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## Access to Justice

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## ACCESS TO JUSTICE

*Deborah L. Rhode\**

“Equal justice under law” is one of America’s most firmly embedded and widely violated legal principles. It embellishes courthouse entries, ceremonial occasions, and occasionally even constitutional decisions. But it comes nowhere close to describing the justice system in practice. Millions of Americans lack any access to the system, let alone equal access. An estimated four-fifths of the civil legal needs of the poor, and the needs of an estimated two- to three-fifths of middle-income individuals, remain unmet.<sup>1</sup> Governmental legal services and indigent criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel for most low-income litigants a statistical impossibility.<sup>2</sup> We tolerate a system

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1. For unmet needs of the poor, see *Access to Justice Development Campaign 2000: The Case for Support*, Mich. B.J., Mar. 2000, at 370; Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 Yale L. & Pol’y Rev. 369, 402 (1998) [hereinafter Houseman, *Legal Assistance*]; David C. Leven, *Justice for the Forgotten and Despised*, 16 Touro L. Rev. 1, 6-7 (1999); Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 Md. J. Contemp. Legal Issues 223, 224 (1994); Fla. Bar Ass’n, *Access to the Legal System* 29 (1999); Legal Servs. Corp., *Serving the Civil Legal Needs of Low-Income Americans: A Special Report to Congress* 12 (2000); Legal Services Project, *Funding Civil Legal Services for the Poor: Report to the Chief Judge* 5 (1998); Or. State Bar Ass’n, *The State of Access to Justice in Oregon* (2000); and *Hearing on the Legal Services Corporation Before the Subcomm. on Commercial and Admin. Law of the House Judiciary Comm.* (1999) (statement of John Pickering). For unmet needs of middle income consumers, see ABA Consortium on Legal Services and the Public, *Agenda for Access: The American People and Civil Justice* (1996); ABA Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans* (1994); Maryland Moderate-Income Access to Justice Advisory Taskforce, *Preliminary Report and Preliminary Recommendations on the Unmet Legal Needs of Moderate-Income Persons in Maryland* (1996) [hereinafter *Maryland Report*]; and Roy W. Reese & Carolyn A. Aldred, ABA, *Legal Needs Among Low-Income and Moderate-Income Households: Summary of Findings for the Comprehensive Legal Needs Study* (1995). See also *Access to Justice Working Group, Report to the State Bar of California* 4-6 (1996) [hereinafter *California Report*] (estimating that three-quarters of the needs of California poor are unmet).

2. See *infra* notes 7-22 and accompanying text.

in which money often matters more than merits and equal protection principles are routinely subverted in practice.

This is not, of course, the only legal context in which rhetoric outruns reality. But it is one of the most disturbing, given the fundamental nature of the individual rights at issue. It is a shameful irony that the nation with the world's most lawyers has one of the least adequate systems for legal assistance. It is more shameful still that the inequities attract so little concern. Over the last two decades, national spending on legal aid has been cut by a third, and increasing restrictions have been placed on the cases and clients that government-funded programs can accept. Entire categories of the "unworthy poor" have been denied assistance, and courts have largely acquiesced in these limitations.<sup>3</sup> The case law governing effective assistance of counsel and access to nonlawyer services is a conceptual embarrassment. Yet neither the public nor the profession has been moved to respond in any significant fashion. Access to justice is the subject for countless bar commissions, committees, conferences, and colloquia, but it is not a core concern in American policy decisions, constitutional jurisprudence, or law school curricula.

This article argues for a more attainable aspiration. It begins with a candid confrontation of our failures: our unwillingness to take equal justice seriously at a conceptual, doctrinal, political, or professional level. And it concludes with a challenge to do better. The aim is not a detailed deconstruction of constitutional case law or an exhaustive examination of policy proposals. The objective rather is to explore the outlines of a more manageable commitment—adequate access to justice—and some strategies for pushing us in that direction.

## I. CONCEPTUAL FAILURES

In theory, "equal justice under law" is difficult to oppose. In practice, however, it begins to unravel at several key points, beginning with what we mean by "justice." Is our commitment to substantive or procedural fairness?

In conventional usage, the concept seems largely procedural. "Equal justice" is usually taken to mean "equal access to justice," which in turn is taken to mean access to law.<sup>4</sup> But as is frequently noted, a purely procedural understanding by no means captures our aspirations. Those who receive their "day in court" do not always feel that "justice has been done," and with reason. The role of money and special interests in the legislative process often skews the law to insure

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3. See *infra* Part IV.

4. See Geoffrey C. Hazard, Jr., *After Legal Aid Is Abolished*, 2 J. Inst. for Study Legal Ethics 375, 386 (1999); Stephen L. Pepper, *Access to What?*, 2 J. Inst. for Study Legal Ethics 269, 272 (1999); Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 Conn. L. Rev. 651, 655 (1981).

that the “haves come out ahead.”<sup>5</sup> Procedural hurdles and burdens of proof may prevent the have-nots from translating formal rights into legal judgments. And post-judgment power relations between the parties may make legal victories too expensive and difficult to enforce, or may prompt legislative backlash. Those who win in court may still lose in life.

These difficulties are seldom acknowledged in bar discussions regarding access to justice. Their prevailing theme is that more is better, and their focus is on how to achieve it. But these discussions leave a host of conceptual complexities unaddressed. Even from a purely procedural standpoint, what does meaningful access to law imply? If, as is commonly assumed, it also entails access to legal assistance, how much is enough? For what, for whom, and from whom? What kinds of matters and which potential clients should receive assistance? When do legal services need to come from lawyers rather than from other qualified providers? Should government funding extend only to those who are officially deemed poor or to all of those who cannot realistically afford lawyers? How much claiming and blaming is our society prepared to subsidize? How do legal needs compare with other claims on our collective resources? And, most importantly, who should decide?

The complexities are compounded if we also think seriously about what would make justice truly “equal.” Equal to what or to whom? If our standard is the proverbial “reasonable person,” how much would that individual be prepared to pay for process? If our standard is opposing parties, how, realistically, do we deal with disparities in incentives, resources, and legal ability? Although there is broad agreement that the quality of justice should not depend on the ability to pay, there is little corresponding consensus on an alternative. And as R.H. Tawney once noted about equal opportunity generally, one wonders what would alarm proponents most, “the denial of the principle or the attempt to apply it.”<sup>6</sup> Given the elasticity of legal needs among the general public and the disparity of talent within the profession, any serious effort to equalize access would require not only massive public expenditures but the prohibition of private purchases.

## II. POLICY FAILURES

Part of the reason that we are reluctant to confront these problems involves the scale of subsidies that would be necessary for solutions. Unlike most other industrialized nations, the United States recognizes

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5. Marc Galanter, *Why the “Haves” Come Out Ahead?: Speculations on the Limits of Legal Change*, 9 *Law & Soc’y Rev.* 95 (1974) (internal quotation omitted).

6. R.H. Tawney, *Equality* 103 (1964).

no right to legal assistance for civil matters.<sup>7</sup> Although courts have discretion to appoint counsel where necessary to assure due process, they have done so only in a narrow category of cases, and legislatures have guaranteed compensation for a still more limited number of matters.<sup>8</sup> The nation has only about one legal aid lawyer or public defender for every 4300 persons below the poverty line compared with a ratio of one lawyer for every 380 Americans in the population generally.<sup>9</sup> The federal government, which provides about two-thirds of the funding for civil legal aid, now spends only about \$300 million for such assistance. This works out to roughly \$8 per year for those officially classified poor and less than 1% of the nation's total expenditures on lawyers.<sup>10</sup>

Recent estimates suggest that well over ten times that amount, on the order of three to four billion dollars, would be required to meet the civil legal needs of low-income Americans.<sup>11</sup> Such estimates substantially understate the magnitude of expenditures necessary to guarantee adequate access, since they do not include either the unmet needs of middle-income Americans who are now priced out of the legal process, or collective concerns such as environmental risks, community economic development, and racial discrimination in public education or political reapportionment plans.

Nor do these access-to-justice projections take into account the cost of providing truly adequate assistance in criminal cases and in the limited number of civil proceedings where indigents are already entitled to court-appointed counsel. Hourly rates and statutory caps on compensation for private lawyers are set at utterly unrealistic levels. Rates for out-of-court work are as low as \$20 or \$25 per hour, which does not even cover overhead in cities like New York.<sup>12</sup>

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7. California Report, *supra* note 1, at 3-4; Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 Md. J. Contemp. Legal Issues 199 (1994) [hereinafter Johnson, *Equal Justice*].

8. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26-27 (1981); *Yarbrough v. Superior Court*, 702 P.2d 583 (Cal. 1985). For further discussion of *Yarbrough*, see *infra* note 76.

9. This figure is based on the number of lawyers in private practice or working for private organizations. See Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in 1995* tbl. 4 (1990).

10. See Rhudy, *supra* note 1, at 236-38. According to the most recent figures available, in 1998 there were approximately 35,574,000 persons below the poverty level. U.S. Dep't of Commerce, *Statistical Abstract of the United States* tbl. 763 (119th ed. 1999). The 1998 budget for the Legal Services Corporation was \$283 million. Office of Management and Budget, *Analytical Perspectives: Budget of the United States Government, Fiscal Year 2000*, at 595 (1999). Estimated expenditures by the Legal Services Corporation for fiscal year 2000 are \$303 million. *Id.* tbl. 11.3.

11. California Report, *supra* note 1, at 40 (putting the figure at \$3.6 billion); Hazard, *supra* note 4, at 380 (estimating between \$4-5 billion).

12. Mark Green & Child Planning and Advocacy Now, *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings* iv (2000); Jayson Blair, *The Lawyers Live to Fight Again*, N.Y. Times, June 25, 2000, § 4, at 3;

Many litigants theoretically entitled to counsel go without, or suffer long delays and inadequate assistance because court-appointments are a financial loss for lawyers.<sup>13</sup> Limits of \$1000 are common for felony cases, and some states allow less than half that amount.<sup>14</sup> In jurisdictions like Virginia, which allocates \$300, teenagers selling sodas on the beach do better than court-appointed counsel.<sup>15</sup> Low ceilings apply even for defendants facing the death penalty, and attorneys subject to such compensation caps have ended up with hourly rates below \$4.<sup>16</sup> For most court-appointed lawyers, thorough preparation is a quick route to financial ruin. Analogous constraints arise in public defender offices that generally operate with crushing caseloads. Defense lawyers often juggle up to 500 felony matters at a given time, which precludes significant preparation for the vast majority of clients.<sup>17</sup>

The problems are still worse in many jurisdictions that rely on competitive bids. There, defense counsel agree to provide representation for a specified percentage of criminal dockets irrespective of the number or complexity of cases. Such systems favor attorneys willing to turn over high volumes of clients at low costs, and caseloads of 900 felonies or 3500 misdemeanors per year are not uncommon.<sup>18</sup> Some of these attorneys have not taken a case to trial in years, and seldom file any pretrial motions.<sup>19</sup> Even defendants facing the death penalty have ended up with lawyers who have "never tried a case before and never should again."<sup>20</sup>

Defendants who hire their own counsel do not always fare better. Most of these individuals are just over the line of indigency, and

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Somini Sengupta, *Report Says Lack of Lawyers Crippling Family Court*, N.Y. Times, May 14, 2000, § 1, at 35; Joel Stashenko, *Manhattan Lawyers Latest to Challenge Attorneys Fees*, Associated Press, Feb. 25, 2000.

13. Laura Mansnerus, *A Break on the Wheels of Justice: Shortage of Lawyers for the Poor Plagues the Courts*, N.Y. Times, Jan. 17, 2001, at B1.

14. For private practitioners, see David I. Cole, *No Equal Justice* 83-85 (1999); Richard Klein & Robert Spangenberg, ABA, *The Indigent Defense Crisis* 5-6 (1993); Marcia Coyle, *Hoping for \$75/Hour*, Nat'l L.J., June 7, 1999, at A1; and Bob Herbert, *Cheap Justice in America*, N.Y. Times, Mar. 1, 1998, § 4, at 15.

15. Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence* 204 (2000).

16. Cole, *supra* note 14, at 84; Herbert *supra* note 14.

17. Cole, *supra* note 14, at 83; Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1850-51 (1995) [hereinafter Bright, *Counsel for the Poor*]; J. Michael McWilliams, *The Erosion of Indigent Rights: Excessive Caseloads Resulting in Ineffective Counsel for Poor*, 79 A.B.A. J. 8 (1993).

18. Alan Berlow, *Requiem for a Public Defender*, Am. Prospect, June 5, 2000, at 28.

19. Marvin Zalman & Larry J. Siegel, *Criminal Procedure: Constitution and Society* 453 (2d ed. 1997); see also Berlow, *supra* note 18, at 28, 30-32; cf. Chester Mursky, *Quality Legal Aid: Going, Going, Gone*, Nat'l L.J., Dec. 4, 1995, at A19.

20. Stephen B. Bright, *Keep the Hope of Equal Justice Alive*, Address at Yale Law School Commencement (May 24, 1999), in *Yale L. Rep.*, Fall 1999, at 22.

cannot afford substantial legal expenses.<sup>21</sup> Their lawyers typically charge a flat fee, payable in advance, which creates obvious incentives to plea bargain. Only defendants who have celebrated cases or can meet steep charges, usually in white-collar or organized-crime cases, have ready access to the highly skilled advocacy that the public sees in publicized trials. Where defendants lack such resources, counsel face further temptations to curtail their advocacy. A quick plea spares lawyers the strain and potential humiliation of an unsuccessful trial. Such bargains also preserve good working relationships with judges and prosecutors, who face their own often overwhelming caseload demands. In this system, effective representation is the exception, not the rule, and it is often better to be rich and guilty than poor and innocent.<sup>22</sup>

Our pretensions to equal justice mesh poorly with these financial realities. But rather than addressing the tension, we retreat into comforting generalities and ceremonial platitudes. We embrace access and equality, but without making any serious effort to give them practical content. In a world of limited resources, we urgently need limiting principles. Our failure to develop any conceptually coherent strategies for reconciling our ideals and institutions has contributed to corresponding failures at both the political and doctrinal level.

### III. POLITICAL FAILURES

Much of the problem in securing broader access to justice stems from the public's failure to recognize that there is, in fact, a problem. A wide gap persists between popular perceptions and daily realities, particularly for criminal cases. Most Americans are convinced that the legal system coddles criminals and that defense lawyers get far too many defendants off on technicalities.<sup>23</sup> The trials featured in entertainment media reinforce this perception. In the courtrooms that the public sees, zealous advocacy is the norm. O.J. Simpson's lawyers left no stone unturned. But they were charging by the stone. Most defense counsel cannot—and it matters. In recent studies, between half and four-fifths of counsel entered guilty pleas without interviewing any prosecution witnesses, and four-fifths did so without filing any defense motions.<sup>24</sup>

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21. Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 Marq. L. Rev. 47, 51-52, 56 (1997).

22. Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 Am. Crim. L. Rev. 743, 802-13 (1995); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992).

23. ABA, *Perceptions of the U.S. Justice System* (1999).

24. Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation*, 1981 Ariz. St. L.J. 523, 538; Mike McConville & Chester

The rationalizations for such inadequate efforts occasionally surface with chilling candor. In one Texas case, a defendant managed to win release after seven years of imprisonment. His court-appointed attorney had seen no reason to go to "sleazy bars to look for witnesses," since he assumed, without investigation, that his client was guilty.<sup>25</sup> In a recent North Carolina case, a court-appointed lawyer acknowledged that he had deliberately failed to file a timely appeal because he felt that his client "deserved to die."<sup>26</sup>

Similar rationalizations are apparent among legislators who refuse to support adequate funding for court-appointed counsel. Their position is understandable, given an electorate more interested in getting tough on criminals than in subsidizing their defense. The chair of a Missouri appropriations committee expressed common attitudes with uncommon candor in announcing publicly that "he [did not] care if indigents [were] represented or not."<sup>27</sup> Although recent exonerations of wrongfully convicted defendants through DNA evidence have increased public concerns about the adequacy of their defense, budget priorities have rarely changed in response.<sup>28</sup>

With respect to civil legal assistance, the public is more supportive, but equally misinformed. As an abstract matter, the vast majority of Americans favors providing legal assistance for the poor in civil cases. Depending on how the question is asked, between 65 and 85% of those surveyed support such aid.<sup>29</sup> However, most would prefer the assistance to come from volunteer lawyers rather than from government-funded attorneys, half believe that legal aid lawyers contribute to frivolous litigation, and 40% favor providing only advice, not advocacy in court.<sup>30</sup> Public attitudes also vary considerably

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Mirsky, *Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice*, 42 Soc. Probs. 216 (1995).

25. William A. Mintz, *Lawyer Wouldn't Go to 'Sleazy Bar,' Client Wins Freedom from Life Term*, Nat'l L.J., Nov. 24, 1980, at 7.

26. Sara Rimer, *Lawyer Sabotaged Case of a Client on Death Row*, N.Y. Times, Nov. 24, 2000, at A37.

27. Ron Ostroff, *Missouri Remains Unable to Pay Indigents' Counsel; Pro Bono Revolt Grows*, Nat'l L.J., May 11, 1981, at 2.

28. The Innocence Protection Act of 2000, H.R. 4167, 106th Cong. §§ 201-03 (2000), would provide significant incentives for states to meet minimal standards for representation of indigent defendants in capital cases and would provide federal funding for efforts by public agencies and private, nonprofit organizations to improve such representation.

29. Legal Servs. Corp., *Low Income Legal Assistance Poll*, [http://www.lsc.gov/pressr/pr\\_poll.htm](http://www.lsc.gov/pressr/pr_poll.htm) (citing 1999 Harris survey results indicating that 66% of adults believed that legal aid should be available for the poor in cases involving child custody, adoption and divorce; 80% believed aid should be available in cases of domestic violence; and 81% in cases involving fraud against the elderly); Belden Russonello & Stewart, *National Survey on Civil Legal Aid (2000)* (unpublished report on file with author) (finding that 82% of those surveyed favor government funded legal aid).

30. Belden Russonello & Stewart, *supra* note 29.



depending on the kinds of cases and clients at issue. Assistance in cases involving domestic violence, divorce, child custody, and fraud against elderly victims attracts broad support.<sup>31</sup> For other claims, such as those involving challenges to welfare legislation or prison conditions, one Denver legal aid attorney aptly noted that “[t]he only thing less popular than a poor person these days is a poor person with a lawyer.”<sup>32</sup>

Not only are Americans ambivalent about ensuring legal assistance, they are ill-informed about the assistance currently available. Almost four-fifths incorrectly believe that the poor are currently entitled to legal aid in civil cases.<sup>33</sup> Only a third think that the poor would have a very difficult time obtaining assistance; a quarter think it would be easy.<sup>34</sup> Such perceptions are wildly out of touch with reality. Legal services offices can handle less than a fifth of the needs of eligible clients and often are able to offer only brief advice, not the full range of assistance that is necessary.<sup>35</sup> In some jurisdictions, poor people must wait over two years before seeing a lawyer for matters like divorce that are not considered emergencies, and other offices exclude such matters entirely.<sup>36</sup> Legal aid programs that accept federal funds also may not accept entire categories of cases or clients who seldom have anywhere else to go, such as prisoners, undocumented immigrants, or individuals with claims involving abortions, homosexual rights, or challenges to welfare legislation.<sup>37</sup>

Most Americans agree that wealthy litigants have advantages in the legal system, and only a third think that courts try to treat rich and poor alike. Yet few seem aware of the extent of the advantages or feel inclined to do anything about them.<sup>38</sup> Eighty percent think that “[i]n spite of its problems, the American justice system is still the best

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31. See *supra* note 29.

32. Robert Pear, *As Welfare Overhaul Looms, Legal Aid for Poor Dwindles*, N.Y. Times, Sept. 5, 1995, at A1 (quoting Jonathan D. Asher). For legislative restrictions on federally funded legal aid, see *supra* text accompanying notes 14-15.

33. Johnson, *Equal Justice*, *supra* note 7, at 201.

34. Belden Russonello & Stewart, *supra* note 29.

35. Pickering, *supra* note 1, at 52-53 (noting that approximately 10% of federally funded legal aid cases are litigated and the average expenditure is only about \$300 per case).

36. The Bronx Legal Aid Society office has a “two-and-one-half-year waiting list to receive an appointment for a divorce.” Legal Services Project, *supra* note 1, at 4; see also Mitchell Zuckoff, *Uneven Justice: Limited Funds for Legal Aid Can Lead to Mismatches in Civil Cases*, Boston Globe, Mar. 12, 2000, at A1.

37. See 45 C.F.R. §§ 1610-42 (1999).

38. ABA, Perceptions of the U.S. Justice System, *supra* note 23, at 59 (finding that 90% of “wealthy people or companies often wear down their opponents by dragging out legal proceedings”); see also Nat’l Ctr. for State Courts, *How the Public Views the State Courts: A 1999 National Survey 22* (1999) [hereinafter Nat’l Ctr. for State Courts, *Public Views*] (finding that two-thirds of those surveyed believe that courts are not affordable for ordinary citizens).

in the world.”<sup>39</sup> It is by no means clear that such support would persist if the public were more aware of what passes for justice among the have-nots. Most people are poorly informed about the legal system and much of their information comes from idealized portrayals in civics classes and popular media.<sup>40</sup> Few have any direct experience with how the system functions—or fails to function—for the poor.<sup>41</sup> What if ordinary citizens watched the “meet ‘em, greet ‘em and plead ‘em” criminal defense bar “dispose” of felony cases in under two hours with no investigation?<sup>42</sup> What if the public saw civil courts take weeks to try a commercial dispute between wealthy businesses but give less than five minutes to decide the future of an abused or neglected child?<sup>43</sup> What if most Americans had the experience of appearing in housing courts, where less than 10% of tenants could afford lawyers, and those who could had a far greater chance of prevailing on similarly legitimate claims?<sup>44</sup>

Such experiences have not been part of the public debate over access to justice. The way the debate has been framed has worked against broad popular support for poverty law programs. The Legal Services Corporation (“LSC”), which oversees federal civil legal aid grants, has long been a favorite target of the political right. The most

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39. ABA, Perceptions of the U.S. Justice System, *supra* note 23, at 59.

40. *Id.* (finding that only one-quarter of those surveyed were well-informed and that the chief sources of information were elementary and high school classes); Nat’l Ctr. for State Courts, Public Views, *supra* note 38 (finding that 60% get information from electronic media and 50% from print).

41. Only one-half of those surveyed had had any direct experience with courts. One-quarter of those surveyed had been on juries, and about one-quarter had been parties. Nat’l Ctr. for State Courts, Public Views, *supra* note 38. By definition, jury service involved cases that went to trial, which are rare for the poor. Studies are divided about how direct experience affects perceptions of the courts. Compare *id.* (finding that those with greater knowledge had less confidence), with ABA, Perceptions of the U.S. Justice System, *supra* note 23 (finding that those with recent experience felt more positive).

42. Berlow, *supra* note 18, at 28. For time estimates, see *id.* and Lois G. Forer, Money and Justice: Who Owns the Courts? 120 (1984).

43. Forer, *supra* note 42, at 23, 99, 132-33.

44. Legal Services Project, *supra* note 1, at 3 (noting that 90% of New York tenants lack counsel in eviction proceedings); Russel Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations With Unrepresented Poor Persons*, 85 Cal. L. Rev. 79, 107-08, 154-55 (1997) [hereinafter Engler, *Out of Sight*] (citing studies where 90% of tenants are unrepresented and often relinquish legitimate defenses due to exploitation of their ignorance); see Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 Law & Soc’y Rev. 627, 645-53 (1992) (reporting that in a study of Hawaiian public housing eviction proceedings, represented tenants had a 1% probability of eviction for financial nonperformance and a 29% probability of eviction for behavioral violations, while during one period out of six examined unrepresented tenants had a 51% and 67% probability of eviction, for the same respective violations); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol’y Rev. 385, 413 (1995) (noting that “legal services tenants were more than three times as likely to avoid eviction as were unrepresented tenants” in New Haven eviction actions).

effective state and local programs have attracted similar opposition.<sup>45</sup> Congressional critics like Representative Dan Burton paint the LSC as a "reckless and irresponsible agency" with a "left-wing political agenda that hurts the poor more than it helps."<sup>46</sup> Republican Steve Largent, in an op-ed piece explaining why the LSC should be abolished, asks: "Ever wonder why some prisoners have cushy amenities such as cable TV, why evicting drug dealers from housing projects is so difficult, or why reforming the welfare system is taking so long? Well wonder no more. We have the Legal Services Corporation to blame."<sup>47</sup>

Such claims build on longstanding objections both to government-subsidized legal services and to required pro bono assistance by private lawyers. In critics' view, much of this aid in fact worsens the plight of its intended beneficiaries. The most commonly cited example involves representation of tenants with "marginal" cases; landlords forced to litigate such matters allegedly pass on their costs in the form of increased rents to the non-litigious poor.<sup>48</sup> Other illustrations of assertedly counterproductive legal assistance involve welfare claims that promote dependency; efforts to prevent evictions of drug dealers or expulsions of disruptive students; and farmworkers' lawsuits that encourage mechanization and increase unemployment.<sup>49</sup>

A related objection is that even if some legal services do help the poor, it is inefficient to provide those services in kind rather than through cash transfers. Earmarking government or pro bono funds for legal aid assertedly encourages overinvestments in law, as opposed to other purchases that the poor might value more, such as food, medicine, education, or housing.<sup>50</sup> Critics note that poor people with

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45. See Bruce Rushton, *Legislature '95: Legal Aid Agencies Face Legislative Ax; Lawmakers Object to Help for Migrant Farm Workers*, News Trib. (Tacoma, Wash.), Apr. 15, 1995, at B1; Anne Windishar, *Poor Need Legal Help Now More Than Ever*, Spokesman Rev. (Spokane, Wash.), Mar. 6, 1995, at A12. Law school clinics also have been targets. See Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 Tul. L. Rev. 235 (1999).

46. Brennan Ctr. for Justice, *An Unsolved Mystery: Why are Rogue Politicians Trying to Kill a Program that Helps Their Neediest Constituents?* 2 (1999) (quoting Rep. Burton).

47. Steve Largent, *It's a Good Idea Gone Bad*, USA Today, May 25, 1995, at A12.

48. Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 Cornell L. Rev. 1115, 1117 (1992) (quoting John A. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564, 564-65 (1979)); see also Werner Z. Hirsh, *Law And Economics: An Introductory Analysis* 63-81 (2d ed. 1988).

49. *Impact of EPA and OSHA Regulations on Small Business: Hearing Before the House Comm. on Small Bus., Gov't Programs, and Oversight* (1998) (testimony of Kenneth F. Boehm [hereinafter Boehm, Testimony]); see also *Legal Services for the Poor: Time for Reform* (Douglas J. Besharov ed., 1990) [hereinafter Besharov]; Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 St. Louis U. Pub. L. Rev. 321 (1998) [hereinafter Boehm, *Legal Services*].

50. Richard Posner, *Economic Analysis of Law* 513-14 (5th ed. 1998); Charles Silver & Frank B. Cross, *What's Not to Like About Being a Lawyer?*, 109 Yale L.J.

unmet legal needs rarely spend their discretionary income on lawyers.<sup>51</sup> And it is by no means clear that clients, if given the choice, would invest in the kinds of impact litigation that legal services attorneys often prefer.<sup>52</sup> Although supporters of legal aid programs “cite the concept of equal access to justice,” critics emphasize that the “reality is that there is nothing resembling equality in [those programs’] case selection process[es].”<sup>53</sup>

There are a number of difficulties with these claims that do not emerge clearly in public debate. To begin with, the value of legal assistance cannot be gauged by what the poor are currently willing to pay. The poor also invest very little in expensive private education for their children, but that hardly suggests that they do not value first-rate schools.<sup>54</sup> Those who cannot meet their most basic subsistence needs often are unable to make purchases that would prove cost-effective in the longer term. That is part of what traps them in poverty. Legal services are often a more efficient use of resources than subsistence goods. A few hours of legal work may result in benefits far exceeding their costs. In its “Access to Justice” series defending the LSC, the Brennan Center offers a host of examples: domestic violence victims in need of protective orders; brain-damaged children and senior citizens on fixed incomes erroneously denied medical coverage; and impoverished nursing mothers exposed to dangerous pesticides.<sup>55</sup> For many forms of legal assistance, it would be difficult, if not impossible, to attach a precise dollar value, but the benefits may be enormous and enduring.<sup>56</sup> For millions of poor people, government subsidized or pro bono services make it possible to divorce and remarry, to adopt a child, and to terminate an unwanted pregnancy.

Moreover, law is a public good. Protecting legal rights often has value beyond what those rights are worth to any single client. Holding employers accountable for unsafe farm working conditions, or making landlords liable for violations of housing codes and eviction procedures can provide a crucial deterrent against future abuse. Contrary to critics’ claims, it is by no means clear that the costs of defending such lawsuits will all be passed on to other poor people, or that those costs are excessive in light of the deterrent value that they

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1443, 1481-84 (2000).

51. Silver & Cross, *supra* note 50, at 1484.

52. See Besharov, *supra* note 49, at 3-29 ch. 1; Boehm, *Legal Services*, *supra* note 49, at 329-36.

53. Boehm, Testimony, *supra* note 49.

54. See David Luban & Deborah L. Rhode, *Pro Bono as a Professional Responsibility* (unpublished manuscript on file with authors, 2000).

55. Brennan Ctr. for Justice, *Legal Services Clients Tell Their Story 2* (1999); see Brennan Ctr. for Justice, *Restricting Legal Services: How Congress Left the Poor with Only Half a Lawyer 2*, 9-10, 13 (1999).

56. *Hearing Before the Subcomm. on Depts. of Commerce, Justice, and State and the Judiciary and Related Agencies of the House Appropriations Comms.*, 106th Cong. (1999) (testimony of Douglas S. Eakeley, Chairman, LSC).

serve. Whether the landlord will in fact raise the rent is a complicated empirical question that depends on local market conditions.<sup>57</sup> And whether such increases would be worth incurring is equally complicated, particularly if, as some research suggests, tenants represented by legal aid attorneys typically have valid claims.<sup>58</sup> Understaffed legal services offices have no reason to spend substantial, scarce resources litigating the “marginal” or meritless cases that critics’ arguments assume.

Similar points could be made about other litigation that assertedly hurts the poor more than it helps. For example, contesting the expulsion of a disruptive student is not necessarily counterproductive; it may sometimes force school districts to respect appropriate procedural norms or to find more constructive solutions to disciplinary issues. 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 ability to pay an effective way of screening out meritless claims. And determining when the costs of legal assistance exceed its benefits involves far more complex and subjective judgments than critics or policymakers have acknowledged. The simplistic sound bites that opponents launch against legal services are seriously distorting public perceptions and policy priorities. To preserve political support, LSC funded offices have tailored caseloads to address opponents’ concerns. Over two-thirds of federal resources now target domestic violence and other family cases, which are the most politically popular.<sup>59</sup> As LSC President John McKay has explained to local program directors, “We’re trying to find programs we do well that Congress is willing to fund.”<sup>60</sup> While recognizing that this strategy may be a “shallow way to do things,” it appears necessary to counteract legislative opposition.<sup>61</sup>

In the long run, however, this strategy inevitably risks compounding the problem it seeks to address. Justifications for legal services that stress only the needs of the “deserving poor” invite restrictions that exclude all others. Why permit government-funded lawyers to pursue their “left political agenda” through organizing and lobbying activities, or assisting convicted felons and undocumented immigrants when millions of impoverished American children still need basic services? Yet it is politically unpopular groups whose legal rights are

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57. Neil K. Komesar, *The Revolution in Landlord-Tenant Law: A Comparative Institutional View*, 69 Cornell L. Rev. 612, 613-14 (1984); Gunn, *supra* note 44, at 385-86.

58. Gunn, *supra* note 44, at 420-21.

59. Janet Elliott, *Repositioning Legal Aid; New Leader Hopes Battered Moms Can Rescue Poverty Law*, Tex. Law., Mar. 16, 1998, at 1 (citing John McKay, President, LSC).

60. *Id.* (quoting John McKay, President, LSC).

61. *Id.* (quoting John McKay, President, LSC).

most vulnerable. When shut out of the courts, groups like immigrants and prisoners have nowhere else to turn.<sup>62</sup>

Moreover, the direct personal services to the poor that Americans find most acceptable do nothing to address the structural sources of poverty, or to help the poor help themselves. Current LSC restrictions prohibit federally-funded lawyers from providing the very kinds of assistance most likely to have structural impact: advocacy before legislative and administrative tribunals, grass-roots community organizing, and class-action litigation.<sup>63</sup> These lawyers also may not collect attorneys' fees, which removes an effective deterrent to future abuses and a crucial funding source for other work.<sup>64</sup> Nor may programs that receive federal support use other sources of funding to pursue cases that LSC guidelines exclude.<sup>65</sup> Taken together, these restrictions hobble the ability of legal services lawyers to address the causes as well as symptoms of poverty. By expanding "access to justice" only on these terms, legal assistance may foster the illusion that "justice" has been done when underlying problems remain unsolved.

What constitutes the appropriate balance between impact and service work has been a matter of longstanding debate within the legal services community and need not be revisited in detail here. The point is simply that current restrictions have inappropriately skewed the balance. They prevent lawyers from effectively addressing common problems or from helping to organize community efforts that will. And such restrictions are likely to persist unless we can do better in persuading the public—or the courts—of the importance of adequate access to justice in practice as well as principle.

#### IV. JUDICIAL FAILURES

In 1956, in *Griffin v. Illinois*,<sup>66</sup> the Supreme Court observed that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>67</sup> Over the next half century, American courts have repeatedly witnessed the truth of that observation, and have repeatedly failed to address it. These failures have occurred along multiple dimensions. Courts have declined to recognize a right to appointed counsel in civil cases except under highly limited circumstances. In the civil and criminal proceedings where courts have recognized a right to assistance, they have failed to insure that representation meets acceptable standards. Judicial oversight has been equally lacking for the substantive and financial

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62. See generally Leven, *supra* note 1.

63. 45 C.F.R. §§ 1612, 1617 (1999).

64. *Id.* § 1642.

65. *Id.* § 1610.

66. 351 U.S. 12 (1956).

67. *Id.* at 19.

restrictions that legislatures have established for legal services. And despite the overwhelming shortages of affordable or government-subsidized legal assistance, courts have failed to establish structures that would enable most Americans to represent themselves effectively.

One cluster of problems arises from limited judicial interpretations of the constitutional right to counsel. Over the last seventy-five years, courts have gradually extended requirements of lawyers for indigent criminal defendants. Those requirements for federal prosecutions have been grounded in the Sixth Amendment guarantee of counsel, and for state prosecutions, in the Fourteenth Amendment due process and equal protection clauses.<sup>68</sup> Both lines of decisions build on the same commonsense insight expressed in the Court's 1932 *Powell v. Alabama* ruling: "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>69</sup>

However, the Court has largely failed to extend that insight to civil contexts where similarly fundamental interests are at issue. In *Lassiter v. Department of Social Services*, the Supreme Court interpreted the due process clause to require appointment of counsel in civil cases if the proceeding would otherwise prove fundamentally unfair.<sup>70</sup> In making that determination, courts should consider three basic factors: "the private interests at stake, the government's interest, and the risk that [lack of counsel] will lead to an erroneous decision."<sup>71</sup> Under this standard, a majority of Justices found no reversible error in *Lassiter*.<sup>72</sup> There, an incarcerated woman lost parental rights after a hearing at which she lacked assistance of counsel.<sup>73</sup> In the majority's view, such assistance would not have made a "determinative difference," given the state's strong factual case and the absence of "troublesome points of law."<sup>74</sup> Lower courts have proven similarly reluctant to require lawyers in civil contexts.<sup>75</sup>

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68. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956). *But see* *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (finding no right to counsel in optional post-conviction proceedings).

69. 287 U.S. 45, 68-69 (1932).

70. 452 U.S. 18 (1981).

71. *Id.* at 27, 31.

72. *Id.* at 33.

73. *Id.* at 20-22.

74. *Id.* at 32-33.

75. In summarizing these cases, Laurence Tribe concludes:

The states are required to subsidize the most basic civil litigation costs of indigents only when: the state has a complete monopoly on resolution of the dispute, a fundamental interest is at stake, and the resulting financial burden on the state treasury would be light. Because these decisions contain so many escape hatches for a judiciary not particularly familiar with the plight of the dispossessed and understandably hesitant to spend the states' revenues, the [F]ourteenth [A]mendment provides only modest relief for poor people who seek a day in court.

And in the exceptional cases where they have appointed counsel, they have often failed to ensure compensation.<sup>76</sup>

This reluctance is problematic on several grounds. Some civil proceedings implicate interests as significant as those at issue in many minor criminal proceedings where counsel is required. It is a cruel irony that, in domestic violence cases, defendants who face little risk of significant sanctions are entitled to counsel, while victims whose lives are at risk are expected to seek legal protection without legal assistance.<sup>77</sup> The rationale for subsidized representation seems particularly strong in cases like *Lassiter*, where crucial interests are at issue, legal standards are imprecise and subjective, proceedings are formal and adversarial, and resources between the parties are grossly imbalanced.<sup>78</sup> Under such circumstances, opportunities for legal assistance are crucial to the legitimacy of the justice system. As the Supreme Court has recognized in other contexts, the “right to sue and defend” is a right “conservative of all other rights, and lies at the foundation of orderly government.”<sup>79</sup> Providing representation that will make that right meaningful fosters values central to our concept of a just society. Not only does it serve the instrumental function noted in *Lassiter* of preventing erroneous decisions, but it also affirms interests of human dignity that are core democratic ideals. As Frank Michelman has argued, the opportunity to litigate effectively promotes “self-respect” and a sense of “hav[ing one’s] will[] ‘counted’ in societal decisions.”<sup>80</sup>

Not only has the judiciary failed to institutionalize those values in civil contexts, it has trivialized their meaning in criminal cases. Judges routinely fail to ensure effective assistance of counsel, and sometimes

Laurence H. Tribe, *American Constitutional Law* 1652 (2d ed. 1988). For a recent example, see *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

76. In *Payne v. Superior Court*, 553 P.2d 565 (Cal. 1976), the California Supreme Court held that a prisoner seeking to defend a civil action but unable to appear in court personally should be entitled to counsel if a continuance was not feasible, if his property interests would be affected, and if an attorney would be helpful. A decade later, in *Yarbrough v. Superior Court*, 702 P.2d 583 (Cal. 1985), the court reaffirmed *Payne* but reserved the issue of how to compensate court-appointed counsel in the hopes that the legislature, bar and other interested groups would find a solution. That solution was not forthcoming. See Philip Carrizosa, *Yarbrough Case Still Awaits Trial-By Free Lawyer*, L.A. Daily J., Nov. 16, 1987, at 1.

77. “Two-thirds of battering complaints are classified as simple misdemeanors, even though most involve serious injuries in recently surveyed cities, fewer than [10%] of men arrested for domestic assault serve any jail time.” Deborah L. Rhode, *Speaking of Sex: The Denial of Gender Inequality* 112 (1997) (citing studies). One-half of all interspousal homicides and most serious injuries occur after victims attempt to separate from their abusers. *Id.* at 114; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 64-65 (1991).

78. *Lassiter*, 452 U.S. at 35-59 (Blackmun, J., dissenting); *id.* at 59-60 (Stevens, J., dissenting).

79. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

80. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 Duke L.J. 1153, 1172.



actively work against it. Too many courts appoint lawyers based not on ability but on personal ties, campaign contributions, and willingness to dispose of cases quickly, without time-consuming motions or trials.<sup>81</sup> In theory, inadequate representation could trigger malpractice remedies. In fact, such remedies are almost never forthcoming, because convicted criminals are unsympathetic plaintiffs and prevailing doctrine denies recovery unless they can prove their innocence or have their convictions set aside.<sup>82</sup> And only in the most egregious cases will courts reverse convictions for ineffective assistance of counsel. Trial judges have declined to find inadequate representation where attorneys were drunk, on drugs, suffering from severe mental illness, or parking their car during key parts of the prosecution's case.<sup>83</sup> Convictions have been upheld where lawyers spent less time preparing for trial than the average American spends showering before work.<sup>84</sup> And defendants have been executed despite their lawyers' lack of any prior trial experience, ignorance of all relevant death penalty precedents, or failure to present any mitigating evidence.<sup>85</sup> One systematic survey found that over 99% of federal ineffective-assistance claims were unsuccessful.<sup>86</sup>

The extent of judicial tolerance is well-illustrated by a recent Texas case. There, counsel for a defendant facing the death penalty fell asleep several times during witness testimony that he found "boring" and spent only about five hours preparing for trial.<sup>87</sup> In rejecting claims of inadequate representation, the Texas court reasoned that the decision to sleep might have been a "strategic" ploy to gain sympathy from the jury.<sup>88</sup> And a federal judge reviewing that decision

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81. Robert Sherrill, *Death Trip: The American Way of Execution*, The Nation, Jan. 8, 2001, at 13.

82. Charles W. Wolfram, *Modern Legal Ethics* § 5.6 (1986); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 Rutgers L. Rev. 101, 111-19 (1995); *Wiley v. County of San Diego*, 966 P.2d 983, 991 (Cal. 1998); see generally Ronald E. Mallen & Jeffrey M. Smith, 3 *Legal Malpractice* § 25.3 (4th ed. 1996); cf. Restatement (Third) of the Law Governing Lawyers § 75 cmt. d (Proposed Final Draft No. 2, Apr. 6, 1998).

83. Bright, *Counsel for the Poor*, *supra* note 17, at 1835; Cole, *supra* note 14, at 87; Bruce A. Green, *Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment*, 78 Iowa L. Rev. 433, 499-501 (1993); James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2104-06; Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. Rev. L. & Soc. Change 137 (1986); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1957-58 (1992); Stephen B. Bright, *Sleeping on the Job*, Nat'l L.J., Dec. 4, 2000, at A26 [hereinafter Bright, *Sleeping*].

84. Bright, *Sleeping*, *supra* note 83.

85. See Bright, *Counsel for the Poor*, *supra* note 17, at 1837-41; Cole, *supra* note 14, at 87; Green, *supra* note 83, at 433; *Death Watch*, The Nation, Nov. 20, 2000, at 3.

86. Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 Cal. W. L. Rev. 237, 259-60 (1995).

87. Herbert, *supra* note 14; Bruce Shapiro, *Sleeping Lawyer Syndrome*, The Nation, Apr. 7, 1997, at 27.

88. *McFarland v. State*, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996) (en

maintained that “[t]he Constitution says that everyone’s entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake.”<sup>89</sup> Other courts agree. Instances of courtroom napping are sufficiently common that an entire jurisprudence has developed to determine how much dozing is constitutionally permissible. Some courts even apply a three-step analysis: did counsel sleep for repeated and prolonged periods; was counsel actually unconscious; and were crucial defense interests at stake while counsel was asleep?<sup>90</sup> According to some prosecutors and judges, it would set a dangerous precedent if defendants were entitled to a new trial merely because their lawyers slept through substantial parts of their first.<sup>91</sup>

Not only have courts been reluctant to set aside convictions for ineffective assistance of counsel, they have been equally unwilling to address the financial and caseload pressures that produce it. Challenges to inadequate statutory fees for private attorneys and excessive assignments for public defenders have rarely been successful.<sup>92</sup> Indeed, judges, who face crushing caseloads of their own, often have been reluctant to encourage effective advocacy that would result in more time-consuming trials and pretrial matters.<sup>93</sup> Yet in the long run, the judiciary’s tolerance of insufficient resources for indigent representation ill-serves its own as well as societal interests. The errors resulting from unqualified or unprepared defense counsel are a leading cause of erroneous convictions and reversals on appeal.<sup>94</sup>

Courts have also largely acquiesced in the restrictions that Congress has placed on federal funds for legal services, despite their corrosive effects on constitutionally protected interests. In the most recent

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banc).

89. Shapiro, *supra* note 87 (quoting Judge Shaver).

90. *Tippins v. Walker*, 77 F.3d 682, 687-90 (2d Cir. 1996); *Burdine v. Johnson*, 66 F. Supp. 2d 854, 863-66 (S.D. Tex. 1999), *reh’g en banc granted*, 2000 U.S. App. LEXIS 31036 (5th Cir. 2000).

91. Henry Weinstein, *Condemned Man Awaits Fate in Dozing Lawyer Case*, L.A. Times, June 6, 2000, at A1.

92. See *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 435-36 (1990) (finding that boycott of court-appointed cases by private defense attorneys seeking higher compensation constituted an antitrust violation); cf. Frances A. McMorris, *Giuliani’s Hard Line Breaks Strike at New York City Legal Services*, Wall St. J., Oct. 6, 1994, at B11. The efforts continue. See *N.Y. County Lawyers’ Ass’n v. Pataki*, No. 1029872000 (N.Y. Sup. Ct., Apr. 7, 2000).

93. See generally McConville & Mirsky, *supra* note 24; see also Schulhofer, *supra* note 22, at 1990; Scott & Stuntz, *supra* note 83, at 1959; Sara Rimer & Raymond Bonner, *Texas Lawyer’s Death Row Record a Concern*, N.Y. Times, June 11, 2000, at A1 (noting judges’ preference for lawyers who “moved cases quickly”).

94. See Dwyer, Neufield & Sheck, *supra* note 15, at 263 (finding that 27% of cases exonerating defendants through DNA evidence involved attorneys’ incompetence); Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals*, N.Y. Times, June 12, 2000, at A1 (noting findings of Columbia Law School study in which two of three capital convictions were overturned, and 37% of the reversals were the product of defense-attorney incompetence).

round of challenges, both the Ninth and Second Circuits rejected claims that these restrictions impermissibly burdened clients' due process or First Amendment rights.<sup>95</sup> Under the appellate courts' analyses, these limitations imposed no unconstitutional conditions on the receipt of federal funds because LSC organizations had alternative channels to pursue protected activities. Legal aid offices could create affiliated organizations to engage in restricted activities as long as they used separate funds, personnel, and facilities.<sup>96</sup> In the courts' view, any burdens encountered by LSC clients simply left them in the same position that they would have occupied if Congress had never created the LSC. Claims that the restrictions impermissibly interfered with recipients' lawyer-client relationships were also rejected on the ground that this relationship enjoys no special constitutional protection from governmental regulation.<sup>97</sup> And challenges to prohibitions on activities involving welfare reform were largely dismissed on the theory that such limitations were viewpoint-neutral; they applied to efforts seeking to defend as well as challenge welfare legislation.<sup>98</sup>

Only one limitation failed to survive both courts' scrutiny. The Second Circuit, but not the Ninth, struck down the "suits for benefits" provision that permits a legal services office to represent a client seeking relief from a welfare agency only if the claim does not involve a challenge to existing law. This, in the Second Circuit's view, constituted viewpoint discrimination in violation of the First Amendment, and the Supreme Court has agreed.<sup>99</sup>

Although this is not the occasion for an extended analysis of relevant constitutional doctrine, a few brief points bear emphasis. It is true, of course, that the plaintiffs in these cases were no worse off as a result of the restrictions than they would have been if the government had never provided funding. But that is often true in cases where the Supreme Court has found unconstitutional conditions; the point of the doctrine is to require the government to respect constitutional rights if it chooses to provide assistance. Once Congress decides to subsidize certain attorney-client relationships, it should not be permitted to undermine their effectiveness. Foreclosing strategies like class actions, requests for attorneys' fees, or legislative advocacy often have that effect. In many jurisdictions, no non-federally funded organizations are available to pursue federally-restricted activities.<sup>100</sup>

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95. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 772-73 (2d Cir. 1999), *cert. granted*, 120 S. Ct. 1553, *argued on* Oct. 4, 2000; *Legal Aid Soc'y v. Legal Servs. Corp.*, 145 F.3d 1017, 1031 (9th Cir. 1998), *cert. denied*, 525 U.S. 1015 (1998).

96. *Velazquez*, 164 F.3d at 766-67; *Legal Aid Soc'y*, 145 F.3d at 1024-27.

97. *Velazquez*, 164 F.3d at 764-65.

98. *Id.* at 768-69.

99. *Id.* at 773; *Legal Servs. Corp. v. Velasquez*, \_\_\_\_ U.S. \_\_\_\_ (2000).

100. *See Legal Servs. Corp.*, *supra* note 1, at 8; *see generally* David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia and Oregon*

And no federally funded program has yet found it economically feasible to establish a separate affiliate that would be permitted to engage in such activities.<sup>101</sup>

Moreover, contrary to the appellate courts' implication, the attorney-client relationship has long been recognized to serve crucial constitutional values of expression and association.<sup>102</sup> Current LSC restrictions undercut those values and compromise lawyers' ethical obligations to serve their clients' best interests. For example, it is usually advantageous for plaintiffs with similar claims to pursue them as class actions, since such collective efforts offer broader relief, higher stakes and visibility, and greater bargaining leverage.<sup>103</sup> By foreclosing such strategies, LSC restrictions impair lawyers' ethical obligations to provide effective representation and to exercise independent professional judgment about what that representation requires.<sup>104</sup> Of course, attorneys can decline representation or ask a client's permission to limit its scope when they believe that their advocacy would be compromised.<sup>105</sup> But it will not always be apparent at the outset of representation whether certain strategies are necessary to advance a client's objectives. Nor will it always be possible to find alternative counsel to accept the case from the outset, or to take it over if a conflict develops between federal regulations and client interests.<sup>106</sup> Lawyers for the poor should not be forced to choose between betraying their ethical obligations and forfeiting essential funds.

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*Describe the Costs*, 17 Yale L. & Pol'y Rev. 337 (1998).

101. Cf. Brief of Amici Curiae N.Y. State Bar Ass'n et al. at 23-25, *Legal Servs. Corp. v. Velazquez*, \_\_\_ U.S. \_\_\_ (2000) (Nos. 99-603 & 99-960); Udell, *supra* note 100, at 351-55.

102. See, e.g., *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

103. See Brennan Ctr. for Justice, *Left Out in the Cold: How Clients Are Affected by Restrictions on Their Legal Services Lawyers* (2000); Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 Ohio St. L.J. 1, 17-18 (1984); see generally Deborah Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 533 (2000).

104. Model Rules of Prof'l Conduct R. 1.1 (1983) (requiring competent representation); *Id.* R. 5.4(c) (prohibiting a lawyer from permitting a person who "pays the lawyer to render services for another to direct or regulate the lawyer's professional judgement in rendering such legal services"); see Symposium, *Ethical Issues Panel*, 25 Fordham Urb. L.J. 357, 374-81 (1998) (comments of Stephen Ellmann); *id.* at 368-71 (comments of Emily J. Sack); see also Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on the Lawyer-Client Relationship: Some Thoughts from Scholars, Practitioners, and Courts*, 67 Fordham L. Rev. 2319, 2330-31 (1999).

105. Model Rules of Prof'l Conduct R. 1.2(e) (1983) (advising a lawyer to "consult with the client regarding the relevant limitations on the lawyer's conduct").

106. Udell, *supra* note 100, at 339; *Ethical Issues Panel*, *supra* note 104, at 368 (comments of Sack). But see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 Fordham L. Rev. 2187, 2235 (1999).

It is also unrealistic to view the restrictions related to welfare reform as viewpoint-neutral simply because they apply to advocacy on either side of the issue. As a practical matter, those clients poor enough to qualify for legal services will not be found on both sides of welfare disputes. In purpose and effect, LSC restrictions foreclose arguments challenging eligibility limitations, not arguments seeking to sustain them. And as courts have recognized in other contexts, the constitutionality of conditions on speech should be assessed in light of their actual, not theoretical, impact.<sup>107</sup> From that perspective, the Court was clearly correct in striking down the restriction for the reason that Justice Souter noted at oral argument: "There's something very risky going on when the government's policy in effect says, you can't make an argument that disagrees with the government."<sup>108</sup>

Finally, and most disturbingly, courts have failed to address the effects of their own procedural choices in obstructing access to justice. Whatever the justifications for deferring to legislative priorities concerning legal services, no such excuses explain the barriers to self-representation and low-cost assistance created by the judiciary's own rules and practices. On issues like procedural simplification, pro se assistance, and nonlawyer services, courts have too often been part of the problem, not the solution.

In "poor peoples' courts" that handle housing, bankruptcy, small claims, and family matters, parties without lawyers are less the exception than the rule. Cases in which at least one side is unrepresented are far more common than those in which both sides have counsel.<sup>109</sup> In some of these courts, over four-fifths of the proceedings involve pro se litigants.<sup>110</sup> Yet the systems in which these parties operate have been designed by and for lawyers, and courts have done far too little to make them accessible to the average claimant.

Innovative projects and reform proposals are not in short supply. Examples include: procedural simplification; standardized forms; increased educational materials; self-service centers with interactive kiosks for information and document preparation; free in-person assistance from volunteer lawyers or court personnel; and judicial

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107. See, e.g., *United States v. Eichman*, 496 U.S. 310 (1990).

108. *Legal Servs. Corp. v. Velazquez*, \_\_\_ U.S. \_\_\_. Tony Mauro, *Free to Argue*, Am. Law., Nov. 2000, at 67, 69 (quoting Justice Souter).

109. Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 1987 (1999) [hereinafter Engler, *Justice for All*]; see also Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 *Judicature* 13 (July/Aug. 1998) [hereinafter Goldschmidt, *Litigants*]; Maryland Report, *supra* note 1, at 25-26.

110. Engler, *Justice for All*, *supra* note 109, at 2047; Goldschmidt, *Litigants*, *supra* note 109, at 13; see also Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* (1998); Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 *Fam. L.Q.* 407, 408 (1994).

intervention to prevent manifest injustice.<sup>111</sup> Yet few jurisdictions have attempted systematic implementation of such reforms. A majority of surveyed courts has no formal pro se assistance services.<sup>112</sup> Many of the services that are available are unusable by those who need help most: uneducated litigants with limited competence and English language skills.<sup>113</sup> All too often, these litigants are expected to navigate procedures of bewildering complexity, and to complete forms with archaic jargon left over from medieval English pleadings.<sup>114</sup> Court clerks and mediators are instructed not to give legal advice, since that would constitute "unauthorized practice of law."<sup>115</sup> Even pro se facilitators are cautioned against answering any "should" questions, such as "which form should I file?"<sup>116</sup>

Judges vary considerably in their willingness to fill the gaps and to assist unrepresented parties. Less than 10% of surveyed courts have any established policies on point.<sup>117</sup> While some judges attempt to prevent exploitation of the ignorance of pro se litigants, others decline to do so out of concern that such efforts will compromise their impartiality or encourage more individuals to proceed without

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111. Family Law Section Comm. on the Probate and Family Court, Mass. Bar Ass'n, *Changing the Culture of the Probate and Family Court* 29 (1997) [hereinafter *Changing the Culture*]; Standing Comm. on the Delivery of Legal Services, ABA, *Responding to the Needs of the Self-Represented Divorce Litigant* 12-38 (1994); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531 (1994); Engler, *Justice for All*, *supra* note 109, at 20-49; Goldschmidt, *Litigants*, *supra* note 109, at 20-22; Yegge, *supra* note 110, at 413-17.

112. See Goldschmidt, *Litigants*, *supra* note 109, at 20.

113. Lillian C. Henry & Gillian N. Bush, *California's Family Law Facilitator and Arizona's Self-Service Center: Success and Limitations of Two Systems Designed to Meet the Challenges of Legal Services* (1999) (unpublished paper, Stanford Law School on file with author); see also Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 Fla. L. Rev. 481, 483 (1996) (stating that only 44% of surveyed participants in a pro se divorce assistance program had obtained a divorce); Bruce D. Sales et al., *Is Self Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 St. Louis U. L.J. 553, 563 & n.51 (1992) (finding that most of surveyed pro se divorce litigants had some college education).

114. Engler, *Justice for All*, *supra* note 109, at 2060, 2064; Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 Harv. Negot. L. Rev. 85, 92 (1996); see 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, 70.

115. Judith S. Kaye & Jonathan Lippman, *Breaking New Ground* 2 (1997); Engler, *Justice for All*, *supra* note 109, at 2056, 2060, 2064; John M. Greacen, "No Legal Advice from Court Personnel": What Does That Mean?, *Judges' J.*, Winter 1995, at 10, 10-12; Kurtzberg & Henikoff, *supra* note 114, at 90; 80 Op. Md. Att'y Gen. No. 95-056 (Dec. 19, 1995) [hereinafter *Md. Op.*].

116. *Md. Op.*, *supra* note 115; Henry & Bush, *supra* note 113.

117. Jona Goldschmidt, *How are Judges and Courts Coping with Pro Se Litigants?: Results from a Survey of Judges and Court Managers* 16 (May 1997) (unpublished manuscript on file with author), cited in Engler, *Justice for All*, *supra* note 109, at 2013.

lawyers.<sup>118</sup> Some courts are openly hostile to unrepresented parties, whom they view as tying up the system or attempting to gain tactical advantages.<sup>119</sup> Even the most sympathetic judges often have been unwilling to push for reforms that will antagonize lawyers whose economic interests are threatened by pro se assistance and whose support is critical to judges' own effectiveness, election campaigns, and advancement.

Similar considerations have worked against efforts to broaden access through nonlawyer providers of legal services. Almost all the scholarly experts and bar commissions that have studied the issue have recommended increased opportunities for nonlawyer assistance.<sup>120</sup> Almost all the major judicial rulings on the issue have ignored those recommendations. Current bans on unauthorized practice of law by lay competitors are sweeping in scope and unsupportable in practice. Nonlawyers who engage in law-related activities are subject to criminal prohibitions that are inconsistently interpreted, unevenly enforced, and inappropriately applied.<sup>121</sup>

The dominant approach is to prohibit individuals who are not members of the state bar from providing personalized legal services. For example, independent paralegals may type documents but may not answer even the simplest legal questions.<sup>122</sup> Yet comparative research finds that nonlawyer specialists are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest.<sup>123</sup> Such results should come as no surprise.

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118. *Jacobsen v. Filler*, 790 F.2d 1362 (9th Cir. 1986); *Changing the Culture*, *supra* note 111, at 51; Engler, *Justice for All*, *supra* note 109, at 2012-15; Goldschmidt, *Litigants*, *supra* note 109, at 19.

119. *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Okon v. Rogers*, 466 N.E.2d 658, 662 (Ill. App. Ct. 1984) (Barry, J., dissenting); Monitoring Subcomm., City Wide Task Force on Hous. Courts, *5 Minute Justice or "Ain't Nothing Going on But the Rent"*, 65-68 (1986); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533, 566-75 (1992); Engler, *supra* note 109, at 2014, 2016.

120. For scholars' views, see the sources cited in Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. Rev. L. & Soc. Change 701 (1996) [hereinafter Rhode, *Professionalism*]; and Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 Geo. J. Legal Ethics 209 (1990) [hereinafter Rhode, *Legal Services*]. For other experts' views, see ABA Comm. on Nonlawyer Practice, *Nonlawyer Activity in Law-Related Situations: A Report With Recommendations* (1995); and Cal. State Bar, Comm'n on Legal Technician's Report (1990) [hereinafter Technician's Report].

121. See generally Rhode, *Legal Services*, *supra* note 120.

122. Fifteenth Judicial Dist. Unified Bar Ass'n v. Glasgow, 1999 WL 1128847, at \*4 (Tenn. Ct. App. 1999); Model Rules of Prof'l Conduct R. 5.5 cmt. (1983); Deborah L. Rhode & David Luban, *Legal Ethics* 670-73 (2d ed. 1995); Debra Baker, *Is This Woman a Threat to Lawyers?*, 85 A.B.A. J. 54 (1999).

123. See *In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar*, 422 S.E.2d 123, 124-25 (S.C. 1992); Technician's Report, *supra* note 120, at 41; Judith Citron, *The Citizens Advice Bureau: For the Community, By the Community* (1989); Herbert Kritzer, *Legal Advocacy* 193-203 (1998); Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption*

Law schools generally do not teach, and bar exams do not test, the specialized information involved in dealing with divorces, landlord-tenant disputes, bankruptcy, immigration, welfare, and similar claims. Yet performance-related considerations are irrelevant under prevailing case law, which focuses only on whether nonlawyers are providing legal assistance, not on whether they are doing so effectively. While courts have justifiable concerns about unqualified or unethical lay assistance, these abuses are not the only targets of unauthorized-practice doctrine. As the discussion below indicates, they could be addressed through more narrowly drawn prohibitions and licensing structures for nonlawyer providers.<sup>124</sup>

A final area of judicial abdication involves pro bono service. The scope of judicial power to require lawyers to provide unpaid legal assistance remains unsettled, largely because the power has so rarely been exercised. The Supreme Court has never spoken directly to the point, although its dicta and summary dismissals imply that courts have inherent authority to impose such requirements, at least for criminal cases.<sup>125</sup> Lower court decisions are mixed, but some have concluded that requiring unpaid service constitutes an abuse of authority or a violation of the Fifth Amendment, which prohibits taking property without just compensation.<sup>126</sup> Such decisions are difficult to reconcile with Supreme Court precedents, which hold that “the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed.”<sup>127</sup> As long as the required amount of service is not unreasonable, takings claims

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*From State Unauthorized Practice of Law Rules*, 11 Akron Tax J. 47 (1995); Rhode, *Legal Services*, *supra* note 120; Rhode, *Professionalism*, *supra* note 120. In the one reported survey of consumer satisfaction, nonlawyers rated higher than lawyers. Rhode, *Legal Services*, *supra* note 120, at 230-31; *see also* Yegge, *supra* note 110, at 418.

124. For examples of such proposals, see sources cited in Rhode, *Professionalism*, *supra* note 120, at 715 & n.57; and Technician’s Report, *supra* note 120.

125. In *Sparks v. Parker*, 368 So. 2d 528 (Ala. 1979), the Alabama Supreme Court upheld an assignment system for indigent criminal defense, which the United States Supreme Court summarily dismissed on appeal. *Sparks v. Parker*, 444 U.S. 803 (1979). And, in earlier cases, the Court concluded that attorneys, as “officers of the court,” are “bound to render service when required.” *Powell v. Alabama*, 287 U.S. 45, 73 (1932); *see also* *Mallard v. United States Dist. Court*, 490 U.S. 296 (1989) (finding no statutory authority for court to compel appointment and reserving issue of inherent authority).

126. *Schwarz v. Kogan*, 132 F.3d 1387 (11th Cir. 1998) (upholding reporting requirement); *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221 (D. Neb. 1995) (finding inherent authority to compel lawyer’s representation of a civil plaintiff if other lawyers rejected representation because of the plaintiff’s indigency); *Zarabia v. Bradshaw*, 912 P.2d 5, 7-8 (Ariz. 1996); *DeLisio v. Alaska Super. Court*, 740 P.2d 437, 442 (Alaska 1987); *McNabb v. Osmundson*, 315 N.W.2d 9, 15-17 (Iowa 1982).

127. *Hurtado v. United States*, 410 U.S. 578, 588 (1973). The Court cited with approval *United States v. Dillon*, 346 F.2d 633, 636 (9th Cir. 1965), which upheld required service. *Hurtado*, 410 U.S. at 589.



generally have failed. And there is ample support in Supreme Court decisions for viewing pro bono assistance as a public duty.<sup>128</sup>

Not only has the judiciary been unwilling to mandate such assistance in individual cases, it has failed to adopt ethical rules requiring lawyers to provide annual pro bono service.

Proposed requirements have come and gone, but mainly have gone.<sup>129</sup> State supreme courts have adopted only aspirational standards, coupled in at least one jurisdiction with voluntary or mandatory reporting systems.<sup>130</sup> As the discussion below notes, most lawyers have failed to meet these aspirational goals, and the performance of the profession as a whole remains at shameful levels.

Given bar resistance to pro bono obligations and legislative resistance to adequate funding for legal services, the judiciary's acquiescence in distributional inequalities is surely understandable. As Geoffrey Hazard has noted, no "politically sober judge, however anguished by injustice unfolding before her eyes," could welcome the battles involved in trying to establish some broadly enforceable right to effective assistance of counsel.<sup>131</sup> But the political obstacles and passive virtues that justify caution do not justify abdication.<sup>132</sup> And as the concluding section of this article suggests, the judiciary has both the opportunity and the obligation to narrow the gap between equal protection principles and practices.

## V. FAILURES OF THE BAR

Access to justice is a favorite theme in bar rhetoric but a low priority in reform agendas. The gap between rhetoric and reality is particularly apparent in two contexts: commitments to pro bono service and rules affecting unauthorized practice and unrepresented parties.

Bar ethical codes and commentary have long maintained that lawyers have an obligation to assist those who cannot afford counsel.<sup>133</sup> And bar leaders have long waxed eloquent in describing the "quiet heroism" of the profession in discharging that responsibility.<sup>134</sup> According to ABA executive director Robert A.

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128. See *supra* notes 66-79 and accompanying text.

129. See Comm. on Pro Bono and Legal Servs., *Proposal to Chief Judge Judith Kaye for an Attorney Pro Bono Reporting Requirement*, 52 N.Y.C. B. Ass'n Rec. 367 (1997); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 Md. L. Rev. 78, 97-99 (1990).

130. *In re* Amendments to Rules Regulating the Fla. Bar 1-3.1(a) and Rules of Judicial Admin. 2.065 (Legal Aid), 630 So. 2d 501 (Fla. 1993).

131. Hazard, *supra* note 4, at 380.

132. See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

133. Model Rules of Prof'l Conduct R. 6.1 (1983); Model Code of Prof'l Responsibility EC 2-25, 8-3 (1981).

134. Robert L. Haig, *Lawyer-Bashing: Have We Earned It?*, N.Y. L.J., Nov. 19,

Stein, "The Law Firm Pro Bono Challenge issued to [large] law firms has resulted in more than three million hours of donated services annually! This is an extraordinary accomplishment in which all ABA members can take great pride."<sup>135</sup> A constant refrain among bar leaders is that "no other profession . . . is as charitable with its time and money."<sup>136</sup>

Such claims suggest more about the profession's capacity for self-delusion than self-sacrifice. The bar has consistently refused to require pro bono assistance and the limited data available suggest that most lawyers' voluntary contributions are minimal.<sup>137</sup> Full information is difficult to come by, because only one state (Florida) mandates reporting of contribution levels, and because many lawyers take liberties with the definition of "pro bono" and include any uncompensated or undercompensated work.<sup>138</sup> However, recent surveys indicate that most lawyers provide no significant pro bono assistance to the poor. In states that claim to have "model" programs, involvement ranges from a high of 47% in New York to 15-18% in Texas, Minnesota, Michigan and Florida. Contributions by volunteers ranged from an average of forty-two hours per year in New York to a median of twenty hours in Texas.<sup>139</sup> Less than 10% of practitioners

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1993, at 2.

135. Robert A. Stein, *Leader of the Pro Bono Pack*, 83 A.B.A. J. 108 (1997); see also Jerome J. Shestack, *The Pro Bono Principle*, 84 A.B.A. J. 8 (1998) (noting that the profession can "rightfully boast" about its pro bono challenge).

136. Haig, *supra* note 134; see also James C. Moore, *Legal Services for the Poor: The Unfulfilled Responsibility of An Affluent Society*, Remarks at the Nat'l Press Club (Oct. 14, 1998) ("I can think of no other profession that acts as responsibly towards those who need its help as does the legal profession.").

137. For the most recent refusal to recommend mandatory pro bono, see *Mandatory Pro Bono Idea Loses Steam at Ethics 2000 Commission's Final Hearing*, 16 ABA/BNA Manual on Prof. Conduct 370 (2000).

138. See Carroll Seron, *The Business of Practicing Law* 129-33 (1996); Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415, 2423 (1999) [hereinafter Rhode, *Cultures of Commitment*]. Less than one-half of New York lawyers provide pro bono services, and of these, three-quarters provided free legal services for a friend or relative, and about two-thirds provided services for a client who could not pay. Only 14% (slightly over 7% of all New York lawyers) took referrals from bar pro bono programs. Gary Spencer, *Pro Bono Data Show Little Improvement*, N.Y. L.J., Mar. 5, 1999, at 1; see also Denise R. Johnson, *The Legal Needs of the Poor As a Starting Point for Systemic Reform*, 17 *Yale L. & Pol'y Rev.* 479, 480 n.6 (1998) [hereinafter Johnson, *Legal Needs*] (citing research indicating that only 10% of New York lawyers provide legal services to the poor); Judith L. Maute, *Pro Bono in Oklahoma: Time for Change*, 54 *Okla. L. Rev.* (forthcoming Spring 2001).

139. For Texas' "model" program, see *Tex. State Bar, Civil Legal Services to the Poor in Texas*, Report to the Supreme Court of Texas, at 200 (2000), available at <http://www.texasbar.com/attyinfo/probono/legpoor.htm>. For New York's "model" program, see *N.Y. State Unified Court System, Report on the Pro Bono Activities of the New York State Bar*, available at <http://www.courts.state.ny.us/probono/pbrpt.htm>. For praise of New York's approach, see Moore, *supra* note 136. For Michigan's approach, see Candace Crowley and Al Butzbaugh, *State Bar Coordinates Private Endowment and Operations Funding for Civil Legal Aid*, 78

accept referrals from federally-funded legal aid offices or bar-sponsored poverty-related programs.<sup>140</sup> Most lawyers are no more charitable with their money than their time. Reported financial contributions range from an average of \$82 per year in New York to \$32 per year in Florida.<sup>141</sup> In short, the best available research finds that the American legal profession averages less than half an hour of work per week and under half a dollar per day in support of legal services for the poor.

Pro bono programs involving the profession's most affluent members reflect a particularly dispiriting distance between the bar's idealized image and actual practices. In Silicon Valley, the heartland of salary hikes, no firm now manages to meet the modest thirty hours per year average that used to be the accepted minimum.<sup>142</sup> Only a third of the nation's large law firms have committed themselves to meet the ABA's Pro Bono Challenge, which requires contributions equivalent to 3-5% of gross revenues.<sup>143</sup> And only eighteen of the nation's 100 most financially successful firms meet the ABA's standard of hours per year of pro bono service.<sup>144</sup> The approximately 50,000 lawyers at these firms averaged eight minutes per day on pro bono activities.<sup>145</sup>

When measured against lawyers' capacity to give, these contribution levels should scarcely be a matter of "great pride."<sup>146</sup> Law is among the nation's highest paying occupations, yet many of its top earners are making only nominal contributions. Although recent salary wars have pushed compensation levels to new heights, this

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Mich. B.J. 1094, 1095 (1999). For Minnesota's approach, described as one of the "best" in the country, see David E. Rovella, *Can the Bar Fill the LSC's Shoes?*, Nat'l. L.J., Aug. 5, 1996, at A1 (quoting Esther Lardent). For Florida's approach, see Talbot D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 Fla. St. U. L. Rev. 631 (1998).

140. LSC Statistics: Private Attorney Involvement, All Programs, available at [http://www.lsc.gov/pressr/pr\\_pai.htm](http://www.lsc.gov/pressr/pr_pai.htm); see Spencer, *supra* note 138.

141. N.Y. State Unified Court System, *supra* note 139; D'Alemberte, *supra* note 139; Access to the Legal System (July 1999), <http://www.Flabar.org/newflabar/publicmediainfo/TBFNews> (indicating that Florida lawyers contributed \$1,861,627 between July 1, 1997, and June 30, 1998); Interview with Mildred Wilson, Fla. State Bar Membership Office (2000) (indicating that in December, 1998, the Florida bar had 58,789 members.) A "Generous Associates" campaign by the Washington, D.C., Legal Services Office has attempted to respond to recent cutbacks in pro bono. Such cutbacks have been encouraged by salary hikes advocated on the "Greedy Associates" website. The 2000 campaign generated only about \$175,000. Joseph C. Zengerle, *Everybody Loses Without Pro Bono*, Nat'l L.J., Oct. 30, 2000, at A20.

142. Katrina M. Dewey, *Of Porsches and Philanthropists*, Cal. Law., Oct. 2000, at 96.

143. Interview with Esther Lardent, Pro Bono Institute (2000).

144. Aric Press, *Eight Minutes*, Am. Law., July 2000, at 13.

145. Press Release, Judicial Council of California, Chief Justice Urges More Lawyers to Donate Time to Pro Bono Efforts, Sept. 16, 2000, available at <http://www.courtinfo.ca.gov/newsreleases/NR52-00.htm>.

146. See Stein, *supra* note 135 and accompanying text.

affluence has eroded, rather than expanded, support for pro bono programs.<sup>147</sup> Over the past decade, the average revenues of the most successful firms increased by over 50%, while the average pro bono hours declined by a third.<sup>148</sup> As one attorney summarized the prevailing view: "It doesn't seem reasonable to expect [a] lawyer to reduce his billable time or his leisure time [in order to do unpaid work]. I don't know what the average lawyer earns but my guess is the lawyer would answer: not enough."<sup>149</sup>

Efforts to increase the profession's public service commitments have met with both moral and practical objections. Those objections have been reviewed at length elsewhere, and need not be rehearsed at length here.<sup>150</sup> However, a few general observations about the resistance to pro bono requirements bear at least brief note.

As a matter of principle, some lawyers insist that compulsory charity is a contradiction in terms. From their perspective, requiring service would undermine its moral significance and infringe lawyers' own rights. If equal justice under law is a societal value, then society as a whole should bear its cost. The poor have fundamental needs for food and medical care, but we do not require grocers or physicians to donate their help in meeting those needs. Why should lawyers' responsibilities be greater?<sup>151</sup>

There are several problems with this claim, beginning with its assumption that pro bono service is "charity." As bar ethical codes have long maintained, such assistance is not simply a philanthropic exercise; it is also a professional responsibility. Lawyers have special powers and special privileges that entail special obligations. America's highly legalized culture makes legal assistance "essential to virtually all projects of social import[ance]."<sup>152</sup> Attorneys in this nation have a much more extensive and exclusive right to provide

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147. Kate Ackley & Bryan Rund, *Pro Bono: Casualty of Salary Wars?*, Legal Times, Apr. 10, 2000, at 1; Anthony Perez Cassino, *Skyrocketing Pay and Public Service*, N.Y. L.J., Mar. 31, 2000, at 24; Mark Hansen, *Trickle-away Economics?: Cost of High First Year Salaries May Be Borne By Pro Bono Recipients*, 86 A.B.A. J. 20 (2000); Roger Parloff, *Too Rich To Give*, Am. Law., Apr. 2000, at 15; Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. Times, Aug. 17, 2000, at A1.

148. Press, *supra* note 144.

149. Letter from Jon Hoffheimer to Deborah L. Rhode (July 8, 1999) (on file with author).

150. See generally Marvin E. Frankel, *Proposal: A National Legal Service*, 45 S.C. L. Rev. 887 (1994); Lardent, *supra* note 129; Macey, *supra* note 48. Refer also to the sources cited in Rhode, *Cultures of Commitment*, *supra* note 138.

151. See Comm. to Improve the Availability of Legal Servs., Final Report to the Chief Judge of the State of New York (1990) [hereinafter New York Report], reprinted in 19 Hofstra L. Rev. 755, 782 (1991); Debra Baker, *Mandating Good Works: Colorado Proposal Requiring Pro Bono Draws Fire From Most Lawyers*, 85 A.B.A. J. 22 (1999); Frankel, *supra* note 150, at 890. Refer also to the sources cited in Rhode, *Cultures of Commitment*, *supra* note 138, at 2419.

152. Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. Rev. 1148, 1156 (1990).

legal assistance than attorneys in other countries.<sup>153</sup> The American bar has jealously guarded those prerogatives and its success in restricting lay competition has helped to price services out of reach for many consumers.<sup>154</sup> Under these circumstances, it is not unreasonable to expect lawyers to make some pro bono contributions in return for their privileged status.<sup>155</sup>

Nor is it plausible to view a minimal requirement of service as a violation of lawyers' rights: a form of "latent fascism," "economic slavery," and "involuntary servitude."<sup>156</sup> There is clearly no doctrinal basis for such claims and their moral foundations are equally weak. A well-established line of precedent holds that constitutional prohibitions of involuntary servitude extend only to physical restraints or legal confinement, which are not the sanctions authorized by mandatory pro bono programs.<sup>157</sup> Nor does requiring the equivalent of an hour per week of uncompensated assistance stand on the same moral footing as slavery. Michael Millemann aptly observes:

It is surprising—surprising is a polite word—to hear some of the most wealthy, unregulated, and successful entrepreneurs in the modern economic world invoke the amendment that abolished slavery to justify their refusal to provide a little legal help to those, who in today's society, are most like the freed slaves.<sup>158</sup>

The pragmatic objections to pro bono obligations are more plausible, but ultimately no more convincing. It is true, as critics note, that having reluctant dilettantes dabble in poverty law is an expensive way of providing what may sometimes be inadequate services. But the question is always, "compared to what?" For many low-income groups, some assistance will be better than none, which is their current alternative. And as discussion below indicates, concerns of cost-effectiveness could be readily addressed by two strategies: offering a broad range of opportunities for participation coupled with

153. See Deborah L. Rhode, In the Interests of Justice 136-37 (2000) [hereinafter Rhode, Justice]; Andrew Boon & Jennifer Levin, The Ethics and Conduct of Lawyers in England and Wales 55-59, 402 (1999); Citron, *supra* note 123; see also Christine Parker, Just Lawyers: Regulation and Access to Justice 1-9 (1999).

154. See Rhode, Justice, *supra* note 153, at 136-38; see generally Rhode, *Professionalism*, *supra* note 120.

155. Nor would it be inappropriate to expect comparable contributions from other professionals who have similar monopolies over the provision of other critical services.

156. For further discussion, see lawyers quoted in Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 610 (1985) [hereinafter Rhode, *Ethical Perspectives*]; Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. Va. L. Rev. 367, 391 n.97 (1993-94); and Michael J. Mazzone, *Mandatory Pro Bono: Slavery in Disguise*, Tex. Law., Oct. 22, 1990, at 22.

157. *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1357-58 (6th Cir. 1996).

158. Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 Md. L. Rev. 18, 70 (1990).

educational programs and support structures; and allowing lawyers unwilling or unable to provide direct service the option of substituting cash assistance to legal aid providers. In the absence of experience with mandatory pro bono programs, it cannot be assumed that their costs would be prohibitive and their benefits inconsequential.<sup>159</sup>

At the very least, pro bono requirements would support attorneys who would like to participate in public interest projects but who work in organizations that have discouraged such participation. For many lawyers, these projects would offer welcome opportunities to develop new skills, obtain more trial experience, and enhance their contacts and reputations in the community. Such opportunities, in the context of causes to which attorneys were committed, would undoubtedly prove more rewarding, personally and professionally, than much of what now occupies their time.<sup>160</sup> There is, moreover, broader value in exposing all members of the bar to how the justice system functions, or fails to function, for the have-nots. Such exposure may build support for reform, and increase the accountability of "poor peoples' courts" now accustomed to cutting procedural corners.<sup>161</sup>

A similar point could be made about requiring pro bono service by law students. Less than 10% of law schools now impose such requirements, and most students graduate without pro bono legal experience.<sup>162</sup> Issues concerning access to justice and public service have been missing or marginal in core law school curricula, and bar accreditation standards have done little to make such concerns an educational priority.<sup>163</sup>

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159. For such assumptions, see Macey, *supra* note 48; George M. Kraw, *Pro Malo Publico*, S.F. Recorder, Aug. 25, 1999, at 4; and Gary G. Sackett, *Dear Access to Justice Task Force*, 11 Utah B.J. 22 (1998).

160. Steven Lubet & Cathryn Steward, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. Pa. L. Rev. 1245, 1299 (1997).

161. *See id.* at 1304-05. For example, Steven Lubet described how a Chicago court, handling landlord, tenant, and collection matters, was suddenly transformed in the presence of the city's most prominent lawyer: "It was as though we were now in a real courtroom where justice, and people, mattered." *Id.* at 1305; *see also* Rhode, *Cultures of Commitment*, *supra* note 138, at 2420.

162. Ass'n of American Law Schools, *The Report: Learning to Serve*, available at <http://www.aals.org/probono/report.html>; Rhode, *Cultures of Commitment*, *supra* note 138, at 2436, 2433-43.

163. "[I]n 1996, the [ABA] amended its accreditation standards to call on schools to 'encourage . . . students to participate in pro bono activities and provide opportunities for them to do so.'" Rhode, *Cultures of Commitment*, *supra* note 138, at 2416 (quoting Recodification of Accreditation Standards 302 (1996) (omission in original)). However, schools are not required to provide specific information about how they comply with that standard or how many students participate. In the absence of such accountability, many schools' performances leave much to be desired. About one-third either have no legal pro bono programs or have programs in which less than fifty students participate. Ass'n of American Law Schools, *supra* note 162.

The Association of American Law Schools has recently taken steps in the right direction by forming a Commission and a Section on Pro Bono and Public Service, and by sponsoring regional colloquia on access to justice. *See* Ass'n of American Law

One final area in which the bar's record concerning access to justice has been particularly troubling involves unrepresented parties. The profession has both resisted efforts to provide qualified nonlawyer assistance for such parties, and has tolerated exploitation of their vulnerability by opponents.

The bar's opposition to unauthorized practice of law by lay competitors has been chronicled elsewhere, and again the point is not to replicate that discussion here but rather to highlight its implications for access to justice. Bar leaders have long insisted that such prohibitions are motivated solely by concerns to protect the public rather than the profession. But virtually no experts, including the ABA's own Commission on Nonlawyer Practice, share that view.<sup>164</sup> As noted earlier, most research finds that lay specialists can effectively provide routine services where legal needs are greatest. For many of these needs, retaining a lawyer is like "hir[ing] a surgeon to pierce an ear."<sup>165</sup> Other countries generally permit nonlawyers to give legal advice and to provide assistance on routine matters, and no evidence suggests that these lay specialists are inadequate. A case on point involves Great Britain's Citizen's Advice Bureaus, which rely on nonlawyer volunteers to provide effective low-cost assistance involving some ten million matters yearly.<sup>166</sup>

Although bar leaders do not lack examples of unqualified or unethical lay assistance, these abuses are not qualitatively different than those arising from lawyers' misconduct. And as discussion below indicates, the problems can be addressed through regulation, not prohibition, of lay specialists. Yet the organized bar is moving in precisely the opposite direction. At its meeting in February of 2000, the ABA approved a resolution to increase enforcement of unauthorized practice prohibitions, and some state and local bars have launched similar efforts.<sup>167</sup>

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Schools, Equal Justice Project, <http://www.aals.org/equaljustice/index.html>; Ass'n of American Law Schools, Pro Bono Home, <http://www.aals.org/probono/index.html>. However, much more needs to be done to make these issues central to the educational experience.

164. Compare Model Rules of Prof'l Conduct R. 5.5 cmt. (1983) ("Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons."), with Kritzer, *supra* note 123. Refer also to the sources cited in Rhode, Justice, *supra* note 153, and Rhode, *Professionalism*, *supra* note 120.

165. Hal Lancaster, *Rating Lawyers: If Your Legal Problems Are Complex, a Clinic May Not Be the Answer*, Wall St. J., July 31, 1980, at 1 (quoting Robert Ellickson) (internal quotations omitted).

166. Richard L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, 1985 Am. B. Found. Res. J., at 1, 29; Citron, *supra* note 123; Michael Zander, *The State of Justice* 23 n.61 (2000).

167. ABA, Select Comm. Report on the 2000 Midyear Meeting, available at <http://www.abanet.org/leadership/2000hous.html>.

A profession truly committed to public protection would not only reverse this position, it would also rethink the rules governing lawyers' dealings with unrepresented parties. In response to bar opposition, the commission that drafted the Model Rules of Professional Conduct deleted provisions enjoining lawyers who appeared against pro se opponents from "unfairly exploiting... ignorance of the law" and from "procur[ing] an unconscionable result."<sup>168</sup> According to opponents, "parties 'too cheap to hire a lawyer' should not be 'coddled' by special treatment."<sup>169</sup> Under the draft ultimately approved, lawyers' sole responsibility is to avoid implying that they are disinterested and to "make reasonable efforts to correct... misunderstanding[s]" concerning their role.<sup>170</sup>

Such minimal obligations have proven totally inadequate to curb overreaching behavior in contexts involving many unrepresented and uninformed parties. Counsel for more powerful litigants in landlord-tenant, consumer, and family law disputes often mislead opponents into waiving important rights and accepting inadequate settlements.<sup>171</sup> Since these individuals typically do not know or cannot prove that they were misinformed by opposing counsel, such conduct rarely results in any disciplinary or judicial sanctions.<sup>172</sup>

As these examples suggest, the bar's commitment to equal justice remains largely rhetorical. Most attorneys support the concept, but only as long as it does not put their own interests at risk. Stephen Gillers aptly observes that "[t]he lawyers who approved the [Model] Rules looked after their own."<sup>173</sup> Significant reform will require enlisting other Americans to look after *their* own, and to demand a justice system more accessible and more accountable to the public interest.

## VI. AN ALTERNATIVE ASPIRATION: ADEQUATE ACCESS TO JUSTICE

Strategies for increasing access to justice are not in short supply. The past quarter century has spawned a cottage industry of recommendations by commissions, conferences, committees, and task forces. But what has not emerged is any consensus around manageable reforms or a substantial constituency demanding them. To make significant progress, we will first need to identify realistic objectives and to mobilize the profession and the public in their

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168. See Rhode, *Ethical Perspectives*, *supra* note 156, at 611 (quoting Model Rules of Prof'l Conduct R. 3.6 (Discussion Draft 1983)).

169. *Id.* (quoting commentators).

170. Model Rules of Prof'l Conduct R. 4.3 (1983).

171. See, e.g., Engler, *Out of Sight*, *supra* note 44, at 107-30.

172. See *id.* at 133-37.

173. Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 Ohio St. L.J. 243, 245 (1985) (citation omitted).



support. Despite the conceptual difficulties surrounding access to justice, several principles seem likely to command broad agreement. While equal access to justice may be an implausible ideal, adequate access should remain a societal aspiration. To that end, courts, bar associations, law schools, legal aid providers, and community organizations must work together to develop comprehensive, coordinated systems for the delivery of legal services. Under such systems, legal procedures and support structures should be designed to maximize individuals' opportunities to address law-related problems themselves, without expensive professional assistance. Those who need, but cannot realistically afford, lawyers should have reasonable opportunities for competent services. Opportunities for assistance should be available for all individuals, not just citizens or those meeting some political litmus test.

Reducing the need for professional assistance calls for strategies along several dimensions: increased simplification of the law; more self-help initiatives; better protection of unrepresented parties; greater access to nonlawyer providers; and expanded opportunities for informal dispute resolution in accessible out-of-court settings. As critics have long noted, American legal procedures are strewn with unnecessary formalities, archaic jargon, and cumbersome rituals that discourage individuals from resolving legal problems themselves.<sup>174</sup> Simplified forms and streamlined procedures could expand ordinary Americans' opportunities to handle routine matters such as governmental benefits, probate, uncontested divorces, landlord-tenant disputes, and consumer claims.

More assistance for self-representation would serve similar objectives. All jurisdictions should have comprehensive services such as free or low-cost workshops, hotlines, court-house advisors, and walk-in centers that provide personalized multilingual assistance at accessible times and locations. Courts and bar ethical rules should also provide unrepresented parties with greater protection. Judges should assume affirmative obligations to prevent manifest injustice, modeled on precedents from small-claims courts and administrative agencies.<sup>175</sup> Lawyers should be enjoined from knowingly exploiting the ignorance of an unrepresented party. More specifically, they should be held to standards analogous to those governing *ex parte* proceedings, which require lawyers to disclose facts and claims necessary for an informed decision.<sup>176</sup>

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174. Nat'l Ctr. for State Courts, *Meeting the Needs of Self-Represented Litigants: A Consumer Based Approach* (1999); Fred Rodell, *Woe Unto You, Lawyers!* 123-37 (2d ed. 1957); Franklin Strier, *Reconstructing Justice: An Agenda for Trial Reform* 233-34 (1994); Cramton, *supra* note 111, at 562-64; Johnson, *Legal Needs*, *supra* note 138, at 486; *see also* Houseman, *Legal Assistance*, *supra* note 1.

175. *See* Engler, *Justice for All*, *supra* note 109, at 2063, 2068-69; Engler, *Out of Sight*, *supra* note 44, at 142-47.

176. *See* Model Rules of Prof'l Conduct R. 3.3(d) (1983); Engler, *Out of Sight*,

Individuals should also have greater access to nonlawyer providers of legal services. In devising appropriate alternatives to sweeping unauthorized practice prohibitions, courts and legislatures must balance the public interest in maximizing access as well as minimizing harm. Considerations should include the ability of nonlawyer providers to provide adequate assistance, the risks of injury if they do not, and the ability of consumers to assess providers' qualifications and to remedy problems caused by ineffective performance.<sup>177</sup> Where the risk of injury is substantial, in contexts such as immigration involving unsophisticated and vulnerable consumers, lay practitioners could be subject to licensing requirements. In other fields, it might be adequate to register practitioners and to allow voluntary certification of those who meet certain established standards. Moreover, "[s]tates also could require all lay practitioners to carry malpractice insurance, to contribute to client security funds," and to observe basic ethical obligations governing confidentiality, competence, and conflicts of interest.<sup>178</sup>

Americans would also benefit from more effective channels for informal dispute resolution in out-of-court settings. For example, organizations over a certain size could be required to establish internal complaint procedures or to participate in industry-wide grievance systems that met prescribed standards of procedural fairness. Many organizations now lack such procedures or have arbitration and mediation processes that are skewed against complainants.<sup>179</sup> Considerable evidence suggests that well-designed employee and consumer grievance procedures benefit both institutional and individual participants, and that most people prefer to resolve disputes in informal, nonlegal settings.<sup>180</sup> Giving organizations greater responsibility for "doing justice" internally is likely to prove more cost-effective than relying on less accessible judicial remedies.<sup>181</sup>

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*supra* note 44, at 139-42; *cf. supra* note 164 and accompanying text.

177. ABA Comm. on Nonlawyer Practice, *supra* note 120, at 137; Rhode, *Professionalism*, *supra* note 120, at 714-15.

178. Rhode, *Professionalism*, *supra* note 120, at 715.

179. Compulsory arbitration systems sponsored by employers who are repeat players often systematically disadvantage employees who are not. See Richard C. Reuben, *The Bias Factor*, Cal. Law., Nov. 1999, at 25; Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 Ohio St. J. on Disp. Resol. 297, 387 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 931, 1015-17 (1999).

180. For research on internal processes, see Parker, *supra* note 153, at 184-88. For preferences regarding dispute resolution, see Zander, *supra* note 166, at 29-32; and Hazel G. Genn, *Paths to Justice: What People Do and Think About Going to Law* 217-18 (1999).

181. See Parker, *supra* note 153, at 188-89; *cf. Brent Fisse & John Braithwaite, Corporations, Crime and Accountability* 197 (1993).

Courts, legislatures, and bar associations should also assume greater obligations to insure adequate legal assistance for those who need but cannot realistically afford it. What constitutes "adequate," "need" and "affordability" are, of course, somewhat subjective determinations. But by almost any standard, our current system falls far short. Courts must do more to ensure competent performance of lawyers in criminal cases, and opportunities for legal representation in civil cases. Standards governing malpractice and effective assistance of counsel should be strengthened, certification for lawyers in capital cases should be required, and states should be obligated to allocate sufficient resources for indigent defense. In civil contexts, courts should be more willing to appoint lawyers and to strike down funding restrictions that prevent adequate representation.

Other eligibility restrictions also require rethinking. Most European nations guarantee legal assistance for a much broader category of individuals than those entitled to legal aid in this country. Under the eligibility structures of other nations, relevant considerations include: Does the claim have a reasonable possibility of success? What would be the benefits of legal assistance or the harms if it is unavailable?<sup>182</sup> Would a reasonable lawyer, advising a reasonable client suggest that the client use his or her own money to pursue the issue?<sup>183</sup> In assessing financial eligibility, these systems typically operate with sliding scales. This approach permits at least partial coverage for a broader range of clients than American legal aid offices, which serve only those below or just over the poverty line.<sup>184</sup> These more liberal eligibility structures avoid a major limitation of the United States model, which excludes many individuals with urgent problems and no realistic means of addressing them.<sup>185</sup>

The political prospects for expanding coverage along these lines in this country are, to be sure, less than encouraging. At a time of growing skepticism toward entitlement programs for the poor, and declining funds for federal legal services, any proposal for broader coverage will face an uphill battle. But a legal aid system that included a wider spectrum of the public would have broader appeal than a system benefitting only the poor. And financial support for such a system could come from a variety of sources likely to command greater support than general tax funds. Examples include: a tax on

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182. Mark Richardson & Steven Reynolds, *The Shrinking Public Purse: Civil Legal Aid in New South Wales, Australia*, 5 Md. J. Contemp. Legal Issues 349, 360 (1994).

183. Jeremy Cooper, *English Legal Services: A Tale of Diminishing Returns*, 5 Md. J. Contemp. Legal Issues 247, 253 (1994); see also *Quail v. Municipal Court*, 171 Cal. App. 3d 572, 590 n.13 (1985) (citing the German test: whether the matter would be pursued by a reasonable person able to pay the cost). Britain has now moved away from an entitlement structure. See Zander, *supra* note 166, at 9-25.

184. See 45 C.F.R. § 1611.3 (1999).

185. Houseman, *Legal Assistance*, *supra* note 1, at 431; ABA, *Findings of the Comprehensive Legal Needs Study 7-17* (1994).

law-related revenues; a surcharge on court costs for cases that exceed a certain amount; more opportunities for court-awarded fees for prevailing parties; and pro bono requirements for lawyers that could be satisfied by fifty hours of annual service or the financial equivalent.<sup>186</sup> In a nation that spends over \$90 billion on private legal fees, a modest 1-2% tax would substantially increase the capacity of civil legal aid programs.<sup>187</sup> So would significant pro bono contributions by close to a million attorneys.

It is a national disgrace that civil legal aid programs now reflect less than 1% of the nation's legal expenditures.<sup>188</sup> And it is a professional disgrace that pro bono service occupies less than 1% of lawyers' working hours. We can and must do more, and our greatest challenge lies in persuading the public and the profession to share that view. More education and research needs to focus on what passes for justice among the have-nots.<sup>189</sup> Law schools have a unique opportunity and a corresponding obligation to insure that issues concerning access to legal services occupy a central place in their curricula, and that pro bono activity plays a central role in their students' educational experience.<sup>190</sup>

This country has come a considerable distance since 1919, when Reginald Heber Smith published his landmark account of *Justice and the Poor*. At that time, the entire nation had only about forty legal aid organizations, with sixty full-time attorneys and a combined budget of less than \$200,000.<sup>191</sup> Yet despite our substantial progress, we are nowhere close to the goal that Smith envisioned: "that denial of justice on account of poverty shall forever be made impossible in America."<sup>192</sup> That ideal should remain our aspiration, and occasions like this can serve as reminders of all that still stands in the way.

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186. See D'Alemberte, *supra* note 139.

187. Johnson, *Equal Justice*, *supra* note 7, at 215.

188. *Id.*

189. See Rhode, *Cultures of Commitment*, *supra* note 138. These issues have attracted disturbingly little attention from constitutional law scholars since Frank Michelman's landmark 1973 work. See Michelman, *supra* note 80.

190. See Rhode, *Cultures of Commitment*, *supra* note 138, at 2433-36; *supra* text accompanying notes 162-63.

191. Jerald S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 53-62 (1976); Bryant Garth, *Neighborhood Law Firms for the Poor* 19-20 (1980).

192. Reginald Heber Smith, *Justice and the Poor* 249 (1919).

*Notes & Observations*