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Access to Justice: Again, Still

Cover Page Footnote

Ernest F. McFarland Professor of Law; Director of the Center on Ethics, Stanford University. This Essay draws on Deborah L. Rhode, *Access to Justice* (2004), as well as articles that have included or adapted some of its analysis. The extensive documentation in the book and related publications is not replicated here.

ACCESS TO JUSTICE: AGAIN, STILL

*Deborah L. Rhode**

It is a great honor to have provided the occasion for such a distinguished group of colleagues to address such a crucial topic. I am deeply grateful to all the participants, and especially to Bruce Green, for organizing the colloquium and providing such a gracious foreword. The generous and insightful comments of colleagues who bring such commitment to these issues mean more than I can adequately express.

Few issues are more central to our legal system and more neglected in our legal policy debates than access to justice. The recent presidential campaign is a case in point. We heard endlessly about the problem of too much law: the frivolous litigation that is driving up the costs of malpractice insurance and medical care. We heard almost nothing about the opposite and far more pervasive problem of too little law: the public's inadequate assistance for crucial legal needs. It is a shameful irony that the nation with the most lawyers has among the least adequate systems for ensuring legal assistance. It is more shameful still that the inadequacies attract so little concern. This colloquium refocuses our attention on what is missing or marginal in our policy agenda. How can we ensure some reasonable access to justice for the vast majority of Americans of limited means who are now priced out of the legal system?

The strengths of the preceding essays speak for themselves, and I find little with which to disagree. The point of this brief response is simply to address certain core issues the symposium raises.

One central theme of *Access to Justice* is the disconnect between America's aspirational principles and actual practices. "Equal justice under law" is the ideal that we inscribe on courthouse doors. It comes nowhere close to describing what goes on inside them. Most Americans of limited means lack any access to the justice system, let alone equal access. Our current structure fails to meet an estimated four-fifths of the civil legal needs of the poor, as well as two to three-fifths of the needs of middle-income individuals.¹ Government aid budgets are capped at ludicrous levels, which make consistently

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1. See Deborah L. Rhode, *Access to Justice* 3 (2004).

effective assistance of counsel a statistical impossibility.² The doctrine governing effective assistance of counsel is a due process disaster. Courts have upheld convictions where lawyers were on drugs, asleep, or parking their cars during key parts of the prosecutors' cases.³

What accounts for this mismatch between our legal ideals and institutions? One obvious answer is resources. Money may not be the root of all evil in our justice system, but the lack of money is surely a critical contributor. Over the last two decades, national spending on legal aid has been cut by a third.⁴ The result is that fewer than 1% of American lawyers are in legal services practice, which works out to about one lawyer for every 1400 poor or near poor person, and a per capita annual expenditure for civil legal aid of only about \$2.25.⁵ For that amount, not much due process is available.

In criminal cases, although some defense lawyers provide exceptionally able representation, indigent defense systems are typically understaffed and underfunded. Many jurisdictions limit compensation to \$1000 for felony cases, which can work out to hourly rates below the minimum wage.⁶ Caseloads can run as high as 700 felonies a year, over four times the maximum prescribed by the National Legal Aid and Defender Association.⁷ For most indigent defense attorneys, adequate preparation is a quick route to financial ruin. Lawyers for poor defendants receive on average one-eighth of the resources per case available to prosecutors.⁸ Under these circumstances, courts cannot afford to be too choosy about the quality of representation that they find acceptable. As Lawrence Friedman puts it, "any old lawyer will do."⁹ Lawrence Marshall recounts chilling examples of the sort that *Access to Justice* also chronicles.¹⁰ Even in death penalty cases, judges have routinely appointed attorneys with histories of substance abuse, mental health difficulties, and disciplinary violations, and have failed to demand any experience or

2. *Id.*; see also Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 Emory L.J. 1169, 1179-84 (2003); Leonard Post, *Indigent Defense Services Blasted*, Nat'l L.J., July 12, 2004, at 1.

3. Rhode, *supra* note 1, at 4.

4. *See id.* at 3.

5. *Id.* at 4, 106.

6. *Id.* at 128; see also Vivian Berger, *Time for a Real Raise*, Nat'l L.J., Sept. 13, 2004, at 27.

7. Rhode, *supra* note 1, at 4, 126-27; Leonard Post, *Citing Low Pay, Lawyers Refuse Indigent Cases*, Nat'l L.J., Aug. 23, 2004, at 4 (discussing Louisiana caseloads).

8. Rhode, *supra* note 1, at 123.

9. Lawrence M. Friedman, *Access to Justice: Some Comments*, 73 Fordham L. Rev. 927, 927 (2004).

10. Lawrence C. Marshall, *Gideon's Paradox*, 73 Fordham L. Rev. 955, 956-59 (2004).

expertise in criminal law.¹¹ In this system, it is generally riskier to be poor and innocent than guilty and rich.¹²

Money is the root of other problems as well. The bar's desire to protect lawyers from nonlawyer competitors has encouraged prohibitions on unauthorized practice of law that are sweeping in scope and unsupportable in practice. The dominant approach is to prohibit lay provision of personalized legal services. Yet as is clear from the comparative research that Deborah Cantrell's essay and *Access to Justice* summarize, nonlawyer specialists are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest.¹³ Although the public has justifiable concerns about unqualified or unethical lay assistance, these abuses are not the only targets of unauthorized practice doctrine. And they could be more effectively addressed through more narrowly drawn prohibitions, and adequate licensing and enforcement structures governing nonlawyer providers.¹⁴ The primary obstacles to such reforms are lawyers, and their influence among elected legislators and judges.¹⁵

The bar's self-interest has also worked against other structural reforms that would reduce reliance on law and lawyers. Procedural simplification, court reforms, and subsidized assistance for unrepresented parties could make dispute resolution systems more fair and accessible to those of limited means. Yet all too often, the profession has been more the problem than the solution. In courts that handle housing, bankruptcy, small claims, and family matters, parties without lawyers are less the exception than the rule.¹⁶ But the

11. Rhode, *supra* note 1, at 140.

12. See *id.* at 122, 125, 138; see also Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1850-54 (1994).

13. See Rhode, *supra* note 1, at 89; see also Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work* 193-202 (1998); Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 Fordham L. Rev. 883, 884-91 (2004).

14. For examples of such proposals, see Rhode, *supra* note 1, at 90-91; Suzanne J. Schmitz, *What's the Harm?: Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*, 10 Wm. & Mary J. Women & L. 295, 312-17 (2004). For the need for better enforcement against incompetent and unethical assistance, see Milagros Cisneros, *H.B. 2659: Notorious Notaries—How Arizona is Curbing Notario Fraud in the Immigrant Community*, 32 Ariz. St. L.J. 287, 301-07 (2000), and Patrick McGreevy, *Los Angeles; 18 Charged in Sting Targeting Immigrant Fraud*, L.A. Times, May 14, 2003, at B3.

15. I have chronicled this opposition for well over a quarter century, beginning with the study launched while a student in Stephen Wizner's legal clinic. For discussion of that study, see Cantrell, *supra* note 13, at 885-86. For other bar campaigns, see Rhode, *supra* note 1, at 75-76, 87-88; Deborah L. Rhode, *In the Interests of Justice* 135-39 (2002) [hereinafter Rhode, *In the Interests of Justice*]; Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won't Go Away*, 34 Ariz. St. L.J. 585 (2002).

16. Rhode, *supra* note 1, at 14, 82.

systems in which these parties operate have been designed by and for lawyers, and too little effort has focused on making them accessible to the average claimant. All too often, as Norman Spaulding notes, campaigns for direct public access to law have been stifled or co-opted; participants have been forced to settle for slightly greater (but still inadequate) access to lawyers instead.¹⁷ Effective alternative models are in ample supply, but a majority of surveyed courts have no formal pro se assistance services, and many of the services that are available are inadequate, especially for those who need help most: uneducated litigants with limited competence and English language skills.¹⁸ Gary Blasi's essay, as well as my own book, provide telling examples of how ill-designed pro se assistance programs can fall short in improving actual outcomes.¹⁹

What blocks the path to effective reforms is not, of course, only money. Many strategies concerning unauthorized practice doctrine and court reforms that would improve the public's access to routine legal assistance would cost relatively little. Other reforms, such as increasing the budgets of criminal and civil legal aid, would serve the profession's self-interest by increasing jobs and compensation, promoting fair outcomes, and preempting calls for less palatable changes in the delivery of services. From the taxpayer's perspective, the price of these increased subsidies would be relatively small, compared with other legal expenditures.²⁰ Of the one hundred billion dollars we spend annually on law enforcement, only about 2-3% goes to indigent defense.²¹ Of our total legal expenditures, less than 1% goes to civil legal assistance.²² A modest increase in civil and criminal aid funding could help close the gap between ideals and institutions in our justice system.

What stands in the way is not so much money as ignorance and indifference. Professor Friedman puts it bluntly and all too accurately: On issues of access to justice, "the level of public . . . misinformation is simply appalling."²³ Four-fifths of Americans believe, incorrectly, that the poor are entitled to counsel in civil cases; only a third think that low-income individuals would have difficulty finding legal assistance, a perception wildly out of touch with reality.²⁴ Legal aid programs can address only about a fifth of the needs of

17. Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and The Right to Counsel*, 73 Fordham L. Rev. 983, 985 (2004).

18. Rhode, *supra* note 1, at 83; see also Sean Groom, *Courthouse Pro-Bono*, Wash. Lawyer, June 2004, at 21.

19. Rhode, *supra* note 1, at 119; Gary Blasi, *How Much Access? How Much Justice?*, 73 Fordham L. Rev. 865 (2004).

20. Rhode, *supra* note 1, at 123, 187; Friedman, *supra* note 9, at 932.

21. Rhode, *supra* note 1, at 123.

22. *Id.* at 106, 186.

23. Friedman, *supra* note 9, at 928.

24. Rhode, *supra* note 1, at 4.

eligible clients and often can offer only brief advice, not the full range of services necessary.²⁵ In some impoverished urban and rural areas, the situation is still worse, and waiting lists of two years for nonemergencies are common.²⁶ Entire categories of the “unworthy” poor, such as prisoners and undocumented immigrants, are ineligible for aid from government-funded programs and have nowhere else to go.²⁷ Such programs are also barred by statute from providing the kinds of legislative and organizing assistance that could be most effective in addressing the root cause of poverty, not just its legal symptoms.²⁸ As the essays by Professors Blasi and Hobbs note, representation of low-income communities is often most crucial in the legislative and political arenas where policies are established and resources are allocated.²⁹ Yet that is precisely the kind of representation that the public has been least willing to subsidize. And although the vast majority of Americans support civil legal assistance, they would rather see it come from volunteer attorneys than from government-funded organizations, and 40% favor only advice, not representation at trial.³⁰

When it comes to litigation in any context, the public generally wants less not more. Four-fifths of surveyed Americans also believe that lawyers file too many frivolous cases, a belief fostered by corporate campaigns that are long on folklore and short on facts.³¹ In the world that the insurance industry portrays, “fat cat” attorneys and avaricious plaintiffs are “living in the lap of luxury,” while bankrupting businesses, clogging the courts, and pricing insurance out of reach.³² Yet in the world that disinterested researchers document, the more serious problem is undercompensation, not overreaching. Studies of unsafe products, negligent medical care, and automobile and airline accidents find that the tort liability system reimburses only 4-6% of victims’ costs.³³

25. *Id.* at 13.

26. For example, the District of Columbia meets only 10% of the need. See Jonathan Smith, *Taking the Stand: Community in Need, Securing Equal Access to Justice*, Wash. Lawyer, May 2003, at 38. For the needs of rural poor, see Rhode, *supra* note 1, at 118; and Deborah L. Rhode, *Rural Justice, Retooled*, Equal Justice Magazine, Summer 2004, available at www.ejm.lsc.gov/EJMIssue6/ourview.htm.

27. Rhode, *supra* note 1, at 3-4, 13. The eligibility restrictions appear at 45 C.F.R. § 1611 (2003).

28. Rhode, *supra* note 1, at 13; see also 45 C.F.R. §§ 1610-1642.

29. Blasi, *supra* note 19, at 880-81; Steven H. Hobbs, *Shout from Taller Rooftops: A Response to Deborah L. Rhode’s Access to Justice*, 73 Fordham L. Rev. 935, 941 (2004).

30. Rhode, *supra* note 1, at 104; Beldon, Russonello & Stewart Research Assocs., National Survey on Civil Legal Aid (Apr. 2000) (unpublished report, on file with author).

31. Rhode, *supra* note 1, at 26.

32. See *id.* at 26-27.

33. *Id.* at 31.

That is not to suggest, as do most trial lawyers' campaigns, that the answer is more litigation as we know it. Rather, the inconsistencies, inefficiencies, and inequities of the current process call out for reform.³⁴ In many areas of tort law, between half to two-thirds of the recoveries paid by insurance companies are consumed by lawyers' fees and legal expenses.³⁵ Similar injuries yield dissimilar results, depending on the effectiveness of each sides' lawyers, the location of the lawsuit, and the defendant's assets.³⁶ The high cost of litigation prices modest claims out of the system entirely.³⁷ Many countries have developed more efficient dispute resolution processes, but as Professor Friedman notes, most Americans remain resolutely ignorant about alternatives and unwilling even to contemplate the possibility that other systems might be better.³⁸ Although four-fifths of the public agrees that our adversarial process is too slow and costly, the same proportion believe that it is the best in the world.³⁹

Conventional wisdom about the criminal justice system reflects similar levels of misinformation and complacency. About three-quarters of Americans think that too many defendants get off on "technicalities," a view reinforced by Hollywood dramas and celebrity trials.⁴⁰ But law in prime time is not law in real time. The attorneys for O.J. Simpson may have left no stone unturned, but they were charging by the stone, and the public was watching. In the unseen world of indigent defense, 90% of those accused plead guilty, typically without any significant time spent on their case.⁴¹ In Louisiana, for example, the average indigent defendant gets eleven minutes of attorney attention.⁴² Few Americans have any real appreciation of what passes for justice among the have nots, and fewer still seem to care. Less than half of those surveyed believe that defendants accused of murder should get a new trial if they had an incompetent attorney.⁴³

Even among lawyers, ignorance and indifference are all too common. Surveying the gap between the profession's principles and practices, Professor Pearce puts it bluntly: "[T]he organized bar . . . refuses to acknowledge" this truth openly.⁴⁴ The problem begins in law school. Issues involving access to justice are generally notable for

34. *Id.* at 31-37.

35. *Id.* at 34.

36. *Id.* at 36.

37. *Id.* at 34.

38. Friedman, *supra* note 9, at 930-31.

39. See Rhode, *supra* note 1, at 4, 32.

40. *Id.* at 124.

41. *Id.*

42. Post, *supra* note 2, at 21 (quoting David Carroll, Director of Research and Evaluation of the National Legal Aid and Defender Association).

43. Rhode, *supra* note 1, at 124.

44. Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 Fordham L. Rev. 969, 969 (2004).

their absence. The subject rarely arises in the core curriculum and receives surprisingly little coverage even in professional responsibility courses.⁴⁵ Less than 1% of surveyed students recall any attention to pro bono responsibilities in their legal ethics classes.⁴⁶ Few schools have a separate course on access to justice or ensure that most students have some experience providing legal aid to those who cannot afford it.⁴⁷ A majority of law students graduate without doing any pro bono legal work, and many of the governmental and nonprofit opportunities that are available do not address those who need help most.⁴⁸ Nor has legal education given priority to the kinds of transformative clinical and public service experiences that Anthony Alfieri, Steve Wizner, and Jane Aiken advocate, which integrate theory and practice and build commitments to social justice.⁴⁹

The lack of exposure continues in practice. As noted earlier, less than 1% of lawyers work for legal aid organizations, and few of the remainder contribute in other ways. The best available estimates indicate that lawyers' annual pro bono contributions average only half an hour a week and half a dollar a day, and little of that assistance goes to low-income clients.⁵⁰ Fewer than 10% of practitioners accept referrals from federally-funded legal aid offices or bar-sponsored, poverty-related programs.⁵¹ As long as chronically underserved groups remain out of sight and out of mind, they can be viewed as someone else's responsibility. Although the organized bar strongly supports increased public funding for legal services, it strongly opposes requirements of increased contributions from lawyers. Proposals for mandatory pro bono assistance have come and gone, but largely gone.⁵² The vast majority of attorneys resist any public service

45. Even the most casual scan of leading constitutional law, civil procedure, and professional responsibility casebooks suggests the gaps. There are, of course, exceptions in the legal ethics field, including not only Deborah L. Rhode & David Luban, *Legal Ethics* (4th ed. 2004), but also Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* (2d ed. 1994).

46. Rhode, *supra* note 1, at 192. The survey sampled some 3000 students from six different schools. It is excerpted in Chapter 7 of *Access to Justice*, *supra* note 1, and in Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. Legal Educ. 413 (2003). The full study appears in Deborah L. Rhode, *Public Service and the Professions: Pro Bono in Principle and in Practice* (forthcoming 2005) (manuscript on file with author) [hereinafter Rhode, *Public Service and the Professions*].

47. There is only one casebook on the subject. See Martha R. Mahoney et al., *Social Justice: Professionals, Communities, and Law* (2003).

48. Rhode, *supra* note 1, at 156-57; Rhode, *Public Service and the Professions*, *supra* note 46.

49. See Anthony V. Alfieri, *Teaching Ethics/Doing Justice*, 73 Fordham L. Rev. 851 (2004); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 Fordham L. Rev. 997 (2004).

50. Rhode, *supra* note 1, at 154; Rhode, *Public Service and the Professions*, *supra* note 46, at 25.

51. Rhode, *supra* note 1, at 154.

52. For the history, see Rhode, *supra* note 1, at 65-66, 152-53; and Rhode, *Public Service and the Professions*, *supra* note 46.

obligations, and only three states even require practitioners to report voluntary service.⁵³ In the face of such bar opposition, most elected state judges understandably have no interest in mandating service or equivalent financial contributions.

Nor has the judiciary been willing to intervene in other ways to insure a more equitable justice system. In 1956, in *Griffin v. Illinois*, 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."⁵⁴ Over the next half century, American courts repeatedly have witnessed the truth of that observation, and repeatedly have failed to address it. These failures have occurred along multiple dimensions. In civil cases, except in a few highly limited circumstances, courts have declined to require any legal assistance, let alone equal or adequate assistance. In the civil and criminal proceedings where courts have recognized a right to representation, they have failed to insure that it meets acceptable standards.

The extent of judicial tolerance is well illustrated by the jurisprudence that has developed to determine how much dozing is constitutionally permissible. As one judge famously put it: "[T]he Constitution says that everyone is entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake."⁵⁵ Other courts have agreed, and some have employed a detailed 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?⁵⁶ The irony in relying on the trial record to determine if crucial interests were jeopardized seems to be lost on many judges. How can the record be adequate if the lawyer responsible for making it was napping?

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 seldom been successful, and discipline for incompetent performance is rarer still.⁵⁷ Indeed, judges who face crushing caseloads often have been reluctant to encourage effective advocacy that would result in more time-

53. Rhode, *Public Service and the Professions*, *supra* note 46.

54. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

55. *McFarland v. State*, 928 S.W. 2d 482, 506 n.20 (Tex. Crim. App. 1996); Rhode, *supra* note 1, at 137; Bruce Shapiro, *Sleeping Lawyer Syndrome*, *The Nation*, Apr. 7, 1997, at 27-29 (quoting Judge Doug Shaver).

56. See, e.g., *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001), *cert. denied*, 535 U.S. 1120 (2002); *Tippins v. Walker*, 77 F.3d 682, 687-90 (2d Cir. 1996); *Burdine v. Texas*, 66 F. Supp. 2d 854, 863-64 (S.D. Tex. 1999).

57. Rhode, *supra* note 1, at 13, 131-32; Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 *Fordham L. Rev.* 1615, 1617-21 (2002); Green, *supra* note 2, at 1196.

consuming trials and pretrial matters. Some courts will even withhold appointments from lawyers who provide such advocacy.⁵⁸

In civil cases, few judges have taken the proactive role that Russell Pearce and Norman Spaulding have argued is necessary to prevent demonstrable injustice.⁵⁹ In a society that allocates legal assistance primarily by market methods and allows vast disparities in wealth, equal access to justice is an unrealistic aspiration.⁶⁰ But adequate access to justice is an attainable goal, as is judicial intervention to promote more equitable results. Many countries with fewer resources have more generous systems of legal aid, more accessible systems of dispute resolution, and more active roles for courts in promoting procedural fairness.⁶¹ The gross inequalities that the American justice system tolerates are an embarrassment to a country that considers its legal system a model for the rest of the world.

It is equally shameful that my own wing of the profession has shown similar indifference. Present company of course excepted, most legal academics have done little to educate themselves, the profession, or the public about access to justice and the strategies necessary to increase it. To borrow Steven Hobbs' apt phrase, we are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews.⁶² We have made almost no attempts to provide the research that Professor Blasi notes is essential to assess potential reform efforts.⁶³ As *Access to Justice* similarly observes, we know far too little about the performance of programs for the delivery of legal aid and pro bono services: the satisfaction of clients, the quality of assistance, and the impact on parties and their communities.⁶⁴ We have also failed to institutionalize the kinds of exemplary interdisciplinary collaboration and partnerships with community organizations that Professor Alfieri leads at the University of Miami's Center on Ethics and Public Service.⁶⁵ As legal academics, we have unique opportunities to

58. See Rhode, *supra* note 1, at 128; see also Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. Tex. L. Rev. 595, 622, 641 (2001); Green, *supra* note 2, at 1196-99; Marshall, *supra* note 10, at 956-57.

59. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999); Pearce, *supra* note 44; Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 Geo. J. Legal Ethics 423 (2004).

60. Rhode, *supra* note 1, at 5-7.

61. See *id.* at 7, 112, 117; Rhode & Luban, *supra* note 45, at 164-73.

62. Hobbs, *supra* note 29, at 951.

63. Blasi, *supra* note 19, at 866.

64. Rhode, *supra* note 1, at 120-21.

65. Alfieri, *supra* note 49, at 860-62.

improve the system in which we work. Our curricular, research, and service priorities should reflect as much.

Access to Justice begins with a historical overview and concludes with an ambitious “roadmap for reform.”⁶⁶ In assessing the proposed reforms, Professor Friedman finds it “hard to resist a certain amount of pessimism.”⁶⁷ The injustices that the book chronicles are deeply rooted in American culture, as are the obstacles to addressing them. Yet despite the ignorance, indifference, and self-interest that work against progressive change, the history of social justice campaigns offers grounds for at least cautious optimism. In 1919, when Reginald Heber Smith published his classic account of *Justice and the Poor*, criminal defendants had no right to counsel, and the entire nation had only sixty full-time legal aid attorneys, with a combined budget of less than \$200,000.⁶⁸ The bar had no organized pro bono programs, law schools had no clinics, and the profession had no concept of public interest law. To paraphrase Martin Luther King, we aren’t where we need to be, we aren’t where we should be, we aren’t where we hope to be, but at least we aren’t where we were.⁶⁹

Moreover, some powerful forces can be marshaled in support of further reform. The most obvious is public discontent with law and lawyering. At last count, Google recorded some 800,000 legal humor websites, and their frequently unflattering content underscores a widespread desire for change.⁷⁰ The public sees too much law for those who can afford it, and too little for everyone else. In civil matters, Americans are frustrated by the expense of litigation and the barriers to self-representation. And at least some aspects of the criminal process also cause concern. Fewer than half of surveyed Americans believe that the legal system treats all racial and ethnic groups the same, and part of the reason for the difference is the inadequate legal assistance available to low-income minority defendants.⁷¹

So too, as Professor Marshall’s experience with the Innocence Project demonstrates, when poor lawyering leads to demonstrably erroneous convictions, the public and their political leaders can be moved to act. These cases evoke concern not only for the innocent defendants who are imprisoned, but also for the guilty who remain free and who may commit further offenses. The argument for greater resources for indigent defense can thus be cast as an argument for a

66. See Rhode, *supra* note 1, at 47-48, 185-94.

67. Friedman, *supra* note 9, at 932.

68. Rhode, *supra* note 1, at 22.

69. Rev. Martin Luther King, Jr., Remarks at the American Jewish Committee 58th Annual Meeting (May 20, 1965), available at <http://www.ajc.org/InTheMedia/Publications.asp?did=403&pid=930> (last visited Nov. 15, 2003).

70. Rhode, *supra* note 1, at 194.

71. *Id.* at 123; ABA, Perceptions of the U.S. Justice System 65 (2000).

more accurate criminal justice process. The case can also be made in purely economic terms. As Professor Marshall's essay notes, wrongful convictions are staggeringly expensive; the price includes not just the costs of incarceration, but also multiple trials and appeals, and sometimes civil damages for the innocent defendants.⁷² An investment in lawyering that could prevent such errors seems well worth the expenditure. Illinois is a case history in which such arguments proved at least partially successful. A well-publicized series of death row exonerations led not only to a moratorium on capital sentences but also to other safeguards including higher standards for lawyers in death penalty cases.⁷³ That experience could serve as a model for similar initiatives elsewhere.

Forces within the bar can also lay foundations for broader reforms. When asked about major issues facing the profession, lawyers consistently put public image and credibility at the top of the list.⁷⁴ One of the best ways to improve that image, according to popular opinion surveys, is for attorneys to help increase the affordability and accessibility of legal services.⁷⁵ Many judges are also concerned about public credibility, and would like to improve courts' capacity to cope with unrepresented or inadequately represented parties.⁷⁶ Such concerns have encouraged the creation of task forces or other official bodies focusing on access to justice in about three quarters of the states.⁷⁷

So too, many individual lawyers have much to gain, personally and professionally, from greater involvement with issues of social justice. Public interest and pro bono service can enhance skills, contacts, reputation, and psychological well-being.⁷⁸ Too few lawyers now have adequate opportunities for such work. In my own national study of some 3000 lawyers, fewer than half of those responding were satisfied with the amount of time that they were able to spend on pro bono activities.⁷⁹ Bar association surveys also consistently find that lawyers'

72. Marshall, *supra* note 10, at 957-59; see also Rhode, *supra* note 1, at 141.

73. See Rhode, *supra* note 1, at 141; Marshall *supra* note 10, at 958-59.

74. Rhode, *In the Interests of Justice*, *supra* note 15, at 5.

75. In one representative survey, which asked what would improve the image of lawyers, the response most often chosen was their provision of free legal services to the needy. Peter D. Hart Research Assocs., *A Survey of Attitudes Nationwide Toward Lawyers and the Legal System* 29 (1993); Rhode, *supra* note 1, at 147. For public concern about the expense of law and lawyers, see *supra* note 6 and accompanying text, and *In the Interests of Justice*, *supra* note 15, at 3-5.

76. See Charles L. Owen et al., *Access to Justice: Meeting the Needs of Self-Represented Litigants* 3-19 (2002); Rhode, *supra* note 1, at 85-86.

77. ABA & Nat'l Legal Aid and Defender Ass'n, *Supporting Partnerships to Expand Access to Justice: Twelve Lessons from Successful State Access to Justice Efforts* (2003); Rhode, *supra* note 1, at 194.

78. Rhode, *supra* note 1, at 147, 164; Rhode, *Public Service and the Professions*, *supra* note 46, at 252-54.

79. Rhode, *supra* note 1, at 170; Rhode, *Public Service and the Professions*, *supra* note 46, at 266-67.

greatest source of dissatisfaction with practice is their "lack of connection to the social good."⁸⁰ Involvement in public service is a way to reestablish that link.

Of course, neither lawyers nor the public speak with one voice on the necessary directions for reform. Nor do they agree on key definitional issues: What counts as pro bono? What do we mean by justice? How much access is necessary? How can we best achieve it? One of the most critical questions is, as Professor Blasi notes, whether we should be primarily concerned with parties' subjective perceptions of fairness, or alternatively, with more objective measures of outcome?⁸¹ My own view, set forth at greater length in *Access to Justice*, is that both the fact and appearance of fairness matter. That position seems consistent with other commentary here, but we need not reach consensus on all these conceptual issues in order to make substantial progress. Americans generally agree on certain core principles that can serve as benchmarks for progress:

Individuals should have access to legal services and dispute resolution processes that are fair, efficient, and affordable.

Individuals who need, but cannot realistically pay the full price of assistance should be eligible for competent aid.

Individuals should have well-designed opportunities to address their legal needs themselves, and should have access to services that would make self help effective.⁸²

To bring us closer to these goals, *Access to Justice* and the commentary that it has inspired here emphasize reforms on three levels: resources, structure, and accountability.

First, we need to spend more, and more wisely, on both civil and criminal legal assistance. Our current allocations for legal aid are a sixth to a fifteenth of the budgets of other countries with similar legal systems.⁸³ For a nation that will soon be paying more than \$200 billion to safeguard the rule of law in Iraq, a modest increase in support of the rule of law at home should not be unthinkable.⁸⁴ That increase could enable government-subsidized programs both to assist a broader group of individuals, and to provide more effective representation for those eligible for assistance. Sweeping restrictions could be lifted on the kinds of cases and types of representation that qualify for government funding. Many European and British Commonwealth countries have systems that could serve as models for

80. ABA Young Lawyers Div., Career Satisfaction Survey 28 (2000); ABA Young Lawyers Div., Career Satisfaction Survey 11 (1995); Rhode, *supra* note 1, at 147.

81. Blasi, *supra* note 19, at 870-79; *see also* Rhode, *supra* note 1, at 6.

82. Rhode, *supra* note 1, at 185.

83. *Id.* at 112, 186.

84. *See, e.g.*, Paul Krugman, *Checking the Facts, in Advance*, N.Y. Times, Oct. 12, 2004, at A6.

reform.⁸⁵ Typically, they allocate aid on a sliding scale so that individuals of limited means can receive at least partially subsidized services. Rather than excluding broad categories of unpopular clients, other countries focus on the merits of the claim. Does the individual have a reasonable probability of success? What would be the likely benefits of providing aid and the harms of withholding it? Similar tests could be adapted for civil matters in this country. The advantage of such expanded coverage is that it would meet crucial needs that are now priced out of the system. It would also attract broader support than the current program, which serves only the most economically disadvantaged and politically powerless communities.

In criminal cases, all jurisdictions should aim for what bar commissions recommend: a rough parity of resources between defense and prosecution.⁸⁶ Statutory fees should be set at rates that permit adequate preparation, and caseloads should not exceed bar guidelines for competent representation. Financial support for this expansion in both criminal and civil legal aid could come through more politically acceptable measures than a general tax increase, such as a targeted tax on law firm revenues or an increased surcharge on court filing fees for cases over a certain financial level.⁸⁷

Additional support could also come from lawyers' pro bono services. One obvious strategy is for courts or bar associations to require some modest contribution to legal aid or public interest programs. Resistance to such requirements might be reduced by providing a broad array of service opportunities, along with training and back-up assistance, and by allowing financial contributions as a substitute for time. Even if skeptics are correct that rules mandating pro bono work would be difficult to enforce, the benefits might still be substantial. At the very least, these requirements would support the many lawyers who would like more pro bono involvement, but who are in workplaces that fail to provide adequate resources or credit for such work. A less controversial alternative would be to require reporting of the contributions that lawyers and legal employers make to legal aid and public interest causes. Experience to date indicates that such reporting rules have led to modest increases in the resources available to poverty law organizations.⁸⁸ Further improvements might result if contribution rates were widely publicized, and if clients,

85. Christine Parker, *Just Lawyers: Regulation and Access to Justice* 33-35 (1999); Rhode, *supra* note 1, at 104, 187; Gary Bellow, *Legal Services in Comparative Perspective*, 5 Md. J. Contemp. Legal Issues 371, 375-76 (1994); Deborah L. Rhode, *In the Interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession*, 56 Current Legal Probs. 93, 108 (2003).

86. Rhode, *supra* note 1, at 142, 187.

87. *Id.* at 188; Blasi, *supra* note 19, at 880-81.

88. Rhode, *supra* note 1, at 179; Rhode, *Public Service and the Professions*, *supra* note 46, at 301.

colleagues, and job candidates began paying more visible attention to employers' pro bono records.

Even without changes in formal rules governing pro bono work, legal employers and legal educators can do more to encourage charitable commitments. They can impose their own service requirements, and provide greater resources, rewards, and recognition for pro bono service. They can also enlist more lawyers in the policy-oriented activities that Professors Blasi and Hobbs emphasize. As Martha Davis notes, further efforts should be made to ensure that lawyers and law students have the kind of public service experiences that are likely to build empathy and strengthen commitments to social justice.⁸⁹ That, in turn, may require administrators of law school and bar pro bono programs to ensure increased opportunities for effective training, guided reflection, and appropriate placements.

A second cluster of strategies should focus on structural changes that would improve the functioning of dispute resolution processes and the delivery of legal services. Access to law is not an end in itself; the goal is justice, and formal proceedings or representation by lawyers is not always the most effective way of addressing legal concerns. Most individuals prefer to resolve law-related problems directly outside of court, so one objective of reform should be to promote more equitable dispute resolution processes in workplaces, businesses, and other organizational settings.⁹⁰

Civil courts should also redesign their own processes to reduce costs and increase accessibility. The legal system as traditionally structured is not an effective way of solving many disputes that involve modest stakes or that reflect broader social problems. In most states, small claims courts are too limited in jurisdiction, hours, location, and enforcement power, and assistance for self-represented litigants in these and other proceedings is inadequate at best.⁹¹ The tort system is inconsistent and inefficient; relatively few accident victims can afford it, and 50-60% of the payouts by defendant insurance companies end up compensating lawyers.⁹² In other contexts, particularly those involving families and petty offenses, overburdened trial courts lack the time, resources, and remedial options to address the underlying problems.⁹³

89. Martha F. Davis, *Access and Justice: The Transformative Potential of Pro Bono Work*, 73 *Fordham L. Rev.* 903, 922-24 (2004).

90. Rhode, *supra* note 1, at 86-87; Michael Zander, *The State of Justice* 28-32 (2000).

91. Rhode, *supra* note 1, at 84.

92. *See supra* notes 33-34 and accompanying text.

93. Rhode, *supra* note 1, at 85; Tery Carter, *Red Hook Experiment*, ABA J., June 2004, at 37; *see also* Leonard Post, *Courts Mix Justice with Social Work*, Nat'l L.J., June 7, 2004, at A1.

Alternative models are readily available. A growing number of judicial systems offer more accessible and equitable processes that should be widely available. Such innovations include:

- online or automated document preparation services;
- personalized multilingual help for pro se litigants;
- simplified forms and procedures;
- evening hours and community sites for hearings and legal assistance;
- expanded jurisdiction for small claims courts;
- specialized no-fault compensation systems in areas like medical malpractice and automobile accidents; and
- collaborative problem-solving tribunals that partner with other social service providers.⁹⁴

Analogous reforms are necessary for the delivery of legal services. In essence, Americans need a wider range of choices in law-related assistance and better regulation of the choices that are available. Less protection should be available for the professional monopoly and more for individual consumers. Sweeping prohibitions on the unauthorized practice of law should be replaced with appropriate ethical standards and regulatory structures for lay providers. The level of oversight should depend on nonlawyer specialists' ability to provide adequate assistance, the seriousness of harm if they do not, and the public's ability to assess providers' qualifications and remedy any deficiencies in their performance.⁹⁵

A final set of strategies should focus on increasing the accountability of the legal profession and the legal process. More oversight is essential both for individual lawyers and for the systems that structure their services. Courts and bar disciplinary agencies should impose more frequent and significant sanctions for frivolous claims and incompetent representation. Standards governing ineffective assistance of counsel in criminal cases also must be strengthened. Defendants should not have to prove their innocence in order to obtain remedies if their lawyers are drunk, dozing, or demonstrably ignorant of the relevant law or facts. It should be enough to establish the likelihood that minimally competent representation would have yielded a significantly better result. Alternatively, as Professor Marshall suggests, if a defendant establishes incompetence, the burden should shift to the state to prove that the outcome would have been the same.⁹⁶

94. See Carter, *supra* note 93; Post, *supra* note 93.

95. Rhode, *supra* note 1, at 90-91.

96. Marshall, *supra* note 10, at 962; see also Rhode, *supra* note 1, at 135-36.

Courts and legislatures must also assume greater responsibility to ensure effective systems for funding and regulating legal services for the poor. In civil cases, courts should be more willing to appoint counsel where fundamental rights and substantial due process concerns are at issue. The judiciary should also be more willing to intervene to protect inadequately represented parties and to strike down restrictions on government-subsidized services. In criminal cases, courts should require appropriate compensation, resources, and caseload limitations for indigent defense lawyers, as well as an independent oversight body to monitor their appointment and performance. This body should insure that counsel are qualified, that their representation meets minimum standards, and that judges do not use their appointment power to punish zealous advocates.

Government funding programs, bar associations, legal service providers, and academic researchers should also join forces in compiling better information on access to justice. We need to know more about the effectiveness of specific strategies involving indigent representation, self-help assistance, alternative dispute resolution, pro bono programs, and related initiatives. Better data are necessary concerning objective outcomes, client experiences, and community impact. Only through more comprehensive evaluation can policy makers develop appropriate resource priorities and reform agendas. The urgency of reform must, in turn, be better communicated to the general public. Bar associations can partner with other organizations to raise the visibility of unmet needs and to promote the necessary responses. The Virginia Indigent Defense Coalition and the blue ribbon National Committee on the Right to Counsel are recent examples of how to direct more attention and resources to chronically underfunded causes.⁹⁷

Finally, law schools should more actively promote access to justice through research, teaching, and pro bono programs. Legal education plays an important role in socializing the next generation of lawyers, judges, scholars, and public policy makers to care about this issue and to carry on where current efforts fall short. Stephen Wizner and Jane Aiken remind us of the importance of that responsibility,⁹⁸ and my own experience offers an example of how it can matter. I was a student in one of Professor Wizner's clinics. It kept me in law school.

97. See, e.g., Penny J. White, *Mourning and Celebrating Gideon's Fortieth*, 72 UMKC L. Rev. 515, 542 (2003). For information on the Virginia Indigent Defense Coalition, see Va. Indigent Def. Coalition, *A System in Crisis: Indigent Defense in Virginia*, at <http://www.vidcoalition.org/crisis.html> (last visited Oct. 30, 2004), and on the National Committee on the Right to Counsel's Criminal Justice Reform Federation Fund, see Press Release, Nat'l Comm. on the Right to Counsel, National Committee on the Right to Counsel to Examine System of Legal Representation for People Who Cannot Afford it (June 22, 2004), at http://www.constitutionproject.org/rc/launch_release.doc.

98. See Wizner & Aiken, *supra* note 49.

Although I took the course some thirty years ago, I can still recall one pivotal moment. My first client, the mother of an ailing infant, was sick, out of work, and late in her rent. At the request of the landlord, the local utility company had turned off her heat and water. During bitter New England winters, this was a frequently successful means of forcing a tenant's immediate payment or departure. It was also clearly illegal. With some effort I finally managed to locate the utility company employee responsible. He professed total ignorance of the statutory prohibition. Even to a naive first-year law student, that seemed highly implausible, particularly since the legal aid office where I was working had repeatedly complained to the company under similar circumstances. With barely repressed rage, I read him the relevant statute, described the infant's illness, and warned that if the tenant's utilities were not turned on by the morning, I would spend my next two and half years in law school figuring out how to make him pay. How, exactly, I had no idea. Presumably, neither did he, but he must have concluded that he had a loony law student on his hands who just might try it. The next morning, my client had heat. I experienced the power of the law.

I also experienced its limitations. Heat and water were a very small part of what this woman needed, and our office was too understaffed to untangle her other legal problems, let alone address the broader social conditions that underpinned them. But the case gave me a sense of what lawyers can do to promote justice at the individual and policy level, and confirmed my decision to go to law school. As gatekeepers to the profession, legal educators have a unique opportunity and obligation to continue conveying these messages. I am grateful to the editors and participants in this colloquium for their contribution to that mission.

Notes & Observations