

Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History

Robert W. Gordon

Abstract: Ideally, justice is a universal good: the law protects equally the rights of the rich and powerful, the poor and marginal. In reality, the major share of legal services goes to business entities and wealthy people and the prestige and prosperity to the lawyers who serve them. This essay deals with the history of access to justice – chiefly civil justice – and with the role of lawyers and organized legal professions in promoting and restricting that access. In the last century, legal professionals and others have taken small steps to provide access to legal processes and legal advice to people who could not otherwise afford them. By doing so, they have inched closer to the ideals of universal justice. Though the organized bar has repeatedly served its own interests before those of the public, and has restricted access to justice for the poor, it has been a relatively constructive force.

ROBERT W. GORDON is Professor of Law at Stanford Law School and Chancellor Kent Professor Emeritus of Law and Legal History and Professor (Adjunct) of Law at Yale Law School. He is the author of *Taming the Past: Essays on Law in History and History in Law* (2017) and editor of *Law, Society, and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (with Morton J. Horowitz, 2011) and *The Legacy of Oliver Wendell Holmes, Jr.* (1992).

In no profession is the gulf greater between ideals and practices than it is for lawyers. Ideally, justice is a universal good: the law protects equally the rights of the rich and the poor, the giant corporation and the small business, the innocent and the criminal accused. The ethical imperative that lawyers must zealously serve the interests of their clients can be justified, and reconciled with the goal of universal justice, only if all other affected parties (including the clients' adversaries) will be competently represented as well. In practice, of course, access to the complex and expensive procedures of law and the services of lawyers is largely determined by clients' ability to pay: the major share of legal services goes to business entities and wealthy people. The lawyers who enjoy the greatest professional success and prestige do most of their work on behalf of the rich and powerful.¹

This essay examines the history of access to justice – chiefly civil justice, with a brief note on criminal defense – and the role of lawyers and organized

© 2019 by Robert W. Gordon
doi:10.1162/DAED_a_00551

legal professions in promoting and restricting that access. Traditionally, access to justice has meant at minimum the effective capacity to bring claims to a court, or to defend oneself against such claims. Although many courts allow parties to represent themselves, it is clear that effective access usually requires the services of a competent lawyer, since lawyers hold the monopoly of rights of practice in courts and the skills and experience that accrue from that practice. The costs of litigation, however, are very high – in court costs, administrative costs, witness fees, and lawyers’ fees – so much so that even middle-class parties are foreclosed from using the courts for any but routine transactions unless they can tap into financing from some other source, such as contingent fees and attorney-fee awards paid by the adverse party, or state-subsidized legal services.

In the modern world, access to justice requires more than the capacity to litigate in courts. It requires help with navigating the mazes of bureaucratic government and filling out its forms, and with contesting adverse government actions. It requires help in planning for major life events, like founding a business, adopting a child, or divorcing a spouse. It requires effective assistance with challenging adverse actions of business corporations or professionals, say, as employees or customers. It requires access to powerful decision-makers, or agents in a position to influence them. Lawyers are not exclusive providers of such out-of-court services – they have to compete with accountants, financial consultants, and lobbyists, among others – but they tend to dominate.

In the last century, legal professions, governments, and charitable providers have taken small, partial steps to provide access to legal processes and legal advice to people who could not otherwise afford

them. By doing so, they have inched closer to the ideals of universal justice. They have also, on occasion, acted to restrict access to law by the poor and powerless. Despite inspiring rhetoric – and more inspiring models and exemplars – that American lawyers use to trumpet their commitment to equal justice for all, they have generally served their own interests before those of the public, in particular the poor and economically struggling. They serve best the rich and powerful, serve some middle-class clients and interests to the extent that it generates adequate fees, and, with notable exceptions, either serve minimally or not at all virtually everyone else.

Before 1900, mentions in Anglo-American legal records of aid to the poor are scattered. Most of the references are to judges who appointed counsel to poor clients or to lawyers who voluntarily took their cases.

Medieval canon law was full of injunctions to lawyers to serve persons too poor to pay their fees, and “persons of humble status” were frequent enough litigants to suggest that some lawyers did.² Common lawyers also recognized some duties to the poor, codified in statute in 1495, when

Parliament provided . . . that poor persons could petition to plead *in forma pauperis* in all courts of record without the payment of any court fees, and provided further that the Chancellor and Justices should assign to such poor persons attorneys and learned counsel who should give their counsels without taking any reward.³

Lawyers’ fees in medieval times were not high per case (most serjeants-at-law made their serious money via retainers), but English law was already so technical that no one could navigate pleading rules without a lawyer. Scattered reports refer to poor litigants represented by appointed

or volunteer counsel: there is no way to know how frequently. It is likely that most poor persons' disputes were heard in more informal courts like the Court of Requests, or manorial or borough courts. Before the early eighteenth century, middle-class litigants like tradesmen and well-off farmers appeared frequently in common-law courts. But as long ago as the mid-eighteenth century, lawyers' fees and court costs had escalated above even most middle-class pocketbooks.⁴

Until the mid-eighteenth century, a criminal accused was not allowed a lawyer to contest the facts of the cases against him, but had to conduct his own defense. This began to change around the mid-eighteenth century, when lawyers were permitted, but without pay.

With respect to criminal defense, reflecting the colonists' experience on the receiving end of imperial prosecution, the new republic definitively rejected earlier English practice by providing federal and state constitutional rights to counsel in criminal cases. They provided no funding to support the right, but in serious felony cases, especially for murder, courts would often appoint prominent lawyers to defend without pay. They often welcomed the chance for publicity in notorious trials.

Most small claims for civil justice in the earlier nineteenth century were pursued without lawyers in local informal tribunals, like justice of the peace courts or county courts. Anyone, including wives, minors, and slaves, could come under the jurisdiction of these courts, which were regulatory agencies and enforcers of local laws as well as dispute-settlers. Yet even in regular trial and appellate courts, the reports show many cases with lawyers litigating relatively small sums like \$50 to \$100. Entry barriers to the profession were almost nil in most states, so litigants could have the benefit of low-cost advice.

Subsidized advice in the United States to help poor people deal with social and legal problems began with the Working Women's Protective Union in 1863 in New York, which helped workers collect fraudulently withheld wages. The union's example gradually spread to other cities. Staffed, at first, mostly by volunteer women nonlawyers, the Chicago Protective Agency for Women and Children expanded the model. By 1905, it had a paid staff and was handling four thousand cases. The Protective Agency also brought wage claims, but specialized in helping victims of domestic violence, who were often ignored by courts. Around the same time, the Chicago Bureau of Justice was founded. Its clients were mostly poor people with small debts to tradesmen, landlords, and mortgage lenders. Like the Protective Agency, it distrusted the formal legal system: it saw many judges as corrupt and the lower bar as incompetent. The two Chicago organizations merged in 1905 to form the Legal Aid Society of Chicago.⁵

New York City opened its own Legal Aid Society in 1900, largely to aid floods of newly arrived Jewish immigrants. The society grew out of an earlier bureau giving legal advice to German immigrants. Unlike the women's protective unions, New York Legal Aid was mostly staffed by lawyers and defined its work as strictly legal rather than social work. But it was also strongly paternalistic, seeking to educate in American values those whom the lawyers saw as quarrelsome litigious Jews. It generally sought only money damages for clients rather than seeking broader solutions to their family problems, and refused to act if defendants had no assets.

In the early-twentieth-century wave of professionalization, social work emerged as a recognized credentialed profession. Lawyers, spearheaded by new national and local bar associations, sought to raise

their own professional standards with new educational and bar exam requirements. Among lawyers, Reginald Heber Smith of Boston became the most prominent advocate for legal aid with his Carnegie Foundation Report on *Justice and the Poor* (1919), an indictment of unequal access to justice that was the leading manifesto for the legal-aid movement for the rest of the century.⁶ Smith maintained that providing lawyers for the poor and people of moderate means was an elementary requirement of justice, which the legal profession had an obligation to supply rather than leave to charity.

His report ignored the existence of substantial women's legal-aid organizations. He and his disciples fought a running battle with the social workers, insisting that law was a masculine sphere in which clients could exercise legal rights only with the help of a trained lawyer. Eventually, these quarrels were resolved by compromise, with the recognition that many poor clients' problems could not be addressed solely by means of the law. Smith estimated in 1919 that about \$600,000 would suffice to fund adequate legal-aid services in the nation's cities – a contribution of \$5 per lawyer – but complained that lawyers and their guilds were mostly indifferent to the responsibility to supply it.

Some bar leaders continued to promote legal aid, but the rank-and-file remained apathetic and sometimes actively hostile. Until the mid-1960s, the American Bar Association (ABA) condemned as socialism the idea of state-funded – as opposed to bar- and charity-funded – civil legal services, just as the American Medical Association had condemned Medicare. Most urban legal-aid programs remained severely underfunded, unable to accept most potential clients, and prohibited from helping clients divorce or go bankrupt for fear of offending charitable funders. These programs were averse to

taking adversarial stances against landlords or businesses, favoring conciliation rather than the vindication of rights.⁷

The landscape changed in 1965 with the funding of the Office of Equal Opportunity Legal Services Program (since reorganized as the Legal Services Corporation, or LSC) as a component of Lyndon B. Johnson's war on poverty. In a major shift of policy, national bar leaders at the ABA supported this program at the time and have since become its stalwart defenders against multiple political attacks. Federal services expanded the total national legal-aid budget from under \$5 million per year to \$321 million in 1980 – 1981.

Program lawyers, including many top graduates of elite law schools, saw a much more ambitious role for the LSC than traditional legal aid. Rather than simply trying to help clients solve their problems one by one, they favored bringing strategic test-case suits before sympathetic liberal federal judges, and helping client groups like welfare recipients to form organizations capable of making their own demands. Their most controversial efforts were the work of program-funded California Rural Legal Assistance lawyers for Cesar Chavez's farmworkers and program lawyers' support for the militant National Welfare Rights Organization, which lobbied for a right to universal basic income.

The lawyers made fierce enemies among those interests that their clients sued. These included Governor Ronald Reagan of California (as president, he tried to abolish the program in 1981, and succeeded in cutting its budget by 25 percent); local and national welfare officials; real-estate interests targeted by new tenants' organizations; established city patronage machines; and – not least – local lawyers and bar associations unhappy about competition from the new legal-

services bar. The battle over federal legal services has continued since.

The LSC survives with the backing of elite lawyers, the ABA, and the judiciary, but under many and increasing restrictions on the kinds of clients and cases it can accept. The legal-services offices it funds may not bring class actions, lobby legislators, or represent unions, noncitizens, prisoners, or organizations promoting abortion, school desegregation, or welfare reform.⁸ The general aim of conservatives has been to limit LSC-funded lawyers to individual personal aid, and to steer them away from actions with collective consequences like law reform, class actions, impact litigation, or aid to political organizing.⁹

In the same political moment as the founding of the Legal Services Program, the Ford Foundation and other grantors supplied funding to create “public interest” law firms that would supply the resources to pursue systemic reform projects affecting the poor. Ford also funded clinical legal education in law schools. The clinics have supplied a significant proportion of liberal-progressive lawyering. These efforts supplemented the longstanding work of the NAACP Legal Defense Fund (LDF) and the American Civil Liberties Union (ACLU), venerable nonprofits funded by subscribers, to seek court decisions favorable to their causes (African American equality for LDF; first, labor organizing and, later, free expression generally and women’s rights for the ACLU).

Institutionalized pro bono lawyering – although still sparse in relation to the perceived need – came out of the same generation as the lawyers who staffed the Legal Services Program. It has persisted and expanded, in part as a means to attract new associates to corporate practice and give them some on-the-job training with real clients. Most pro bono work is performed

by lawyers in large firms, who often collaborate effectively with established public interest firms to fund and staff major litigation efforts. Law firm pro bono services now exceed in value the entire federal legal-services budget. Some firms also fund public interest fellowships, as the global Skadden firm does with the Skadden Fellowships.

Like LSC lawyers, however, though for different reasons, law firm pro bono lawyers are restricted in the types of work they are allowed to take on: they generally have to avoid clients such as environmental or labor interests whose general aims may be adverse to the firm’s paying clients.¹⁰ Many bar associations have flirted with proposals to make some pro bono service mandatory, but have abandoned the idea in the face of member opposition.¹¹ Some state court judges, however, have strongly supported pro bono work. In 2012, New York State made performance of at least fifty hours of pro bono work by students during law school a condition of their admission to the bar. Yet reliable estimates are that, nationwide, American lawyers, on average, perform about half an hour of pro bono work, broadly defined, per year. They make only derisory financial contributions to legal-aid and public interest organizations.¹²

At the same time that bar associations – formed and dominated for the early part of the twentieth century by elite lawyers – were mostly ignoring calls for civil justice for the poor and middle-class, they were actively campaigning against lawyers for a particular kind of client: plaintiffs’ personal-injury lawyers. Personal-injury lawsuits proliferated in the late nineteenth century as a response to the large-scale carnage of the industrial age: injuries and deaths from mining operations, railroads, street railways,

and, eventually, automobiles. A specialized bar, mostly Jewish and night-school-trained, developed to serve the injured and their families. They took a contingent fee: 30 to 40 percent of any damages recovered, nothing if they lost. The elite lawyers who represented businesses like railroads and streetcar companies tried to close down the night schools. They used the new bar associations to restrict entry to practice, to draw up ethical codes targeting personal-injury lawyers with prohibitions on advertising and soliciting clients, and to discipline the lawyers for violating the codes.¹³ (The Supreme Court struck down the prohibitions on advertising in 1977, though the Court has upheld most restrictions on soliciting paying clients.¹⁴)

After World War II, the personal-injury lawyers seemed to have prevailed in that battle. They formed a powerful trade association, the American Trial Lawyers Association (ATLA; since renamed the American Association for Justice), that lobbied legislatures and argued in courts for broader theories of liability and damage awards. The ATLA portrayed the plaintiffs' lawyers as populist champions, representing the little guy against wealthy and well-lawyered corporations.¹⁵ Their cause was aided by the expansions of liability to include strict liability for defective products (such as pharmaceuticals) and changes in the civil procedure rules to favor class actions and multiparty litigation; and by the Supreme Court decision invalidating the bar's prohibition on advertising.

The defense bar struck back during the general business revolt against regulation beginning in the 1970s and 1980s. Corporate and insurance practitioners warned of a "litigation explosion" of worthless claims that would make American businesses uncompetitive. The trial lawyers were portrayed as greedy exploiters of

naive or opportunistic plaintiffs, looking to score settlements out of nuisance suits supported by "junk science."¹⁶ Some of the critiques were valid, such as that plaintiff and defendant class action lawyers sometimes colluded against the interests of the injured to settle cases early and cheaply, assisted by trial judges trying to clear their dockets.¹⁷ The "litigation explosion" claims have proved mostly mythic, and "junk science" was surely as widely used by defendants (think tobacco) as plaintiffs. But the propaganda of the "tort reform" movement was a huge public relations and political success.¹⁸ Federal and state legislation and court decisions have put limits on both punitive and ordinary damage claims, sometimes imposing strict caps on liability that have the effect of removing lawyers' incentives to take complex cases.¹⁹ Congress has allowed class action defendants to remove cases to federal courts that are expected to treat plaintiffs less generously.²⁰

Most observers have concluded that the chief defect of the personal-injury contingent-fee system for handling tort claims is not that it encourages frivolous claims, but that it filters out too many meritorious claims because they do not promise to yield an adequate recovery.²¹ Its other main defect is its inefficiency: about 50 percent of recoveries are eaten up by administrative costs, including lawyers' fees.²² Some reforms have been proposed, such as enabling outside investors to fund litigation for the big, mass tort claims, which would require loosening ethical prohibitions on fee-sharing with nonlawyers.²³

In the American legal system, in which courts have ample authority to make law through precedent and constitutional rulings, it is not surprising that interest groups should use lawsuits as vehicles

of policy-making. In the heyday of what is now called classical legalism (1870–1932), many such suits were brought by corporations to invalidate Progressive Era legislation adverse to their interests. But social movements for subordinated groups have used the same vehicles. In the nineteenth century, antislavery lawyers brought freedom suits for their slave clients and sought to invalidate the fugitive slave laws and prevent the extension of slavery into new territories.

The most famous and effective uses of lawsuits to create new rights were, of course, those of civil rights and civil liberties organizations like the NAACP Legal Defense Fund, the National Lawyers' Guild, and the ACLU, among others, on behalf of African Americans, women, political and religious dissenters, labor, the disabled, and gays and lesbians. This was lawyering for a cause, but also lawyering for clients who could not find other lawyers. The NAACP and other movement lawyers represented black criminal defendants whom no Southern lawyer, black or white, could act for without risking loss of all his other clients, as well as movement activists and demonstrators served with injunctions or thrown into jail. Guild lawyers acted for accused communists shunned by the respectable bar. The ACLU was founded to represent pariahs like labor organizers and anti-World War I protestors.²⁴ These movements were largely staffed by lawyers marginal to the higher reaches of their profession: racial minorities, Jews, women, and a few maverick patricians.

As with federal legal services, the successes of these legal strategies on behalf of social movements inspired attempts to cripple the lawyers and legal organizations that staffed them. In the civil rights era after *Brown v. Board of Education*, the cream of the establishment bar in the South worked with officials to hobble

the public interest lawyers who brought claims to challenge racial segregation and defend protestors from arrest and prosecution. The states demanded lists of NAACP members, accused lawyers in group practices of ethical violations like soliciting clients, and brought suits for stirring up litigation.²⁵ Most of these efforts were ultimately rebuffed by the Supreme Court, which carved out an exception to the antisolicitation rules for non-profit public interest lawyers.²⁶ In the civil rights era, liberal Congresses and judges also created new avenues for private plaintiffs to enforce antidiscrimination statutes, often through the incentive that, if successful, their lawyers could recover attorney fees from the losing side.

“Equal justice under law” sounds like an uncontroversial slogan. But claims to equal rights are also claims to redistribution of resources, status, and authority: when groups shut out of the justice system get lawyers to make those claims effective, the result can be to sharply challenge existing hierarchies of wealth, power, and status. The rights revolution provoked a severe backlash.

Conservative Supreme Courts since the 1980s have cut back the doctrines and remedies favored by liberal courts in the 1960s and 1970s. Conservative judges are generally reluctant to find that Congress has authorized private rights of action unless it has said so explicitly.²⁷ They are more likely to insist on proof of discriminatory intent, as well as disparate impact, in hiring practices; and to disfavor comprehensive remedies such as structural orders to desegregate school systems or to institute compensatory affirmative action hiring plans.

The Court has also made plaintiffs' cases more difficult to prove and finance. It has tightened pleading rules to impose more procedural roadblocks to get

to discovery; heightened plaintiffs' burdens of proof while enlarging defenses; severely cut back on punitive damages awards; and made it much harder for public interest plaintiffs to recover attorney's fees by denying fee awards if defendants agree to settle.²⁸ In an important string of recent decisions, the Court has approved the now widespread practices of mandatory arbitration clauses in employment and consumer contracts, by which employers require their employees, and consumer products and financial services sellers require their customers, to submit all of their disputes to arbitration and to forgo class actions. The Court has held that federal law preempts and invalidates many state laws that attempt to regulate such practices.²⁹ By denying plaintiffs the ability to aggregate claims, the Court effectively precludes them from addressing and trying to deter and remedy widespread small violations (such as imposing hidden fees). In some contexts – such as nursing homes that mistreat or neglect their vulnerable patients – that removes any incentive for lawyers to accept cases even to avert horrendous harms.

Criminal prosecution is the sharp end of the state, its most coercive process short of war. Lawyers have long been aware that having a good lawyer who can afford to challenge the state's evidence and sway a jury confers significant advantages on a criminal defendant. So important was the right to counsel considered that it was enshrined in the early constitutions. Yet the great majority of defendants are indigent. They cannot buy an adequate defense on the market. Nineteenth-century courts gave some recognition to the problem by appointing counsel in serious felony cases, especially capital cases. Some of the law reform-minded bar groups formed in the Progressive Era (not the

ABA) began to recognize the problem. There followed a long history of reports and initiatives to try to solve it.

A new urgency to fund criminal defense came from Supreme Court decisions requiring states to provide for indigent defense of federal felony defendants (1938), state felony defendants (1963), and, finally, all accused facing loss of liberty (1972). States responded variously: some expanded existing public defender offices, others (like most states of the Old Confederacy) assigned counsel – often the dregs of the bar – to represent accused persons, but paid so little (like \$500 for a capital case) that all any counsel could hope to get for her client was a hastily negotiated guilty plea. Meanwhile, the wars on crime and on drugs, following a spike in violent crime peaking around 1990, effectively transferred charging and sentencing discretion from judges to prosecutors, reducing even further defense counsel's only leverage – the credible threat to take a case to trial – in plea negotiations. Now, fifty-five years after *Gideon v. Wainwright*, criminal defense remains in a state of crisis.³⁰ Despite many publicized exonerations of defendants in capital cases wrongly convicted by the state's misconduct or mistakes, funding for criminal defense has little popular support – in part because most defendants are black or brown – and almost no effective political lobby, though by now the organized bar has taken up its cause.

Contrast England and Wales. After World War II, under pressure to reduce enormous class disparities among a people who had shared equally in wartime sacrifice, the government resolved to try to make the common-law courts, which had been priced far out of the range of most citizens, more accessible. (The pre-war and wartime governments tried to compensate by funding Citizens Advice

Bureaus that dispensed informal advice to people with legal, or potentially legal, problems. These still exist: there is no law in England giving the profession the monopoly over advice-giving.) The route chosen was a form of judicare: Parliament provided a generous system of state support for solicitors and barristers to represent the indigent. By the 1960s, barristers were receiving over half their collective income from legal-aid cases.

A series of governments, beginning with Margaret Thatcher's conservative one and followed by conservative and neoliberal ones, decided this scheme was too costly and wasteful, and have gradually dismantled it in favor of central state control over lawyers' costs and outsourcing to nonprofit providers of more "holistic" services that favor mediation and conciliation over adversarialism in family cases. Personal-injury cases are now, as in the United States, financed by contingent fees. Since 2000, control over providers has been tightened further, subordinating clients' welfare and rights entirely to budgetary concerns, abandoning audits of quality, and leaving to providers how to deal with exploding caseloads.³¹ The legal profession's responses to these changes have been mixed. Initially, they were outraged by some of the reforms targeting their traditional privileges, like barristers' monopoly of rights of audience in courts, and solicitors' monopoly of conveyancing practices.³² More recently, however, lawyers and judges have rallied to protest cuts in legal services budgets and to try to protect rule-of-law values in a system of administrative controls.

The highest barriers to access to the legal system are its complexity and costs.³³ Complexity calls for personnel with the training to deal with it, and their time and that of the other experts who support

their work – forensic accountants, scientific and medical experts, and the like – is expensive. Some blame the complexity of law on lawyers themselves, and there is probably some truth to that charge. But the most likely cause is that a pluralist, fragmented political system like the United States' proliferates multiple and conflicting laws, and interpretations of those laws, to satisfy the demands of interest groups. Legal procedures are distended to meet the capacities and budgets of their highest-end users: business corporations.³⁴ The adversary system adds extra expense because investigating facts is left to the parties, their lawyers, and their hired experts rather than to a neutral magistrate as in Europe. Litigation seems not to have been expensive in the nineteenth century, but became much more so in the twentieth, even though actual trials have almost vanished in civil and criminal cases.

Cost and complexity naturally give rise to counterpressures to reduce both. Some well-known studies of litigation rates over time show that with industrialization, they rise sharply, but then start to decline. The reason suggested is that many areas traditionally handled in courts become routinized in administrative procedures, or shunted off to more informal dispute-settlement.³⁵

There are several examples within the American judicial system:

Compensation for employee injuries beginning around 1910 were shifted out of the tort system into administrative workers' compensation systems. (Lawyers were at first excluded from the claims system, but forced themselves, and then were allowed, back in.)

Claims for auto accident compensation were, early in the twentieth century, largely relegated to insurance agency adjusters, who determined the merit and value of claims, with the courts as

A Brief History a backstop for unsettled cases.³⁶ Minor “soft-tissue” injuries from accidents are increasingly the province of settlement mills, which send demands for compensation to insurance companies, take a cut of the proceeds, and never try cases.³⁷

The veterans benefits claim system from the Civil War to 1988 excluded lawyers by providing they could be paid no more than \$10 per case.³⁸

Divorce has been mostly delegalized, taken out of the court system by no-fault divorce, and self-help form-filling in uncontested cases. Many divorce lawyers’ offices now offer mediation services to clients.³⁹

More ominously, as mentioned above, many tort and contract claims that might otherwise be heard in courts have been relegated to arbitration by mandatory arbitration clauses in most consumer and employee contracts.

Federal immigration rules permit certain kinds of nonlawyer advisors to act for immigrants.⁴⁰

Another project of the organized bar that has obstructed access to justice, broadly conceived, has been its sustained efforts to maintain its monopoly over advice-giving that has any legal component. Throughout the twentieth century, using statutes prohibiting the “unauthorized practice of law,” the bar has fought turf wars with many competitors, some won and some lost.⁴¹ The bar ceded most tax preparation work to accountants, and real-estate closings in many states to title companies and realtors. It is currently challenging firms like LegalZoom and RocketLawyer, which supply mostly standardized legal services for relatively routine transactions.

Many current proposals are in the air to relax unauthorized practice rules to allow paraprofessionals who have gone through a short training and certification

program to help clients navigate disputes and adverse government actions. Segments of the organized bar, although still mounting phalanxes of resistance, have begun to perceive the inutility and bad public relations of resisting nonlawyer involvement in markets its monopoly does not serve. There are many areas of practice in which specialized paraprofessional providers could give better service than barely competent generalist graduates of law schools (immigration law is a prime example).

An ABA Commission on Nonlawyer Practice recommended in 1995 that unauthorized-practice rules be relaxed to permit the licensing of paraprofessionals.⁴² The ABA ignored the report. In 2012, the Supreme Court of Washington State agreed to license paralegals, but, as of 2018, they were limited to twenty-eight paralegals in family practice, regulated by the state bar, and not allowed to appear in court; and they face hostility from family lawyers.⁴³ In general, it is unrealistic to expect bar associations, representing a profession facing high levels of unemployment among recent law graduates, to go very far to welcome competing providers.

In the profession’s long history, leading lawyers and judges have recognized and sporadically acted on the profession’s public obligations to open paths to legal services for relatively poor people. They have frequently acknowledged that the ideal of the rule of law requires universal access to justice. The profession’s ideals have inspired some of its exceptional members to devote their careers to serving and promoting service to poor or unpopular clienteles. Those ideals and their heroic exemplars still lead students to apply to law schools and, once in practice, to seek out occasions for pro bono work or charitable or government service.

But most lawyers, most of the time, are concerned with making a profitable living, and not much interested in supplying or financing legal services for others: they put their own interests first, then their clients', and only as an afterthought, the public's and nonpaying clientele's. More disturbing, lawyers for powerful clients facing opposition from weaker adversaries have proved all too willing to subvert the ideals of equal access to law, under the pretext of economic efficiency, by denying a level playing field to lawyers for the other side. Remember, for example, the campaigns against the tort plaintiff's bar and for mandatory arbitration clauses in employment and consumer contracts, and the attacks on law reform efforts of legal services and on fee awards supporting the public interest and civil rights bars.⁴⁴

Professional organizations such as bar associations have always had a dual character: they are official spokesmen for the public aspirations of the profession to serve the ideals of the rule of law and universal justice, and often sponsors of programs to make the ideals effective; but

they are primarily guilds whose aim is to protect and expand monopoly domains for their members' work, demand for their services, and their fees and profits. When those public aims and the guild's interests conflict, the leaders and the rank-and-file of the bar tend, not surprisingly, to favor the guild's. Initiatives to make justice more accessible have been more likely, when they come, to originate with those marginal to or outside of the profession.

European societies have long accepted the responsibilities of providing legal services, just as they provide health care, to people who cannot afford them as basic responsibilities of the state.⁴⁵ In the United States, the government underwrites over half of the cost of health care (through Medicare, Medicaid, and programs of the U.S. Department of Veterans Affairs). But for legal services, we are still depending on direct client funding plus a stingy and hobbled federal program and a mishmash of volunteer and philanthropic efforts. That is no way to run a system that aspires to equal justice.

ENDNOTES

- ¹ If empirical support is needed for so obvious a proposition, see the classic study of the Chicago Bar: John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, and Edward O. Laumann, *Urban Lawyers: The New Social Structure of the Bar* (Chicago: University of Chicago Press, 2005).
- ² James A. Brundage, "Legal Aid for the Poor and the Professionalization of Law in the Middle Ages," *American Journal of Legal History* 9 (169) (1988): 171, 174.
- ³ David J. Seipp, "Legal Services for the Poor in the Early Common Law," in *Law and Society in Later Medieval England and Ireland: Essays in Honour of Paul Brand* (Abingdon, United Kingdom: Routledge, 2018), discussing An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, Statute 11 Hen. 7, chap. 12, reprinted in *Statutes of the Realm*, vol. 2 (1495), 578.
- ⁴ See Christopher W. Brooks, "Litigation and Society in England, 1200–1996," in *Lawyers, Litigation and English Society Since 1450* (London: Hambledon Press, 1998), 63, 94–95.
- ⁵ For the pioneering role of the women's societies, see Felice Batlan, *Women and Justice for the Poor: A History of Legal Aid, 1863–1945* (Cambridge: Cambridge University Press, 2015).
- ⁶ Reginald Heber Smith, *Justice and the Poor: A Study of the Present Denial of Justice to the Poor and of the Agencies Making More Equal Their Position Before the Law with Particular Reference to Legal*

- Aid Work in the United States* (New York: Carnegie Foundation for the Advancement of Learning, 1919).
- ⁷ See Earl Johnson Jr., *To Establish Justice for All: The Past and Future of Civil Legal Aid in the United States*, vol. 1 (Santa Barbara, Calif: Praeger, 2014), 3–43.
- ⁸ The restrictions on LSC-funded lawyers are summarized at Legal Services Corporation, “About Statutory Restrictions on LSC-Funded Programs,” <https://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs>. For more information on their effects, see Brennan Center for Justice, *Restricting Legal Services: How Congress Left the Poor with Only Half a Lawyer* (New York: Brennan Center for Justice, New York University School of Law, 2000).
- ⁹ The definitive history of OEO-LSP and LSC is by one of the program’s early directors, Earl Johnson Jr., *To Establish Justice for All*.
- ¹⁰ See Scott Cummings, “The Politics of Pro Bono,” *UCLA Law Review* 52 (1) (2004): 116–123.
- ¹¹ Deborah L. Rhode, *Access to Justice* (Oxford: Oxford University Press, 2004), 148–151.
- ¹² *Ibid.*, 154–155.
- ¹³ Jerold Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford: Oxford University Press, 1976).
- ¹⁴ *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); and *Ohralik v. Ohio State Bar*, 446 U.S. 447 (1978).
- ¹⁵ John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, Mass.: Harvard University Press, 2009), chap. 4.
- ¹⁶ See, for example, Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books/St. Martin’s, 1991); Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America’s Rule of Law* (New York: Truman Talley Books/St. Martin’s, 2003); and Philip K. Howard, *The Death of Common Sense: How Law is Suffocating America* (New York: Random House, 1994).
- ¹⁷ See, for example, John C. Coffee Jr., “Class Wars: The Dilemma of the Mass Tort Class Action,” *Columbia Law Review* 95 (1343) (1995).
- ¹⁸ See, for example, Marc Galanter, “Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) about our Allegedly Contentious and Litigious Society,” *UCLA Law Review* 31 (4) (1983).
- ¹⁹ See Stephen Daniels and Joanne Martin, “Evidence on the Link Between Damage Caps and Access to the Civil Justice System,” *DePaul Law Review* 55 (635) (2006).
- ²⁰ Class Action Fairness Act of 2005 (CAFA), 28 U.S. Code § 1332(d).
- ²¹ Richard L. Abel, “The Real Tort Crisis—Too Few Claims,” *Ohio State Law Journal* 48 (443) (1987).
- ²² See Deborah R. Hensler, Mary E. Vaiana, James S. Kakalik, and Mark A. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* (Santa Monica, Calif.: RAND Corporation, 1987), 29, Table 4.1.
- ²³ ABA Model Rules of Professional Conduct § 5.4.
- ²⁴ See Mark Tushnet, “The Rights Revolution in the Twentieth Century,” in *The Cambridge History of Law in America*, vol. 3, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 377–402.
- ²⁵ See, for example, the Virginia antisolicitation statute invalidated in *NAACP v. Button*, 371 U.S. 415 (1963).
- ²⁶ *In Re Primus*, 436 U.S. 412 (1978).
- ²⁷ Pamela S. Karlan, “Disarming the Private Attorney General,” *University of Illinois Law Review* 183 (2002).

- ²⁸ See Stephen B. Burbank and Sean Farhang, “Retrenching Civil Rights Litigation: Why the Court Succeeded Where Congress Failed,” in *The Rights Revolution Revisited: Institutional Perspectives on the Private Enforcement of Civil Rights in the U.S.*, ed. Lynda G. Dodd (Cambridge: Cambridge University Press, 2018), 197–223.
- ²⁹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); and *Epic Systems Corp. v. Lewis*, 584 U.S. ____ (2018).
- ³⁰ Stephen B. Bright and Sia M. Sanneh, “Fifty Years of Defiance and Resistance after *Gideon v. Wainwright*,” *Yale Law Journal* 122 (2150) (2013).
- ³¹ See Hilary Sommerlad, “Some Reflections on the Relationship between Citizenship, Access to Justice, and the Reform of Legal Aid,” *Journal of Law and Society* 31 (345) (2004).
- ³² Richard L. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press, 2004).
- ³³ The most comprehensive analysis of legal complexity and costs and their causes is Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (Oxford: Oxford University Press, 2016), chap. 7.
- ³⁴ See Robert A. Kagan, “Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry,” *Law and Social Inquiry* 19 (1) (1994).
- ³⁵ See Lawrence M. Friedman, “Access to Justice: Social and Historical Context,” in *Access to Justice: Promising Institutions*, vol. 2, ed. Mauro Cappelletti and John Weisner (Alphen aan den Rijn, The Netherlands: Sijtoff and Noordhoff, 1978).
- ³⁶ H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Piscataway, N.J.: Transaction Publishers, 1970).
- ³⁷ Nora Freeman Engstrom, “Sunlight and Settlement Mills,” *NYU Law Review* 86 (805) (2011).
- ³⁸ Codified in 38 U.S. Code § 3404(c)(2).
- ³⁹ Rhode, *Access to Justice*, 81–82.
- ⁴⁰ U.S. Citizenship and Immigration Services, “Representation before USCIS,” in *Adjudicator’s Field Manual* (Washington, D.C.: U.S. Citizenship and Immigration Services, 2012), https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2201/Chptr12_1.html (revised April 23, 2012).
- ⁴¹ Deborah L. Rhode, “Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions,” *Stanford Law Review* 14 (1) (1981); and Richard L. Abel, *American Lawyers* (Oxford: Oxford University Press, 1989), 112–126.
- ⁴² ABA Commission on Nonlawyer Practice, “Nonlawyer Activity in Law-Related Situations” (Chicago: American Bar Association, 1995), https://www.paralegals.org/files/ABA_Commission_on_Non-Lawyer_Practice.pdf.
- ⁴³ Washington State Bar Association, “Limited License Legal Technicians,” <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians>; and Nicole Shilling, “Loosening a Legal Monopoly: Perspectives from Paraprofessional Pioneers,” unpublished interview study of Washington LLLTs, Stanford Law School, 2018.
- ⁴⁴ For a catalog of several such efforts, see David Luban, “Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers,” *California Law Review* 91 (209) (2003).
- ⁴⁵ See Richard L. Abel, “Law without Politics: Legal Aid Under Advanced Capitalism,” *UCLA Law Review* 32 (474) (1985): 492–494.