourable the Lord Woolf, Access to Justice: Draft Civil Proceedings Rules (1995) [hereinafter Woolf, Civil Proceedings Rules]. The resulting Rules were finally enacted into law on December 17, 1998 and are embodied in the Civil Procedure Rules 1998 which came into force on April 26, 1999. See Civil Procedure Rules 1998, SI 1998/3132 (Sweet & Maxwell 1999) (Eng.).

services will ever experience the kind of productivity increases necessary to substantially reduce the cost of legal services relative to the cost of most other goods and services. Nevertheless, it will be shown that from a social welfare point of view these almost inevitable increases in cost need not necessarily affect the ability of persons to secure legal services.

Section 2 of this Comment sets the stage by describing the recent English attempts at civil procedure reform. As previously mentioned, this Comment examines the Woolf reforms and the newly enacted Civil Procedure Rules 1998, noting those new Rules that most explicitly attempt to control the cost of litigation. Section 3 then introduces the Baumol Hypothesis which provides the theoretical framework for the analysis. This analytical framework is then applied to the Civil Procedure Rules in Section 4, and alternative suggestions are made as to how litigation costs might be better controlled. Section 5 presents this Comment's conclusion.

2. THE CIVIL PROCEDURE RULES 1998
("CPR" OR "WOOLF REFORMS")

In 1994, Lord Harry Woolf was appointed by the Lord Chancellor to study the procedures in the civil courts of England and Wales and to recommend changes that would improve the operation of the civil justice system. This four year inquiry was wide-ranging and finally resulted in over 300 recommendations designed to decrease the cost and complexity of civil litigation. Lord Woolf's inquiry produced two interim publications that detailed his findings, and many of his recommendations were codified in the subsequent Civil Procedure Rules 1998. These Civil Procedure Rules took effect on April 26, 1999, amid much speculation and hope that they would help reign in spiraling costs, delay, and complexity of the English system of civil justice. The new system

5 See Woolf, Interim Report, supra note 1.
7 See Woolf, Interim Report, supra note 1; Woolf, Final Report, supra note 6.
has not been without detractors but, by and large, the reforms have been met with a great deal of optimism.

A primary concern of the Woolf reforms, as they came to be known, was that "[e]xcessive cost[s] deter people from making or defending claims." In particular, "[a] number of businesses [say] that it is often cheaper to pay up, irrespective of the merits, than to defend an action. For individual litigants the unaffordable cost of litigation constitutes a denial of access to justice." These concerns were reflected in the "overriding objective" of the Civil Procedure Rules 1998, which is simply to construe the civil procedure system so as to deal with cases justly.


The overriding objective is the lens through which the entire Civil Procedure Rules must be viewed. Simply put, the overriding objective is that the system of civil procedure must be construed in such a manner as to enable the court to deal with cases justly.

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9 It would not be an overstatement to say that the more than 300 changes suggested by Lord Woolf gave rise to the most radical change to English civil procedure in the past 100 years. Despite such extraordinary changes, the Woolf Reforms were generally met with a great amount of optimism. See Terence Shaw, Reforms to Make Justice More Civil, DAILY TELEGRAPH, July 27, 1996, at 12; Simona de Logu, Shake-up of UK Civil Courts Announced, UPI, June 16, 1995, available at LEXIS, U.S. News Library, Combined File. Most English lawyers seemed to recognize that something needed to be done to decrease costs although there was relatively little agreement about how to fix the problem. See Lord Harry Woolf, Civil Justice in the United Kingdom, 45 AM. J. COMP. L. 709, 711-13 (1997) [hereinafter Woolf, Civil Justice]: Fixed Costs: Woolf’s Achilles Heel?, LAW., Oct. 8, 1996, at 13, available at LEXIS, News Library, Lawyer File.

10 Quote of the Week, LAW., Sept. 11, 2000, available at http://www.thelawyer.co.uk (quoting Gordon Pollock QC as declaring, "I just think that the whole thing [the Woolf reforms] is a complete waste of time."). Professor Michael Zander was among the most outspoken of the critics, arguing that the solutions offered by Lord Woolf were likely to make matters worse. Martin Mears, The High Cost of Letting Woolf Through the Doors, TIMES (London), Nov. 7, 2000, at Law.


12 WOOLF, INTERIM REPORT, supra note 1, at 9.

13 Id.

14 Civil Procedure Rule 1.1.

15 See id. 1.3.1 (stating that the overriding objective “provides a compass to guide courts and litigants and legal advisors as to their general course”).
Specifically this means that, so far as practical, the court must attempt to: (1) place the parties on an equal footing; (2) save expense; (3) deal with the case in ways which are proportionate to the amount of money involved, the importance of the case, complexity of the issues, and the financial position of the parties; (4) ensure that the case is dealt with expeditiously and fairly; and (5) allot to the case an appropriate share of the court’s resources while keeping in mind the necessity of allotting other resources to other cases. It is important to note that most of these guidelines directly address the cost of the litigation before the court. Also addressed in the CPR is the issue of delay, which acts as drag or friction upon the economy by reducing the ability of individuals and corporations to increase productivity and fully utilize capital. The costs incurred in delay are difficult to quantify and are somewhat more abstract than costs that are more directly related to the litigation process.

2.2. Noteworthy Changes to English Civil Procedure

The Civil Procedure Rules enacted many important and novel changes that revolutionized English civil procedure. Indeed, the Woolf reforms did “not ‘tinker’ with the existing system; they [re-wrote] it.” While many, if not most, of these changes are designed to reduce the complexity and cost of litigation (in keeping with the overriding objective), it is most instructive to focus attention on a few of the most noticeable changes. Therefore, rather than analyze each particular element of the Civil Procedure Rules, this Comment will focus on those rules relating to discovery, the awarding of costs, and case management. I believe that the changes to these elements of English civil procedure are the most important and will have the most far-reaching effect.

16 See id. 1.1(1).
17 Id. 1.1.
18 See id. 1.0.2 (stating that the Civil Procedure Rules 1998 have no equivalent in the prior rules and that their principal purpose is to signal a substantial shift in the manner in which cases are handled).
20 See supra Section 2.1.
2.2.1. Discovery

"From the outset of the consultation process that led to the Woolf reforms it was clear that issues relating to discovery were seen as critical to an updated civil litigation system."\(^{21}\) The objective was to limit discovery rather than to expand and Americanize it.\(^{22}\) In particular, there was dissatisfaction with the prior *Peruvian Guano* test\(^{23}\) that had previously been used to determine the range of discoverable material.\(^{24}\)

The result of the *Peruvian Guano* decision was to make virtually unlimited the range of potentially relevant (and therefore discoverable) documents, which parties and their lawyers are obliged to review and list, and which the other side is obliged to read, against the knowledge that only a handful of such documents will affect the outcome of the case. In that sense it is a monumentally inefficient process, especially in the larger cases. The more conscientiously it is carried out, the more inefficient it is.\(^{25}\)

This decision to move toward restricted discovery was due, in part, to the effect of market forces operating upon the English courts.\(^{26}\) In the years leading up to the Woolf reforms, commercial organizations were effectively shopping around for the least expensive venue to bring an action, and expansive discovery was causing these firms to take their commercial litigation elsewhere.\(^{27}\) Indeed, Lord Woolf explicitly stated such factors as support for


\(^{22}\) *See generally Woolf, INTERIM REPORT, supra* note 1, at 164-74.


\(^{24}\) Woolf, *INTERIM REPORT, supra* note 1, at 167; *see also Woolf, Civil Justice, supra* note 9, at 711 (stating that "[t]he scale of discovery, at least in the larger cases, is completely out of control.").

\(^{25}\) Woolf, *INTERIM REPORT, supra* note 1, at 167; *see also Woolf, Civil Justice, supra* note 9, at 711 (asserting that "[t]he principle of full, candid disclosure in the interests of justice has been devalued because discovery is pursued without sufficient regard to economy and efficiency in terms of the usefulness of the information which is likely to be obtained from the documents disclosed.").

\(^{26}\) *See Woolf, Civil Justice, supra* note 9, at 715 (noting that the costs of commercial and patent litigation influence where international entities resolve their legal disputes).

\(^{27}\) *See id.*
limiting discovery. Arguing that "the costs of conducting litigation in the Commercial Court [was] totally beyond reason" and that commercial organizations may change venue to New York, Lord Woolf believed that civil procedure reform in general, and reform of discovery in particular, was a matter of importance to the national economy. If true, this is a powerful statement regarding the high cost of litigation.

It can hardly be doubted that this concern over discovery is partly due to a desire to protect personal privacy. Yet the economic cost of searching for relevant documents pursuant to a discovery request and giving depositions must not be underestimated. Discovery operates not only as a drag on the economy by directly impacting the business operations of the litigants, but it also operates as a drag on the judicial system by increasing the burden on the courts.

2.2.2. Costs

"Several long established principles relating to legal costs have either been modified or disappeared completely as a result of the Woolf reforms, and one or two totally new concepts and procedures have been introduced." Most notably, the long-standing English rule of awarding costs to the winning party has been modified by the Civil Procedure Rules. While the general rule still remains that the unsuccessful party will be ordered to pay the costs of the successful party, the Civil Procedure Rules introduced a number of explicit exceptions. Also, if the court orders a party to

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28 See Woolf, INTERIM REPORT, supra note 1, at 164-74.
29 Woolf, Civil Justice, supra note 9, at 715 (explaining that the reduction of litigation costs "is, therefore, a matter of considerable importance to the City of London and the economy of the country.").
32 See Civil Procedure Rule 44.3.1 (commenting that "[a]lthough this rule preserves the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, Lord Woolf M.R. was anxious to move away from the position that any success is sufficient to obtain an order for costs.").
33 See Civil Procedure Rule 44.3 (stating when a court has discretion with respect to the allocation of costs).
pay the costs of another, it may require some amount to be paid on account before the costs are assessed.34 "This, coupled with the ability to order costs or a proportion of costs which have been summarily assessed to be paid within 14 days has established in today’s litigation system a concept of what one learned commentator has described as ‘a pay as you go’ system for costs."35 This "pay as you go" system may have a significant impact upon the behavior of the parties. In particular, such a system may create incentives for settlement by making the parties immediately internalize their costs and make a calculated decision as to whether their expected marginal revenue exceeds their expected marginal costs.36

"A major development in the approach of district judges to costs in the last decade has been a determination to ascertain the levels of solicitors’ overheads, to fix local remuneration rates accordingly and to let those rates be known."37 Accordingly, costs for relatively simple actions are, for the first time in civil litigation in England, fixed and specified in the Civil Procedure Rules according to the value of the claim.38 Subject to limited exceptions, "[t]he court may not award more or less than the amount shown in the table."39 Despite the ambitious goal of clarifying costs, there is a developing realization that "costs are at the moment something of a mess."40 Indeed, there seems to be little hope that fixed costs are really an antidote for the increasing cost of litigation. There are often too many variables that must be taken account of to determine the amount of costs that should be awarded to a party.41 In

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34 Id. 44.3(8).
35 Bacon, supra note 31, at 741.
36 See HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 435 (3d ed. 1993) (noting the standard logic that "if the marginal revenue of some action didn’t equal the marginal cost of that action, then it would pay . . . to change the action.").
38 See Civil Procedure Rule 46.2; see also Bacon, supra note 31, at 740 (explaining the amount of costs that may be awarded in relatively simple fast track cases).
39 Civil Procedure Rule 46.2(2).
40 Holloway, supra note 37, at 316.
41 See Fixed Costs: Woolf’s Achilles Heel?, supra note 9 (noting that fixed costs in personal injury cases could be unfair to the plaintiff due to variations in costs and time).
particular, the length of a trial is often unpredictable and it may be
nearly impossible to account for all the variations in cost that arise
simply from the location of the trial.\textsuperscript{42}

Similarly, Part 45 of the Civil Procedure Rules sets out a de-
tailed listing of fixed costs which become applicable where, inter
alia, the claim is for a specified sum of money and a judgment in
default, admission, or summary judgment is obtained.\textsuperscript{43} Thus, for
example, where the amount of the judgment exceeds £5000 and
where summary judgment is given, the cost is £210,\textsuperscript{44} plus some
similarly specified sum for commencement of the claim.\textsuperscript{45}

2.2.3. Case Management

The Civil Procedure Rules classify cases into three distinct
types for the purpose of case management: small claims, fast track,
and multi-track.\textsuperscript{46} These classifications are somewhat similar to the
various case tracks that have been experimented with and utilized
in the United States. In fact, this method of case management was
developed by looking to the experience that U.S. courts had with
similar classification systems.\textsuperscript{47}

The fast track, for example, includes those claims that have a
financial value more than £5,000 but not greater than £15,000 and
otherwise do not fit the criteria for the Small Claims track.\textsuperscript{48} The
fast track comprises those cases that concern some landlord-tenant
issues or claims for personal injuries where the financial value of
the claim exceeds £1,000 but is not more than £5,000.\textsuperscript{49} It exists in
order to make litigation “more affordable, more predictable, and
more proportionate to the value and complexity of individual

\textsuperscript{42} See Holloway, supra note 37, at 316.
\textsuperscript{43} Civil Procedure Rule 45.1(2).
\textsuperscript{44} Id. 45.4(b).
\textsuperscript{45} Id. 45.2.
\textsuperscript{46} Id. Part 26.
\textsuperscript{47} See John Heaps & Kathryn Taylor, The Abuser Pays: The Control of Unwar-
ranted Discovery, 41 N.Y.L. Sch. L. Rev. 615, 617 (1997) (stating that “some of the
problems, and indeed solutions such as case management proposed by Lord
Woolf, will sound familiar to U.S. lawyers.”).
\textsuperscript{48} Civil Procedure Rule 26.6(4).
\textsuperscript{49} Id. 26.6.
cases."\(^{50}\) Another fast track feature is "speed and the virtually sacrosanct status of the trial date."\(^{51}\)

The multi-track comprises all cases that do not otherwise meet the criteria for small claims or fast track.\(^{52}\) The multi-track includes "a spectrum of cases from the relatively straightforward to cases which are complex, weighty, of high financial value or of significant public interest."\(^{53}\)

The issues of case management and costs are closely related and intertwined.\(^{54}\) Indeed, "[p]rocedural judges are to take account of the parties' financial circumstances in allocating cases to the fast track or to the small claims jurisdiction."\(^{55}\) Moreover, the "[l]imited procedures and tight timetables on the fast track, and judicial case management on the multi-track, will make it more difficult for wealthier parties to gain a tactical advantage over their opponents by additional expenditure."\(^{56}\)

3. **THE BAUMOL HYPOTHESIS**

In 1966, William Baumol and William Bowen hypothesized that the chronic problem of cumulative cost increases in the performing arts was due (at least in significant part) to the fact that the performing arts typically experience few or mild increases in productivity over time.\(^{57}\) Later termed the "cost disease of the personal services," Professor Baumol's has hypothesis has been extended to health care, education, and other "stagnant" components of the service sector.\(^{58}\) Each of these "stagnant" sectors of the economy possess a basic underlying criterion — they are all sectors in which

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\(^{50}\) Woolf, *Civil Justice*, supra note 9, at 723.


\(^{52}\) *See Civil Procedure Rule 26.6(6).*

\(^{53}\) *Woolf, INTERIM REPORT, supra note 1,* at 48.

\(^{54}\) *See Civil Procedure Rule 44.2.1* (citing Lord Woolf's view that litigation became so expensive because the client was not aware of the costs incurred, and that this problem could be cured by obliging the solicitor "to inform the client whenever an adverse costs order is made.").

\(^{55}\) *See Woolf, Civil Justice, supra note 9,* at 724.

\(^{56}\) *Id.*


\(^{58}\) *See Baumol, Health Care, supra note 2,* at 19-20.
the human touch is of the essence.\textsuperscript{59} The human touch may be required because of either real or perceived differences in the output that is produced. Other typically cited personal services susceptible to the cost disease are automotive repair, automotive insurance, and postal services.\textsuperscript{60}

Although the Baumol Hypothesis has not yet been explicitly extended to legal services, there is substantial reason to believe that legal services also possess characteristics that are inherently resistant to productivity increases and therefore inherently susceptible to cost increases.\textsuperscript{61} This is plausible for several reasons. First, it is virtually impossible to standardize a lawyer's methods of production. Outwardly similar legal problems often require subtly different solutions. There is a certain amount of "art" involved in negotiating or persuading a judge, jury, or opposing party that a particular outcome is appropriate. For better or worse, the work performed by a lawyer is too complex and dependent upon particular factual circumstances to reduce it to a simple algorithm.

Second, it is likely that, within limits, clients would prefer that their lawyers spend at least some minimum amount of time on their case. There also may be a perceived correlation of quality with the amount of labor that the lawyer applies to the legal problem. If the perceived correlation of quality with labor input varies from the true correlation, this will inhibit productivity growth where it might otherwise occur. To the extent that it exists, this perceived correlation of quality with labor expenditure creates a lower bound on the cost of legal services.

\textsuperscript{59} This dependence on the human touch may arise for different reasons. The method of producing the service may be so varied as to preclude standardization, or the consumer may prefer that the service not be standardized. There is sufficient variation in the characteristics of legal problems such that assembly-line legal analysis is not a viable solution. See William J. Baumol, Productivity Policy and the Service Sector, Discussion Paper \#1 (1984) (unpublished manuscript, on file with the Fishman-Davidson Center for the Study of the Service Sector) [hereinafter Baumol, Productivity Policy].

\textsuperscript{60} See Baumol, Health Care, supra note 2, at 19.

\textsuperscript{61} Foreshadowing this Comment, it has interestingly been suggested that, at least within the United States, access to legal services may soon present the same public policy problems as access to health care. See Geoffrey C. Hazard, Jr., Would British Fixes Improve U.S. Justice?, NAT'L L.J., Apr. 28, 1997, at A21. However, there have been attempts to standardize some of the simpler legal services. See "Fast-Food" Legal Services, USA TODAY (Newsletter Edition), Dec. 1996, at 16.
Third, and particularly applicable to the English system of justice, is the problem of duplication of labor. In England, solicitors "conventionally prepare the cases, and barristers... undertake the advocacy in court." This duplication of labor between solicitor and barrister may compound the problem of resistance to productivity increases. Although the division between solicitors and barristers is becoming blurred, there remains a very real distinction. At least partly due to the "strict experience and training tests applied," the inefficient division of labor creates a barrier to increased productivity. This is a built-in inefficiency.

3.1. Concept of the "Stagnant" Service Sector

Strictly for the purpose of developing a basic theory, the Baumol Hypothesis assumes that the economy may be divided into two distinct groups. These two groups may be thought to consist of "technologically progressive activities in which innovations, capital accumulation, and economies of large scale all make for a cumulative rise in output per man hour and activities which, by their very nature, permit only sporadic increases in productivity." For convenience, these two groups are referred to as the productive sector and the stagnant sector, respectively.

Automobile manufacturing is one of the most obvious examples of economic activity within the productive sector. Like most manufacturing processes, automobile manufacturing has the goal of producing some end product, with little concern as to how that product is produced. In other words, assuming that the price of the manufactured good remains constant, the consumer does not care how much labor was expended in producing it. "Thus it has been possible, as it were, behind the scenes, to effect successive and cumulative decreases in the labor input coefficient for most manufactured goods, often along with some degree of improvement in the quality of the product."
In contrast to the productive sector, the stagnant service sector may best be defined as those economic activities “in which quality is highly correlated with labor-time expended, and in which frequently (but not always) there must be direct contact between the consumers and those who provide the labor.”67 Stagnant service sectors are typically economic activities in which “for all practical purposes the labor is itself the end product.”68 The stagnant service sector is often also associated with the difficulty in standardizing the product, as well as a perceived positive correlation between labor time expenditure and the quality of the product.69 Legal services share many of these characteristics and therefore may appropriately be categorized as a “stagnant service.”

For an extreme example of a stagnant service consider the performance of a Mozart quartet scored for thirty minutes. This hypothetical quartet “took two person-hours to perform in the 18th century and requires exactly the same amount of performer-time today.”70 Not only is the human touch an essential element of the performance, but “[t]he loss of quality that would result from an attempt to speed up the performance is obvious enough.”71

Although some personal services are herein described as “stagnant,” it is not implied that such sectors never experience growth in productivity. Rather, productivity growth in stagnant sectors is more likely to occur in discrete bursts rather than a persistent trend, as one might expect in manufacturing.72 Consider, for example, the discrete increase in productivity made possible by the advent of computerized legal research tools. Prior to electronic databases, attorneys had to sort through various reporters and digests in order to find legal precedent. This was naturally a very labor-intensive process and subject to a large degree of potential error. With the advent of electronic databases, attorneys no longer needed to devote as much labor input to legal research. Moreover, it is quite likely that there was a contemporaneous improvement in

67 Baumol, Productivity Policy, supra note 59, at 3.
68 Baumol, Macroeconomics, supra note 4, at 416.
69 See Baumol, Productivity Policy, supra note 59, at 3. It seems very plausible that legal services match these criteria very well.
70 Id.
71 Id.
72 See Baumol, Macroeconomics, supra note 4, at 416-17; Baumol, Productivity Policy, supra note 59, at 11-12.
the quality of the legal research that they were producing. This productivity increase was, more or less, a single event rather than an ongoing process. This is not to say that future productivity increases will not occur — they surely will. Rather, the point to bear in mind is that within stagnant sectors one would not expect to find continuously increasing productivity to the extent found in other sectors of the economy. Instead, one would expect to see discrete bursts of productivity increases followed by longer periods of relatively stable productivity. The difference in productivity growth between the productive sectors and the stagnant sectors is "a matter of degree rather than an absolute dichotomy."

Admittedly, the real world provides examples of activities that do not fall into such neat classifications. Some manufacturing processes possess the characteristics of both productive and stagnant industries. For the purposes of the present (and rather rudimentary) analysis, these hybrid activities will be ignored.

3.2. Mathematical Derivation of the Baumol Hypothesis

Beyond the basic underlying assumption of the separability of economic activities into productive and stagnant sectors, the cost disease model utilizes three other assumptions. First, and most important, the model assumes that wages in the two sectors of the economy go up and down together. This is a fairly realistic assumption because "[i]n the long run there is some degree of mobility in all labor markets and consequently, while wages in one activity can lag behind those in another, unless the former is in process of disappearing altogether we cannot expect the disparity to continue indefinitely." Therefore, for simplicity of the model, hourly wages are assumed to be precisely the same, though the model could easily be modified to provide for a more realistic scenario. Second, the model assumes that expenses other than the cost of labor are nonexistent. This is obviously an unrealistic as-

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74 This is, of course, true by definition of a stagnant service sector.
75 See Baumol, Macroeconomics, supra note 4, at 416-17.
76 Id.
77 Id. at 417.
78 See id.
assumption, but it is useful because it simplifies the mathematical model.\textsuperscript{79} Finally, the model assumes that money wages rise as rapidly as output per man-hour in the productive sector.\textsuperscript{80} While there may be some reality in this assumption, it is nevertheless rather inessential to the model.\textsuperscript{81} This assumption would affect only the magnitude of the absolute price level but would not affect the relative costs and prices that will be shown to be most important to the model.\textsuperscript{82}

The Baumol Hypothesis can be easily described mathematically by assuming a two sector economy composed of a stagnant legal services sector and a productive manufacturing sector.\textsuperscript{83}

Let:

\[ Y_1 = \text{units of output of legal services} \]

\[ Y_2 = \text{units of output of manufactured goods} \]

\[ L_1 = \text{labor input in legal services sector} \]

\[ L_2 = \text{labor input in manufacturing sector.} \]

Assuming that the output of legal services per man hour grows at a constant rate and that the output of manufactured goods per man hour grows at some constant compounded rate, \( r \), then for some constants \( a \) and \( b \), the output at any particular time \( t \) may be described by:\textsuperscript{84}

\[
(1) \quad Y_{1(t)} = aL_{1(t)} \\
(2) \quad Y_{2(t)} = bL_{2(t)}e^{rt}.
\]

\textsuperscript{79} See id.

\textsuperscript{80} See Baumol, Macroeconomics, supra note 4, at 417.

\textsuperscript{81} See id.

\textsuperscript{82} See id.

\textsuperscript{83} There is no inherent difficulty with such an assumption. Although for conceptual purposes the economy is divided into a legal services sector and a manufacturing sector, it is not necessary to so limit the model. One can also divide the economy into a legal services sector and some other sector encompassing all other sectors in the aggregate sense.

\textsuperscript{84} See Baumol, Macroeconomics, supra note 4, at 417.
Essentially, equation (1) specifies (by assumption) that the output of the stagnant service sector grows in fixed proportion to the amount of labor unit input. In other words, equation (1) simply states that the marginal product of labor is equal to some constant $a$. On the other hand, equation (2) describes a productive sector of the economy in which the output over time grows at an ever-increasing rate with respect to the unit labor input. In other words, equation (2) simply states that the marginal product of labor is constantly increasing as a function of $t$.\(^{85}\)

While it may be somewhat artificial to assume a two-sector model in which one sector produces at some constant output per man hour and the other sector grows at a constant (rather than fluctuating) rate, it is not so far abstracted from reality as to lose instructive value.\(^{86}\) It is often necessary in economic analysis to peel away the layers of complicating variables in order to understand the overarching implications.\(^ {87}\)

Now, assuming that all workers are homogeneous, all jobs are equally attractive to workers, and that the labor market is perfectly competitive, then all workers will receive precisely the same wage rate.\(^{88}\) Once again, these are simplifying, standard assumptions present in many economic models.\(^{89}\) Assuming that wages are equal across all sectors of the economy and that wages grow at the same constant compounded rate $r$ as the labor productivity in the manufacturing sector,\(^ {90}\) then for some constant $W$ at time $t$, wages across the economy may be described by:

\[
W(t) = W_0 t
\]

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\(^{85}\) The marginal product of labor is the first derivative of the production function.

\(^{86}\) See Baumol, *Macroeconomics*, supra note 4, at 415-16.

\(^{87}\) See Michael C. Jensen & William H. Meckling, *The Nature of Man*, J. APPLIED CORP. FIN., Summer 1994, at 4, 4 (arguing that a limited number of variables simplifies social science models to allow for greater understanding).


\(^{89}\) See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 86-88 (2d ed. 1994).

\(^{90}\) Wages theoretically increase in lockstep with increases in labor productivity because wages are determined by the marginal productivity of labor. See MARK BLAUG, *THE METHODOLOGY OF ECONOMICS* 193-201 (1980).
This equation requires some explanation. First, labor productivity is simply shorthand for describing the marginal productivity of labor at a particular point along the production function. Second, because we had earlier assumed that workers in this model were homogeneous, indifferent between jobs, and that the labor market was perfectly competitive, we can expect that the wage rate in both the productive and stagnant sectors will correspond with \( W(t) \).

Because the cost of a unit of output in this simplified economy is equal to the total wages paid in that sector divided by units of output,\(^{91}\) it follows that the cost per unit of output in the legal services sector, \( C_{L(t)} \), may be described by:

\[
(4) \quad C_{L(t)} = \frac{W(t)I_{L(t)}}{Y_{L(t)}} = \frac{We^n L_{L(t)}}{aL_{L(t)}} = \frac{We^n}{a} 
\]

\[
(5) \quad C_{G(t)} = \frac{W(t)I_{G(t)}}{Y_{G(t)}} = \frac{We^n L_{G(t)}}{bL_{G(t)}e^n} = \frac{W}{b}. 
\]

Taking the limit yields:

\[
(6) \quad \lim_{t \to \infty} C_{L(t)} = \lim_{t \to \infty} \frac{We^n}{a} = \infty 
\]

\[
(7) \quad \lim_{t \to \infty} C_{G(t)} = \lim_{t \to \infty} \frac{W}{b} = \frac{W}{b}. 
\]

Essentially, equation (6) illustrates that the per-unit cost of the output of the stagnant service sector will increase without bound over time. Conversely, equation (7) illustrates that the per-unit cost of goods in the productive sector of the economy will remain constant over time.

Because of the mobility of labor, wages throughout the economy will tend to rise at approximately the same rate (therefore

\(^{91}\) This is the case simply because the model assumes no other costs of production besides wages.
constantly tending toward a uniform economy-wide wage rate). To the extent that workers in the stagnant service sector produce less output per hour than the workers in the more productive sectors of the economy, but the cost of labor input is equal across the economy, the per unit cost of the stagnant service sector output will reflect this difference as a relatively higher price. Moreover, because the differential between unit cost in the two sectors is increasing over time, stagnant service sector output will continuously become more expensive relative to productive sector output.

While it is important to note that no single influence accounts for the entire increase in the personal services sector, it is likely that the cost disease has had a significant effect.

3.3. Application of the Baumol Hypothesis

Even if it were true that productivity in the stagnant services was not increasing one iota, their rising prices could still not put them beyond the reach of the community; on the contrary, it would remain true that society could afford ever more of them, just as it has in fact been getting ever more of the health care and education that seem to grow steadily toward becoming too expensive to afford.

Indeed, as long as productivity does not actually decline in any sector, individuals will be able to achieve at least the same amount of every good and service, regardless of price level. More intuitively, these simple productivity increases result in the growth of the total economic pie. Taken out of the abstract and applied to the legal services sector of the economy, it follows that so long as productivity within the legal services sector is not declining, society will likely be able to consume as much legal services as it did the year before.

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92 This assumption of a uniform wage rate across the economy is nonessential. Even given a wage differential between the sectors, one would still expect long run nominal wages to increase everywhere. See Baumol, Health Care, supra note 2, at 20-21.

93 Assuming a competitive market, price is equal to the marginal cost of the good or service. See VARIAN, supra note 36, at 374.

94 Baumol, Health Care, supra note 2, at 19.

95 Id. at 23.

96 See id.
In terms of developing a procedural system designed to lower the cost of legal services, lawmakers should focus on increasing productivity rather than simply attempting to force reduction in costs by limiting cost awards or restricting discovery. It is the low productivity of legal services, relative to the rest of the economy, that has the greatest potential for chronic increase in cost. However, to the extent that the increase in cost does not necessarily mean that society is worse off, it is appropriate that lawmakers focus on restricting discovery and creating more effective case management techniques.

3.4. The Rebuttal to Baumol

Although there has not been significant debate disputing the basic cost disease hypothesis, there has been some discussion as to the relative significance of the cost disease as a factor in rising costs. Yet, while the exact magnitude of these effects has been the subject of some controversy, it appears to be accepted by the economic community that the role of the cost disease is at least a very significant, if not dominant, factor.

In an empirical study of the cost disease with respect to the cost of government services, Professors J. Stephen Ferris and Edwin G. West determined that approximately two-thirds of the rise in cost from 1959 to 1989 is attributable to relatively slow productivity growth, while the remaining one-third is due to changes in real wages across sectors.97 This means that “the relative productivity hypothesis (i.e., Baumol’s cause of the cost disease hypothesis) is not sufficient, in itself, to explain fully past movements in measured real cost.”98 If these results are accurate, and if they carry over to the legal service sector, we must look to other means to fully address the problem of rising legal costs — and this implies that some restructuring of the legal system in terms of procedure may be appropriate. This may be especially relevant for those legal systems that are experiencing massive growth in the real wage rate among lawyers, such as the United States.99 In these countries, one

98 Id. at 43.
would naturally expect the cost disease component of the rise in cost of legal services to be proportionally smaller and hence, the impact of procedural restructuring may bring significant benefits.

The criticism by Professors Ferris and West points out a deficiency in the assumption that relative wage rates across both sectors of the simplified economy do not change. This is a legitimate criticism of the Baumol Hypothesis. Because "changes in measured relative costs depend upon changes in relative wages as well as changes in relative productivity," measured relative prices are not necessarily attributable to differing rates of productivity growth. For instance, "real wages can differ across sectors either because competitive markets pay heterogeneous workers wage differentials that reflect individual productivity differences . . . or because differences in the degree of competition across sectors are reflected in the returns realized by different (otherwise homogeneous) labor groups." Changes in relative wages will affect social welfare only when the change is a result of changes in the differential reflecting individual productivity differences.

Conceding the validity of such criticism does not diminish the fact that the cost disease hypothesis has plausible validity, yet because of the uncertainty as to the exact magnitude it is important to test it empirically. The most damaging criticism of the hypothesis does not deny the presence of the cost disease, but rather the magnitude of the cost increases attributable to it. In light of these facts, the cost disease model remains useful at least insofar as it has been empirically shown to account for a substantial amount of cost increases in stagnant service sectors.

4. WHAT THIS MEANS FOR THE CIVIL PROCEDURE RULES

One should recognize that "anticipatory resignation about the prospects for productivity growth is hardly justified." Efficiency gains are beneficial and should, of course, be encouraged. How-

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of lawyers over the period from 1983 to 1993 have grown by an average annual percentage rate of 29.7).

100 Ferris & West, supra note 97, at 39.
101 Id.
102 See id.
103 See id. at 50.
104 Baumol, Productivity Policy, supra note 59, at 14.
ever, because continuous productivity growth is unlikely, it is important not to expect that sporadic increases in efficiency will be enough to sufficiently offset the cost disease.

Generally, an increase in efficiency implies an increase in productivity. 105 In this sense, one might say that manufacturers are constantly becoming more efficient by producing more output with less labor input. Legal services are also becoming more efficient by producing more or better quality services utilizing less attorney input (i.e., "more productive billable hours"). Productivity increases in the legal services are important in that they increase the social welfare. 106 The cautionary note on which this Comment is focused is simply that discrete efficiency gains are not enough to overcome the cost disease. Changes to civil procedure systems may result in lower costs in the short run, but, in the long run, momentarily lower costs will be overrun by the cost disease.

This conclusion implies that substantial restructuring of a legal system may incur more costs than benefits because the restructuring may not ever be able to achieve the goal of significantly reducing costs. Moreover, there is no substantial evidence that legal services in England have become unaffordable. 107 Of course, there is certainly anecdotal evidence of increasing legal costs depriving litigants of access to justice, 108 but this anecdotal evidence also fits the description of the "fiscal illusion" 109 that one would expect to arise from the cost disease. 110 In fact, at least one commentator has

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105 This is fairly clear if one accepts efficiency to mean doing more with the same.

106 Productivity increases enlarge the production possibilities set, causing an outward shift in the production possibilities frontier. This consequently expands the utility possibilities set, causing an outward shift in the utility possibilities frontier and the potential for greater social welfare (assuming the existence of a well-behaved welfare function). See Varian, supra note 36, at 519-21, 535-39.


108 See Woolf, Interim Report, supra note 1, at 9 (stating that "[m]any of those who make their living by conducting litigation accepted... that they would not be able to afford their own services if they made the misfortune to get caught up in legal proceedings.").

109 Baumol, Health Care, supra note 2, at 23.

110 See Baumol, Health Care, supra note 2, at 25-26 (noting that "[i]t will not be easy to convince the intelligent layperson that, even though the prices of personal services appear to be rising at a rate that is out of control, in fact the costs of those
noted that "such anecdotal evidence has been available at least since [he] began at the bar, and [probably] many decades before..." Because the problem does not appear to be attributable to anything but the cost disease, the English civil procedure reform should not be so focused on decreasing the cost of litigation. Instead, the English system of justice would be better served by concentrating more on increasing the quality and productivity of the civil justice system. This would tend to reduce the impact of the cost disease in the future.

4.1. The Civil Procedure Rules Should Abandon Notions of Fixed Costs

Probably the most important change that should be made to the English system of civil procedure is to abolish the fixed costs that were introduced by the Woolf reforms.112

[If legislatures join the general public in the belief that inefficiency and skullduggery are the sources of the rising relative costs of the services, they may conclude that additional money spent on them represents good money thrown after bad. The net result may be that the public is deprived of services or condemned to services of poorer quality than they might really want if they understood the nature and necessity of their price.113

In the legal service sector this may possibly lead to procedural reforms that reduce the overall quality of the judicial process.

Zeal for civil procedure reform should also be tempered by recognition that reduction of civil costs may, in the long run, be overshadowed by the associated inefficiency costs of such reform. This is particularly important in considering fixed costs to be awarded to the winning party. The consequences of price-fixing are well-accepted by economists. It is generally agreed that fixing prices below the market rate causes production shortages or the

services...are really gradually declining, because of small increases in their labor productivity.

111 Conrad Dehn, supra note 107, at 155.
112 See supra Section 2.2.2.
113 Baumol, Productivity Policy, supra note 59, at 15-16.
production of inferior goods or services. On the other hand, fixing prices above the market rate will likely result in surplus production of goods or services. When the court awards costs to a successful party, it is in part attempting to place some value on the lawyer’s services. In the event that lawyers are virtually guaranteed not to recover the full amount of costs necessary to cover their expenses and receive adequate remuneration, this will create either a shortage of lawyers willing to participate in the action or a possible decrease in the quality of legal services provided. Either possibility will restrict access to justice.

Furthermore, fixed costs are inappropriate when the actual cost of any particular case is unpredictable, as it is in litigation. Indeed, litigation is so unpredictable that it has been described as “a gamble.” In fact, researchers have found that within a sample of 119 personal injury cases, solicitors spent anywhere from twenty-four minutes to fourteen hours on particular cases, highlighting the variance in the cost of litigation. Fixed costs may actually create incentives for lawyers to spend less time working on a case or decline certain cases altogether when liability is not immediately clear. Therefore, at least within the subset of personal injury cases, “[t]he figures indicate that fixed costs . . . may be unfair to the plaintiff.”

4.2. Case Management Will Probably Not Reduce Costs in the Long Run

One of Lord Woolf’s most basic recommendations for reforming the civil justice system is the institution of judicial case management. As described by Lord Woolf, case management is intended to “tackle not only the cost but also the time taken by cases to reach a conclusion.” To the extent that judicial case management is instituted to reduce delay, with such delay considered a barrier to achieving justice, case management is entirely appropri-

114 See John O’Hare & Robert N. Hill, Civil Litigation 524 (1997).
115 Nicholas Fridd & Steven Weddle, Basic Practice in Courts and Tribunals 269 (1989).
117 Id.
119 Id. at 18.
ate and will likely be fairly effective. But to the extent that case management is instituted to reduce the cost of legal services, it is unlikely that it will achieve its objective over the long run. In essence, the institution of judicial case management represents a one-time productivity increase. Accordingly, the Baumol hypothesis suggests that the immediate (i.e., short run) effect may be lower costs of obtaining justice, but, over the long run, the cost savings will evaporate as a direct result of the cost disease.

Caution in implementing case management is highly appropriate. The increased focus on speeding cases through the judicial process has resulted in claims being handled more quickly (and therefore at a lower apparent cost), “but the suggestions are that many claims are being settled when liability has not been fully investigated.” If this is in fact the case, one might suspect that the quality of legal services has actually suffered a decrease in the wake of the Woolf reforms. The implicit suggestion is that the cost to consumers has increased rather than decreased, although the increased cost may be camouflaged as an inferior product.

Insofar as case management is intended to promote justice by encouraging the quick and efficient resolution of disputes, it can hardly be suggested that it is inappropriate. However, if case management is instituted with the objective that it will lower the cost of achieving quick and efficient resolutions, failure to meet that objective will not be long in coming. Once again, it is important to approach legal reform with realistic expectations.

4.3. Discovery Reform Will Not Significantly Reduce Costs in the Long Run

At least in England, “discovery is often the largest single cost factor in litigation, both in terms of legal expenses and the diversion of management resources . . .” The new Civil Procedure Rules narrowed the general scope of discoverable documents. Of course, if discovery is not necessary to achieve a just resolution

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120 See id., supra note 6, at 20 (noting generally positive results from judicial case management procedures utilized by the United States, Canada, and Australia).

121 Here to Stay; But at What Cost?, POST MAG., Oct. 28, 1999, at 3.

122 Heaps & Taylor, supra note 47, at 629.

123 See generally Civil Procedure Rules Part 31.
to a claim it should not be permitted. Unnecessary discovery is obviously nonproductive and costly. But if it is the case that discovery tends to increase the quality of legal services, one should not simply focus upon the marginal cost of additional discovery to the exclusion of other nonquantifiable considerations. The marginal cost of the additional discovery cannot be separated from the question of how much the additional discovery will add to the quality of legal services. This is a question that can only be dealt with on an ad hoc basis. The new Rules are therefore appropriate insofar as they tend to prevent nonessential discovery. Nevertheless, judges should be wary not to focus attention on the total cost of discovery. Instead, judicial scrutiny should be directed toward whether the additional expected benefit of disclosure equals or exceeds the expected cost in that particular instance.

More importantly, decreasing the availability of disclosure may also have the effect of decreasing access to justice. As is apparent from Baumol’s hypothesis, the cost of discovery should be expected to rise without bounds over time. This by no means implies that parties will not be able to afford discovery in the future. Indeed, the Baumol hypothesis suggests that the parties will be able to afford even greater amounts of discovery, although it will comprise an ever-increasing portion of a party’s budget. Accordingly, a decrease in access to discovery may in fact do nothing to help the parties, but may only hurt them by decreasing the availability of information.

5. Conclusion

Legal services fall within a sector of the economy that is productively stagnant. In contrast to more productive sectors of the economy (such as manufacturing), legal services do not experience continuous and cumulative increases in productivity over time. Rather, when productivity increases occur within the legal services sector, they tend to occur in discrete jumps. Because productivity increases in productive sectors of the economy tend to outstrip productivity increases in the stagnant service sectors, the relative price of output in the stagnant sector tends to increase dramatically.

Ironically, the ease of obtaining cheap photocopied documents has, at least in part, led to the massive expense incurred in litigation. See WOOLF, INTERIM REPORT, supra note 1, at 164-65.
over time. As a result of the inherently "stagnant" nature of the legal services sector, efforts to decrease the nominal cost of legal services will not have a significant effect upon the long run cost of legal services.

This is not to suggest that we need not concern ourselves with questions of efficiency. Finding more efficient, more productive ways of conducting legal services in general, and civil litigation in particular, remains very important objectives. Nevertheless, it is important to realize the limits of reform within legal services. It has been the objective of this Comment to show that despite the best efforts of past, present, or future reformers, the cost of litigation will rise over time without bounds. However, this increase in the relative price of legal services does not mean that parties have less access to justice. Accordingly, it is not appropriate to focus attention exclusively upon decreasing the cost of litigation. Rather, reform should focus upon improving the productivity of the legal service sector. It is only increased productivity that can significantly decrease the relative price of legal services.