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Equal Justice Under Law: Connecting Principle to Practice

Deborah L. Rhode*

“Equal justice under law” is what America proclaims on its courthouse doors. What goes on inside them, however, looks entirely different. It is a shameful irony that our nation, which has the world’s greatest concentration of lawyers, has one of the least adequate systems for legal assistance. It is even more shameful that these inadequacies attract so little concern.

The facts speak for themselves. An estimated four-fifths of the legal needs of the poor, and the needs of two- to three-fifths of middle-income individuals, remain unmet.¹ Only one lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income

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1. For an earlier and more extended discussion of the issues presented in this paper, see Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001). For unmet needs of the poor, see LEGAL SERVICES CORPORATION, *SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, A SPECIAL REPORT TO CONGRESS* (2000); 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); LEGAL SERVICES PROJECT, *FUNDING CIVIL LEGAL SERVICES FOR THE POOR: REPORT TO THE CHIEF JUDGE* 5 (1999); David C. Levin, *Justice for the Forgotten and Despised*, 6 *TOURO L. REV.* 1, 6-7 (1999); *Access to Justice Development Campaign 2000: The Case for Support*, 79 *MICH. B.J.* 370 (2000); FLORIDA BAR, *ACCESS TO THE LEGAL SYSTEM* (1999); OR. STATE BAR REPORT, *THE STATE OF ACCESS TO JUSTICE IN OREGON* (2000); 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). For 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); Roy W. Reese and Carolyn A. Elred, American Bar Association, *Legal Needs Among Low-Income and Moderate Income Households: Summary of Findings for the Comprehensive Legal Needs Study* (1994); see also ACCESS TO JUSTICE WORKING GROUP, *AND JUSTICE FOR ALL: REPORT TO THE STATE BAR OF CALIFORNIA* 4-6 (1996) [hereinafter “AND JUSTICE FOR ALL”] (estimating that three-quarters of the needs of poor Californians are unmet).

Americans.² Over the last two decades, national spending on legal assistance has been cut by a third, and increasing restrictions have been placed on the cases and clients that government-funded programs can accept.³ Entire categories of the “unworthy poor” have been denied assistance.⁴ Courts have largely acquiesced in these denials, as well as in ludicrously limited fees for court-appointed lawyers.⁵ The legal doctrine governing the effective assistance of counsel and the access to non-lawyer services is a conceptual embarrassment. The price is paid in untold misery—in loss of liberty, livelihood, and occasionally even life. Yet, neither the public nor the profession has been moved to respond in any significant fashion.

This essay chronicles our abandoned aspirations. It begins with a candid confrontation of our failures: our unwillingness to take equal justice seriously at a theoretical, political, doctrinal, or professional level. It concludes with a challenge to do better.

I. FAILURES OF THEORY

In principle, “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.” In most discussions, “equal justice” implies an equal access to the justice system.⁶ The underlying assumption is that social justice is available through procedural justice. Yet, as is frequently noted, equal access to the justice system is a dubious proposition.⁷ Those who receive their “day in court” do not always feel that “justice has been done,” and with reason. Money often matters more than merits, in all the ways that Marc Galanter described in his classic article on “Why the

2. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, CAL. L. REV. (forthcoming 2003).

3. See *infra* notes 30 and 33.

4. *Id.*

5. See *infra* notes 30, 33, 40, and 41.

6. See Geoffrey Hazard, Jr., *After Legal Aid Is Abolished*, 2 J. INST. STUD. LEG. ETH. 375, 386 (1999); Stephen Pepper, *Access to What?*, 2 J. INST. STUD. LEG. ETH. 269, 272 (1999); Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981).

7. DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 148 (2002).

‘Haves’ Come Out Ahead.’⁸ Substantive rights and procedural obstacles can be skewed, and given the post-judgment power relations among the parties, even those who win in court can lose in life.

These difficulties are seldom acknowledged in bar discussions of access to justice, which assume that more access is better, and the trick is how to best achieve it. Even from a purely procedural standpoint, however, these discussions leave a host of conceptual complexities unaddressed. Does meaningful access to law also require access to lawyers, and if so, how much is enough? For what, from whom, and for whom is access to justice required? Should government support go only to the officially poor, or to all those who cannot realistically afford lawyers? Could well-trained non-lawyers effectively meet some of the public’s unmet legal needs? How much claiming and blaming is our society prepared to subsidize? How do legal needs compare with other claims on our collective resources? Most importantly, who should decide the answers?

The complexities are compounded if we think seriously about what would truly make justice “equal.” Equal to what or to whom? How realistically do we deal with disparities in incentives, resources, and legal ability? Would we not only need massive public expenditures, but also restriction of private expenditures? As R.H. Tawney once noted about equal opportunity, one wonders what would alarm proponents most—“the denial of the principle or the attempt to apply it.”⁹ If cost were no constraint, what would prevent people from excessively resorting to expensive procedural processes. As Professor Marc Galanter puts the relevant question—presumably rhetorically—“Is the utopia of access to justice a condition in which *all* disputes are fully adjudicated?”¹⁰

Part of the reason that we are reluctant to confront these issues involves the scale of additional subsidies that would be necessary to provide minimal, let alone equal, access. Unlike most other

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

9. R.H. TAWNEY, EQUALITY 103 (1964).

10. Marc Galanter, *Justice in Many Rooms*, in ACCESS TO JUSTICE AND THE WELFARE STATE 147, 150 (Mauro Cappelletti, ed., 1981) (emphasis added).
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industrialized nations, the United States recognizes no right to legal assistance for civil matters. Courts have exercised their discretion to appoint counsel in only a narrow category of cases. Legislative budgets have been equally minimal. The federal government, which provides about two-thirds of the funding for civil legal aid, now spends only about \$300 million for such assistance.¹¹ This works out to roughly eight dollars per year for those officially classified as poor. 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.¹² Such estimates substantially understate the magnitude of expenditures that would be necessary to guarantee minimal access, because such estimates do not include the unmet needs of middle-income Americans, who are now priced out of the legal process. Nor do they include collective concerns such as environmental risks or community economic development. Moreover, the ultimate legal cost of representation would not only include the price of legal assistance, but also of opposing parties' legal costs, as well as any remedies that legal proceedings could secure. If Americans could assert all of their entitlements under both common law and government programs, the financial implications would be dramatic.¹³ In the current political climate, the prospects for such a reform agenda are not promising, to say the least.

Nor do these access to justice projections take into account the cost of providing truly adequate assistance in both the criminal cases and the limited number of civil proceedings where indigents are already entitled to court-appointed counsel. Hourly rates and statutory caps on the compensation for private lawyers are set at ludicrously unrealistic levels. Rates per hour can drop below fifteen dollars an hour, and ceilings of \$1,000 are common for felony cases. In some states, teenagers who sell soda on the beaches earn more than court-appointed lawyers.¹⁴ For most of these lawyers, excessive

11. See Rhode, *supra* note 1; Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *FORDHAM L. REV.* 1573 (2002).

12. And Justice for All, *supra* note 1, at 40 (putting the figure at \$3.6 billion); Hazard, *supra* note 6, at 380 (estimating between four and five billion dollars).

13. RHODE & HAZARD, *supra* note 7, at 150.

14. JIM BOWYER ET AL., *ACTUAL INNOCENCE* 204 (1999).

caseloads are a way of life, and thorough preparation is a quick route to financial ruin.¹⁵ As a consequence, some lawyers have spent less time preparing for a felony trial than the average American spends showering before work.¹⁶ Analogous constraints arise in public defender offices that generally operate with crushing caseloads, sometimes up to 500 felony matters at a time. Under these circumstances adequate preparation is impossible for the vast majority of cases.¹⁷ Most court-appointed counsel also lack sufficient resources to hire the experts and investigators who may be essential to an adequate defense.¹⁸ Defendants who receive an income just above the poverty line, and hire their own attorneys, do not necessarily fare better. Even in capital cases, many individuals end up—as death penalty expert Stephen Bright once put it—with counsel who have “never tried a case before and never should again.”¹⁹

Our pretensions to equal justice mesh poorly with these financial realities. Yet we have failed to devise appropriate limiting principles, both at the theoretical level and at the political level.

15. Excessive caseloads are common among private practitioners who specialize in court-appointed cases. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2001); Jane Fritsche & David Rohde, *Caseloads Push System to Breaking Point*, N.Y. TIMES, Apr. 9, 2001, at A1 (describing a lawyer with 1600 cases in a single year, and thirteen others who exceeded Legal Aid Society limits).

16. Stephen B. Bright, *Sleeping on the Job*, NAT'L L.J., Dec. 4, 2000, at A26.

17. See prepared statement of Stephen B. Bright, Before the Senate Committee on the Judiciary Federal News Service, June 27, 2001 (describing a court-appointed lawyer earning only \$11.84 per hour for a capital trial); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Bob Sablatura, *Study Confirms Money Counts in County Courts: Those Using Appointed Lawyers Twice as Likely to Serve Time*, HOUSTON CHRONICLE, Oct. 7, 1999, at 1.

18. Catherine Greene Burnette 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, 597, 622 (2001); No Fair Trial Unless You Can Buy One, ATLANTA-J. CONST., Sept. 9, 2001, at 8.

19. Stephen B. Bright, *Keep the Dream Alive*, (unpublished speech, 1999, available at <http://schr.org/reports/docs/commerce.pdf> (last visited Jan. 24, 2003)).

II. FAILURES OF POLICY AND POLITICS

Much of the problem in securing a 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 concerning access to services. Most Americans are convinced that the legal system coddles criminals, a view reinforced by news and entertainment media. In the courtrooms that the public sees, lawyers such as those representing O.J. Simpson leave no stone unturned. But these lawyers are charging by the stone, while most defense counsel cannot. It matters. Recent studies find that between half and four-fifths of counsel entered guilty pleas without interviewing any prosecution witnesses.²⁰

The inadequacy of representation is lost on many legislators, whose electorate is more interested in getting tough on criminals than in subsidizing their defense. For example, Georgia's annual budget for indigent criminal defense is less than one-fifth of its budget for prosecutors, and one-half of the amount allocated to improve just one interstate highway intersection.²¹ The chair of a Missouri appropriations committee expressed a common attitude with uncommon candor by publicly announcing that he "did not care whether indigent criminal defendants received representation."²² Although recent exonerations of wrongfully convicted defendants through DNA evidence has somewhat increased the public's concern about the adequacy of criminal defense, budget priorities have rarely changed in response.²³

Ironically enough, some politicians view overturned convictions

20. 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, 56 (1997). Mike McConville & Chester Mirsky, *Guilty Plea Courts: A Social Disciplinary Model of Criminal Justice*, 42 SOC. PROB. 216 (1995).

21. *State Should Pay for Indigent Defense*, ATLANTA J. CONST., Dec. 31, 2001, at A11; *Presumed Innocent Doesn't Apply to All*, ATLANTA J. CONST., Aug. 5, 2001, at F8.

22. Ron Ostroff, *Missouri Remains Unable To Pay Indigents' Counsel; Pro Bono Revolt Grows*, NAT'L. L.J., May 11, 1981, at 2.

23. The Innocence Protection Act of 2000, H.R. 4167, 106th Cong. §§ 201-203 (2000), would provide significant incentives for states to meet minimal standards for representing indigent defendants in capital cases and would provide federal funding for efforts by public agencies and private nonprofit organizations to improve such representation.

as a vindication of the system. President George W. Bush, while serving as the Governor of Texas, jokingly dismissed the significance of a federal court decision overturning the conviction of a death-row defendant whose lawyer had slept during his trial. According to Bush, this decision's reversal of two state court rulings proved that the "system works."²⁴ Similar comments are often made about cases in which recently discovered DNA evidence exposed wrongful convictions. Yet, when demonstrably innocent defendants are incarcerated for decades before release, and thousands of other prisoners lack any representation for potentially valid claims, is this evidence of a system working?²⁵

Although legal aid for civil cases has a somewhat greater political appeal, Americans are equally misinformed about what adequate aid would require. The vast majority of the public favors legal representation for the poor. However, most would rather see it come from volunteer attorneys than from government subsidies, and forty-percent want to support only advice, not litigation.²⁶ For many 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 is a poor person with a lawyer."²⁷

Not only are Americans ambivalent about ensuring legal assistance, they are ill-informed about the assistance that is currently available. Almost four-fifths of Americans incorrectly believe that the poor are now entitled to legal aid in civil cases, and only a third thinks that they would have a very difficult time obtaining assistance.²⁸ Such perceptions are wildly out of touch with reality.

24. Bright, *supra* note 16.

25. Calvin Burdine was convicted in 1986; the Supreme Court upheld the reversal of his conviction in 2002. *See also* Robert Sherrill, *Death Trip: The American Way of Execution*, THE NATION, Jan. 8, 2001, at 20 (discussing the case of Ricardo Guerra who spent fourteen years on death row before being exonerated).

26. *See* Rhode, *Access to Justice*, *supra* note 1, at 1791; Belden, et al., National Survey on Civil Legal Aid (unpublished report, Apr. 2000, on file with the WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY).

27. 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 infra*.

28. Belden, *supra* note 26; Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 3 MD. J. CONTEMP. LEGAL ISSUES 199 (1994).

Legal services can handle less than a fifth of the needs of eligible clients. Often, they are only able to offer brief advice, and not the full range of assistance that is necessary.²⁹ Waitlists of two years for non-emergencies are common. Entire categories of the “unworthy poor” are excluded from federal support, such as prisoners, undocumented immigrants, or individuals with claims involving abortions, gay and lesbian rights, or challenges to welfare legislation.³⁰

Part of the problem is that few individuals are aware of what passes for justice among the “have-nots,” and their perceptions are often skewed by idealized portrayals in civics classes, popular media, and right wing political rhetoric. The federal legal services budget has been a particularly inviting target, and the most effective state and local programs have attracted similar opposition.³¹ According to critics’ accounts, legal services lawyers have pursued radical social agendas, and obtained “cushy” amenities for convicted felons. Further, they have worsened the plight of the poor by encouraging welfare dependency, or by bankrupting those who hire low income workers.³² Such claims have eroded political support and have encouraged restrictions on federal funding. As a consequence, most legal aid organizations may not bring class action lawsuits or assist community organizing activities that might address the structural sources of poverty-related legal needs.³³

29. Hearing on the Legal Services Corporation Before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee (1999) (statement of John Pickering).

30. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 504, 110 Stat. 1321; 45 C.F.R. §§ 1610-1642.

31. See Bruce Rushton, *Legislature 95: Legal Aid Agencies Face Legislative Ax: Lawmakers Object to Help for Migrant 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 face similar opposition. See Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999).

32. See Rhode, *Access to Justice*, *supra* note 1, at 1793-94.

33. 45 C.F.R. 1612, 1677. For a discussion on the need for such legal services activities see Steve Bachmann, *Access to Justice As Access to Organizing*, 4 U.S.F. J.L. & SOC. CHALLENGES 1 (2002); Rhode, *Access to Justice*, *supra* note 1, at 1795; BRENNAN CENTER FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER 9-10 (2000).

III. FAILURES OF THE JUDICIARY

Such restrictions on legal assistance have persisted because of judicial as well as public indifference. 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.”³⁴ 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. 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 assistance, they have failed to insure that the representation meets acceptable standards.

Reported decisions have declined to find ineffective assistance of counsel even where the attorney was drunk, on drugs, or parking his car during key parts of the prosecution’s case.³⁵ Defendants have been executed despite their lawyers’ lack of any prior trial experience, their ignorance of all relevant death penalty precedents, or their failure to present any mitigating evidence.³⁶ One systematic survey found that over ninety-nine percent of ineffective assistance claims were unsuccessful.³⁷

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, “the Constitution says that everyone is entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be

34. 351 U.S. 12, 19 (1956).

35. DAVID I. COLE, *NO EQUAL JUSTICE* 87 (1999); BRIGHT, *supra* note 19; 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); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 499-501 (1993).

36. See COLE, *supra* note 35, at 87; Bright, *supra* note 16, at A26; Green, *supra* note 35, at 499-501.

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

awake.”³⁸ 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.³⁹

Not only have courts been reluctant to set aside convictions for an ineffective assistance of counsel, but 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. Discipline for incompetent attorney performance is notoriously absent.⁴⁰ Indeed, judges, who face crushing caseloads of their own, have often been reluctant to encourage effective advocacy because it would increase the number of lengthy trials and pretrial matters. Some courts will even withhold appointments from lawyers who provide such advocacy.⁴¹

Finally, and most disturbingly, judges have failed to address the impact of their own rules and practices in obstructing access to justice. On issues such as procedural simplification, pro se assistance, and non-lawyer services, courts have too often been part of the problem, rather than the solution. In “poor people’s courts,” which

38. *McFarland v. State*, 928 S.W.2d 482 (Tx. Ct. App. 1996); Bob Herbert, *Cheap Justice in America*, N.Y. TIMES, Mar. 1, 1998, at 15; Bruce Shapiro, *Sleeping Lawyer Syndrome*, THE NATION, Apr. 7, 1997, at 27-29 (quoting Judge Doug Shaver).

39. *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), *Cockrell v. Burdine*, cert. den. sub. nom. 122 S. Ct. 2347 (2002). The problem in relying on the trial record to determine if crucial interests were jeopardized should be obvious! Robert McGlasson, Burdine’s court-appointed lawyer, indicated one of the obvious shortfalls by asking, “[h]ow can you make the record if you’re asleep?” Jason Hoppin, *Law on Sleepy Lawyers Could Use a Tucking In: Circuits Toss and Turn on Review Standard*, S.F. RECORDER, June 6, 2002.

40. Frances A. McMorris, *Giuliani’s Hard Line Breaks Strike at New York City Legal Services*, WALL ST. J., Oct. 6, 1994, at B11; *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990) (finding that a boycott by District of Columbia defense attorneys who were seeking higher compensation constituted an antitrust violation). Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615 (2002). For one of the few recent cases finding a threat of inadequate representation due to inadequate compensation, see New York County Lawyers Association, New York, No. 102987/00 (2002).

41. See Bright, *supra* note 17, at 6; Burnette, *supra* note 18, at 595, 597, 622, 641. 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”); McConville & Mirsky, *supra* note 20; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101

handle housing, bankruptcy, small claims, and family matters, parties without lawyers are less the exception than the rule.⁴² Yet these parties operate in systems that 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. They include procedural simplification; standardized forms; educational materials; self-service centers with interactive kiosks for information and document preparation; and free in-person assistance from volunteer lawyers or court personnel.⁴³ However, a majority of surveyed courts have no formal pro se assistance services. Many of the available services are unusable by those who need help most, such as uneducated litigants with limited computer competence and English language skills.⁴⁴

Judges vary considerably in their willingness to fill the gaps and to assist unrepresented parties. Some courts have been reluctant to intervene on the ground that such efforts will either compromise their

42. United States v. Eichman, 496 U.S. 310, 317 (1990); 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); Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 14 (1998) [hereinafter Goldschmidt, Litigants]; 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 (1994).

43. ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVICES, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT 12-13 (1994); FAMILY LAW SEC. COMM. ON THE PROBATE AND FAMILY CT., MASS. B. ASSOC., CHANGING THE CULTURE OF THE PROBATE AND FAMILY COURT 29 (1997) [hereinafter “CHANGING THE CULTURE”]; Goldschmidt, Litigants, *supra* note 42, at 29-34; Engler, *supra* note 42, at 2049; Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); Dianne Molvig, *Growing Solutions to Unmet Legal Needs*, 69-AUG. WIS. LAW. 10 (1996).

44. 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*, 34 (1999) (Stanford Law School, unpublished paper 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 (1996) (only forty-four percent 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 (1993) (finding that most pro se divorce litigants who were surveyed had some college education). Services are inadequate for non-English speaking criminal defendants as well. See *No English Translates Into No Fairness*, ATLANTA-J. CONST., Oct. 22,

impartiality or encourage more individuals to proceed without representation.⁴⁵ Even the most sympathetic judges have often 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.⁴⁶

Similar considerations have worked against the efforts to broaden access through non-lawyer providers of legal services. Almost all scholarly experts and bar commissions that have systematically studied the issue have recommended an increase in opportunities for lay assistance.⁴⁷ Almost all of the major judicial decisions have ignored those recommendations, which has resulted in prohibitions on the unauthorized practice of law by non-lawyer competitors, which are sweeping in scope and unsupportable in practice.⁴⁸ The dominant approach is to prohibit the lay provision of personalized legal services. Comparative research, however, finds that nonlawyer specialists are generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are greatest.⁴⁹ Such results should come as no surprise. Law schools do not generally teach, and bar exams do not test, the specialized information that

45. Engler, *supra* note 42, at 2012-15; CHANGING THE CULTURE, *supra* note 43, at 51; Goldschmidt, Litigants, *supra* note 42, at 19; Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986).

46. See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation—Who Should Control Lawyer Regulation: Courts, Legislature, or the Market?* (2002) (unpublished manuscript, on file with the author).

47. 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*]; Deborah L. Rhode, *The Delivery of Legal Services by Nonlawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990). For other experts, see COMMISSION ON NONLAWYER PRACTICE, AMERICAN BAR ASSOCIATION, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS (Chicago: American Bar Association, 1995); State Bar of California Commission on Legal Technician's Report (San Francisco: July 1990) [hereinafter California Commission].

48. See *supra* note 46.

49. See Rhode, *Professionalism*, *supra* note 47; HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 193-203 (1998); JUDITH CITRON, THE CITIZENS ADVICE BUREAU: FOR THE COMMUNITY, BY THE COMMUNITY (1989); Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption From State Unauthorized Practice of Law Rules*, 11 AKRON TAX J. 47 (1995); California Commission, *supra* note 47, at 41. See also Yegge, *supra* note 42, at 407, 418. In the one reported survey of consumer satisfaction, non-lawyers rated higher than lawyers. Rhode,

those matters require. Although courts have justifiable concerns about unqualified or unethical lay assistance, these abuses are not the only targets of the unauthorized practice doctrine. Moreover, such problems could be addressed through more narrowly drawn prohibitions and licensing structures for nonlawyer providers.⁵⁰

A final area of judicial abdication involves pro bono service. Proposed requirements have come and gone, but mainly gone.⁵¹ State supreme courts have adopted only aspirational standards, coupled in a few jurisdictions with occasional court assignments or mandatory reporting systems.⁵² Yet, most lawyers have failed to meet these aspirational goals, and the performance of the profession as a whole remains at a shameful level.

IV. FAILURES OF THE BAR

Nowhere is the gap between rhetorical commitments and actual practices more appalling than on issues of public service. Bar ethical codes and commentary have long maintained that lawyers have an obligation to assist those who cannot afford counsel.⁵³ Additionally, bar leaders have long waxed eloquent in describing the “quiet heroism” of the profession in discharging that responsibility.⁵⁴

Such claims suggest more about the profession’s capacity for self-delusion than for self-sacrifice. Although accurate information is difficult to obtain, recent surveys indicate that most lawyers provide no significant pro bono assistance to the poor.⁵⁵ In most states, fewer

50. For examples of such proposals, see Rhode, *Professionalism*, *supra* note 47, at 715; California Commission, *supra* note 47.

51. See Comm. on Pro Bono and Legal Servs., *Proposal to the 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, 98-99 (1990).

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

53. MODEL RULES OF PROF’L CONDUCT R. 6.1; MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25, 8-3.

54. Robert L. Haig, *Lawyer-Bashing: Have We Earned It?*, N.Y. L.J., Nov. 19, 1993, at 2; 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).

55. Rhode, *Access to Justice*, *supra* note 1. See also DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE (forthcoming 2003; on file with the author).

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than a fifth of lawyers offer such services.⁵⁶ The average pro bono contribution is under half an hour a week and half a dollar a day.⁵⁷

Participation by the profession's most affluent members reflect a particularly dispiriting distance between the bar's idealized image and its actual practices. Fewer than a fifth of the nation's 100 most financially successful firms meet the ABA's standard of providing fifty hours a year of pro bono service.⁵⁸ Over the past decade, when these firms' revenues grew by over fifty percent, their average pro bono hours decreased by a third. For many other employers, salary wars have pushed compensation levels to new heights, which has eroded, rather than expanded, support for pro bono programs.⁵⁹ Even the most modest efforts to increase the profession's public service commitments have been dismissed as forms of "latent fascism" and "economic slavery."⁶⁰ The vast majority of lawyers have rejected the notion that their special status entails special obligations.

The bar has also fought for restraints on lay competition that help to price services out of reach for many consumers. Bar leaders have long insisted that such restrictions are motivated solely by concerns to protect the public, rather than the profession. Virtually no experts or other countries share that view.⁶¹ Most nations permit nonlawyers to provide advice on routine matters, and no evidence suggests that these lay specialists are inadequate.⁶² Problems of unqualified or

56. LSC Statistics: Private Attorney Involvement, All Programs, available at http://www.lsc.gov/press/pr_pai.htm (last visited Jan. 19, 2003); see Gary Spencer, *Pro Bono Data Show Little Improvement*, N.Y. L.J., Mar. 5, 1999, at 1.

57. Rhode, *Access to Justice*, *supra* note 1.

58. Aric Press, *Eight Minutes*, AM. LAW., July 2000, at 13.

59. Kate Ackley & Bryan Rund, *Pro Bono: Casualty of Salary Wars?*, LEGAL TIMES, Apr. 10, 2000, at 1, 18; Roger Parloff, *Too Rich To Give*, AM. LAW., Apr. 2000, at 15; Anthony Perez Cassino, *Skyrocketing Pay and Public Service*, N.Y. L.J., Mar. 31, 2000, at 24. Mark Hansen, *Trickle-away Economics?*, 86 A.B.A. J. 20 (2000).

60. See Deborah L. Rhode, *Ethical Perspectives in Legal Practice*, 37 STAN. L. REV. 589, 610 (1985); Tigran W. Eldred & Thomas Schoenherr, *The Lawyers's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 391 n.97 (1994); Michael J. Mazzone, *Mandatory Pro Bono: Slavery in Disguise*, TEX. LAW., Oct. 22, 1990, at 22.

61. See Rhode, *Access to Justice*, *supra* note 1, at 1806-07.

62. Richard L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, AM. B. FOUND. RES. J. 1, 29 (1985); CITRON, *supra* note 49; Herbert M. Kritzer, *The Future Role of 'Law Workers': Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002); MICHAEL ZANDER, THE STATE OF JUSTICE 23 n.61 (2001).

unethical services can be addressed through regulation, not prohibition. Yet the organized bar is moving in precisely the opposite direction. In its most recent action, the American Bar Association approved a resolution to increase the enforcement of unauthorized practice prohibitions, and some states are taking similar actions.⁶³ Unless and until the public demands a less restrictive licensing structure, unmet legal needs are likely to remain a persistent and pervasive problem.

V. AN ALTERNATIVE ASPIRATION: ADEQUATE ACCESS TO JUSTICE

Any serious effort to address this problem must begin with more realistic aspirations. Equal justice is an implausible ideal; adequate access to justice is less poetic but more imaginable. 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. Such systems should seek both to reduce the need for expensive professional assistance, and to increase access to such assistance for those who cannot realistically afford it.

Minimizing the need for professional assistance calls for strategies along several dimensions: increased simplification of the law; more self-help initiatives; better protections of unrepresented parties; greater access to non-lawyer providers; greater collaboration among professionals across multiple disciplines including law; and expanded opportunities for informal dispute resolution in accessible out-of-court settings. Providing adequate assistance for those who are unable to afford it will require a greater commitment from courts, legislatures, and bar associations. Judges must do far more to ensure the competent performance of lawyers in criminal cases, and to ensure adequate access to lawyers in civil cases. The standards governing malpractice and effective assistance of counsel should also be strengthened. States should be required to allocate sufficient resources for indigent defense, and restrictions should be lifted from

63. Select Committee Report on the 2000 Midyear Meeting, *available at* <http://www.abanet.org/leadership/2000hous.html> (last visited Jan. 19, 2003); *Governor Davis Signs Bar-Backed Bill to Crack Down on UPL*, CAL. B.J., Oct. 2002, at 1.

the causes and strategies that lawyers can pursue. Financial subsidies should come from a variety of sources that are likely to command greater political support than general tax funds. Examples of such financial subsidies include: a tax on legal services revenues; a surcharge on court costs for cases that exceed a certain amount; and a pro bono requirement for lawyers that could be satisfied by a reasonable amount of direct service or the financial equivalent.⁶⁴

It is a national disgrace that civil legal aid programs now reflect less than one percent of the nation's legal expenditures. It is a professional disgrace that pro bono service occupies less than one percent of lawyers' working hours. We can, and must, do more. Our greatest challenge lies in persuading the public and the profession to share this view. More education about what passes for justice among the "have-nots" should be a key priority. Law schools have a unique opportunity and a corresponding obligation to insure that access to justice becomes a professional priority.

64. See AND JUSTICE FOR ALL, *supra* note 1, at 49-50, 58-60; Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FL. ST. U. L. REV. 631 (1998).