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## TEACHING ACCESS TO JUSTICE

*Len Rieser\**

*“I wish I could take your case. But we just don’t have the staff to serve everyone who needs help.”*

In the course of thirty years in a legal aid program serving families and children, I made this statement, or some variation on it, so many times that it has become an indelible memory. So are the responses I received: resignation (from people already accustomed to being denied help), anger (from people who could not believe that they could not get legal services in matters affecting their and their children’s lives), and sometimes tears (both groups).

As a young lawyer, I was not prepared for these exchanges. Law school had taught me about the constitutional and statutory rights of children and families. Only in practice, however, did I confront the issue of whether people actually have access to the machinery for *asserting* those rights.

In today’s America, the answer is that they mostly do not. Large numbers of people of low or moderate means simply do not get the legal help they need to deal with matters of major importance involving their families, employment, and well-being. Surveys suggest that, in significant proportions of the cases in which they confront civil legal problems, Americans just give up; that is, they decide to do nothing to assert their rights.<sup>1</sup> And when people *do* participate in legal

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1. The figures vary from one report to another, but all point to a substantial problem. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7 (2017), <http://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [perma: <http://perma.cc/JT5K-T58B>] (“Low-income Americans seek professional legal help for only 20% of the civil legal problems they face.”); Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 21, 30–36 (Samuel Estreicher & Joy Radice eds., 2016), (noting that in about 38% of the instances in which they confront legal problems, poor Americans “lump” them together and do nothing about their issues as compared to their European counterparts); REBECCA L. SANDEFUR, AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 11–13, 11 fig.5 (2014), [http://www.americanbarfoundation.org/uploads/cms/documents/sandefur\\_accessing\\_justice\\_in\\_the\\_contemporary\\_usa\\_aug\\_2014.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf) [perma: <http://perma.cc/EY2Q-FCGK>] (noting that Americans seek help from an “adviser/representative” for only 15% of legal problems). Cases in which contingency fee arrangements are available are likely something of an exception to this general pattern. See SANDEFUR, *supra*, at 11 (noting that parties seek help from a “third party” in 32% of personal injury

proceedings, they tend to do so pro se. Surveys of the rates at which litigants are unrepresented in “routine” but critically important proceedings involving child support, custody, domestic violence, evictions, foreclosures, collections, and more, show that individuals appear pro se from 20% to nearly 100% of the time.<sup>2</sup> In eviction proceedings in Philadelphia Municipal Court, for example, about 92% of tenants go it alone.<sup>3</sup>

A comparison to our health care system is revealing. That system is significantly regulated by the federal and state governments, with the goal—far from fully realized, to be sure—of ensuring that people’s needs are met. The Affordable Care Act<sup>4</sup> took a major step in the direction of universal coverage. Medicare, Medicaid, CHIP, and other programs assure that low-income individuals, elderly people, children, and people with disabilities can obtain services. Emergency rooms must provide critical care regardless of an individual’s ability to pay. While the system has enormous problems, it at least partially reflects the idea that health services are a public good that should be available to all.

The inscriptions on courthouses, of course, say the same thing about justice. But here the situation is quite different. While legal *rights* are theoretically available to everyone, the services—legal information, help with forms and filings, advice, and representation—that are needed to vindicate those rights, are not. Instead, for people who cannot afford legal fees of hundreds of dollars per hour, available services vary wildly from situation to situation: a legal aid lawyer for this tenant but not that one, pro bono service for the domestic violence victim here but not there, a helpful website or clerk or judge in one county but not in the next. And except in those states that have embarked on “universal access” efforts,<sup>5</sup> government has taken little responsibility for addressing this crazy quilt of services and non-services.

*What Can Be Done About the Civil Justice Gap? And What Does It Imply About Legal Education?*

Let’s start with the second question. Some law students do learn about barriers to justice, especially in clinical and externship programs and, in a few schools, in actual “access to justice” courses. But most students do not participate in such programs. Moreover, students generally derive much of their

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cases).

2. See Hadfield & Heine, *supra* note 1, at 37–39; ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2017, at 75–76 (2017), [http://internationallegalaidgroup.org/images/miscdocs/ILAG\\_2017\\_National\\_Report\\_-\\_USA\\_-\\_Mr\\_Alان\\_Houseman.pdf](http://internationallegalaidgroup.org/images/miscdocs/ILAG_2017_National_Report_-_USA_-_Mr_Alان_Houseman.pdf) [perma: <http://perma.cc/Y86Q-9EJB>].

3. Jake Blumgart, *To Reduce Unfair Evictions, Tenants Need Lawyers*, PLANPHILLY (Mar. 16, 2017), <http://planphilly.com/articles/2017/03/16/to-reduce-unfair-evictions-tenants-need-lawyers> [perma: <http://perma.cc/PAQ8-JVMD>].

4. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 110 Stat. 2033 (2010) (codified as amended in scattered sections of U.S.C.).

5. See *Justice for All Project*, NAT’L CTR. FOR ST. CTS., <http://www.ncsc.org/jfap> [perma: <http://perma.cc/687C-GQCQ>] (last visited Oct. 7, 2018).

understanding of legal practice from appellate decisions, probably disproportionately federal,<sup>6</sup> in which a claim is asserted by a knowledgeable lawyer for the plaintiff, countered by a knowledgeable lawyer for the defendant, and decided by thoughtful judges with time to weigh both sides and do their own research. This picture has little to do with the experience of most people of low and moderate means in the state courts—and even less with that of doubly disadvantaged people, or those who face additional structural oppression, such as people of color, people with disabilities, and immigrants.

What justifies our failure to engage *all* students in discussions of the justice gap, and of our obligation to do something about it? The limited attention we give to the subject is especially strange given our extensive focus on questions of ethics. Without minimizing the importance of the rules that prohibit us from failing to act zealously on behalf of our clients, from misusing client funds, and from divulging confidences and avoiding conflicts, isn't it also a significant ethical issue that most people of low and even moderate means are unable to obtain any legal help at all?

Returning to the first question—what can be done—the answers are many. Indeed, this is among the most exciting areas of innovation in the legal profession today. Despite the Supreme Court's narrow reading of the extent to which the Due Process Clause creates a right to counsel in civil matters,<sup>7</sup> states and even municipalities are establishing such rights—not only for reasons of fairness, but also because paying for lawyers to contest evictions (for example) is viewed as cheaper than paying the costs that result from homelessness.<sup>8</sup>

And there's more to the solution than creating rights to counsel and increasing funding for legal services. Limited-scope representation, in which an attorney assists with some aspects of a matter while leaving others to the client, is becoming more common.<sup>9</sup> Also expanding are in-court “help centers,” where unrepresented litigants can get assistance with court procedures, forms, and filings.<sup>10</sup> And efforts are underway to simplify convoluted legal rules, many of

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6. Although approximately 95% of litigation occurs in state courts, Hadfield & Heine, *supra* note 1, at 37, federal decisions are heavily represented in law school casebooks.

7. See *Turner v. Rogers*, 564 U.S. 431, 446–48 (2011); *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 31–33 (1981).

8. See, e.g., NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org> [perma: <http://perma.cc/P2XJ-EZJH>] (last visited Oct. 7, 2018). The National Coalition for a Civil Right to Counsel keeps information on its immigration pilot projects in New York and San Francisco, see *Immigration General—Pilot Projects*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org/bibliography/sections/1497> [perma: <http://perma.cc/SBE9-JRN6>] (last visited Oct. 7, 2018), and on its eviction projects in multiple cities, see *Housing Eviction—Media*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/bibliography/sections/160> [perma: <http://perma.cc/UMB3-6SXL>] (last visited Oct. 7, 2018).

9. See *Limited Scope Representation Helps Lawyers Expand Practice*, AM. BAR ASS'N (Apr. 2015), <http://www.americanbar.org/publications/youraba/2015/april-2015/limited-scope-representation-helps-lawyers-expand-practice.html> [perma: <http://perma.cc/K4KY-6K5Z>] (citing Sue Talia, an expert on limited-scope representation, for the proposition that “people don't feel the need any longer for full-service representation for many of their legal issues”).

10. See, e.g., *Self-Representation State Links*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/>

which were created by lawyers and judges without thought to their potential for baffling mere mortals.<sup>11</sup>

New York City's "navigators" help people get themselves and their papers organized before entering landlord-tenant court.<sup>12</sup> Washington has a "limited license" that allows for practice in certain specific areas without a full law degree.<sup>13</sup> Maryland has an app that enables anyone with a smartphone to access legal information and assistance.<sup>14</sup> Online dispute resolution programs are being piloted.<sup>15</sup> Judges are adopting practices for helping unrepresented people understand court proceedings.<sup>16</sup> New software will query you about your legal problem and, after you respond, generate a ready-to-file pleading.<sup>17</sup>

Collaborations with medical providers, social services, schools, and other community resources are helping people identify legal issues and get help.<sup>18</sup> "Incubators" are helping new graduates develop lower-cost and "low bono" practices.<sup>19</sup> Pro bono legal services, an important resource sometimes made available in random ways, are becoming expanded and systematized.<sup>20</sup> And these (and many more) innovations are happening against the backdrop of a recent resolution of the Conference of Chief Justices and the Conference of

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Topics/Access-and-Fairness/Self-Representation/State-Links.aspx?cat=Self%20Help%20Information%20Resources%20and%20Centers [perma: <http://perma.cc/C4AU-JKHF>] (last visited Oct. 7, 2018).

11. See, e.g., Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 *DRAKE L. REV.* 845, 860 (2013).

12. REBECCA L. SANDEFUR, AM. BAR FOUND., & THOMAS M. CLARKE, NAT'L CTR. FOR STATE CT., *ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 5* (2016).

13. *In re Adoption of New APR 28—Ltd. Practice Rule for Ltd. License Legal Technicians*, No. 25700-A-1005 (Wash. 2012) (order permitting limiting representation).

14. *Maryland Law Help App*, MD. COURTS, <http://mdcourts.gov/legalhelp/mobileapp> [perma: <http://perma.cc/4RR2-Q8DF>] (last visited Oct. 7, 2018).

15. See, e.g., UTAH ONLINE DISPUTE RESOLUTION STEERING COMMITTEE, AWARD NO. SJI-16-T-142, UTAH ONLINE DISPUTE RESOLUTION PILOT PROGRAM (2017), <http://cdm16501.contentdm.oclc.org/digital/collection/adr/id/63> [perma: <http://perma.cc/65M4-UL88>] (final report of grantee).

16. See, e.g., *Judicial Guidance for Cases Involving Self-Represented Litigants: Bench Guides*, SELF-REPRESENTED LITIGATION NETWORK, <http://www.srln.org/node/1375/judicial-guidance-cases-involving-self-represented-litigants-bench-guides> [perma: <https://perma.cc/KB6W-7TS2>] (last visited Oct. 7, 2018); MASS. PROB. & FAMILY COURT DEP'T PRO SE COMM., *PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE* (1997), <http://www.mass.gov/files/documents/2017/11/01/prosefinalreport.pdf> [perma: <http://perma.cc/N2QX-X6WK>].

17. See, e.g., LAW HELP INTERACTIVE, <http://lawhelpinteractive.org> [perma: <https://perma.cc/FR9D-AVG9>] (last visited Oct. 7, 2018).

18. See, e.g., NAT'L CTR. FOR MEDICAL-LEGAL P'SHIP, <http://medical-legalpartnership.org/> [perma: <http://perma.cc/NYC7-WBUV>] (last visited Oct. 7, 2018).

19. See, e.g., *Lawyer Incubator Profiles*, AM. BAR ASS'N, [http://www.americanbar.org/groups/delivery\\_legal\\_services/initiatives\\_awards/program\\_main/program\\_profiles.html](http://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles.html) [perma: <http://perma.cc/4SW8-6X2J>] (last visited Oct. 7, 2018).

20. See Samuel Estreicher & Jonathan Remy Nash, *Institutionalizing Pro Bono*, in *BEYOND ELITE LAW*, *supra* note 1, at 285.

State Court Administrators, supporting “the aspirational goal of 100 percent access to effective assistance for essential civil legal needs and urg[ing] their members to provide leadership in achieving that goal.”<sup>21</sup>

It’s still a crazy quilt, and as the word “aspirational” implies, we are a long way from treating justice as a public good to which everyone must have access. Yet the innovations are exciting, as is the fact that they have largely resulted from the leadership of lawyers and judges. Certainly members of the legal profession cannot do the whole job of closing the justice gap, just as medical professionals cannot achieve universal access to health care without public and political support. But it has been the unique perspective of legal professionals, and their willingness to explore solutions, that have propelled the access to justice movement forward.

It was against this backdrop that, five years ago, I proposed a course (clunkily) named “Access to Justice in Civil Matters” at the law school, which I proposed with several purposes in mind. First, I expected that some students would become especially interested in exploring the access-to-justice movement and finding roles for themselves in it. I thought these might include actual jobs (for example, in court administration, legal aid offices, “low bono” practices, and the burgeoning legal-technology field), as well as volunteer positions (for example, working with a bar association on pressing for court innovations, community partnerships, and stronger pro bono programs). I also believed that *every* law graduate should have some grasp of access-to-justice issues; indeed, I thought that it verged on dishonesty to allow students to get through law school without learning about the justice gap. And I assumed that, if students emerged with a more accurate picture of the legal world, they would find ways to have an impact—including, of course, ways that I might not anticipate.

#### *What Have I Learned, After Five Years of Teaching Access to Justice?*

First, I am far from the only person involved in bringing these issues into the legal curriculum. My colleagues, as well as teachers at other schools, have developed courses and projects as well, many of them much more ambitious and extensive than my own. For example, some schools have created access to justice labs and institutes.<sup>22</sup> And some states are reshaping bar requirements to include an access-to-justice component.<sup>23</sup>

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21. CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM’RS, RESOLUTION 5 REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL 1 (2015), [http://www.ncsc.org/~media/microsites/files/access/5%20meaningful%20access%20to%20justice%20for%20all\\_final.ashx](http://www.ncsc.org/~media/microsites/files/access/5%20meaningful%20access%20to%20justice%20for%20all_final.ashx) [perma: <http://perma.cc/GYN4-8M2Q>].

22. *See, e.g., About, ACCESS TO JUST. LAB AT HARV. LAW SCH.*, <http://a2jlab.org/> [perma: <http://perma.cc/EKP9-PK64>] (last visited Oct. 7, 2018); *Center for Access to Justice and Technology*, CHI.-KENT C.L., (last visited Oct. 7, 2018); *Legal Design Lab*, STAN. L. SCH., <http://law.stanford.edu/organizations/pages/legal-design-lab/> [perma: <http://perma.cc/E6TB-4FFG>] (last visited Oct. 7, 2018).

23. *E.g., Supreme Judicial Court of Mass., Notice of Approval of Proposal to Add Access to Justice Topic to the Massachusetts Bar Examination (2014)*, <http://www.mass.gov/courts/docs/sjc/rule->

Second, my sense that the civil justice gap would come as a surprise to most students has been confirmed. One student told me, only two classes into the semester, that she was entirely “rewiring her thinking” about the profession she was entering. Another student noted, after observing Municipal Court, how struck she was that she had reached the final semester of law school without having seen a court proceeding—much less the sort of assembly-line, lawyer-less (for tenants, at least) hearings of the sort that she had seen that day.

Third, teaching about access to justice is challenging. Students generally have had few opportunities to gain experience in the legal world, either as self-represented individuals or as clients. Few have been involved in (or helped others with) child custody litigation, SSI hearings, foreclosures, forfeitures, debt collection proceedings, or threats of eviction. Without having had the experience of being told by a clerk to file a nunc pro tunc motion, or struggling to comply with rules of evidence, or trying to fit the facts of their situation into a sixteen-factor legal test, students can have trouble relating to readings and discussions about the complexity of legal proceedings. And because most students have not experienced the workings (or the politics) of court systems and of the legal industry, they can also have difficulty imagining solutions.

Compounding the problem is the fact that, from the day they start law school, students are aggressively pushed to “think [and act] like lawyers”—that is, to adopt perspectives, knowledge, skills, and language not shared by others in society. But the price of this transformation may be the loss of the ability to see the legal world the way “ordinary” consumers see it. While it is our job to help students think like lawyers, we need to help them turn off their legal skills long enough to see how laws, rules, and procedures that make sense to professionals become barriers for everyone else (which also means that we who are already lawyers need to turn off those skills as well). And then we need to turn those legal perspectives and skills back on in order to find ways to fix the problems.

These challenges, while significant, are ones that students can recognize and that they seem to approach with enthusiasm. As a result, class discussions are often characterized by a sense of shared discovery of access problems (and possible solutions) that have been, in a sense, hiding in plain sight.

Fourth, real learning requires more than hearing about problems and imagining solutions. Ideally, students should be working directly on researching barriers to access, designing responses, and advocating for their implementation. That has proven a tall order, in part because the access-to-justice movement in Pennsylvania is in its early stages. We are one of only a few states without an Access to Justice Commission<sup>24</sup> or organized leadership from the state Supreme Court, although some justices and appellate judges seem sympathetic. Fortunately, the Philadelphia courts have taken some significant steps to address

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changes/bbe-rule-301-amendment.pdf [perma: <http://perma.cc/J69G-4S66>].

24. See *Access to Justice Commissions Directory and Structure*, AM. BAR ASS'N, [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/resource\\_center\\_for\\_access\\_to\\_justice/atj-commissions/commission-directory.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/atj-commissions/commission-directory.html) [perma: <http://perma.cc/2Q3M-KFJJ>] (last visited Oct. 7, 2018).

these issues,<sup>25</sup> and the Philadelphia Bar Association has an active committee on the subject.<sup>26</sup> But, even though a few of my students have interned with these organizations, it has been difficult to scale up such opportunities.

Finally, issues of access to civil (and for that matter criminal) justice should be explored not only in a dedicated course, but also in many other courses that deal with substantive law and procedure. Property, contracts, family law, consumer law, immigration, tax, bankruptcy, administrative law, civil procedure, and many other areas of law look different when we do not view rights and remedies in isolation, but also ask whether and at what cost people can actually access them.

There is, in sum, much work ahead. But there is also an obvious payoff. If we can help the next generation of lawyers to recognize America's access-to-justice problem, we will be increasing the chance that, in time, that problem will be resolved. Could there be a worthier goal for legal education?

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25. As just one example, the Philadelphia Court of Common Pleas has recently added an "Elder Justice & Civil Resource Center," a resource center located at Philadelphia City Hall that provides free legal assistance for unrepresented seniors. See *The Elder Justice & Civil Resource Center*, PHILA. COURTS, FIRST JUDICIAL DISTRICT, <http://www.philacourts.us/ejc/> [perma: <http://perma.cc/8KTR-8HUI>] (last visited Oct. 7, 2018).

26. *Philadelphia Bar Association's Civil Gideon Corner*, PHILA. BAR ASS'N, <http://www.philadelphiabar.org/page/CivilGideon?appNum=2> [perma: <http://perma.cc/S55A-TWY8>] (last visited Oct. 7, 2018).