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Cover Page Footnote
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HOW MUCH ACCESS? HOW MUCH JUSTICE?

Gary Blasi*

Professor Rhode’s provocative Access to Justice takes an expansive view of the topic, to say the least. In most common usage, “access to justice” means access to a lawyer, or what are generally regarded as next-best alternatives, such as assistance for self-represented litigants or demystifying court procedures. Those generally assumed to lack full “access to justice” are those unable to pay market rates for representation by lawyers. Rhode’s reformatory vision goes much further than this, to include literally dozens of prescriptions, from the modest—making court procedures more intelligible to nonlawyers or expanding pro bono contributions from both lawyers and law students—to the more ambitious and controversial: tort reform or relaxing constraints on unauthorized practice and multidisciplinary practice. In taking this broad view, Rhode performs two services. First, she sets out in some detail all the problems and unrealized opportunities that combine to produce radical disparities in access to justice—by virtually any definition of the phrase—particularly for people of limited means. Second, in so doing, she produces a maddeningly extensive list of individual prescriptions, most of which seem plausible when taken separately. In advancing them all at once, however, Professor Rhode forces us to consider two questions that progressives often skirt: At what cost? And with what consequences? In an odd and unexpected way, she forces a sympathetic reader like this one to reconsider his instinctive agreement with nearly all of her individual prescriptions by offering them all at once and without the

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* Professor of Law, UCLA School of Law. My thanks to Richard Abel for comments on an earlier draft. Remaining errors are, of course, mine alone.

2. Id. at 85-87, 145-84.
3. Id. at 39-41, 91-96.
4. I find Professor Rhode’s arguments for reforming the tort system generally unpersuasive as a means of increasing access to justice, given the fact that the contingent fee system insures that, at least for people with significant injuries, there is no shortage of access to motivated and competent representation. In addition, when Rhode blames the anti-competitive policies of the organized bar, particularly the ABA, for seeking to maintain barriers to “unauthorized practice,” her argument may have some force with regard to the controversies about multidisciplinary practice by accounting firms, but it is unconvincing with regard to the kinds of practice of most concern to people of modest means. She does not demonstrate that the attorneys who would be harmed by competition from nonlawyers in these areas have any significant influence in the organized bar. See id.
means to evaluate either their individual costs and consequences or their relative merits. She also provokes us to consider foundational questions we must answer in order to evaluate whether we are truly equalizing “access to justice” when we implement one or another of the proposed reforms.

Professor Rhode notes that “[t]rue equality in legal assistance [not quite the same as ‘access to justice,’ as the book makes clear] would presumably require not only massive public expenditures but also the restriction of private expenditures,” and that it is by no means certain that legal needs trump “other claims on our collective resources.”

When it comes to the myriad individual proposals for reform, however, we do not get a sense of the economic and non-economic costs, or of the expected benefit. Instead, to those who might find a given prescription inadequate or troublesome (for example, wider use of alternate dispute resolution procedures or mandatory law student pro bono requirements) Professor Rhode responds with the rhetorical question: “Compared to what?” The problem with this response is that in any foreseeable world, advocates of equal access to justice are unlikely to see all of Professor Rhode’s prescriptions enacted. In the world of action and advocacy about access to justice, as in overburdened legal services offices, we must allocate scarce resources across competing demands and opportunities. In order to develop a workable strategy and a set of priorities, we actually need a reasoned answer to Professor Rhode’s rhetorical “as compared to what?” A preliminary response might be: “As compared to one or another of your other policy prescriptions.”

In order to make such comparisons, however, we need a metric for “access to justice.” If we can invest the same amount of energy and resources either in facilitating pro bono work by law students or in making the legal system more accessible to self-represented litigants, which will provide the greatest return? In addition, if we take seriously the overall goal of “equal access to justice,” how will we know that we have gotten there, or even if we are making progress? When the lawyer in the old New Yorker cartoon asks his client, “How much justice can you afford?” he expects a numeric answer with a dollar sign rather than a discourse on moral philosophy. But the question has another meaning, one with which every policy prescription and budget allocation must at least implicitly contend: How much “justice” will this initiative provide, and with what costs, including opportunity costs? An inquiry into what “justice” means

5. Id. at 6.
6. Id. at 41-43.
7. Id. at 159-60.
8. Id. at 160.
leads, in most directions, into philosophical swamps I have no desire to enter here. I will assume here that "justice" is whatever the nominally justice-dispensing institutions of the society dispense, with respect to those individuals and firms whose access to those institutions is not compromised in some way.

I. CONTEXTS FOR JUSTICE: FIVE EPISODES

The experience of injustice or justice is invariably personal and contextual. Most lawyers and law professors associate access to justice with access to a lawyer. Not everyone does. Growing up in the oil fields of Oklahoma, I never heard anyone use the term "lawyer" and "justice" in the same sentence. I did hear "lawyer" associated with "rip-off" and "sell-out" fairly often, generally in the context of some personal story with an unhappy ending. Those stories resonated both with my family history and with the oilfield subculture concerning law, lawyers, and justice. Generally speaking, disputes were settled by very personal, sometimes violent, means. Family legends included the night a great uncle shared a cellar with the bank robber (and local folk hero) Pretty Boy Floyd in the dustbowl years. When Woody Guthrie's eponymous ballad had Floyd observing that, "Some will rob you with a six-gun/And some with a fountain pen," the people I grew up with assumed he meant lawyers as well as bankers. Justice was to be sought. But lawyers were to be avoided.

That lawyers might sometimes be on the right side of evident justice never really occurred to me until, as a refugee from graduate school, I happened upon the Echo Park Community Law Office, in a rundown storefront in a working class neighborhood in Los Angeles, where some young lawyers were developing a practice that was completely new to me. I spent the next seven years working in that office, four of them effectively practicing law without a license, and qualifying to take the bar under California's archaic apprenticeship provisions.11 The local legal aid office necessitated the unlawful practice by deciding there were too many eviction cases for them to handle and choosing to handle none of them. Instead, they gave tenant defendants some court forms and a page or two of opaque instructions about what the law required. When tenants started bringing these packets to our office for translation into plain English and relating their stories of landlord abuse, of rats biting their children and the like, the office agreed that we should take their cases, provided that I would do all the work that did not require going into the courtroom. We also began to develop tort cases against landlords under common law theories that only a naive beginning student of the law would have

10. Woody Guthrie, The Ballad of Pretty Boy Floyd, on Dust Bowl Ballads (RCA Records 1940).
thought appropriate: nuisance, intentional infliction of emotional
distress, and the like.\textsuperscript{12} Our clients generally expressed satisfaction
with both our representation and the legal system when we won and
disappointment when we lost, depending on what we had led them to
expect. Often those who lost also expressed satisfaction, provided
they thought they had had a fair hearing.

Nine years later, as a legal aid staff attorney, I continued
representing tenants in slum buildings, mostly in the garment district
of Los Angeles. To deal with the overwhelming number of eviction
cases facing the neighborhood offices of the Legal Aid Foundation of
Los Angeles, Barbara Blanco (now of Loyola Law School Los
Angeles) and I established an Eviction Defense Center to provide
assistance to tenants from across Los Angeles. With the help of the
first generation of personal computers and three remarkable support
staff, we prepared the eviction defense paperwork for approximately
10,000 tenants a year, provided each of them with a packet of
instructions customized to fit the facts of their case, and showed them
a film of what to expect at trial. We also represented a few hundred
tenants in court, rarely losing a case at trial. Moreover, by targeting
particular abusive landlords and legal issues, we felt we were making
an impact beyond our individual cases. We did not know much about
what happened to the people we had helped to represent themselves,
other than that they never lost solely because they could not
understand how to file a responsive pleading.

Nearly two decades later, as part of a clinical course in public policy
advocacy I teach at the UCLA Law School, twelve students and I
evaluated the effect of the implied warranty of habitability on slum
housing conditions in Los Angeles, as the legal concept played out in
our local courts. We developed a “court watch” program and
recorded what happened to tenants, nearly all of them unrepresented,
in eviction cases. The results will not surprise anyone familiar with
other studies of urban housing courts.\textsuperscript{13} One conservative student
who was initially skeptical of the entire enterprise recorded in her
journal this response to her courtroom observations: “Three words:
travesty of justice.” We documented a consistent pattern of a “law of
the courtroom” that was completely at odds with clear statutory and
appellate authority.\textsuperscript{14} In addition to the “court watch,” we reviewed a

\textsuperscript{12} Many of these causes of action would later be sanctioned by the California

\textsuperscript{13} See, e.g., Barbara Bezdek, \textit{Silence in the Court: Participation and
Subordination of Poor Tenants’ Voices in Legal Process}, 20 Hofstra L. Rev. 533
(1992) (describing Baltimore’s “rent court”); Mark H. Lazerson, \textit{In the Halls of
Justice, the Only Justice Is in the Halls}, in 1 The Politics of Informal Justice: The
York City Housing Court).

\textsuperscript{14} Blue Ribbon Citizens’ Comm. on Slum Housing, Executive Summary, The
Los Angeles Civil Justice System and the Warranty of Habitability 3-4 (June 15, 1997)
random sample of eviction case files with habitability claims. The results were striking: Out of 151 tenants who had asserted facts constituting breaches of the implied warranty of habitability, the total number who prevailed at trial without a lawyer was zero. And when the pro se tenants settled, as most did, the terms were no better than what would have happened had they gone to trial and lost. I was distressed to learn that more than half of all these pro se tenants had been assisted by the office I had helped to found, the Eviction Defense Center.

More recently, I was asked by another legal services agency to conduct a full evaluation of the effectiveness of a new self-help assistance center located in a local courthouse. With the assistance of our law school’s meticulous empirical research group, we did something rarely done in such evaluations.15 We developed a control group of unassisted litigants and compared both expressed satisfaction and outcomes as to both assisted and unassisted tenants. One result was particularly striking: Interviewed shortly after receiving services, the self-help center clients were very pleased. Fully ninety-five percent said they were either “extremely satisfied” or “very satisfied” with the services they had received.16 It was easy to see why. The lawyers and paralegals in the office were remarkable in their client-centeredness and supportive attitudes, and meticulous in explaining to tenants all their rights under California law and local rent control regulations. We also did follow-up interviews with both sets of tenants after they had gone to court. Although the objective outcomes were similar for both center-assisted tenants and the unassisted control group, the center’s clients were actually less satisfied than the unassisted control group.17 Again, the explanation appeared to us fairly straightforward. The staff of the self-help center had done an extremely good job of explaining to tenants their legal rights under California law, but they had been less successful in communicating what was actually going to happen when the tenants got to court. The unassisted tenants were less well-informed, and thus perhaps more cynical but also less disappointed.

(unpublished report, on file with author). The full final report was never issued by the Blue Ribbon Committee because court officials agreed to remedy many of the problems identified in a preliminary version of the Executive Summary.

15. A significant exception is the research by 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 (2001).


17. Id. at 14.
II. SUBJECTIVE JUSTICE

As the last example makes clear, the subjective sense of justice can be largely independent of outcomes or of actual (as opposed to perceived) procedural fairness. Ironically, as a result of receiving more access to justice, as the term is conventionally understood, the clients of the self-help center experienced less subjective justice in the process. There is a substantial literature on the psychology of perceived or subjective justice. Since Thibaut and Walker suggested that litigants' satisfaction with dispute resolution could be independently affected both by outcomes and by perception of the process leading to outcomes,\(^{18}\) scholars have produced a rich empirical literature on the determinants of perceptions of justice. Among the more striking findings is that of Tom R. Tyler, evaluating reports from 652 citizens about their encounters with the police and courts:

The findings reported strongly support the suggestion of prior research that a key determinant of citizen reactions to encounters with legal authorities is the respondents' assessment of the fairness of the procedures used in that contact.\ldots Once such fairness factors are taken into account, there is little independent effect of the favorability of the outcomes or procedures involved.\(^{19}\)

Plainly, process—or at least the perception of process—matters to people. As a determinant of subjective satisfaction with dispute resolution processes, perceptions may be more important than either the actual fairness of the process or the outcome.

A largely separate stream of research in social psychology has documented a widespread "belief in a just world," resistant to clear contrary evidence, that causes many people to construe events in order to maintain what Melvin J. Lerner calls the "fundamental delusion."\(^{20}\) The basic theory, supported by dozens of experiments, is this:

\begin{quote}
[P]eople assume that they live in a just world, in which each person gets what he deserves and deserves what he gets. Should a person witness clear injustice, this (potentially vital) belief in the justice of the world becomes threatened. Thus, people are motivated to maintain or reaffirm their belief in a just world, perhaps through personal or active engagement in the preservation of justice. Because the latter may often prove costly (if not impossible), people attempt to maintain their belief in a just world by simply ignoring
\end{quote}

\begin{footnotes}
\footnote{18. John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975).}
\footnote{20. Melvin J. Lerner, The Belief in a Just World: A Fundamental Delusion (1980) (this book is the seminal work in the field).}
\end{footnotes}
injustice or reinterpreting the results of events such that the consequences appear to be just.21

One consequence, documented across multiple studies, is a common tendency to blame factually innocent victims for their misfortunes:

Witnesses of an innocent victim's suffering will attempt to reestablish justice in the situation by compensating the victim. If they are unable to provide compensation, they will attempt to reestablish justice by finding the victim blameworthy, as a function of his/her actions or personal characteristics.22

The "belief in a just world" also has consequences for how people understand their own circumstances. The strength of the belief varies across individuals. Strong believers tend to maintain the "fundamental delusion" by construing their own misfortunes as less unfair than do weak believers or neutral observers.23

There are sound reasons to be concerned with perceptions and appearances of access to justice. Respect for law and support for legal institutions requires widespread belief that those institutions dispense justice. If we are interested in maximizing perceived access to justice, then we have several means of assessing the outcomes of various policy prescriptions. Standard survey techniques and attitude measures can reveal how people assess their interaction with the justice system. We might determine, for example, that litigants feel they have had more access to justice if they have been given multiple opportunities to speak, even if the judge invariably ignored every such spoken word in making a ruling, provided that the judge smiled sagaciously during the presentation. We might also increase the sense of felt justice by amplifying the tendency of many people to blame themselves for their troubles (another manifestation of the "belief in a just world"). Though such interventions might increase access to subjective justice, one hopes that law and public policy would seek to go beyond the maintenance of institutionally useful illusions.

On the other hand, who are we to interpose any non-subjective measure of justice on those who seek it? As for unwarranted self-blame, this would seem to call less for lawyers than for counselors in the conventional sense. Moreover, the essence of client-centeredness—by now the accepted norm in legal education if not in practice—is that the lawyer-client dyad should be guided by the

22. Lerner, supra note 20, at 40. For a more recent survey of these phenomena, see Responses to Victimizations and Belief in a Just World, supra note 21.
23. E.g., Carolyn L. Hafer & James M. Olson, Individual Differences in the Belief in a Just World and Responses to Personal Misfortune, in Responses to Victimizations and Belief in a Just World, supra note 21, at 65.
preferences of the client rather than those of the lawyer, at least within certain bounds. If a client determines that she would prefer having her "day in court" or a pleasant disputing experience, even if she loses the case, then that client decision ought to carry some weight. My hunch, however, is that at least ex ante, people approach the justice system seeking a result rather than an experience. By analogy, patients treated by a doctor who has a good "bedside manner," like clients put at ease by an active-listening, empathetic lawyer, may feel that they have received high quality professional services. Unfortunately, the objective shortcomings of the engaging doctor may only be revealed at a subsequent autopsy, or those of the likable lawyer in the malpractice case that follows. Presumably, we would not design health care systems based purely on the satisfaction of patients, nor fail to discipline a lawyer who was extremely good at misleading clients. Surely, then, when we speak of "access to justice" we must mean more than "access to the means of feeling as though one has had justice." In the end, we must attend to outcomes: What actually happens to those who participate in the justice system?

When it comes to allocating scarce resources for a more objectively measured "access to justice," there is one area in which subjectivity cannot be avoided. There is no objective method for assessing the relative importance to clients or communities of, say, eviction cases or family law disputes. Federally funded legal services programs are required to engage in priority-setting among areas of potential practice. Groups of clients and community groups are consulted. Invariably, the priorities run to the most obviously vital issues: income maintenance, housing, and so on, with some variation at the margins.

Having participated in these discussions in a variety of different roles, I know that there are always unanswerable arguments and incommensurable comparisons to be made: Securing emergency

25. Id. at 41-63 ("active-listening" is a technique for engendering trust and developing rapport with clients (and others)).
27. There are potentially means for more effectively eliciting priorities from clients and others that have not, to my knowledge, been used. One of these is "conjoint analysis," a technique developed by market researchers to examine the tradeoff decisions consumers are prepared to make between, for example, computer storage, computer speed, and price, by presenting consumers with pairs of choices in which these variables are altered. As applied in legal services, we might ask a sample of potential clients to react to similar pairwise comparisons (e.g., whether they would prefer to have a lawyer in a divorce case and take their chances with some help in an eviction case, or vice versa). Using the statistical techniques of conjoint analysis, we could map the preference curves (or spaces) of at least the sample. See What is Conjoint Analysis?, at http://www.sawtoothsoftware.com/qs-whatisconjoint.shtml (last visited Oct. 30, 2004).
shelter for the homeless will save lives and make it possible for them to deal with other things. At the same time, if we do not improve the educational prospects for poor children of color, they will face an increasingly globalized labor market for uneducated labor, and many will be condemned to extreme poverty and homelessness. And so on.

Advocates generally believe that whatever they are working on is the most critical problem (a belief that is perhaps an instantiation of the “belief in a just world”). In the end, though, there is no objective means by which to compare the “justice” achieved in work to prevent a client from spending a night on the streets and work that reduces the odds that today’s teenage client will be unemployed and homeless a decade from now. Within either sphere of work, however, we can objectively assess how much our work actually contributes to the stated goal.

Before turning to how we might do that, it is worth noting that those of us concerned with access to justice may ourselves be affected by the tendency toward an unwarranted “belief in a just world.” We may respond to systemic injustice by working to provide more access to justice, but when our efforts fall far short, the facts can be hard to accept. I have often been struck, for example, by the popularity of information-and-referral programs in situations where there are very few actual resources to which to refer people. Believing that we are doing something effective can reduce our perceptions of injustice, whether or not our beliefs are factually justified. For the same reasons, we may be motivated to avoid knowing whether our efforts are effective. This phenomenon may account to some degree for the remarkable paucity of evaluations of the consequences (beyond perceptions) of various “access to justice” initiatives, including those advocated by Professor Rhode.

III. OBJECTIVE JUSTICE?

If we are uncomfortable with relying entirely on satisfaction measures, there are at least two methods for arriving at a more objective metric for “access to justice.” I discuss each of these in turn.

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A. "Reasonable Person" and Market Measures

Professor Rhode notes that European countries typically provide civil legal assistance to individuals on the basis of the claim at stake:

Does the claim have a reasonable possibility of success? What would be the benefits of legal assistance or the harms if it is unavailable? Would a reasonable lawyer, advising a reasonable client, suggest that the client use his or her own money to pursue the issue?29

This approach moves from the purely subjective to a prototypical (and hypothetical) "reasonable person." Unless the reasonable lawyer or client would be happy with a satisfactory process, this approach also moves us in the direction of outcome measures as well as objective measures, at least in relation to a modal person. Presumably, reasonable people do not invest their time in trifles, and do not seek justice for the mere experience of the seeking. A "reasonable person" standard also offers some basis for an empirical metric, by setting the target level of "justice" at whatever the justice-dispensing institutions in a given locale deliver to the person with the median level of advocacy resources (personal and available in the market) in a comparable situation. One might get different answers in Beverly Hills and Bangladesh.

A "reasonable person" standard does have some limitations. First, as with all "reasonable person" measures, it assumes some relatively consistent set of values and preferences across the society. Would a "reasonable person" hire a lawyer to prevent a museum from displaying the bones of a possible ancestor who died 10,000 years ago? Although I would not, I respect the different choices of a Native American client who might. In addition to differences in values and preferences, quite often there is no truly "comparable situation." Middle class people do not confront the welfare bureaucracy and need legal help to avoid being made immediately homeless. A homeowner will never be served with an eviction notice from her landlord. A worker will never face the same kind of trouble with a supplier that plagues a small businessperson. The "reasonable person" also comes with unspoken cultural and other contexts.

In addition, the implicit presumption for these "reasonable person" evaluations is some identifiable claim or dispute with some possible resolution in the justice-dispensing institutions of society, generally a bipolar dispute between potentially equally equipped adversaries. The justice implicit in the image of the blind Justitia, with scales of justice and sword30 requires a comparison and a metric: The scale moves in

29. Rhode, supra note 1, at 21-22. This metric makes obvious sense in countries that provide legal services on the judicare model, in which the government provides funding for private attorneys to represent certain clients.
30. See Dennis E. Curtis & Judith Resnik, Images of Justice, 96 Yale L.J. 1727
only one dimension.\textsuperscript{31} In this metaphor, access to justice means being able to put one’s case on the scale in a manner comparable to one’s opponent, and without the intervention of any third party thumb.

The metaphor is not satisfactory for framing a wider range of situations we might reasonably expect to embrace within the notion of “access to justice.” Consider the tenant whose eviction case may be the immediate consequence of her landlord’s economic decision, but is in fact the inevitable result of decisions in a redevelopment process that took place years ago. Do we provide “access to justice” merely by providing this tenant with legal assistance in the eviction case comparable to that available to a middle class litigant in the same circumstances? Or must we also consider contesting decisions in the redevelopment project, on behalf of current and future tenants, long before any eviction case is filed? Would a “reasonable person” hire a lawyer to enforce compliance with redevelopment laws before their violation has had a direct effect on him or her? And consider the tenants I assisted as a legal worker, perhaps illegally, before the implied warranty of habitability was adopted in California by the California Supreme Court in 1974.\textsuperscript{32} The “reasonable person” does not generally seek counsel in reforming systems or changing laws that may, on some distant day, affect him or her directly, particularly when she is unaware of their possible impact. In some instances, there may be interest groups and nongovernmental organizations that perform these functions, but people with the least access to justice also generally have the least representation and resources in this regard as well. We might consider adding to the “reasonable person” standard a “reasonable interest group” standard, but most of the problems of commensurability would remain.

B. Objective Justice: Just the Facts (and Law)

Another approach to conceptualizing “equal access to justice” looks to the justice dispensing process. As a formal matter, if the emphasis is on “equal” rather than “justice,” then dispute resolution processes that are completely random are also completely fair. But in nonrandom justice-dispensing processes, the outcome of a particular dispute or legal problem will be a function of several different things:


\textsuperscript{32} Green v. Superior Court, 517 P.2d 1168 (Cal. 1974).
the facts (both known and discoverable);

the law (to the degree that the law yields predictable results on given facts);

the quality of advocacy and counseling (including preparation and the capacity to marshal both facts and law in a persuasive manner);

the characteristics of the disputants and other parties (including the degree to which they incite bias in the decision-maker);

the characteristics of decision-makers (including how decision-makers respond to various combinations of the above).

In a given case or other dispute, it is often difficult to know what accounted for the outcome. When my students and I found that none of the pro se tenants in the Los Angeles eviction court with a habitability claim had prevailed, it was possible that the law and facts required this result in every case. We did investigate public records of housing code inspections at the buildings from which the losing tenants were being evicted. Those buildings were twice as likely to have housing code violations as the average apartment building in Los Angeles. Based on those data and my own experience in handling hundreds of these cases, we could be reasonably certain that a fair number of the pro se tenants would have been expected to prevail in decisions based on the law and the facts. Although the few tenants who had been represented by counsel at trial fared better, this might have been a consequence of the selective case retention policies of the legal services offices involved, rather than the lawyers being more able than the pro se litigants.

Although the methodology in our small study had some limits, the example suggests another metric for access to justice, not merely in terms of access to advocacy resources (including lawyers and self-help assistance) but rather by looking at the probability that a dispute will be resolved on the basis of the law and the facts. We can say that two disputants have similar access to justice if each has a similar probability of prevailing on substantially identical law and facts. In a given case this may be difficult to judge, but over a large number of cases it is possible to control for other factors, so that we can estimate the probable effect on the outcome of any intervention, including representation by a lawyer. That such empirical evaluations are rarely

33. Blue Ribbon Citizens' Comm. on Slum Housing, supra note 14, at 2.
34. Notwithstanding the popularity of reforms dependent on improving self-help, few lawyers or judges seriously believe that, when working with the same facts and law, a litigant with one hour of preparation can fare as well in his or her first courtroom appearance as someone with at least three years of training and, in most cases, extensive courtroom experience in similar cases. Were this found to be the case, it would certainly not be welcome news to the American Association of Law Schools.
done is not the consequence of any methodological obstacle, as demonstrated by Carroll Seron and her colleagues in their study of the New York City Housing Court.35

This outcome-driven conception of access to justice has two advantages over a “reasonable person” standard. First, it permits us to evaluate empirically the consequence of various interventions, provided that we can obtain access to significant numbers of reasonably similar disputes or situations. This is the model of evaluation accepted in many other contexts, notably medicine: If we take a group of people with similar problems whose other characteristics are randomized, and we provide one group of them with a treatment or resource not provided to the other, we can examine how the one group fares compared to the other. The results will tell us the value, to outcomes, of the treatment or resource. It may well be that providing counseling and information to a self-represented litigant will dramatically improve her chances of achieving her goals in a dispute resolution process. It may be that reducing the formality and complexity of dispute resolution will reduce the disparities between disputants. But maybe not. These are empirical questions, not often asked about these or other “access to justice” reforms of the sort advocated by Professor Rhode.

A second benefit of relying on statistical comparisons of outcomes is that we can widen our focus beyond the issue of access to lawyers, to include virtually any aspect of the justice system that might interfere with equal “access to justice” in the broader sense of the term. For example, in observing eviction proceedings for a month, many of my students noted that a particular judge was much more likely to interrupt tenants than landlords, and to interrupt tenants of color more often than white tenants. The interruptions were generally not helpful. Even with the same access to lawyers (i.e., none), tenants of color did not have equal access to justice compared to white tenants. In a given case, an additional infusion of advocacy resources might equalize the imbalance brought on by the effects of stereotyping and racism, but the point is that additional resources are necessary to compensate for such biases in the dispute resolution process itself. If we are truly committed to equal justice, it is essential to focus on outcomes and all the factors—beyond the law and facts—that contribute to them.

C. Objective Justice: Before and Beyond the Dispute

Any more objective metric of access to justice must also take account of legal needs other than those related to litigation or other dispute-resolving systems. Access to sound legal advice that avoids a future dispute can be more valuable than the best representation in

35. Seron et al., supra note 15.
court. People who are unaware that they have a potential right or remedy, or that a particular course of action may have serious adverse consequences, may find themselves in situations from which no lawyer can extract them. A tenant with a habitability case may learn too late that she should have documented the problems, or might have used a "repair and deduct" remedy, both to remedy a problem and establish a legal defense. Another tenant might have learned that there was some possibility of joining forces with his fellow tenants to place the entire building under receivership and pay for vital repairs out of the owner's equity in the building.\footnote{Cal. Health & Safety Code § 17980.7(c) (West 2004).}

Plainly, "access to justice" implicates not only dispute resolution, but also preventative law and transactional expertise, for these also determine outcomes over the longer term. Finally, a full conception of "access to justice" would also encompass more than the means to obtain a fair outcome under current procedural rules or substantive law, or assistance in planning to avoid future problems under those rules. Full access to justice also requires the means to effectively participate in the political and legal processes that determine law and procedure relevant to future and potential interests.

To sum up, an objective metric for "access to justice" must attend to at least the following:

1. The significance of the interests at stake, both at present and prospectively, and access to the information and assistance necessary to subjectively assess the potential significance of those interests.

2. Access to information about both current and prospective rights, remedies, and risks and the information necessary to participate in the political and legal processes that shape them, including the information required to solve problems and avoid disputes.

3. In the context of disputes that do arise, access to sufficient information, advocacy, and problem-solving resources such that the outcome of the dispute is dependent on current law and facts, rather than on differential access to advocacy resources or on factors not recognized by the substantive law (like the race, class, or gender of disputants). The quantum and quality of advocacy resources to achieve this result will depend, in turn on:

   a. The transparency and simplicity of the disputing and problem-solving process and the concomitant need for advocacy and problem solving expertise.

   b. The cost, accessibility, and quality of advocacy and counseling resources. "Quality" here includes not only substantive legal, procedural, and transactional expertise, but also the capacity of
IV. WHO HAS ACCESS TO JUSTICE?

If the goal is equal access to justice, as framed above, it is worth asking: Who in the United States currently has access to justice? Certainly the very rich have more access than the very poor, unless a particular poor person happens to have a problem that fits chosen priorities of an excellent legal services program or public interest organization. The very poor may in some instances have more access to justice than working class people with incomes just above the Legal Services Corporation income restrictions.

Those with arguably the greatest access to justice, however, are neither rich people nor poor people, but rather artificial people: larger corporations. Corporations engage lawyers (and accountants and others of their choosing) not merely to level the playing field for disputes, but to help plan for and prevent disputes, and to structure transactions for optimal benefit. When disputes do arise, corporations have access to the most experienced and expert lawyers. Corporations take advantage of alternate dispute resolution when it makes sense for them to do so (and have lawyers to tell them when this is the case). Corporations routinely seek not only advice and advocacy about rights and remedies under existing law, but also for the purpose of changing law and procedure.

Corporations do not, to my knowledge, often engage in the kind of empirical inquiry I have urged of the effects on outcomes of relying on less expensive resources than lawyers. Corporations seeking “access to justice” generally hire lawyers and do not rely much on self-help manuals and their lay personnel. Corporations have not engaged in sophisticated triage and evaluation efforts because they do not need to. Reasonable corporations do what reasonable people do under similar circumstances, particularly when it is very difficult to assess the marginal benefit of nonlawyer approaches to seeking justice: they hire the best lawyers they can afford.

To bring the argument full circle, then, the most practical way to operationalize “access to justice,” at least in the short term, may be to equate it with “access to lawyers” and recognize why we are evaluating second-best and third-best options for those who cannot afford to obtain legal services in the private market. This does not mean that we should not make every effort to provide as much access to justice as we can, as efficiently and effectively as we can. But it does mean that we should never be entirely satisfied with less than the

37. Legal personhood has been extended to corporations for many different purposes. See Santa Clara County v. S. Pacific R.R. Co., 118 U.S. 394 (1886) (treating corporations as persons for equal protection purposes).
goal inscribed above the main entrance to the Supreme Court building: “Equal Justice Under Law.”

V. SO HOW MUCH JUSTICE CAN WE AFFORD?

Could we afford to provide many more people with access to justice equal to that available to large corporations and closer to the ideal inscribed at the Supreme Court? We might start by remembering that corporations exist as legal persons, with the capacity to seek justice, only by virtue of law. Since it is law that makes both corporations and their legal representation possible, perhaps we might tax the latter service, just as we tax goods and many services provided to natural persons. To be fair, we might also impose a similar tax on the fees earned by plaintiffs’ counsel in class actions brought against corporations, by a similar logic. Or we might extend the tax on fees paid by other nonnatural legal entities to which the law provides the prime condition of access to justice: the right to exist. People would remain free to avoid the tax by declining the benefits afforded to such entities by the law.

Corporations in America spend billions each year in legal fees, which are deductible as business expenses to the corporation. The top 100 law firms in the U.S., according to The American Lawyer magazine, earned $38.1 billion in 2003. The perusal of the website of any such firm suggests that the sources of the great majority of these fees are corporations and other nonnatural legal entities. If the fees paid to just the largest 100 firms were taxed at the same rate as the consumer sales tax in Los Angeles County (8.75%), a sales tax on these fees would generate approximately $3.3 billion, almost exactly ten times the current budget of the federal Legal Services Corporation, and enough to broaden the availability of subsidized legal services beyond the very poor. We might add to that amount a similar tax on


39. Services of all kinds are generally not subject to sales taxes in California. In 2003 a California Commission proposed extending the sales tax to specific services, including legal services. Cal. Comm’n on Tax Policy in the New Econ., Options for Revising the California Tax System 11 (2003), available at http://commerce.ca.gov/tica/pdfs/link_overview/ersi/TaxComm_OptionsForRevisingCATaxSystem_6-23-03.pdf.

40. I should hasten to add that, were these proposals more than a thought experiment, advocates for increased access to justice would doubtless find themselves at odds with the same organized bar that has been the most steadfast friend of government funding for legal services. Several states have such taxes: Delaware, Hawaii, New Mexico, South Dakota, and Washington. Stephanie Francis Cahill, Taxing the Law: Ventura Proposes Sales Tax on Attorney Fees, 1 No. 3 A.B.A. J. E-Report (2002), WL 1 No. 3 ABAJEREP 1. In most states, however, resistance by the organized bar has been fierce. See, e.g., Access to Justice Task Force: Report to the
HOW MUCH ACCESS?

attorney fees in plaintiff class actions. For example, a similar tax on the proposed class counsels' fees in a single class action in California (an antitrust case against Microsoft) would generate $22.5 million, more than twice the annual amount the State of California provides for civil legal services. We might also look at legal fees paid by labor unions and other large unincorporated associations or by limited liability partnerships, real estate investment trusts, and so on. A billion here, a billion there, and soon we would be talking about real money—and real access to justice, for real people as well as for artificial persons and other entities that exist only by virtue of law. Of course, actually securing such a policy would require not merely more equal access to the institutions of justice as they exist, but more equal access to the political process that constructs those institutions, a topic beyond the scope both of Professor Rhode's important book and of this responsive Essay.


What I am certain of now, however, is that we will not see an extension of the sales tax to professional services, including legal services. And part of the credit for that goes to all of you who responded to the VBA's request for your help in educating legislators on the downside of such a tax.


Notes & Observations