

6-1-2009

Whatever Happened to Access to Justice

Deborah L. Rhode

Recommended Citation

Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 Loy. L.A. L. Rev. 869 (2009).
Available at: <http://digitalcommons.lmu.edu/llr/vol42/iss4/2>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons at Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons at Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

WHATEVER HAPPENED TO ACCESS TO JUSTICE?

*Deborah L. Rhode**

"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.

I. INTRODUCTION

A striking aspect of recent American political campaigns is the almost complete silence surrounding access to justice. Equally striking is the absence of concern about that silence. The inadequacy of basic medical services has generated endless debates. The inadequacy of legal services has passed virtually unnoticed.

The lack of national policy discussion is not for lack of a problem. Nor is it for lack of highly committed and increasingly innovative legal professionals focusing on this issue. But despite their efforts, an estimated four-fifths of the individual legal needs of the poor, and a majority of the needs of middle-income Americans, remain unmet.¹ Although the United States has the world's highest

* Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. The comments of Dmitry Bam, Fellow, Stanford Center on the Legal Profession, Alan Houseman, Center on Law and Social Policy, and Amanda Packel, Associate Director of the Stanford Center on the Legal Profession are gratefully acknowledged.

1. For a discussion of legal needs among low-income individuals, see LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW-INCOME AMERICANS 1–13 (2009), available at http://www.lsc.gov/pdfs/documenting_the_

concentration of lawyers, it fails miserably at making their assistance accessible to those who need it most. "Equal justice under law" is a principle widely embraced and routinely violated.

This gap between our aspirations and achievements assumes particular urgency in the current economic climate. Rising rates of foreclosures, bankruptcies, and unemployment create more needs for legal assistance among those least able to afford it.² At the same time, resources for legal services providers cannot keep pace, given other claims on government budgets and reduced revenues from Interest on Lawyers Trust Accounts ("IOLTA"), which support civil assistance programs.³ Many programs will need to do more with less.

This overview explores the central challenges in narrowing America's justice gap. Part II defines the goals of a comprehensive system of civil legal assistance. Part III summarizes the ways in which the current system falls short, including resource limitations, statutory restrictions, and inadequacies in pro se assistance, pro bono services, and legal education. Part IV turns to the most common proposals for reform, such as expanded rights to counsel and nonlawyer assistance, increased pro bono services, greater involvement of law schools, and more effective political and funding strategies. Only through more sustained efforts can we affirm our commitment to justice not only in principle but also in practice.

justice_gap_in_america_2009.pdf. Surveys find that between two-fifths and three-quarters of the needs of middle-income individuals are unaddressed, with most finding at least half. See DEBORAH L. RHODE, ACCESS TO JUSTICE 3, 79 (2004); Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 LOY. L.A. L. REV. 1 (2009).

2. Erik Eckholm, *Interest Rate Drop Has Dire Results for Legal Aid Groups*, N.Y. TIMES, Jan. 19, 2009, at A12 (reporting a 30 percent increase in requests for legal aid).

3. *Id.* (reporting that reduced legal aid program budgets may produce 20 percent reductions in staffing); see also Diane Curtis, *Economic Downturn Puts a Crimp in Legal Services*, CAL. ST. B.J., Feb. 2009, at A1 (describing cuts of over half for some California legal aid offices along with increased demand for their services); Manuel Valdes, *Economic Woes Threaten Legal Aid Nationwide*, S.F. CHRON., Dec. 7, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2008/12/07/national/a102612S59.DTL&type=politics> (reporting drops of up to 50 percent in earmarks for legal services for the poor in some jurisdictions); Thomas Wells, Jr., *Facing Challenges in Crisis Mode*, A.B.A. J., Jan. 2009, at 9. Interest from IOLTA accounts declined between 2003 and 2006 and currently provides about an eighth of civil legal aid budgets. ALAN W. HOUSEMAN, CTR. FOR LAW AND SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2007 14 (2007), available at http://www.clasp.org/publications/civil_legal_aid_2007.pdf; Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 51 (2007).

II. THE OBJECTIVES OF CIVIL LEGAL ASSISTANCE

Concerns about access to civil legal assistance have an extended history, but the recent wave of reform efforts dates to the mid-1990s. They were a response to major cutbacks in federally funded legal aid programs, together with stringent restrictions on the cases and clients those programs could assist.⁴ As a result, many states had to restructure their delivery systems and identify new sources of funding. A key strategy was to create statewide bodies, often access to justice commissions, under the leadership of the bench and bar.⁵

In an effort to provide guidance to these commissions, in 2006, the American Bar Association's House of Delegates adopted the Principles of a State System for the Delivery of Civil Legal Aid.⁶ Their goal was the provision of "a full range of high quality, coordinated and uniformly available civil law-related services to the state's low-income and other vulnerable populations who cannot afford counsel, in sufficient quantity to meet their civil legal needs."⁷ In a subsequent report by the Center for Law and Social Policy, Alan W. Houseman summarized two primary objectives for such a service delivery model: (1) informing persons of their legal rights and options for assistance; and (2) ensuring access to cost-effective legal services to protect those rights.⁸

These goals, echoed in reports by state access to justice commissions,⁹ set forth broad aspirations in terms likely to secure widespread consensus. Yet bar rhetoric often ducks the difficult

4. For the philosophy behind the cutbacks, see Jeffrey B. Gayner, *The Contract with America: Implementing New Ideas in the U.S.*, HERITAGE FOUND., Oct. 12, 1995, <http://www.heritage.org/research/politicalphilosophy/hl549.cfm>. For restrictions, see *infra* text accompanying notes 60–61.

5. Karla M. Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, JUDGES' J., Summer 2008, at 33–34. For a list of fifty-five access to justice commissions and related initiatives, see ABA Resource Center for Access to Justice Initiatives, *Guidance on State Access to Justice Commissions and Structures*, <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/atjmainpage.html> (last visited Apr. 2, 2009).

6. ABA PRINCIPLES OF A STATE SYSTEM FOR THE DELIVERY OF CIVIL LEGAL AID (2006), available at <http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/tencivilprinciples.pdf>.

7. *Id.* at 1.

8. HOUSEMAN, *supra* note 3, at 1; Houseman, *supra* note 3, at 35.

9. See, e.g., ACCESS TO JUSTICE STUDY COMM., STATE BAR OF WIS., BRIDGING THE JUSTICE GAP: WISCONSIN'S UNMET LEGAL NEEDS 1–2 (2007), available at <http://www.nla-da.org/DMS/Documents/1173539417.81/WIreportfinalATJ.pdf>.

questions: access to what? for whom? at what cost? funded how? One reason for the lack of clarity on these questions is that stakeholders in the reform process have concerns that sometimes tug in different directions. The organized bar worries about the economic effects of procedural simplification and nonlawyer competition.¹⁰ Government officials focus on how much the public values subsidized legal assistance in comparison with other needs. Judges and court administrators are interested in efficiency: how to clear dockets and promote confidence in judicial decision making.¹¹ Legal services providers focus on resources: how to secure the staff and support structures necessary for addressing unmet needs.¹² Clients and the nonprofit groups that represent them care about both procedural and substantive fairness; they want processes and outcomes that will secure their rights and address their social and economic disadvantages. These different interests often lead to different reform priorities, which complicate the challenges of securing significant progress on civil justice issues.

Yet without some shared mission, it is impossible to assess or accelerate progress. Law professor Gary Blasi aptly reminds us of Yogi Berra's truism: when it comes to access to justice, "if you don't know where you're going . . . you might not get there."¹³

Access to What? Procedural or Substantive Justice

A common tendency in bar discussions of access to justice is to conflate procedural and substantive justice, and to treat the provision of services as an end in itself. According to the Massachusetts Access to Justice Commission, "[i]n most instances, if competent legal assistance were available, justice would be within reach, even

10. The bar's reputational concerns and the public perceptions that fuel them are considered in DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 3–6 (2000). To review a discussion of concerns about nonlawyer competition, see *id.* at 135–36; RHODE, *supra* note 1, at 82–83.

11. RHODE, *supra* note 1, at 83–84; Russell Engler, *Shaping a Context-Based Civil Gideon From the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 698, 704–05 (2006).

12. For a discussion of the overemphasis on money as a solution, see JEANNE CHARN & RICHARD ZORZA, THE BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVICES PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS 14–17 (2005), available at <http://www.garybellow.org/Text.pdf>.

13. See Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 913 (2009) (citing Yogi Berra, Live Your Life Like Every Day Is Opening Day, Address at Saint Louis University Commencement Ceremony (May 19, 2007), available at http://www.slu.edu/pr/yogi_quote.wav).

for those of modest means.”¹⁴ Yet the more sophisticated the discussion, the harder it is to maintain that assumption. Even the Massachusetts Commission somewhat inconsistently acknowledged that “[n]ot all barriers [to justice] are in the judicial system”; some are part of a larger problem of economic disadvantage.¹⁵ Many factors affect the justness of the legal process apart from the adequacy of legal assistance: the substance of legal rights and remedies; the structure of legal processes; the attitudes of judges and court personnel; and the resources, expertise, and incentives of the parties.¹⁶ On almost all of those dimensions, as law professor Marc Galanter famously put it, the “‘haves’ come out ahead.”¹⁷

There are, of course, obvious reasons why bar commissions and commentators want to avoid the divisive task of defining justice in substantive rather than procedural terms. But overlooking the difference can lead to reform priorities with unwelcome effects. For example, research on housing courts has found that providing legal assistance for formerly unrepresented tenants does not always improve outcomes. In one early case study in the South Bronx, legal aid lawyers’ procedural victories provoked strong backlash.¹⁸ Judges unable to clear their dockets and landlords unhappy about deadbeat tenants united behind reforms that eliminated certain defenses and ultimately undermined defendants’ bargaining position.¹⁹ In other contexts, changes in the substantive law, inadequate lawyer expertise, or provision of information about the unavailability of defenses has led to poorer outcomes for tenants despite the availability of legal assistance.²⁰

14. MASS. ACCESS TO JUSTICE COMM’N, BARRIERS TO ACCESS TO JUSTICE IN MASSACHUSETTS: A REPORT, WITH RECOMMENDATIONS, TO THE SUPREME JUDICIAL COURT 3 (2007), available at http://www.bostonbar.org/prs/nr_0708/accesstojustice101607.pdf.

15. *Id.*

16. See Engler, *supra* note 11, at 713; Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 871 (2004).

17. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 95 (1974).

18. Marc H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, in THE POLITICS OF INFORMAL JUSTICE 119–62 (Richard L. Abel ed., 1982).

19. See *id.* For a thoughtful discussion of the factors leading to that outcome, see William H. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384, 385–86 (1985).

20. See studies discussed in Russell Engler, *Connecting Self Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 36 FORDHAM URB. L.J. (forthcoming 2009); Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of*

That is not, however, an argument against providing such assistance. Most studies show that increasing legal representation dramatically improves tenants' ability to win at trial or to negotiate favorable settlements.²¹ The result is to reduce the incidence of homelessness and all its accompanying social, economic, and health costs. Indeed, several studies have found that every dollar spent on preventing eviction through legal assistance ends up saving taxpayers substantial amounts in shelter costs and related social services.²² Appointing lawyers for parents in child abuse and neglect proceedings also saves money by enabling families to comply with court orders and to devise plans that keep their children out of foster care systems.²³ The lesson of this and other research reviewed below is that if our goal is improving not just the legal process but also the life circumstances of disadvantaged groups, then the value of legal services should be assessed in context, and lawyers should focus on long-term impact as well as short-term results.

*Access for Whom? How Much Is Enough?
Who Should Decide?*

A related and equally difficult set of issues involves cost. Who should be entitled to government-subsidized legal assistance? For what kinds of matters? And how should these decisions be made? Bar commentary on legal aid generally proceeds on the assumption that more is better, and the trick is how to get it. Yet that assumption leaves a host of conceptual complexities unaddressed. A vast array of concerns and conflicts could give rise to legal proceedings.

Representation Before a Public Housing Eviction Board, 26 LAW & SOC'Y REV. 627, 649–51 (1992) (noting that the success rate of represented tenants increased from approximately 10 percent to 22 percent over the course of the study as counsel gained experience and the housing board's procedures became more formal).

21. See Engler, *supra* note 20; Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS REV. 699, 711 (2006); KAREN DORAN ET AL., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 13 (2003), available at <http://lcbh.org/images/2008/10/chicago-eviction-court-study.pdf>.

22. CMTY. TRAINING & RES. CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL at iv (1993), available at <http://www.cwtfhc.org/donaldson.pdf>; Scherer, *supra* note 21; National Alliance to End Homelessness, *The Cost of Homelessness*, <http://www.endhomelessness.org/section/tools/tenyearplan/cost> (last visited Apr. 4, 2009).

23. Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1093–94 (2009).

Which ones rise to the level of “legal needs”? How much blaming and claiming should society subsidize? Should legal aid go only to individuals officially designated as “poor”? Or should help also be available for those who cannot realistically afford lawyers, and who may have more to lose than their poorer (but also judgment-proof) neighbors? Should individuals be entitled to assistance on all matters where fundamental rights are at issue, or only where their claims seem meritorious? When should they receive lawyers’ help, and when would other forms of aid be sufficient? How should legal aid providers allocate assistance between individual representation and collective impact work such as lobbying, organizing, and test-case litigation? And most important, how should those decisions be made? The point of this overview is not to supply complete answers, but rather to prompt more informed analysis of the questions.

How people decide whether to seek a lawyer’s help provides a starting point for discussion. Cross-cultural research finds that the dominant factor in this decision is the nature of the dispute, not the income of the parties. Even those who could afford to retain a lawyer frequently choose not to, at about the same rates as those with more limited resources.²⁴ The main reasons are that the matter is not sufficiently important or that a lawyer would not help.²⁵ Building on such research, a rational legal aid system would incorporate some form of screening based on the significance of a claim and the cost-effectiveness of assistance. The forty-nine nations that recognize a right to legal aid generally apply such criteria.²⁶ As two British experts noted, in a world of competing claims on social resources, “[t]he idea that ‘you can’t put a price on justice’ has never been true. We can, we do, and we should.”²⁷

American experts have proposed similar limiting principles. For example, the Bellow-Sacks Access to Civil Legal Services Project endorses a full-access system that would “guarantee all Americans . . . legal advice and assistance equivalent to what a

24. Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is That the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 899–900 (2008).

25. *Id.* at 900.

26. Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World?*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 771–72, 778–79 (2006).

27. Richard Moorhead & Pascoe Pleasence, *Access to Justice After Universalism: Introduction*, 30 J.L. & SOC’Y 1, 2–3 (2003) (quoting Alan Sanders, *Core Values, the Magistracy and the Auld Report*, 29 J.L. & SOC’Y 327 (2002)).

person of reasonable means would purchase to secure legal benefits and [protect legal rights].”²⁸ Moderate-income, as well as low-income, individuals would be entitled to personal assistance on a sliding scale of financial eligibility for matters that national policymakers define as critical. The system would function as a service pyramid, with simple advice and information from multiple providers at the base, and expert legal representation in complex or novel matters at the peak. A primary goal would be to match the right level of service to client or community needs.²⁹

California’s model State Equal Justice Act proposed by the state’s Commission on Access to Justice and a report by Alan Houseman for the Center on Law and Social Policy incorporate a similar cost-effectiveness standard for assistance.³⁰ The California legislation, which has been partially adopted in the form of a pilot program, would guarantee legal representation for matters before tribunals that limit representation to licensed legal professionals and in which a reasonable person with the financial means to employ counsel would be likely to pursue the matter in light of the costs and potential benefits.³¹ The Center’s report advocates a full-access system with limiting principles based on equity and efficiency.³² A broad range of services would be available for an equally broad range of forums where legal decisions are made.³³ Such services would include public education; advice and information for individuals and organizations; and representation in judicial, administrative, alternative dispute resolution, legislative, and out-of-court settings.³⁴ Lawyers would be available in the contexts where

28. CHARN & ZORZA, *supra* note 12, at 11; *see id.* at 3–4, 11–12 for details.

29. *Id.* at 19, 22–23, 40.

30. CAL. COMM’N ON ACCESS TO JUSTICE, STATE EQUAL JUSTICE ACT, *available at* http://www.brennancenter.org/page/-/d/download_file_38656.pdf; HOUSEMAN, *supra* note 3.

31. CAL. COMM’N ON ACCESS TO JUSTICE, *supra* note 30. The Act also sets forth circumstances in which it would be presumed that a reasonable person would be likely to pursue the matter, such as housing for the person or person’s family; the maintenance of current employment; the right to income maintenance, health benefits, or other substantial government benefits; custody; and protection from domestic violence. *Id.* California recently passed a pilot project in selected courts providing for counsel in civil matters that involve “critical issues affecting basic human needs” such as custody, domestic violence restraining orders, probate conservancy, guardianship, and elder abuse. Sargent Shriver Civil Counsel Act, A.B. 590, 2009 Leg., Reg. Sess. (Cal. 2009).

32. HOUSEMAN, *supra* note 3.

33. HOUSEMAN, *supra* note 3, at 63.

34. *Id.*

they would provide the most cost-effective response.³⁵ All forms of assistance would meet quality and accountability standards.³⁶

Such a full-access system would also require further changes, including simplification of legal processes, more nonlawyer assistance, collaboration with other legal and social services providers, and expanded pro bono and law school programs.

Other commentators, myself included, have set forth similar proposals.³⁷ The point here is not to debate the details, but rather to note the distance we remain from such a commitment to justice, and the steps necessary to bring us closer.

III. THE JUSTICE GAP: THE DISTANCE BETWEEN PRINCIPLES AND PRACTICES

Legal Rights and Social Wrongs: Limitations on the Right to Counsel

Although the United States considers itself the world's leader in human rights, it lags behind forty-nine other countries in recognizing a right to legal assistance in civil matters. More than seventy-five years ago, the U.S. Supreme Court recognized that an individual's "right to be heard [in legal proceedings] would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."³⁸ Yet in subsequent decisions, the Court declined to recognize such a right in civil cases except where the process would otherwise prove fundamentally unfair. In the leading decision on point, *Lassiter v. Department of Social Services*,³⁹ the Court identified three basic factors in assessing fairness: "the private interests at stake, the government's interest, and the risk that . . . [lack of counsel] will lead to erroneous decisions."⁴⁰

Although that framework is not unreasonable in principle, it has proven unworkable in practice. Vulnerable litigants most in need of

35. *Id.*

36. *Id.* at 63–64.

37. RHODE, *supra* note 1, at 185–94; HOUSEMAN, *supra* note 3, at 17, 23; Houseman, *supra* note 3, at 62–66; DAVID UDELL & REBEKAH DILLER, ACCESS TO JUSTICE: OPENING THE COURTHOUSE DOOR 2–3 (2007), available at http://brennan.3cdn.net/297f4fab202470c67_3vm6i6ar9.pdf.

38. *Powell v. Alabama*, 285 U.S. 45, 68–69 (1932).

39. 452 U.S. 18 (1981).

40. *Id.* at 20–22, 32, 33.

assistance almost never have succeeded in persuading federal courts to provide it.⁴¹ At the state level, supreme courts and legislatures have mandated provision of lawyers only in extremely limited categories of cases, typically involving family and civil commitment issues.⁴² Judging from the caseloads of civil legal programs, no statutory right to counsel is available for about 98 percent of cases that directly involve low-income parties.⁴³ Moreover, the selection of cases in which counsel is guaranteed sometimes seems idiosyncratic. Why should individuals challenging voluntary vaccination orders, quarantines, or school attendance get a lawyer,⁴⁴ but not individuals dealing with survival needs such as food, housing, medical benefits, or protection from domestic violence? A related problem is that theoretical rights to counsel are sometimes “honored . . . only in the breach”; courts simply ignore statutes requiring representation.⁴⁵ Even where lawyers are available, requirements of adequate experience, training, and compensation are “more often than not . . . neither imposed nor satisfied.”⁴⁶ Compensation is frequently set at such ludicrous levels that effective representation would be financially ruinous. Hourly rates can run as low as \$40 and caps can dip to \$150.⁴⁷ Efforts at quality control are noticeable for their absence.⁴⁸

Inadequate Resources, Unmet Needs

Money may not be at the root of all evils in our legal aid system, but it is surely responsible for many. The United States lags behind

41. HOUSEMAN, *supra* note 3, at 16; RHODE, *supra* note 1, at 9.

42. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245 (2006), available at http://brennan.3cdn.net/2f2ca53878e9299012_67m6ib9tv.pdf (“Most state right-to-counsel statutes and court rules fall into three broad categories: family law matters, involuntary commitment, and medical treatment.”); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right to Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 189–91 (2006), available at http://www.law.stanford.edu/display/images/dynamic/events_media/Pastore_Life_After_Lassiter.pdf.

43. HOUSEMAN, *supra* note 3, at 16; Houseman, *supra* note 3, at 53–54.

44. Abel & Rettig, *supra* note 42, at 246–47.

45. MASS. ACCESS TO JUSTICE COMM’N, *supra* note 14, at 24 n.25 (discussing guardianship appointments) (quoting John Ford, Esq., President of the Massachusetts Guardianship Association).

46. Abel & Rettig, *supra* note 42, at 248.

47. *Id.* at 250 nn.48–49.

48. *Id.* at 250–51 (illustrating a lack of uniformity among counties and states regarding counsel appointment and corresponding policies).

other developed countries in spending on civil legal assistance and has fewer intermediary institutions such as advice and ombudsperson agencies to assist with routine needs.⁴⁹ When adjusted for inflation, “[f]ederal appropriations for the Legal Services Corporation, the largest source of money for aid groups,” has dropped by a third over the last fifteen years.⁵⁰ Although other revenue sources have increased, they come nowhere close to meeting current needs. Funding varies considerably by jurisdiction but averages only about \$28 per poor person annually and in some states, drops to less than \$10.⁵¹ At these funding levels, not much due process is available. In the nation as a whole, even before the recent economic crisis, only one lawyer was available for 6,415 poor persons.⁵² Women and minorities are disproportionately affected.⁵³

The result is that virtually all legal aid providers are understaffed and overextended. Both national and state bar studies consistently find that over four-fifths of the individual legal needs of low-income individuals remain unmet.⁵⁴ Moreover, these studies understate the extent of the problem. They do not include collective concerns involving matters such as community economic development, school

49. See HOUSEMAN, *supra* note 3, at 12–13; Lidman, *supra* note 26, at 772. See generally Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. 383 (2000) (comparing expenditures)). For intermediate institutions, see Rebecca Sandefur, *The Fulcrum Point of Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 957–62 (2009).

50. Eckholm, *supra* note 2, at A19. For an overview of federal funding, see Houseman, *supra* note 3, at 46.

51. HOUSEMAN, *supra* note 3, at 11; Houseman, *supra* note 3, at 40–43.

52. For national population ratios, see LEGAL SERVS. CORP., *supra* note 1, at 16. For state lawyer/population ratios, see BOSTON BAR ASS’N TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 3 (2007), available at http://www.bostonbar.org/prs/nr_0809/GideonNewTrumpet.pdf; CAL. COMM’N ON ACCESS TO JUSTICE, ACTION PLAN FOR JUSTICE 32 (2007) [hereinafter BOSTON BAR ASS’N TASK FORCE], available at http://www.calbar.ca.gov/calbar/pdfs/reports/2007_Action-Plan-Justice.pdf (discussing a ratio of one lawyer for every 8,360 California legal aid clients).

53. NE. UNIV. SCH. OF LAW, PROGRAM ON HUMAN RIGHTS AND THE GLOBAL ECON., ACCESS TO CIVIL JUSTICE: RACIAL DISPARITIES AND DISCRIMINATORY IMPACTS ARISING FROM LACK OF ACCESS TO COUNSEL IN CIVIL CASES 6–8 (2007), available at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/14_Access_to_Civil_Justice.pdf.

54. BOSTON BAR ASS’N TASK FORCE, *supra* note 52, at 3 n.9 (noting that among Massachusetts residents, five out of six legal needs among low-income residents are not being met); LEGAL SERVS. CORP., *supra* note 1, at 13; N.Y. STATE BAR ASS’N, TOWARD A RIGHT TO COUNSEL IN CIVIL CASES IN NEW YORK STATE 1 (2008), available at <http://www.brennancenter.org/page/-/Justice/081101.FinalStateBarReport.pdf>. For the effects of the recent economic crisis, see LEGAL SERVS. NYC, NEW YORKERS IN CRISIS (2009).

financing, voting rights, or environmental hazards. Nor do they include middle-income Americans who are priced out of the justice system or individuals who receive only limited assistance that falls well short of adequate representation. Resource shortages have limited the effectiveness, as well as the extent, of services; legal aid providers in too many jurisdictions lack necessary training, coordination, staff support, and policy initiatives.⁵⁵

Courts and legal aid programs have also had difficulty meeting the needs of particularly vulnerable groups. State courthouses are often not in compliance with the Americans with Disabilities Act, which requires reasonable accommodation for individuals with physical and psychological impairments.⁵⁶ Many facilities also lack translation services for litigants with limited proficiency in English.⁵⁷ Legal documents and self-help materials are too often available only in English, and no interpreters are available for most judicial proceedings.⁵⁸ The problems are particularly acute for the rural poor, who lack access to legal and language assistance as well as courthouse facilities.⁵⁹

Restrictions on Cases and Clients

Related problems involve statutory restrictions on the kinds of cases and clients that government-subsidized legal aid programs can assist. For example, programs funded by the federal Legal Services Corporation may not engage in lobbying, political organizing, or class action litigation; represent prisoners or undocumented aliens; or

55. HOUSEMAN, *supra* note 3, at 10.

56. UDELL & DILLER, *supra* note 37, at 9–10; Michael Waterstone, *The Untold Story of the Rest of the Americans With Disabilities Act*, 58 VAND. L. REV. 1807, 1857–58 (2005). For a discussion of inadequate services for those with mental health impairments, see Jeanette Zelhof, Andrew Goldberg & Hina Shamshi, *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 733 (2006).

57. CAL. COMM'N ON ACCESS TO JUSTICE, LANGUAGE BARRIERS TO JUSTICE IN CALIFORNIA 21–22 (2005), available at http://www.calbar.ca.gov/calbar/pdfs/reports/2005_Language-Barriers_Report.pdf; UDELL & DILLER, *supra* note 37, at 10–11; Kwai Hang Ng, *Beyond Court Interpreters: Exploring the Idea of Designated Spanish-Speaking Courtrooms to Address Language Barriers to Justice in the United States*, 12 SOC. OF CRIME, L. & DEVIANCE 97 (2009).

58. CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 52, at 10, 18; UDELL & DILLER, *supra* note 37, at 10–11.

59. N.Y. STATE UNIFIED COURT SYS., COURT INTERPRETING IN NEW YORK: A PLAN OF ACTION 1 (2006), available at http://www.nycourts.gov/courtinterpreter/pdfs/action_plan_040506.pdf; RHODE, *supra* note 1, at 107; UDELL & DILLER, *supra* note 37, at 10.

take cases involving abortion, school desegregation, and gay rights.⁶⁰ Nor may these programs use non-federal funds for such work.⁶¹ Legal challenges to these restrictions have been largely unsuccessful, as have political efforts to persuade Congress to lift at least some of the limitations.⁶² The effect is to deprive federally funded attorneys of their most effective methods of law reform and to prevent representation of poor and unpopular clients who most need help.

The denial of assistance to undocumented aliens imposes particular hardships: Their frequent lack of language skills and understanding of American legal processes makes it difficult to proceed without legal assistance and leaves them vulnerable to unethical service providers.⁶³ Yet only about a third of aliens, and ten percent of those in detention, have legal representation in immigration proceedings.⁶⁴ Although leading federal decisions authorize the appointment of counsel to prevent erroneous judgments,⁶⁵ surveys find not a single immigration case in three

60. 45 C.F.R. §§ 1612.3, 1612.9, 1617.3, 1626.3, 1637.3 (2009). Programs may, however, represent aliens who have been granted a lawful status or are victims of domestic violence, trafficking, or certain other criminal activity. See *id.* § 1626.4.

61. *Id.* § 1610.3.

62. The Supreme Court has struck down only a limited restriction dealing with welfare reform. See *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001). Lower appellate courts have sustained most restrictions. See *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 974 (9th Cir. 2008) (holding that Oregon had no right to control the conditions surrounding the grant and therefore no cognizable injury to establish standing); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 229–31 (2d Cir. 2006) (reversing lower court's invalidation of certain restrictions regarding use of non-federal funds); *Legal Aid Soc'y of Hawaii v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998). In fall 2009, after intense lobbying efforts, the Senate passed an appropriations bill for the Legal Services Corporation that eliminated all restrictions on non-federal funds, except for restrictions on prisoner representation and abortion. The comparable House bill, however, only eliminated restrictions on attorneys' fees, and the final bill incorporated the House version. For earlier versions, see Linda Perle, *Some Restrictions on LSC Funds*, available at http://www.clasp.org/issues/in_focus?type=civil_legal_assistance&id=0001. For the final bill, see Press Release, *Legal Servs. Corp., Senate Sends LSC Funding Increase to President for Signature*, (Dec. 14, 2009), http://www.lsc.gov/press/pressrelease_detail_2009_T248_R35.php.

63. Jennifer Barnes, *The Lawyer-Client Relationship in Immigration Law*, 52 EMORY L.J. 1215, 1217–18 (2003); Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 7–8 (2008); Margaret H. Taylor, *Promoting Legal Representation for Detained Aliens: Litigation and Administrative Reform*, 29 CONN. L. REV. 1647, 1649–50 (1997).

64. Katzmann, *supra* note 63, at 7–8; U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2006 STATISTICAL YEARBOOK at G1 (2007), available at <http://www.usdoj.gov/eoir/statspub/fy06syb.pdf>.

65. See *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975).

decades where a non-citizen has been granted a lawyer.⁶⁶ Research on case outcomes, however, leaves little doubt of the value of attorneys in these proceedings. Studies have found that unrepresented aliens are three to ten times less likely to receive asylum than those represented by counsel.⁶⁷ Even granting the likelihood that individuals with weak cases may less often retain lawyers, the disparity is still striking, and is consistent with other research on the importance of expert assistance in complex legal proceedings.⁶⁸ Given the enormous costs of error for asylum seekers whose lives may be at risk following deportation, the refusal to ensure legal aid underscores a shameful gap between American principles and practices.

Unrealistic income eligibility ceilings, typically set at 125 percent of the poverty line,⁶⁹ also exclude many individuals who cannot realistically afford counsel.⁷⁰ As a consequence, millions of Americans lack access to the legal system. Millions more attempt to represent themselves in a process stacked against them.

The Limits of Self-Representation

These limitations on access to legal representation have led growing numbers of Americans to proceed without it. Technological advances have encouraged that trend. Kits, manuals, interactive computer programs, online information, and form-processing services have emerged to assist those who are priced out of the

66. THOMAS ALEXANDER ALIENKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP* 645 (5th ed. 2003).

67. Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POL'Y INST. INSIGHT, Apr. 2005, at 6 (finding only a 14 percent success rate for unrepresented parties compared with 39 percent for those with counsel); Jaya Ramji Nogales, Andrew Schoenholtz & Philip S. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) (finding the rate of success three times higher for represented parties); Andrew I. Schoenholtz & Hamutal Bernstein, *Improving Immigration Adjudications Through Competent Counsel*, 21 GEO. J. LEGAL ETHICS 55, 58 (2008) (citing research finding asylum seekers with counsel succeeded 25 percent of the time while those without counsel succeeded in only 2 percent of cases).

68. See sources cited *infra* note 133.

69. Legal Services Corp. Regulations, 45 C.F.R. § 1611.3(c)(1) (2008).

70. Legal Services Corp.: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 106th Cong. 127 (1999) (statement of John Pickering, Partner and Senior Counsel at Wilmer, Cutler & Pickering), available at http://comm.docs.house.gov/committees/judiciary/hju62910.000/hju62910_0f.htm; CHARN & ZORZA, *supra* note 12, at 19–21.

market for lawyers.⁷¹ In many courts that handle housing, bankruptcy, immigration, small claims, and family matters, pro se litigants are not the exception but the rule, and the recent economic downturn has increased their presence.⁷² Matters in which at least one side is unrepresented are far more common than those in which both sides have counsel, and in some of these courts, over four-fifths of all cases involve self-represented parties.⁷³ Yet they are navigating processes designed by and for lawyers, and too few court systems have provided the necessary support services.

One national survey found that only eleven states had comprehensive pro se assistance programs; fourteen had highly limited programs, and eight states did not bother to respond.⁷⁴ Many jurisdictions also have no clear guidelines for how courts should deal with unrepresented parties, or have services that are unusable by those who most need help: low-income litigants with limited computer competence and English language skills.⁷⁵ Although legal aid programs have attempted to fill the gap, and virtually all have developed some forms of pro se assistance, resource constraints have limited the aid available.⁷⁶ Many programs fall short of enabling parties to achieve the substantive outcomes that their cases deserve.⁷⁷

All too often, parties without lawyers confront procedures of excessive and bewildering complexity and forms with archaic jargon

71. See generally Ronald Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117 (2009).

72. HOUSEMAN, *supra* note 3, at 20. For increases in the number of self-represented litigants, see Kathryn Alfisi, *Access to Justice: Helping Litigants Help Themselves*, WASHINGTON LAWYER, January 2010, at 30, 32; Richard Zorza, *Access to Justice: Economic Crisis Challenges, Impacts, and Responses*, Report of the Self-Represented Litigant Network, National Center for State Courts (2009) (finding that a majority of surveyed judges reported an increase in self-represented litigants).

73. See RHODE, *supra* note 1; Engler, *supra* note 20.

74. HOUSEMAN, *supra* note 3, at 20–21 (discussing findings by Kathleen Sampson).

75. For a discussion regarding the lack of court guidelines for unrepresented parties, see MARK MARQUARDT ET AL., *THE LEGAL NEEDS SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW INCOME ILLINOISANS* 109–112 (2005), available at <http://www.nlada.org/DMS/Documents/1200667363.98/IL%20Legal%20Needs%20Study.pdf>. For additional information regarding pro se services, see Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 13, 20–22 (1998).

76. For a discussion of efforts to fill the gap in pro se services, see Houseman, *supra* note 3, at 42–43.

77. Gary Blasi, *Evaluation of the Van Nuys Legal Self-Help Center*, Aug. 30, 2001, at 11–12, available at http://www.courtinfo.ca.gov/programs/equalaccess/documents/Final_Evaluation_Van_Nuys_SHC2001.doc (describing low success rate of Van Nuys pro se assistance program).

left over from medieval England. Neither court clerks nor pro se facilitators are generally allowed to give legal advice because that would violate state prohibitions on the unauthorized practice of law.⁷⁸ Only general information is permissible, not correction of errors or specific assistance concerning which forms to file.⁷⁹ The result is that many parties with valid claims are unable to advance them. Pro se litigants in family and housing courts are less likely to prevail or to do as well as litigants with lawyers who raise similar issues.⁸⁰

The problem is in part attributable to the limited support for pro se reforms. As an Illinois legal needs report noted, most litigants would prefer to have a lawyer, and those who cannot obtain one generally lack the incentives and resources to mobilize around the issue.⁸¹ So too, most judges and clerks would rather deal with lawyers—who know their way around the courthouse and demand less time, attention, and hand-holding—than with unrepresented unskilled parties.⁸² Lawyers in private practice want paying clients, orderly courtrooms, and opposing parties who know the rules.⁸³ Legal aid attorneys would rather go to court with their clients than prepare pro se litigants.⁸⁴

78. See MODEL R. PROF'L CONDUCT R. 5.5 cmt. 2 (2002); RHODE, *supra* note 1, at 14; MASS. ACCESS TO JUSTICE COMM'N, *supra* note 14, at 40.

79. RHODE, *supra* note 1, at 83; Jonathan D. Glater, *Amateur Hour in Court*, N.Y. TIMES, Apr. 10, 2009, at B1. See generally JUDITH S. KAYE & JONATHAN LIPPMAN, HOUSING COURT PROGRAM: BREAKING NEW GROUND (1997) (discussing a comprehensive plan proposing changes to the Housing Court); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2005–07 (1999).

80. See Engler, *supra* note 79, at 2056, 2059–60, 2064; see also John M. Greacen, "No Legal Advice from Court Personnel": What Does That Mean?, JUDGES' J., Winter 1995, at 10–12; Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 60–63; Family Law—Domestic Violence—Unauthorized Practice of Law—Activities of Lay Advocates, 80 Op. Att'y Gen. 138 (Md. 1995) (noting that pro se litigants sometimes "have no means of pursuing" their legal rights without legal representation). Other sources discussing the additional burdens for pro se litigants include LEGAL SERVS. PROJECT, FUNDING LEGAL SERVICES FOR THE POOR: REPORT TO THE CHIEF JUDGE 3 (1998) and Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 107–16, 153–58 (1997).

81. MARQUARDT ET AL., *supra* note 75, at 107 (noting preferences of litigants).

82. *Id.* at 109–10.

83. *Id.*

84. *Id.*

Although judicial support for reform is increasing, some members of the bench have been reluctant to jeopardize the appearance of impartiality by assisting unrepresented parties.⁸⁵ Some are impatient with litigants who have questions about how to prepare essential documents; “I’m not your secretary” is an all too typical judicial response.⁸⁶ Other members of the bench are hesitant to push for procedural simplification and assistance programs that might pose an unwelcome competitive threat to local lawyers. Most state judges are elected, and support from the bar is critical for their campaigns, reputation, and advancement. Helping parties dispense with counsel may win few friends in circles that matter.⁸⁷

The most recent revision of the Model Code of Judicial Conduct has done little to improve the situation. The most that advocates of pro se assistance were able to obtain was new language in the comments clarifying that it is “not a violation” of rules of impartiality “for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”⁸⁸ But neither is it a violation for judges to fail to make such accommodations. Such failures are particularly troubling in cases involving procedural complexity, substantial power imbalances, or especially vulnerable parties.⁸⁹ As leading court reform advocates have noted, “our focus on the *appearance* of judicial neutrality has caused us improperly . . . to resist the forms of judicial engagement that are in fact required to guarantee true neutrality.”⁹⁰

Similar obstacles have blocked other efforts to broaden access to nonlawyer services. Almost all of the scholarly experts and commissions that have studied the issue have recommended

85. Russel Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 372 (2008).

86. Amanda Ripley, *Who Needs Lawyers?*, TIME, June 12, 2000, at 62.

87. CAL. STATE BAR, AND JUSTICE FOR ALL: FULFILLING THE PROMISE OF ACCESS TO CIVIL JUSTICE IN CALIFORNIA 47 (1996).

88. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007).

89. For contexts in which rights are trampled by repeat players, see Engler, *supra* note 85, at 391 n.117.

90. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 425 (2004); see also Engler, *supra* note 85, at 385–87.

increased opportunities for such assistance.⁹¹ Almost all of the major decisions by judges and bar associations have ignored those recommendations. The American Bar Association's ("ABA") most recent initiatives in this area have attempted to strengthen enforcement of unauthorized practice prohibitions against lay competitors, and many state and local bars have launched similar efforts.⁹² Yet research concerning nonlawyer specialists in other countries and in American administrative tribunals suggests that these individuals are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest.⁹³ Concerns about unqualified or unethical lay assistance could be met through more narrowly drawn prohibitions and licensing structures for nonlawyers.

Pro Bono Services

A further constraint on access to justice involves inadequate pro bono service. The ABA's ethical codes and judicial decisions have long maintained that lawyers have a responsibility to assist those who cannot afford counsel.⁹⁴ The ABA's current Model Rules of Professional Conduct provides that lawyers should "aspire" to provide at least fifty hours of pro bono work each year or the financial equivalent.⁹⁵ A "substantial majority" of their contributions should go to "persons of limited means" or to organizations assisting them.⁹⁶ Additional assistance should go to activities that improve the law, legal profession, or legal system, or that support "civil rights,

91. RHODE, *supra* note 1, at 89–91; Houseman, *supra* note 3, at 62–67; MASS. ACCESS TO JUSTICE COMM'N, *supra* note 14, at 9–11 (explaining that "agencies cannot meet the demand" for nonlawyer services). For early recommendations, see Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) (recommending that nonlawyer services be made more readily available to pro se litigants to aid them in their self-representation and to protect them from unethical practitioners). See also ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (1995).

92. ABA SELECT COMMITTEE REPORT ON THE 2000 MIDYEAR MEETING, *available at* <http://www.abanet.org/leadership/2000hous.html>; RHODE, *supra* note 1, at 88.

93. See Debra Baker, *Is This Woman a Threat to Lawyers?*, 85 A.B.A. J. 54, 54, 57 (1999); JUDITH CITRON, THE CITIZENS' ADVICE BUREAU; FOR THE COMMUNITY BY THE COMMUNITY 37–60 (1989); Kritzer, *supra* note 24, at 198–203.

94. See MODEL R. PROF'L CONDUCT R. 6.1 (2002); MODEL CODE PROF'L RESP. 2-25, 8-3 (1983).

95. MODEL R. PROF'L CONDUCT R. 6.1 (2002).

96. *Id.* R. 6.1(a)(1).

civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations.”⁹⁷

A growing number of lawyers meet or exceed this goal, and their generous assistance has become an increasingly critical part of the American legal aid system. But most lawyers fall short, even those at the most profitable firms who could readily afford to contribute. Precise figures are unavailable because only seven states require the reporting of pro bono work.⁹⁸ Moreover, many lawyers have included in their reports activities such as bar association service; favors for friends, clients, and family members; and cases where fees turn out to be uncollectible.⁹⁹ Based on such reports, a lawyer’s average pro bono contribution is estimated at less than half a dollar a day and half an hour a week, and much of this assistance does not go to individuals of limited means or to organizations that assist them.¹⁰⁰ Fewer than one in ten lawyers accept referrals from legal aid programs or groups serving low-income communities.¹⁰¹ Less than half of lawyers in the nation’s two hundred most profitable firms have contributed at least twenty hours a year.¹⁰²

Yet neither courts nor bar associations have been willing to require greater contributions. The scope of judicial power to compel unpaid legal assistance remains unsettled, largely because the power has so rarely been exercised. The Supreme Court has not resolved the issue, although some of its language and summary rulings imply

97. *Id.* R. 6.1 ; *see also id.* R. 6.1 cmt. 9 (2002) (allowing firms to satisfy their lawyers’ obligations collectively).

98. ABA Standing Committee on Pro Bono & Public Service, Reporting of Pro Bono Service, <http://www.abanet.org/legalservices/probono/reporting.html> (last visited March 17, 2009) (listing Florida, Hawaii, Illinois, Maryland, Mississippi, Nevada, and New Mexico as the seven states requiring pro bono reports).

99. *See* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 19, 145–48 (2005).

100. *See id.* at 20. Other ABA survey results (finding that two-thirds of lawyers report doing some pro bono work) are not inconsistent with this estimate, given that the average hourly contribution of lawyers who offered pro bono assistance needs to be adjusted for the numbers who did not and for those whose contributions involved activities such as bar association service. *See* ABA STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 4–5 (2005), available at <http://www.abanet.org/legalservices/probono/report.pdf> (two-thirds offer assistance); ABA STANDING COMM. ON PRO BONO & PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 3 (2009) (finding that three-quarters of lawyers offered an average of forty-one hours per year).

101. RHODE, *supra* note 1, at 17.

102. David Bario, *Has Pro Bono Become Recession-Proof?*, AM. LAW., July 2, 2009.

that the judiciary has inherent authority to require such assistance at least in criminal cases.¹⁰³ Lower court decisions are mixed, but most have upheld mandatory court appointments as long as the required amount of service is not "unreasonable."¹⁰⁴

Yet in the face of strong resistance, courts have been reluctant to exercise their appointment power, particularly in civil cases. They have been similarly unwilling to adopt ethical rules requiring a minimum amount of pro bono service or even mandating that lawyers report their contributions. The same is true of bar associations. Even state access to justice commissions are generally content to praise lawyers for their help and look for ways to encourage, not require, more.¹⁰⁵

The limitations of current pro bono programs represent a missed opportunity for both the profession and the public. Volunteer service offers ways to gain additional skills, trial experience, and community contacts. Such career development opportunities, in the context of causes to which attorneys are committed, are often their most rewarding professional experiences.¹⁰⁶ Many lawyers report that they would like to do more pro bono work but are in institutions that do not support it.¹⁰⁷ ABA surveys consistently find that young lawyers' greatest source of dissatisfaction in practice is its lack of connection to the public good.¹⁰⁸ Public service could supply that connection and also make lawyers more aware of how the justice system functions, or fails to function, for the have-nots.¹⁰⁹

103. *Sparks v. Parker*, 444 U.S. 803, 803 (1979). In *Sparks*, the Court dismissed an appeal from the Alabama Supreme Court for want of a substantial federal question. *Id.* In the decision below, the Alabama Supreme Court affirmed an intermediate appellate judge's order that established an indigent defense system in Calhoun County and required unpaid legal assistance in criminal cases. *See Sparks v. Parker*, 368 So. 2d 528, 531-34 (Ala. 1979).

104. *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1985). *Moultrie* is the leading case supporting mandatory court appointments as long as the amount of uncompensated service is reasonable. *See RHODE*, *supra* note 99, at 8-9.

105. *See generally* MASS. ACCESS TO JUSTICE COMM'N, *supra* note 14; ME. JUSTICE ACTION GROUP, *JUSTICE FOR ALL: A REPORT OF THE JUSTICE ACTION GROUP* (2007).

106. *RHODE*, *supra* note 99, at 30.

107. *Id.* at 138-45.

108. ABA YOUNG LAWYERS DIV., *CAREER SATISFACTION SURVEY* 19-20 (2000).

109. Steven Lubet & Carlyn Stewart, *A 'Public Assets' Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1253 (1997); *RHODE*, *supra* note 99, at 44-46.

Legal Education

A similar point could be made about legal education. Although virtually all law schools offer clinical courses that often serve underrepresented groups, issues concerning access to justice and public service have been missing or marginal in core law school curricula. A recent report by the Carnegie Foundation found that social justice concerns rarely arose outside the clinics.¹¹⁰ In my own national survey, only 1 percent of law school graduates reported that pro bono service received coverage in their orientation programs or professional responsibility courses; only 3 percent observed visible faculty support for pro bono work.¹¹¹

Bar accreditation standards are partly responsible for this failure to make access to justice an educational priority. Although those standards do call on schools to “encourage students to participate in pro bono activities and to provide opportunities for them to do so,” no specific standards or even reporting requirements are imposed.¹¹² Faculty obligations are even hazier. The standards merely call on schools to establish policies on faculty responsibilities, including their “obligation to the public.”¹¹³ Neither the faculty nor the administration actually *has* to do anything regarding pro bono participation.

Although a growing number of schools have made efforts to increase pro bono involvement, substantial challenges remain. Only about 15 percent of schools require service by students, and fewer still impose specific requirements on faculty.¹¹⁴ Even at these schools, the amounts demanded are sometimes quite minimal: half of those responding to an ABA survey required only ten to twenty hours of students.¹¹⁵ Although most institutions offer voluntary public service programs, only a minority of students participate. In

110. See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007).

111. RHODE, *supra* note 99, at 162.

112. Deborah L. Rhode, *Foreword: Learning to Serve*, in ASS'N OF AM. LAW SCHS., COMM'N ON PRO BONO & PUB. SERV. OPPORTUNITIES, LEARNING TO SERVE (1998), available at <http://www.aals.org/probono/report.html>.

113. *Id.*

114. ABA STANDING COMM. ON PROFESSIONALISM, REPORT ON A SURVEY OF LAW SCHOOL PROFESSIONALISM PROGRAMS 46–47 (2006), available at http://www.abanet.org/cpr/reports/LawSchool_ProfSurvey.pdf.

115. *Id.* at 47.

short, most law students graduate without pro bono legal work as part of their educational experience.¹¹⁶ Moreover, the quality of some programs is open to question. Many students lack on-site supervision or a classroom opportunity to discuss their work or pro bono issues generally. In the American Bar Foundation's survey of recent law graduates, pro bono ranked last on a list of experiences that practitioners felt had significantly assisted them in practice.¹¹⁷

This failure to make pro bono programs a more integral part of the law school curriculum shortchanges both the profession and the public. Such programs can offer students, no less than lawyers, invaluable skills training and a window on what passes for justice in low-income communities. If the bar wants lawyers to see public service as a professional responsibility, then law schools cannot afford to treat that issue as someone else's responsibility.

The Costs

Legal aid is not, of course, the only area in which our aspirations to fairness far outrun our achievements. But it is one of the most critical. Making legal rights meaningful fosters values central to the rule of law and social justice. Not only does access to legal services help prevent erroneous decisions, but it also affirms a respect for human dignity and procedural fairness, which are core democratic ideals. A few hours of legal work can result in benefits far exceeding their costs. Review of legal services programs reveals countless examples, such as impoverished elderly citizens who receive essential medical treatment, or special-needs children who gain access to educational disability programs.¹¹⁸ Government-subsidized

116. LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2004 ANNUAL SURVEY RESULTS 8, available at http://lsse.iub.edu/2004_annual_report/pdf/LSSSE%202004%20Annual%20Survey%20Results.pdf; see also RHODE, *supra* note 99, at 24.

117. RONIT DINOVITZER, NAT'L ASS'N FOR LAW PLACEMENT FOUND. FOR LAW CAREER RES. & EDUC. & AM. BAR FOUND., AFTER THE J.D.: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 81 (2004), available at <http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf>.

118. See, e.g., VOLS PRO BONO FORUM: A PUBLICATION OF VOLUNTEERS OF LEGAL SERVICE (2008), available at <http://www.volsprobono.org/documents/384501spring08paginated.pdf>; Jamie Welch-Donahue, *New Clinic to Assist Children with Special Needs and Their Families* (Jan. 28, 2009), <http://law.wm.edu/news/stories/2009/new-clinic-to-assist-children-with-special-needs-and-their-families.php>.

representation makes it possible for millions of poor people to obtain crucial health, education, and vocational services.¹¹⁹

Moreover, law is a public good. Protecting legal rights often has value beyond what those rights are worth to any single client. So, for example, holding employers of migrant farm workers accountable for unsafe field conditions, making landlords liable for violations of housing codes, or imposing penalties for consumer fraud can provide an essential deterrent against future abuse. It can also help individuals help themselves. Access to legal services has been one of the key contributors to the decline in domestic violence since the early 1990s, and to the corresponding reduction in associated health and law enforcement costs.¹²⁰ Representation in other contexts such as eviction and child abuse and neglect proceedings can also save taxpayer dollars by reducing the need for related social services.¹²¹

As these examples also suggest, some civil proceedings implicate interests as significant as those involved in many minor criminal cases where counsel is required. It is a cruel irony that in cases involving protective orders for victims of domestic violence, defendants who face little risk of significant sanctions are entitled to lawyers, but victims whose lives are in jeopardy are not.¹²²

This is not to suggest that society in general or the poor in particular would benefit if every potential claim were fully litigated. But neither is the ability to pay or geographic location an effective way of determining who should receive assistance. America's gross inequalities in access to justice are an embarrassment to a nation that considers its legal system to be a model for the civilized world.

119. For examples, see BRENNAN CTR. FOR JUSTICE, BEARING WITNESS: LEGAL SERVICES CLIENTS TELL THEIR STORIES 5 (2000), available at http://brennan.3cdn.net/ffbc4ffad7ba72ce94_g1m6bq3wi.pdf and BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 9-13 (2000), available at <https://www.policyarchive.org/bitstream/handle/10207/8729/restrictinglegalservices.pdf?sequence=1>.

120. Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158, 169 (2003); see also Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511-12 (2003).

121. See sources cited *supra* notes 120-21; see also ACCESS TO JUSTICE STUDY COMM., STATE BAR OF WIS., *supra* note 9, at 9 (estimating that every dollar spent on civil legal aid may save as much as nine dollars in other social costs).

122. RHODE, *supra* note 1, at 9; John Nethercut, "This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases, 38 CLEARINGHOUSE REV. J. L. & SOC. POL'Y 481, 483 (2004) (discussing contexts in which counsel is not available).

IV. A ROADMAP FOR REFORM

In constructing a policy agenda for reform, it is important to focus both on long-term objectives and short-term priorities. The ultimate goal, as noted earlier, is a full-access delivery model that provides a broad range of assistance in a broad range of forums, and promotes quality and accountability in performance.¹²³ In the current financial climate, however, we also need incremental policy proposals reflecting the most cost-effective and politically viable strategies.

“Civil Gideon”

In 2003, the fortieth anniversary of the Supreme Court’s landmark decision *Gideon v. Wainwright*¹²⁴ sparked a resurgence of interest in extending that ruling’s guarantee of counsel in criminal cases to civil cases.¹²⁵ Advocates formed the National Coalition for a Civil Right to Counsel and coordinated litigation and legislative strategies.¹²⁶ The ABA created the Task Force on Access to Civil Justice and, in 2006, adopted its proposed resolution supporting a “civil *Gideon*.”¹²⁷ That resolution urged “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction.”¹²⁸ Building on that framework, some state access to justice commissions or related bodies have proposed guaranteeing counsel in limited categories of

123. See *supra* text accompanying notes 32–37.

124. 372 U.S. 335 (1963).

125. *Gideon* famously held that the Sixth Amendment, as applied to the states by the Fourteenth Amendment, required states to furnish counsel to indigent defendants charged with serious criminal offenses. *Id.* at 345.

126. For an overview of this history, see Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1067 (2009); Engler, *supra* note 11, at 697–99; see also Special Issue, *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 163 (2006); Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 CLEARINGHOUSE REV. 170 (2006).

127. ABA House of Delegates Resolution 112A (Aug. 7, 2006), <http://www.abanet.org/legalservices/sc laid/downloads/06A112A.pdf>.

128. ABA, *2006 Resolution on a Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 508 (2006).

cases or creating pilot programs to evaluate such guarantees.¹²⁹ Parallel initiatives have focused on obtaining requirements of legal representation as part of a broader package of reforms in certain areas such as child abuse and neglect.¹³⁰

In support of such proposals, advocates underscore the human costs of inadequate assistance, as well as the research suggesting that parties with lawyers obtain better outcomes than those without legal representation, which sometimes results in cost savings in social service expenditures.¹³¹ Yet this research is often less conclusive than is assumed and skirts a host of practical issues involved in guaranteeing counsel in civil cases. Many studies finding advantages for represented litigants fail to control for other factors, such as the strength of parties' claims. If, as noted earlier, individuals with strong cases are disproportionately likely to obtain representation, then their better outcomes might be at least partly due to the merits. To be sure, the extent of disparities in results suggests that having counsel makes a difference, and research that does control for merits generally finds advantages from representation.¹³² But this research does not compare the performance of lawyers to that of qualified nonlawyer advocates. Studies that do make such comparisons typically find that lay experts often obtain equivalent or better outcomes.¹³³

129. MASS. ACCESS TO JUSTICE COMM'N, *supra* note 14, at 7 (recommending "civil *Gideon*" in some contexts); ME. JUSTICE ACTION GROUP, *supra* note 105, at 10 (recommending consideration of a "civil *Gideon*" right); N.Y. STATE BAR ASS'N, *supra* note 54, (identifying areas where counsel would be appropriate). For evidence regarding California's efforts toward increasing legal aid, see CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 30; see also CAL. COMM'N ON ACCESS TO JUSTICE, STATE BASIC ACCESS ACT (2008), available at http://brennan.3cdn.net/c8d7c0be3acc133d7a_s8m6ii3y0.pdf; Pastore, *supra* note 126, at 1068. Additional sources have specifically discussed California's efforts. See, e.g., Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REV. 176 (2006); Gary Scott, *State Budget Panel Debates Civil Legal Aid*, DAILY J. (Cal.), June 5, 2007, available at http://www.calegaladvocates.org/news/article.146776-State_Budget_Panel_Debates_Civil_Legal_Representation_Projects (describing Governor Arnold Schwarzenegger's proposed \$5 million pilot project on guarantees for counsel in selected civil cases).

130. Abel, *supra* note 23, at 1113.

131. See Engler, *supra* note 20; N.Y. STATE BAR ASS'N, *supra* note 54; Scherer, *supra* note 21, at 703-04.

132. For one of the most carefully controlled studies, see Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 423-26 (2001).

133. Kritzer, *supra* note 24, at 76; Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765 (2003).

A related limitation of prior work is its failure to address cost-effectiveness in comparative terms. Even granting that lawyers often increase the likelihood of a favorable judgment, what is the value of their contributions compared to other possible uses of their time? For example, could they do more to prevent homelessness by focusing on policy and organizing efforts rather than individual representation? Of course, these activities are not mutually exclusive, and many organizations do both.¹³⁴ But resource constraints inevitably force difficult questions. In what circumstances are lawyers' services most critical? How do their contributions in civil litigation compare with alternative uses of their time or with equivalent expenditures on other social services?

These questions assume particular importance in light of legislatures' reluctance to fund effective representation in areas where it is already guaranteed. One of *Gideon*'s discomfiting lessons is that rights mean little without resources. In many jurisdictions, the current system of indigent defense is a national disgrace. Most court-appointed lawyers are underfunded and overcommitted. Annual caseloads for public defenders can range between 500 and 900 felony matters or over 2,000 misdemeanors.¹³⁵ Such workloads vastly exceed the standards of the National Advisory Commission on Criminal Justice, which set ceilings of 150 felonies and 400 misdemeanors.¹³⁶ Fees for private, court-appointed attorneys are often capped at ludicrous levels, so that effective representation is a quick route to financial ruin. Teenagers selling soda on the beach make more per hour than some indigent defense attorneys.¹³⁷ Resources for hiring experts and investigators are similarly inadequate.¹³⁸

134. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2031–32 (2008).

135. RHODE, *supra* note 1, at 128; Editorial, *Hard Times and the Right to Counsel*, N.Y. TIMES, Nov. 21, 2008, at A34; Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1; John Elgon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES, Apr. 4, 2009, at A19; Vesna Jaksic, *Public Defenders, Prosecutors Face a Crisis in Funding*, NAT'L L.J., Mar. 27, 2007, at A1, available at <http://www.nacdl.org/public.nsf/mediasources/20070327a?opendocument>.

136. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1054 (2006).

137. JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* 188 (2000); RHODE, *supra* note 1, at 13, 127–28.

138. Inadequate expert resources are discussed in ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST*

The problem is compounded by the lack of accountability for ineffective performance. Neither market forces nor judicial and bar oversight structures provide a sufficient check on shoddy representation. Defendants typically lack enough information to second-guess their lawyers' plea recommendations and trial strategies. Even if clients doubt the adequacy of their counsel, they can seldom do much about it. Indigent defendants have no right to select their attorneys, and these attorneys do not depend for their livelihood on the satisfaction of their clients. Nor is "mere negligence" enough to trigger bar disciplinary action, establish malpractice liability, or overturn convictions resulting from ineffective assistance of counsel.¹³⁹ Criminal defendants are generally unsympathetic complainants, and judicial tolerance for ineptitude knows few bounds. Convictions have been sustained where court-appointed counsel have been drunk, on drugs, dozing, or parking their cars during key parts of the proceedings.¹⁴⁰

If the implementation of a right to counsel has proven so inadequate in criminal cases, what makes us believe that an extension of this right to civil contexts would work better? Yet many "civil *Gideon*" advocates understate the challenges of quality control. A common assumption is that judges will have sufficient power to enforce constitutional or statutory guarantees.¹⁴¹ But courts already have such power in criminal proceedings. The problem is judges' reluctance to exercise it in contexts of severe budget constraints. Although litigation has sometimes prompted rulings that require increased defense budgets, considerable challenges remain.¹⁴² Civil

FOR EQUAL JUSTICE 10 (2005), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> and Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. REV. 493 (2008). Inadequate investigator resources are discussed in David Simon, *Equal Before the Law, Toward a Restoration of Gideon's Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 591 (2008).

139. RHODE, *supra* note 1, at 13.

140. *Id.* at 4.

141. Scherer, *supra* note 21, at 715–16. As the *Bellow-Sacks Access to Civil Legal Services Project* notes, "civil *Gideon*" proposals often give no attention to the challenge of ensuring quality when legislatures are unprepared to pay for it. CHARN & ZORZA, *supra* note 12, at 17.

142. For examples of such litigation, see Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2009); Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2007), available at <http://ssrn.com/abstract=1279185>; Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

legal services offices have managed to escape the worst of these problems not only because of a commitment to quality reflected in recently revised ABA standards, but also because they are not obligated to represent all financially eligible clients.¹⁴³ Expanding the right to counsel without corresponding resources could severely compromise the effectiveness of assistance.¹⁴⁴

Given this legacy, a plausible starting point for reform would be a qualified right to aid in civil contexts. Courts or legislatures could guarantee access to the legal services necessary to protect basic rights. As noted earlier, individuals could be entitled to aid equivalent to what a person of reasonable means would be willing to purchase. Lawyers would be available when they were the most cost-effective service providers. Relevant factors in allocating assistance would include the importance and complexity of the matter, the adversarial nature of the process, and the power disparities between the parties.¹⁴⁵ To guide administration of such a standard, national and state decision-making bodies could establish some general presumptions, subject to interpretation by local providers.¹⁴⁶

One virtue of such a system is that it would force greater consistency and transparency in allocating assistance. The right to counsel would turn more on the merits and urgency of claims and less on variations in local budgets. Tradeoffs would, of course, be necessary, not only between different types of claims but also between representing individual clients and engaging in impact litigation, legislative reform, or mobilizing activities that might reduce the need for such representation. Considerable effort in the legal services community has focused on how to make these allocation decisions. Widely accepted criteria include the seriousness of the need as well as the likely collective benefit, long-term impact, and cost-effectiveness of assistance.¹⁴⁷ Reasonable

143. ABA STANDARDS FOR THE PROVISION OF CIVIL LEGAL AID 191 (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2006.pdf>.

144. For concerns of legal services directors, see Pastore, *supra* note 126, at 1084.

145. See Engler, *supra* note 20; N.Y. STATE BAR ASS'N, *supra* note 54, at 7.

146. CHARN & ZORZA, *supra* note 12, at 35.

147. See Gary Bellow & Jean Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1652-67 (1995); Paul Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475, 2490-93 (1998).

people can, of course, disagree about the weight to attach to these factors, how they apply in particular cases, and who should make those determinations. But forcing such priority decisions into the open would at least ensure greater accountability. And in the long run, the increased public visibility of triage might also bring support for increased funding.

In the short term, however, where legislative or judicial recognition of a right to assistance is lacking, an alternative approach is to adopt pilot projects that guarantee aid for specific categories of cases. One model is the collaborative Immigration Justice Project, sponsored by the ABA in cooperation with federal courts, government agencies, and other bar groups. It will assess the effects of providing pro bono representation in all San Diego removal proceedings.¹⁴⁸ California has adopted and other states have considered “civil *Gideon*” pilot projects for areas such as family, housing, and administrative proceedings.¹⁴⁹ Well-designed evaluation of such initiatives is critical, as are structures for effective quality control.¹⁵⁰ Such oversight is essential to increasing the efficiency as well as the equity of legal processes.

Innovative and Collaborative Delivery Models

Another way to increase access to justice is through innovations that reduce the price of expert assistance. Market forces are already pushing in this direction. Technological innovations are enabling lawyers and consumers to obtain information, analyze cases, network with experts, and complete documents in more cost-effective ways.¹⁵¹ However, more needs to be done to cross the digital divide and to reduce procedural barriers. For example, law professor Ronald Staudt envisions a Web-based guided interview that would

148. Schoenholtz & Bernstein, *supra* note 67, at 57–58.

149. See Sargent Shriver Civil Counsel Act, A.B. 590, 2009 Leg., Reg. Sess. (Cal. 2009); N.Y. STATE BAR ASS'N, *supra* note 54.

150. For a discussion of the critical quality control measures, which include not just satisfaction and outcome review, but also case management, staff competence, and peer review, see Jeanne Charn & Rani Youells, *A Question of Quality*, EQUAL JUST., Winter 2004, at 32.

151. See Brenda Bratton Blom, *Cause Lawyering and Social Movements: Can Solo and Small Firm Practitioners Anchor Social Movements?*, 39 STUD. L. POL. & SOC'Y 119 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903959; Staudt, *supra* note 71, at 1121–25. See generally RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008) (noting that online systems and services are increasingly competing with lawyers in providing access to the law and justice).

direct individuals to the appropriate provider of services or enable them to complete forms themselves and file them electronically with the correct state or federal court system.¹⁵² Other proposals include more online dispute resolution systems such as the Square Trade process available for eBay users; the Family Winner, an Australian procedure for couples seeking a divorce; and Money Claim Online, a system developed by English courts to settle claims for back rent and other unpaid debts.¹⁵³

Further effort should focus on encouraging innovative delivery methods and evaluating their effectiveness. One increasingly popular strategy is unbundled discrete services that provide a less costly alternative to full representation.¹⁵⁴ Courts and bar ethics codes could encourage this trend. They could authorize lawyers to argue only certain issues in a case, to help prepare ghostwritten documents, and to limit their liability for specified tasks as long as clients give informed consent and the limitation is reasonable.¹⁵⁵ To make such representation more accessible, lawyers could follow the lead of initiatives such as the chain Legal Grind, which dispenses brief advice along with cappuccino and self-help materials; clinics that offer inexpensive group counseling; and the sole practitioner who provides wills through the functional equivalent of Tupperware parties.¹⁵⁶ More bar associations could establish “low bono” programs that refer clients of limited means to lawyers willing to

152. Staudt, *supra* note 71, at 1128–34.

153. SUSSKIND, *supra* note 151, at 221.

154. For a discussion about unbundled legal services, see Forrest S. Mosten, *Unbundling Legal Services: Servicing Clients Within Their Ability to Pay*, JUDGES' J., Winter 2001, at 15, and ABA MODEST MEANS TASK FORCE, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE (2003), available at www.abanet.org/litigation/taskforces/modest/report.pdf.

155. See MODEL RULES PROF'L CONDUCT R. 1.2 (2002) (providing for limited representation); Mosten, *supra* note 154, at 18 (proposing civil immunity for lawyers if clients sign a discrete task engagement agreement approved by the legislature); Margaret Graham Tebo, *Loosening Ties: Unbundling of Legal Services Can Open Door to New Clients*, A.B.A. J., Aug. 2003, at 35 (noting that California and Florida allow such special appearances and other states allow lawyers to ghostwrite pleadings without appearing as counsel of record). To address concerns about frivolous or fraudulent ghostwritten documents, lawyers could be required to disclose their identities and be responsible for matters within the scope of their limited assistance. See RHODE, *supra* note 1, at 101.

156. See, e.g., Carol J. Williams, *Legal Aid Expands for the Middle Class*, L.A. TIMES, Mar. 10, 2009, at 6 (describing Legal Grind and clinics offering sessions to neighbors with similar problems who share the bills); Legal Grind Attorney and Paralegal Services, <http://www.legalgrind.com> (last visited Mar. 29, 2009); Willparties.com, Home-Based Will Signing Parties, <http://www.willparties.com> (last visited Mar. 29, 2009).

provide reduced-fee services in areas like family and landlord-tenant law.¹⁵⁷ We need to know more about these arrangements and what might improve their performance and profitability.

Lawyers also should expand and strengthen relationships with other service providers. Many clients have problems that would benefit from holistic, multidisciplinary approaches.¹⁵⁸ Homeless individuals may require not just legal assistance with housing needs, but also access to education, health services, and substance-abuse programs. One-stop shopping is particularly beneficial for elderly, rural, and disabled clients who cannot readily shuttle between multiple agencies.

Pro Se Assistance, Nonlawyer Services, and Court Reform

For many law-related needs, lawyers are not the most cost-effective providers, and Americans have had inadequate access to alternatives. Much of the reason lies in overbroad prohibitions on the practice of law. On this issue, as noted earlier, the organized bar has been part of the problem rather than the solution. Courts and legislatures need to modify current rules to permit greater assistance from competent nonlawyers. Licensing systems should establish qualifications, ethical standards, performance oversight processes, and effective malpractice remedies.¹⁵⁹

A related priority is enabling more individuals to handle legal matters without expensive legal representation. Strategies include

- simplified legal requirements, documents, and procedures;

157. To qualify for such assistance, individuals can have incomes between 150 and 250 percent above the poverty line. See, e.g., Oregon State Bar, Lawyer Referral Services, <http://www.osbar.org/public/ris/ris.html> (last visited Apr. 6, 2009) (capping income at 200 percent); Nebraska State Bar Association, For the Public: Low Income Legal Services, <http://www.nebar.com/displaycommon.cfm?an=1&subarticlenbr=83> (last visited Apr. 6, 2009) (capping income at 175 percent); New Haven County Bar Association, Lawyer Referral Service, <http://www.newhavenbar.org/lrs.php#modest> (last visited Apr. 6, 2009) (capping income at 250 percent).

158. See RHODE, *supra* note 1, at 118–19; Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice: Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787 (2002); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000).

159. See RHODE, *supra* note 1, at 90–91. Many access to justice commissions recommend greater access to nonlawyer providers and pro se assistance. See, e.g., MASS. ACCESS TO JUSTICE COMM’N, *supra* note 14, at 11.

- user-friendly technologies, including Web-based resources;
- personal pro se assistance in courthouses and other, more accessible community locations;
- targeted services to particularly vulnerable populations, including non-English-speaking and rural populations; and
- advice hotlines and programs offering limited lawyer assistance.¹⁶⁰

More jurisdictions need such services, and more research is necessary to assess their effectiveness. Much of the evaluation to date has consisted of simple satisfaction measures: how happy are clients and court personnel with self-help programs?¹⁶¹ In general, these surveys find high levels of satisfaction.¹⁶² But research that also assesses outcomes offers a more mixed account. Unsurprisingly, pro se assistance is most effective in contexts like uncontested divorces that do not involve particularly complex or adversarial proceedings.¹⁶³ In housing courts, the success rate for self-represented tenants is much lower. Even more sobering is research finding that parties who received assistance from a self-help center were less satisfied with their outcomes than others who received no such aid.¹⁶⁴ Staff apparently had been helpful in explaining tenants' legal rights, but not in communicating what was likely to happen when parties attempted to exercise them. By contrast, unassisted litigants were less well-informed about what they might achieve, and less disappointed when it did not happen.¹⁶⁵ Giving parties more "access to justice," as that term is conventionally understood, resulted in less actual justice as they perceived it.

That example underscores the point made earlier: a variety of factors apart from legal assistance affect substantive outcomes. Efforts to level the procedural playing field through legal aid will not always prove effective, at least from the players' perspective. But

160. CHARN & ZORZA, *supra* note 12, at 51.

161. Blasi, *supra* note 16, at 873 n.28.

162. *Id.* at 873.

163. Engler, *supra* note 20.

164. Blasi, *supra* note 16, at 870.

165. *Id.*

increasing subjective satisfaction is not our only objective. More evaluation is crucial along multiple dimensions. To what extent do pro se programs increase the accuracy and efficiency of decision making? How might additional assistance from lawyers, lay advocates, or judges increase effectiveness? What other initiatives are necessary to help individuals help themselves?

The need for certain reforms is already apparent from prior research. Judges need to assume greater responsibility for fairness to unrepresented parties, such as investigating issues, promoting compliance with evidentiary rules, and preventing manifestly unbalanced settlements.¹⁶⁶ Courthouses must ensure adequate accommodations for disabled and non-English-speaking individuals. More legal proceedings and services need to be accessible to vulnerable populations including rural, migrant, institutionalized, and elderly individuals.¹⁶⁷ Other Americans would also benefit from additional channels for informal dispute resolution not only in courthouses but also in neighborhood, workplace, and commercial settings. Considerable evidence suggests that most people prefer to resolve grievances through such processes, and that well-designed procedures benefit both business and individual participants.¹⁶⁸ Similar advantages could come from expanding the jurisdiction of small claims courts and the role of courts and clerks in ensuring fairness for unrepresented parties.¹⁶⁹ More jurisdictions also should replicate the successful models of holistic, problem-solving courts in areas like domestic violence, homelessness, drug possession, and juvenile offenses.¹⁷⁰ By partnering with other social service

166. See Engler, *supra* note 85, at 392; CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS 3–7 (2005); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 49–51 (2002). The Self Represented Litigation Network has developed a curriculum designed for judges on equitable treatment of pro se litigants. Alfisi, *supra* note 72, at 36.

167. See RHODE, *supra* note 1, at 118.

168. See HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 217–18 (1999) CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 184–88 (1999); RHODE, *supra* note 1, at 86–87; MICHAEL ZANDER, THE STATE OF JUSTICE 29–32 (2000).

169. See GRAY, *supra* note 166; Tal Finney & Joel Yanovich, *Expanding Social Justice Through the "People's Court"*, 39 LOY. L.A. L. REV. 769 (2006); Goldschmidt, *supra* note 166.

170. See RHODE, *supra* note 1, at 86; John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem Solving Courts*, 17 WIDENER L.J. 97

providers, these courts can address root causes of problems, not just their legal symptoms.

Reforms along all of these dimensions require ongoing assessment and adjustment. Not all access to justice initiatives that look promising in principle work out that way in practice, and there is no substitute for systematic evaluation.

Pro Bono Services

Increasing the amount and quality of lawyers' pro bono services is similarly critical in expanding access to justice. To that end, one promising strategy would be to require lawyers to report their contributions in time and financial assistance. Florida, the first state to institute such a requirement, has experienced a substantial growth in both forms of aid.¹⁷¹ Students, clients, and the legal media can also help pressure legal employers to improve their pro bono programs. For example, a student-led group, Building a Better Legal Profession, and the *American Lawyer's* A-List both rank major firms on measures including pro bono commitments.¹⁷² So too, some government and corporate counsel's offices here and abroad have begun considering pro bono records in allocating legal work.¹⁷³ If more students, clients, and legal publications joined a coordinated campaign, involving a broad spectrum of the legal market, the result might be a significant increase in pro bono contributions.

(2007); Rekha Mirchandami, *Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State*, 33 LAW & SOC. INQUIRY 853 (2008).

171. Since Florida has required the reporting of pro bono work, the number of lawyers providing assistance to the poor has increased by 35 percent, the number of hours has increased by 160 percent, and financial contributions have increased by 243 percent. FLA. BAR, STANDING COMMITTEE ON PRO BONO LEGAL SERVICE, REPORT TO THE SUPREME COURT OF FLORIDA, THE FLORIDA BAR, AND THE FLORIDA BAR FOUNDATION ON THE VOLUNTARY PRO BONO ATTORNEY PLAN 3 (2006).

172. The Pro Bono Institute's challenge to corporate counsel now has seventy-five participants, who agree to consider an outside law firm's pro bono records when allocating legal work. Daphne Eviatar, *Pro Bono Pros: Whether It's to Shore Up a Floundering Program or Add Strategic Focus to a Strong One, Many Am Law 200 Firms Are Turning to the Professionals*, AM. LAW., July 2008, at 106. Building a Better Legal Profession, a national student organization, grades firms on their diversity and pro bono records. Building a Better Legal Profession, Pro Bono Participation: Manhattan, <http://www.betterlegalprofession.org/pdf/probono.pdf> (last visited Mar. 23, 2009); see also Adam Liptak, *In Students' Eyes, Look-Alike Lawyers Don't Make the Grade*, N.Y. TIMES, Oct. 29, 2007, at A10.

173. RHODE, *supra* note 99, at 167-69; David B. Wilkins, Address at the Houston Law Review Symposium, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1, 83-84 (2004).

Additional measures to improve quality and cost-effectiveness are equally important. Many lawyers assume that any unpaid assistance is “pro bono.” Little effort is made to assess client satisfaction or the social impact of services.¹⁷⁴ Law firm programs often follow what strategic philanthropists deplore: a “spray and pray” approach, which spreads assistance widely in the hope that somehow something good will come of it.¹⁷⁵ Something usually does, but the result is not necessarily the most efficient use of resources. Esther Lardent, President of the Pro Bono Institute, notes that too much of current aid is random and episodic; what is needed are approaches that are sustained, strategic, leveraged, and collaborative.¹⁷⁶

One possibility is to create signature programs that target certain compelling, unmet needs where participants have particular interests in and capacities. For example, a Philadelphia firm surveyed its members and local service providers and decided to assist veterans and the elderly; Los Angeles firms focused on children who were abused, neglected, or in detention; and a Silicon Valley firm offered its start-up expertise to local nonprofit organizations.¹⁷⁷ Collaboration among governmental agencies, nonprofit organizations, and private law firms can also achieve results beyond what any of these entities could secure on their own. A model of such cooperation is a coalition among local pro bono attorneys, legal aid organizations, and city attorneys to cope with housing issues on Skid Row in Los Angeles.¹⁷⁸ Each member of the coalition brings distinctive strengths: firms offer resources and litigation expertise,

174. Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1446 (2009); Scott L. Cummings and Deborah L. Rhode, *Managing Pro Bono: Doing Well By Doing Better*, FORDHAM L. REV. (forthcoming 2010).

175. PETER FRUMKIN, STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY 371 (2006).

176. Esther Lardent, Pres., Pro Bono Inst., Comments at the UCLA Law School Conference “Rethinking Pro Bono” (Oct. 3, 2008).

177. See Esther F. Lardent, *The Role of Major Law Firms in Addressing the Unmet Legal Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 49, 52 (2008) (discussing efforts by Los Angeles law firm Latham & Watkins); Michael Aneiro, *Room to Improve*, AM. LAW., July 2006, available at <http://www.law.com/jsp/law/PubArticlePrinterFriendly.jsp?id=900005457107> (discussing efforts by Philadelphia law firm Saul Ewing); Brent Harris, *Fulfilling the Promise of Law Firm Pro Bono* (2008) (unpublished manuscript).

178. I am indebted for this example to presentations at the UCLA Law School Conference “Rethinking Pro Bono” (Oct. 3, 2008).

service providers have knowledge of substantive law and community needs, and city prosecutors have special investigative capacities and the leverage of criminal and civil penalties.¹⁷⁹ Such approaches are often cost-effective because the investment in training and contacts pays off in multiple cases.

Another possibility is for firms to loan lawyers on a part-time or temporary basis to legal services providers. One silver lining of the latest economic downturn is that attorneys with inadequate paid work have time to develop expertise in meeting urgent social needs.¹⁸⁰ The growing ranks of retired attorneys also supply a potential talent pool that is only beginning to be tapped.¹⁸¹ It bears emphasis, however, that such “free” assistance is not free to everyone. Volunteers need training, supervision, backup support, and sometimes office space and staff. Developing additional resources for these programs should be a key priority.

Of equal importance is to ensure more systematic evaluation of pro bono contributions. The ABA’s recently revised Standards for Programs Providing Pro Bono Civil Legal Services to Persons of Limited Means provide a useful framework for assessment, which includes collecting evaluations from participants, clients, referring organizations, and peer review teams.¹⁸² It is, of course, true, as Albert Einstein reportedly observed, that “[n]ot everything that can be counted counts, and not everything that counts can be counted.”¹⁸³

179. The organizations included the Los Angeles City Attorney’s Office, the Legal Aid Foundation of Los Angeles, and the Los Angeles Community Action Network. *Id.*

180. Daphne Eviatar, *Pro Bono Picks Up in Down Times*, AM. LAW., Dec. 2008, available at <http://amlawdaily.typepad.com/amlawdaily/2008/12/pro-bono-picks.html>; Cummings & Rhode, *supra* note 174.

181. The number of lawyers between ages fifty and sixty will triple in the next two decades. Aneiro, *supra* note 177. For examples of pro bono programs for retired or partly retired attorneys, see Kathryn Alfisi, *In Focus: The Senior Lawyer Public Interest Project: An Interview with H. Guy Collier*, WASH. LAW., Dec. 2006, available at http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/december_2006/seniorlawyer.cfm. See also ABA Second Season of Service Project, <http://www.abanet.org/secondseason/home.html> (last visited Mar. 25, 2009).

182. Siobhan Morrissey, *Helping the Helpers: Online Service Makes It Easier to Find Pro Bono Work*, A.B.A. J., Jan. 2008, at 84, available at http://www.abajournal.com/magazine/helping_the_helpers.

183. This aphorism is generally attributed to Albert Einstein himself. See ANTON Z. CAPRI, QUIPS, QUOTES AND QUANTA: AN ANECDOTAL HISTORY OF PHYSICS 30 (2007). Other sources suggest that the phrase appeared on a sign in Einstein’s Princeton University office. See David G. Myers, *The Powers and Perils of Intuition*, PSYCHOL. TODAY, Nov./Dec. 2002, available at <http://www.psychologytoday.com/articles/pto-20021209-000001.html>.

But that is no excuse for failing to measure what can be measured, and to gain some sense of how well pro bono initiatives are working in the world.

Legal Education

Similar points are applicable to legal education. Law schools need to do more and know more concerning curricular coverage of access to justice. One obvious strategy is to integrate the issue into core courses as well as professional responsibility classes and extracurricular programs. Another priority is to increase the scope and quality of pro bono initiatives. A decade ago, a commission of the Association of American Law Schools recommended that every institution “make available for every student at least one well-supervised pro bono opportunity and either require participation or find ways to attract the great majority of students to volunteer.”¹⁸⁴ That remains a worthy aspiration, and law schools should be evaluated for their compliance during the American Bar Association’s accreditation process, and ranked by leading periodicals on the adequacy of such programs.¹⁸⁵ At a minimum, schools should be required to disclose information on matters such as the number of students and faculty who participate in pro bono projects and clinics addressing underserved groups, the number of courses and programs that address access to justice and public service, and the availability of public interest fellowships and internships.

Legal education could also become a more active partner in collaborative public service efforts. One example is a cooperative project of the Roger Williams Law School, Rhode Island community organizations, and local law firms.¹⁸⁶ This Pro Bono Collaborative sponsors thirty initiatives in which students partner with nonprofit organizations and pro bono attorneys to assist low-income

184. ASS’N OF AM. LAW SCHS., COMM’N ON PRO BONO & PUB. SERV. OPPORTUNITIES, *supra* note 112.

185. Equal Justice Works publishes an electronic guide that provides information to students on public service opportunities. See Equal Justice Works, <http://www.equaljusticeworks.org/newsletters/1107.htm> (last visited Mar. 29, 2009). However, schools are likely to be more responsive if their records receive attention in mainstream periodicals as well.

186. Laurie Barron et al., *The Pro Bono Collaborative: Building Bridges Between Law Firms, Low-Income Communities, and Law Students* (Dec. 11, 2008) (unpublished manuscript) (on file with the author).

individuals.¹⁸⁷ Law school faculty and staff play a pivotal role in identifying discrete projects and overseeing their implementation. Another widely acclaimed model is Fordham Law School's student-run program, which helps prepare future lawyers to design pro bono initiatives.¹⁸⁸ A few schools have special public interest tracks or certificate programs.¹⁸⁹ Some have clinics that focus on social justice issues in partnership with local community groups.¹⁹⁰ Sixteen schools are part of the Law School Consortium Project, which helps solo and small-firm practitioners provide affordable services to low- and moderate-income communities.¹⁹¹ Project participants receive technical assistance, legal information, law management training, and a supportive network.¹⁹² Over 40 percent of their work involves "low bono" matters, and over 90 percent of participants report that the project has enabled them to promote social justice through their practices.¹⁹³

Legal education and its constituents need to educate themselves about the adequacy of those efforts. Are law schools providing the full range of skills, including organizing, lobbying, media, policy, and program assessment that are critical to social impact work?¹⁹⁴

187. *Id.*

188. The Fordham Law School pro bono program, under the leadership of the Stein Center on Ethics, won the 2008 Pro Bono Award given by the American Bar Association's Committee on Pro Bono and Public Service. See ABA Pro Bono Publico Award—Current Recipients (Aug. 2008), http://www.abanet.org/legalservices/probono/pbp_current_recipients.html.

189. Chicago-Kent College of Law maintains a public interest certificate program. See Chicago-Kent College of Law, Certificate Program in Public Interest Law, <http://www.kentlaw.edu/academics/pil/requirements.html> (last visited Mar. 24, 2009). UCLA Law School offers the Program in Public Interest Law and Policy. See Richard L. Abel, *Choosing, Nurturing, Training and Placing Public Interest Law Students*, 70 FORDHAM L. REV. 1563, 1564 (2002).

190. See Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 376–84 (2009).

191. See Law School Consortium Project, Member Law Schools, <http://www.lawschoolconsortium.net/members/index.html> (last visited Mar. 22, 2009).

192. See Blom, *supra* note 151 (discussing Law School Consortium Project details).

193. Law School Consortium Project, 2005 Law School Network Practitioner Survey Report (2005), available at http://www.lawschoolconsortium.net/resources/LSCP_Data_Powerpoint.pdf. For an account of the role law schools can play in this project, see DEBORAH HOWARD, HOW TO EXTEND LEGAL EDUCATION TO SUPPORT SOLO AND SMALL FIRM PRACTITIONERS AND INCREASE ACCESS TO JUSTICE TO LOW AND MODERATE-INCOME INDIVIDUALS AND COMMUNITIES: A GUIDEBOOK FOR LAW SCHOOLS (2001), available at <http://www.lawschoolconsortium.net/resources/pdf/guidebook.pdf>.

194. Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 196 (2002). See generally Sameer M. Ashar, *Law Clinics*

How do students, graduates, and experts in the field evaluate the effectiveness of these offerings? If legal education is seriously committed to instilling values of social justice and public service in its students, its own priorities must reflect those values.

*Strategic Priorities: Politics, Money,
Coordination, and Evaluation*

For most of this nation's history, access to justice initiatives have been a hard sell, both politically and economically. Part of the problem is the lack of recognition that there *is* a significant problem. Four-fifths of Americans believe, incorrectly, that the poor are already entitled to lawyers in civil cases, and only a third think that individuals who need legal assistance would typically have difficulty finding it.¹⁹⁵ Such misperceptions, coupled with the equally widespread belief that America has too much litigation, make increased budgets for legal services a low priority.¹⁹⁶ The problem has been compounded by efforts of the political right to paint legal aid lawyers as radical vigilantes, heedlessly pursuing their own agendas at taxpayers' expense.¹⁹⁷

Altering this world view, and the starvation funding that it begets, will require more effective political and communication strategies. Advocates need to put a human face on legal needs and to demonstrate the price for taxpayers when basic rights go unaddressed. This is not, of course, news to those working in the field, and calls for greater public education are common in bar commentary and access to justice commission reports.¹⁹⁸ But talk is

and Collective Mobilization, 14 CLINICAL L. REV. 355 (2008). UCLA's Program in Public Interest Law and Policy offers such skills. See Abel, *supra* note 189, at 1566–67.

195. ABA, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 63 (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf>; Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 201 (1994).

196. David G. Savage, *The Race to the White House: A Trial Lawyer on Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES, Sept. 13, 2004, at 1 (noting that 80 percent of Americans believe there is too much litigation).

197. See *id.*

198. See Gray & Echols, *supra* note 5, at 2. The importance of a communications strategy is discussed in NAT'L LEGAL AID & DEFENDER ASS'N & CTR. FOR LAW AND SOC. POLICY, BRINGING JUSTICE HOME: COMPONENTS OF A COMMUNICATIONS STRATEGY TO BUILD COMMUNITY SUPPORT FOR LEGAL AID (2005), available at <http://www.nlada.org/DMS/Documents/1039117816.63/components%20of%20a%20strategy%20to%20build%20community%20support.pdf>.

cheap and good PR is not, and advocates have generally been unwilling or unable to underwrite the necessary efforts. Legal services providers are understandably reluctant to invest significant funds in speculative media campaigns when so many fundamental needs remain unmet. And bar associations have often lacked the membership support and public credibility to fill the gap.

In the long run, however, the only path to progress is through pooling resources and sharing strategies for building public support. The current economic crisis provides a platform to make the case. In a 2009 ABA-commissioned survey, 88 percent of Americans agreed that it is essential that a nonprofit provider of legal services be available to assist those who could not otherwise afford legal help; two-thirds supported federal funding for such assistance.¹⁹⁹ Publicizing the inadequacy of current resources and enlisting foundations and private donors in that effort could make a significant difference. A good model is the Open Society Institute's support for the Campaign for Equal Access: Bringing Justice Home, cosponsored by the Center for Law and Social Policy and the National Legal Aid & Defender Association.²⁰⁰ That campaign enlisted a prominent public relations firm to help develop a communications toolkit with media research, strategies, and sample materials.²⁰¹

More effort must also focus on increasing funding and lifting restrictions on federal dollars. As the national government makes massive investments to save failing institutions, it cannot afford to shortchange successful ones like civil legal aid offices. These offices urgently need more government support to cope with escalating needs and declining revenues. They also need restored freedom to use the most effective strategies, such as class actions and organizing, and to accept politically powerless clients with compelling claims and nowhere else to go. Building a broader-based coalition to support such reforms should be a key priority.

New sources of funding are also critical. One possibility is a tax on legal services above a certain amount. Although a few states now

199. ABA Survey Summary, *Economic Downturn and Access to Legal Resources* (Apr. 2009), available at http://www.abanet.org/media/docs/economy_survey_summary.pdf.

200. NAT'L LEGAL AID & DEFENDER ASS'N & CTR. FOR LAW AND SOC. POLICY, *supra* note 198.

201. *Id.* at 1 (based on message development research by Belden, Russonello & Stewart).

have such taxes, the proceeds go to general revenue, not to legal aid.²⁰² A number of other states have considered and rejected such a tax.²⁰³ However, the issue remains on the table in some jurisdictions and should be more widely considered as a means of funding legal assistance.²⁰⁴ In an economy that is increasingly based on services, experts have noted the lack of convincing justifications for exempting such a broad range of commercial activity from taxation.²⁰⁵ That is not to discount the legitimate concerns that a tax on legal services raises. One common worry, however, about its potential impact on persons of limited means could be addressed by exempting payments under a certain amount.²⁰⁶ Other risks, such as the potential flight of legal business to other jurisdictions, have not been demonstrated in states like Delaware, Hawaii, and Washington, which now have such a tax.²⁰⁷ At the very least, the strategy demands closer scrutiny.

Another option is to expand the use of fines, cy pres awards, and surcharges on court filing fees. About twenty states now use such revenues to finance legal services, but the amounts are typically quite

202. The states are Delaware (DEL. CODE ANN. TIT. 30, § 2301 (2008)); Hawaii (HAW. REV. STAT., §§ 237-7 to -13 (2008)); New Mexico (N.M. STAT. ANN. §§ 7-9-1 to -4 (2008)); South Dakota (S.D. CODIFIED LAWS §§ 10-45-1 to -5.2 (2008)); and Washington (WASH. REV. CODE ANN. § 82.04.290 (2008)).

203. See Dennis P. Harwick, *The Best Thing That Could Happen to the KBA*, J. KAN. B. ASS'N, Apr. 2007, at 7 (Kansas); Paul Marcotte, *Professions Face More Taxes*, A.B.A. J., Jan. 1987, at 22 (Mississippi, Tennessee, and Texas); Robert M. Paolini, *From the Executive Director: Eye on the Statehouse*, VT. B.J., Summer 2003, at 4 (Vermont); Emily G. Shea, *The Taxation of Legal Services: Does It Violate the Right to Counsel or the Attorney-Client Privilege?*, 25 SUFFOLK U. L. REV. 1163, 1163 n. 1 (1991) (Arkansas, Connecticut, Montana, and Indiana); State Bar of Arizona, Access to Justice Task Force, *Report to the State Bar of Arizona Board of Governors*, ARIZ. ATT'Y, Apr. 2004, at 27 n.9 (Arizona). In two states the legislature passed a tax but then repealed it due to backlash and complexities in administration. See Annette Nellen, *Obstacles to Taxing Services—Are They Insurmountable?*, AICPA CORP. TAX'N INSIDER, Feb. 28, 2008, available at http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2008/CorpTax/Insurmountable.jsp; Edward Poll, *The Taxing Matter of Taxing Legal Services*, MASS. L. WKLY., July 14, 2008 (Massachusetts).

204. For example, California has been considering such a tax. See CAL. COMM'N ON TAX POLICY IN THE NEW ECON., FINAL REPORT 12–14 (2003); David Weintraub, *Sales Tax on Services Might Be Just the Thing*, OAK. TRIB., Mar. 26, 2008.

205. Kirk J. Stark, *The Uneasy Case for Extending the Sales Tax to Services*, 30 FLA. ST. U. L. REV. 435, 458 (2003).

206. The Massachusetts proposal would have exempted a consumer's first \$20,000 of legal expenditures per year. See Alan B. Romero, *Including Legal Services in State Sales Taxes*, 29 HARV. J. ON LEGIS. 280, 283–84 (1992).

207. See *id.*

modest.²⁰⁸ Increasing these surcharges and extending them to all states should be a priority. More courts could also follow the practice of some jurisdictions in giving priority to legal aid providers when allocating revenues from fines and cy pres awards.²⁰⁹

More effort could also center on legal insurance and other co-payment initiatives. An estimated eighteen million Americans now have some form of insurance, a much smaller percentage of the population than in many European countries such as Germany and Sweden, where a majority of adults have coverage.²¹⁰ Understanding what might make U.S. plans more attractive could be an important step in meeting the needs of middle-income Americans. Of similar value would be further experimentation and evaluation of legal services programs here and abroad that provide assistance on a sliding fee scale; modest co-payments are expected from those above a certain income level.²¹¹ Many health insurance programs also operate with such co-payments. It makes sense to know more about their potential impact on those with legal needs who are currently above income eligibility limits, but who cannot realistically afford private lawyers.

All of these options should be part of a coordinated and accountable delivery model for legal services. We urgently need more centralized, strategic planning processes that include representatives of all of the stakeholders: the bench, bar, clients, nonprofits, and educators. Some access to justice commissions are beginning to play this role, but many states have no institution with the necessary structure and resources for the task.²¹² That must change. So too must our systems for evaluation and accountability.

208. Margaret Graham Tebo, *Aiding Legal Aid*, A.B.A. J., June 2002, at 28. For example, a proposed surcharge in Arizona would raise an estimated \$450,000 annually for legal services; by contrast, a 5 percent sales tax on legal services would raise \$88.9 million, or \$70 million if the first \$20,000 was exempt. State Bar of Arizona, Access to Justice Task Force, *supra* note 203, at 27 n.9. California is financing its “civil *Gideon*” pilot programs through a surcharge on court filing fees. *See supra* note 31.

209. Gray & Echols, *supra* note 5, at 2. See the discussion of the New York State Bar’s efforts to promote the use of cy pres funding for legal aid in Kathryn Grant Madigan, *Advocating for a Civil Right to Counsel in New York State*, 25 *TOURO L. REV.* 9, 29 (2009).

210. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 799 (5th ed. 2008).

211. CHARN & ZORZA, *supra* note 12, at 26–28.

212. For examples of commission accomplishments, see Robert Echols, *Examples of State Access to Justice Commissions: Creation, Structure, Accomplishments*, *MGMT. INFO. EXCH. J.*, Spring 2008, at 15–18, 50.

All providers of assistance need benchmarks for determining whether program objectives are being met and structures for continuing assessment.²¹³ More attention must focus on long-term impact, not just short-term results or client satisfaction.²¹⁴ Government agencies and legal academics should partner in research comparing different delivery strategies for dealing with individual needs and broad-scale social problems.

V. CONCLUSION

A quarter century ago, then-President Jimmy Carter chided the American bar for perpetuating a system in which “[n]inety percent of our lawyers serve 10 percent of our people.”²¹⁵ We are, he noted, “overlawyered and underrepresented.”²¹⁶ The criticism is no less valid today.

Our nation does not lack for lawyers. Nor does it lack for ideas of how to make legal assistance more readily accessible. The challenge now is to learn more about what works best, and how to make those initiatives a public priority. Symposia like this one at Loyola Law School are a key part of the process, and I am honored to be a part.

213. Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law,”* 2005 WIS. L. REV. 455, 465–66 (discussing the need for benchmarking).

214. Blasi, *supra* note 16, at 880; CHARN & ZORZA, *supra* note 12, at 14.

215. *President Carter’s Attack on Lawyers, President Spann’s Response and Chief Justice Burger’s Remarks*, 64 A.B.A. J. 840, 842 (1978).

216. *Id.*

