

RETHINKING ACCESS TO JUSTICE

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I would like to begin by providing an overview of access to justice in the United States today. I will then describe what I regard as the two greatest challenges facing the access to justice movement and conclude by offering some suggestions for addressing those challenges.

The need for legal services for low-income Americans now stands at an all-time high. Approximately 65 million people – 21 percent of the population – are financially eligible for assistance at legal aid programs funded by the Legal Services Corporation. That is a 30 percent increase over 2007, the last year before the recession began.

But funding for legal aid has remained stagnant in absolute dollars since 2007 and has declined in inflation-adjusted dollars. The best measure of funding over time is inflation-adjusted dollars spent per eligible person, and by that measure, LSC funding is today at an all-time low. State funding varies widely across the country, and many alternative sources of revenue, such as foundation grants, have significant limitations on their use.

As a result of record-high demand for services and low funding, we are not seeing, at least on a national basis, any improvement in access to justice, despite the hard work of Access to Justice Commissions in more than 30 states. Studies consistently show that only 20 percent of the civil legal needs of low-income people are met, and state courts across the country are today overwhelmed with unrepresented litigants.

How can this be? The United States is looked to internationally as a model of the rule of law. The concept of access to justice is deeply embedded in our national values. As Justice Lewis Powell noted, “Equal justice under law is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. . . . [I]t is fundamental that justice should be the same, in substance and availability, without regard to economic status. “This value is captured in the closing words of the Pledge of Allegiance and in the very first line of the Constitution: “We the people of the United States, in order to form a more perfect union, establish justice” The framers cited establishing justice as their goal even before they mentioned providing for the common defense or ensuring domestic tranquility. I don’t think their ordering was an accident. They recognized that a well-functioning, accessible system of justice is essential to societal stability. It’s about the rule of law. You won’t long have a nation to defend, or worth defending, without it. This is what the great Judge Learned Hand meant when he said in addressing the Legal Aid Society of New York in 1951, “If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”

The disparity between the current state of access to justice in the United States and our national values provides an opportunity for us to step back, take stock, and rethink access to justice. In doing so, we should be mindful of what Esther Lardent, the President of the Pro Bono Institute, recently called “the three enemies of effective movements”: orthodoxy, insularity, and complacency. Orthodoxy, according to Esther, is assuming that there is only one true path or approach to an issue. Insularity is an inward focus and a lack of engagement with those outside the movement. And complacency is the inability or unwillingness to evaluate one’s performance objectively.

With that perspective in mind, I would identify what I think are the two greatest challenges facing the access to justice movement today.

The first is the invisibility of the issue – the widespread ignorance of the magnitude of the justice gap in the United States. The second is a service-delivery model that leaves too many people with no assistance of any kind.

The invisibility of the issue explains, to a significant extent, the disconnect between our professed national value of “justice for all” and funding for civil legal aid. Ignorance of the crisis in access to justice is prevalent among the public, the legal profession (at least with regard to the magnitude of the problem), private philanthropy, and legislators.

Among the public, research has shown a widespread misperception that there is a right to counsel in civil cases. I have my own theory for why this is so. I think most Americans get their understanding of the legal system from television shows. Most television shows about law deal with the criminal justice system. I think many Americans could give you a reasonable approximation of a *Miranda* warning – including the part about having a right to a lawyer and one being appointed to represent you if you cannot afford to pay – with no understanding that *Miranda* rights have no application in a civil case. Most Americans don’t understand the difference between a civil case and a criminal one. Why should they? That’s lawyer stuff.

Within the legal profession, a significant percentage of lawyers are unfamiliar with the size of the justice gap. They do not know the numbers. They do not know that the size of the population eligible for LSC-funded legal aid is at an all-time high or that LSC funding per eligible person is, in inflation-adjusted dollars, at an all-time low. They do not know that last year, 2.3 million people appeared in the state courts of New York without a lawyer, that 98 percent of tenants in eviction cases in New York had no lawyer, that 95 percent of parents in child support cases had no lawyer, and that comparable numbers can be found in courts across the United States.

Private philanthropy, too, is largely unaware of the problem. And to the extent that some foundations are aware of it, they often regard the problem as the unique responsibility of the legal profession, or they regard funding for civil legal aid as being outside the scope of their designated priorities.

Legislators often regard civil legal aid as just another discretionary spending program, a poverty program, that must be reduced because of budget pressures. They do not see the connection between

the values we espouse as a nation and the need for adequately funded civil legal aid. As Justice Jess Dickinson of the Mississippi Supreme Court has said, “We have the moral authority to stop begging and start demanding.”

If we are going to confront and dispel ignorance of the crisis in access to justice, we need to rethink our approach to the issue. We need to ask: To whom do we speak? Who does the talking? And what do we say?

We need to start by speaking to people outside the access-to-justice community. We need to stop talking to ourselves and persuading the already convinced. We need to get before new audiences, particularly of opinion makers and opinion leaders, to present the stark facts and make our case. This is not easy. Because of the invisibility of the issue, it can be difficult to get invitations to speak to the audiences we should most want to reach. But we need to try, and to enlist intermediaries with connections in the effort.

We also need to find people outside the legal aid world to make our case for us. We need new messengers to reach those new audiences. In recent years, judges, and particularly the Chief Justices of a number of state supreme courts, have emerged as very effective advocates for civil legal aid. Your own Chief Justice, Mark Recktenwald, is prominent among them. When judges address the issue, they bring the prestige of their positions, their familiarity with the realities of the justice system today, and their neutrality to the discussion. They present the issue as a nonpartisan one. We need to enlist other, non-traditional advocates for the cause, such as corporate general counsel, chief executive officers, and those foundation leaders who understand the issue and fund legal aid.

And we need to make our case in terms that those outside our world can understand, tailoring the message to the particular audience. We need to start with fundamental American values – particularly the importance of fairness in our justice system, a value that recent research shows resonates deeply with the public. We need to illustrate our case with compelling stories, and to make the business case for legal aid. We need to link legal aid to other client needs so that we are not regarded as foreign. This is the brilliance of medical-legal partnerships, which team doctors and lawyers to provide holistic service to patients whose medical problems can be addressed with legal remedies.

There is good news in the quest to raise the visibility of the need for civil legal aid. Voices for Civil Justice, voicesforciviljustice.org, is a new organization devoted to expanding public awareness of the importance of civil legal aid in helping people protect their livelihoods, their health, and their families. It is funded by the Public Welfare Foundation and the Kresge Foundation, and its mission is to increase media coverage of legal aid. It is headed by Martha Bergmark, a former president of the Legal Services Corporation and the founder of the Mississippi Center for Justice.

I turn now to the second major challenge facing the access to justice movement: a service-delivery model that leaves 80 percent of the legal needs of low-income Americans unmet and turns away half or more of the people who actively seek legal aid. Accepting that status quo as the inevitable result of inadequate funding is complacency. We have to do better.

In light of the realities we face, we need to rethink the goal of the access to justice movement. Is it to provide full representation for every client in every case? That is not realistic, and pursuing that goal at the expense of other alternatives is letting the perfect be the enemy of the good. The fact is that some assistance is better than no assistance.

Late last year, the Legal Services Corporation released a report addressing this issue. <http://lsc.gov/media/in-the-spotlight/report-summit-use-technology-expand-access-justice> The report was the result of a summit that LSC convened “to explore the potential of technology to move the United States toward providing *some form of effective assistance to 100 percent* of persons otherwise unable to afford an attorney for dealing with essential civil legal needs.” Although the report focused on the use of technology, it urged a broad rethinking of the traditional service-delivery model. It recommended the creation of a statewide portal in every state, encompassing all legal services providers in each state, as a universal point of entry to the legal aid system. The portal would employ an automated “triage” system to identify the most appropriate and feasible level of assistance for the matter at issue, taking into account such factors as the sophistication of the client, the nature of the matter, what is at stake, whether the other party is represented, and what resources are available.

The triage assessment will result in full representation for some people and limited representation for others. Some people will be referred to a court-based resource center. Some will be referred to on-line self-help resources, including document-assembly applications. *No one will get nothing*, which is what happens all too often today.

The effectiveness of the triage system in allocating resources will require good historical data. What has been effective in the past? What hasn't? What have past outcomes been with different treatment options? We do not currently have good national or even state-wide data on these questions. The legal aid world can be resistant to data collection and analysis, for understandable reasons: data collection and analysis requires resources and skills that many legal aid programs lack. But I believe the results will justify any needed investment and lead to better management and better client service.

The Legal Aid Society of Cleveland tracks outcomes and uses data to guide resource-allocation decisions. For example, they correlated the results they had achieved in foreclosure cases with the income levels of their clients. They saw that when the client's income was below 75 percent of the federal poverty guideline, they were always unsuccessful in averting foreclosure. That is not surprising, if you think about it; clients at that very low level of income simply did not have enough money to be able to make payments on a restructured mortgage. As a result, the Legal Aid Society of Cleveland decided not to take any more foreclosure cases for people whose incomes were below 75 percent of the poverty guideline. That might strike you as harsh. But I would argue that it was a prudent decision to focus limited resources where they could make a difference.

We need to upgrade the business capacities of legal aid providers. In some places, in-kind pro bono assistance is available from consulting and accounting firms. The Legal Aid Foundation of Metropolitan Chicago, for example, was able to obtain pro bono consulting services to undertake a

thorough analysis of its intake processes, resulting in significant improvements in efficiency. We should try to enlist the assistance of corporate legal departments, which face many issues analogous to those that legal aid offices face, in these efforts.

Rethinking the service delivery model might be viewed as too hard and as a distraction from the core function of client service. But I believe the undertaking is completely consistent with the goal of client service. When we leave 80 percent of the legal needs of low-income people unmet, when we turn away half or more of those who seek out service, we have to do something differently.

I offer one final thought on rethinking access to justice: We need to rethink the scope of the access-to-justice mission. The mission must encompass simplifying the legal system – a system that was designed largely by lawyers for lawyers and does not work well for those who do not have a lawyer. The system need not be nearly as complicated as it is. We must also expand the role of non-lawyer professionals in the way the medical profession has deployed paraprofessionals to speed and improve patient care. The consequences of being without a lawyer do not have to be as dire as they are today. It may be contrary to the economic self-interest of some lawyers to simplify the system and open it to non-lawyers, but so be it. Access to justice should never be driven by lawyers' self-interest.

In confronting the challenges I have outlined, we have one enormous asset – legal aid lawyers. Legal aid lawyers as a group are the lowest paid in the profession. They labor day in and day out with crushing caseloads, with the emotional burden of their clients' circumstances, with the heartbreak of knowing how many people they are unable to help, and with the personal financial insecurity that comes with precarious funding. But they do it with resilience and a professionalism and a passion and a commitment to their clients that is absolutely remarkable. They are making America's promise of justice, reflected in the first line of our Constitution and the closing words of the Pledge of Allegiance, real for thousands of people. I think they are heroes. I thank them for all they do to serve the highest ideals of our profession and of our nation. I commit to them and to you to do everything I can to justify their faith in equal justice.