Minding the Gap: Access to Justice Over the Years

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Deborah L. Rhode and Scott Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 **Geo. J. Legal Ethics** 485 (2017), available at SSRN.

In *Access to Justice: Looking Back, Thinking Ahead*, Deborah L. Rhode and Scott Cummings—two giants in the field—take stock of where we are when it comes to access to civil justice in the United States. Not content merely to offer an anodyne retrospective, they then use the opportunity to outline a bold agenda for future progress.

Rhode and Cummings begin their inquiry by assessing the scope of the problem. But, in so doing, they confront the same dismal paucity of reliable data that's afflicted this inquiry for decades. As Rebecca Sandefur has bluntly put it: "[A]t present, we have no idea of the actual volume of legal need, and no idea of the actual volume of unmet legal need." While the Legal Services Corporation (LSC) reports that "over four-fifths of the legal needs of the poor remain unmet," it is hard to know whether that is true, as even identifying what a "legal need" is or isn't is surprisingly difficult. (P. 487.) *Many* situations raise legal issues, have legal consequences, or pose legal risks, but how do we know whether any given situation is one of true legal *need* that can *only* be handled by someone with bona fide legal expertise? Worse, how do we assess those situations based on lay people's sometimes hazy recollections, often long after the fact?

Then, assuming a genuine legal need exists, a second empirical question arises: How do we address that need? More to the point: Are lawyers required or can others suffice? In recent years, scholars have poured a huge amount of energy into answering that question, but Rhode and Cummings sum up the current state of the inquiry nicely: "Well-designed studies on the contributions of lawyers in routine cases are scarce and conflicting." (Pp. 486-87.)

Where does this leave us? Rhode and Cummings are right, I think, in declaring that, notwithstanding uncertainty about just how big the civil justice gap is or how best it can be filled, "the limited data we do have suggest an unsettling lack of progress in assisting those who need help most." (P. 487.) Though we can only roughly estimate the justice gap's precise shape and exact size, there's no question that the gap is large. Nor is there a question that this gap imposes significant costs: The individuals who are denied assistance, even in the face of urgent legal need, are obviously hurt, as they are thrust into the roiling waters of eviction, bankruptcy, family dissolution, deportation, or personal injury, without a legal lifeboat. And even beyond that, when *some* Americans' legal problems are expeditiously resolved, while *others*' problems are left to fester, the lopsided provision of legal services creates grave problems for society, all but guaranteeing the inadequate enforcement of law and the exacerbation of injustice and inequality.

Finally, as bad as it already is, there is also no doubt that the situation is poised to get worse: The LSC's federal budget has dropped almost forty percent in the past thirty years, and the Trump White House, which has already shuttered the DOJ's Office for Access to Justice, seems intent on defunding the LSC entirely.

So, what to do? Rhode and Cummings roll up their sleeves and provide helpful guidance. In so doing,

they spell out what is, in effect, a kitchen-sink strategy, suggesting that we attack the problem from multiple directions at once.

First, they call for more non-lawyer assistance. In their words, we need "more access to justice, not necessarily more access to lawyers, and the profession needs to do more to support options apart from lawyers." (P. 490.) Here, they observe that the ABA's "preferred strategy . . . for increasing access to justice has, unsurprisingly, been increasing access to lawyers." (P. 489.) But this strategy has drawbacks. Practically, it is completely unrealistic: At a time when even the LSC is on the chopping block, there is no political will to supply more publicly-funded lawyers, and, even if there were such will, many low-income individuals distrust lawyers supplied by government programs. Further, they argue, the ABA's lawyer-centric strategy almost certainly stunts our support and development of worthwhile out-of-the-box options, including streamlined self-help courts, technological innovations like LegalZoom, and the expanded licensure of non-lawyer legal technicians. Accordingly, Rhode and Cummings argue that we ought to soften unauthorized practice restrictions to enable more non-lawyers to assist individuals with routine legal problems, and we should reserve restrictions on unauthorized practice only to those instances when there's "demonstrated consumer injury." (P. 491.)

At the same time, recognizing that lawyers are *sometimes* part of the solution, they call for lawyers to step up and make pro bono work "a higher priority." (P. 492.) While pro bono assistance has increased in recent decades, it remains pitifully low—only a third of lawyers report meeting the fifty-hour annual goal set by the *Model Rules of Professional Conduct*, and a fifth of one survey's respondents reported doing no pro bono work at all. (P. 493.) Moreover, even when lawyers do this work, it is sometimes shoddy: Rhode has previously found that nearly half of public interest legal organizations report dissatisfaction with the quality of pro bono work by firms. Rhode and Cummings thus propose making the current fifty-hour goal mandatory (with a buyout option), encouraging more voluntary pro bono contributions, and demanding greater accountability for the work that's done to ensure that it is impactful, cost-effective, and satisfies the client.

A remaining corner of the access to justice landscape is occupied by public interest organizations. These organizations have experienced outsized growth over the past thirty years: The number of public interest jobs has increased nearly 300-fold, and the public interest sector's percentage of the bar has nearly doubled. Meanwhile, these organizations have also changed shape and direction, as more conservative groups have sprung up, while others have shifted their focus, away from litigation and toward education, research, and policy. Compensation, however, remains abysmal. Rhode and Cummings thus call for increased financial assistance and a renewed focus on creating entry-level positions for attorneys who want to pursue this kind of work right out of the gate.

Rhode and Cummings's essay ends with the famous quote by President Jimmy Carter—that we, in the United States, are "overlawyered and underrepresented." (P. 500.) Four decades after Carter's proclamation, Rhode and Cummings show us that Carter's message still resonates, even while they seek to sow the seeds of future reform.

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