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The Sky Is Falling (Again): Evaluating the Current Crisis in the Judiciary

DONALD CAMPBELL*

"Our administration of justice is not decadent. It is simply behind the times."¹

INTRODUCTION

The title of this symposium is "Crisis in the Judiciary." There seems to be a consensus that the judiciary is in crisis,² but what does the phrase mean? This Article will argue that a more accurate question is: What does it mean today? The idea that the legal profession is ailing is nothing new. Every generation faces questions about how to ensure that courts are both accessible and responsible to the needs of the populace.³ So

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¹ Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395, 416 (1906).

² See, e.g., CHIEF JUSTICE JOHN ROBERTS, 2006 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1-5 (2007), available at <http://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> (discussing the constitutional crisis in the judiciary due to inadequate pay for federal judges); CHIEF JUSTICE WILLIAM REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 1-3 (2005), available at <http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf> (highlighting the funding crisis that is impeding the federal judiciary's functionality); Lee Renzin, *Advice, Consent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1741-44 (1998) (detailing the crisis caused by the high number of federal-judgeship vacancies).

³ See, e.g., Michael J. Frank, *Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary "Crisis,"* 87 MARQ. L. REV. 55, 55-58 (2003) (discussing how inadequate compensation affects the quality of the judiciary); Charles F. Hobson,

in a sense, we are in good company with today's hand-wringing and navel-gazing. However, today's crisis is unique and, in a sense, more disturbing than past crises.⁴ The barriers faced by prior generations were largely self-imposed, or at least within the capacity of the law and profession to attempt to remedy. Today, however, in addition to the traditional debate over the need for greater access to the legal system, we are faced with a more fundamental concern: access to courts.

This is a disturbing diversion because access to courts is a necessary — although admittedly not sufficient — condition that must be satisfied in order for individuals to have access to justice. Severe reductions in court funding may risk these two priorities becoming disassociated. The question then becomes how to acquire more funding for courts so they remain open, rather than how to ensure adequate funding for courts *in order to* provide access to justice. Consider this quote from a recent article in the California Bar Journal about the crisis in funding:

[T]hat the current budget crisis threatens our democracy, [is] an undeniably true statement. Without adequate funding, our courts will bolt their doors and shutter their windows. Without access to the courts, our citizens will lose their fundamental right to get their disputes resolved. Without such resolutions, one party or another will suffer. The party that will usually suffer is the impoverished one: the party that needs access to the courts the most because he or she is least able to afford the delay caused by court closures.⁵

Conceptually, it is helpful to think about the of crisis of access as arising on two levels: first-order and second-order concerns. A first-order concern is physical access to courts. This is the concern raised by the quote above. Closed courthouses can result in both the inability to pursue claims

Defining the Office: John Marshall as Chief Justice, 154 U. PA. L. REV. 1421, 1426-27 (2006) (discussing the judicial crisis faced by the Marshall Court during the Jefferson Administration); Gerald Bard Tjoflat, *More Judges, Less Justice: The Case Against Expansion of the Federal Judiciary*, 79 A.B.A.J. 70, 70-73 (1993) (explaining the adverse effects a growing judiciary has on the equality of justice); Peter Alan Bell, Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 587-90 (1970) (discussing the effects of a judge's out-of-court activity on the perception of the judiciary).

⁴ However, to make a statement that one crisis is more severe than another is itself an indication that the writer is destined to view events through a particular contextual lens. In 1990, long before the current crisis, Professor Geoffrey C. Hazard perceived that the profession was in a crisis unlike any other: "Dissatisfaction with lawyers is a chronic grievance, and inspires periodic calls for reform. Nevertheless, the contemporary problems of the American legal profession seem to run deeper than in the past." Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1239 (1991).

⁵ Bill Hebert, *The Budget and the Crisis in the Judiciary*, CAL. B.J., Aug. 2011, available at <http://www.calbarjournal.com/August2011/Opinion/FromthePresident.aspx>.

and the inability to have claims resolved in a timely manner.⁶Second-order concerns involve what might broadly be defined as knowledge of legal rights and a fair, and just judicial system. A violation of second-order access occurs even if the courthouse is physically available (i.e., is open), when the right or ability to press a claim is unavailable because of structural barriers—such as inability to pay for legal representation,⁷ lack of sufficient knowledge about legal rights (access to lawyers),⁸ or the skewed nature of the system itself against the poor or disadvantaged (access to justice).⁹

First-order access (to courts) is important, as our laws and court system are built upon the assumption that those wronged possess the right to have their case heard and decided by an impartial arbiter.¹⁰ If our legal system does not live up to these ideals, fundamental objectives of democracy are put at risk.¹¹ Those denied access to the legal system to resolve their disputes may very well look to other non-legal avenues (such as self-help) or be divested of pursuing legitimate claims all together.¹² This Article

⁶ *Id.*

⁷ See Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 973-76 (2012).

⁸ See *id.* at 975.

⁹ Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601, 601-02 (1997).

¹⁰ U.S. CONST. amend. V; see also U.S. CONST. amend. XIV, § 1 (extending the Fifth Amendment's due process guarantee to govern state action).

¹¹ 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*, xxxv-xxxvi (Patterson Smith 3d ed., 1972) ("The widespread suspicion that our law fails to secure justice has only too much basis in fact. If this suspicion is allowed to grow unchecked, it will end by poisoning the faith of the people in their own government and in law itself, the very bulwark of justice."); William T. Robinson, III, *Justice in Jeopardy: The Real Cost of Underfunded Courts*, 27 CRIM. JUST. 2, 2-3 (2012) [hereinafter Robinson, *Justice in Jeopardy*] ("[A]n independent, well-functioning judiciary is the key to constitutional democracy. And constitutional democracy is the key to freedom. That is why funding our courts is so fundamental and essential.").

¹² SMITH, *supra* note 11, at 10. Smith, explaining the sentiment of those who found that the legal system was unavailable believed:

It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and another for the poor.

will analyze the unique challenges and opportunities presented by the current budgetary crisis. The Article will not stop at physical access, but will also consider second-order concerns. As a profession, we need to take a broad view of access issues. It is understandable that most of the focus is on the current fiscal woes, because those are the most pressing concerns. However, it is important to recognize that the issues we face today did not arise overnight, or in a vacuum. Instead, the current system exists as a result of decisions made in response to prior crises. Evaluation of the current situation should be viewed through that broader lens. Inertia and assumptions exist today based upon those prior decisions and structures. In other words, there is a tendency to assume that the way things are being done is the way they must or should be done, without realizing that the current system was developed in a different time and under different conditions.

In 1906, Professor Roscoe Pound wrote an article entitled *The Causes of Popular Dissatisfaction with the Administration of Justice*.¹³ He began the article with this statement: "Dissatisfaction with the administration of justice is as old as law."¹⁴ This statement continues to be true more than 100 years after Pound wrote it. This continual dissatisfaction is based on how legal systems develop. Systems are structured and organized by individuals responding to the crisis occurring at the time. The problem is that, as time passes and society changes, the legal system tends to not evolve and therefore becomes out dated. In a sense, this is a good thing. It provides certainty and continuity—familiar procedures and processes that are crucial to a functioning legal system.¹⁵

While the system is effective at ensuring a consistent application of the laws and procedures, it limits the ability to be flexible and respond to changing social and political concerns. Thus, over time, the system becomes (or leaves the impression that it is) out of touch, unresponsive, and unjust.¹⁶ As Pound puts it, the result is "a government of the living by the dead."¹⁷ A legal system that prides itself on certainty and uniformity, based on rules and procedures created long ago, finds itself increasingly

Id.

¹³ Pound, *supra* note 1, at 395.

¹⁴ *Id.* at 395-96. "In other words, as long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere arbitrary technicalities, and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice." *Id.* at 396.

¹⁵ *Id.* at 399-400.

¹⁶ Charles Dickens provides a vivid description of a court system caught up in the intricacies of process over substantive justice in his novel *Bleak House*. CHARLES DICKENS, *BLEAK HOUSE* 1-4 (MacMillan and Co. 1905) (1852).

¹⁷ Pound, *supra* note 1, at 400.

unresponsive. The point here is not that the legal system is so inflexible that it is not capable of change, but instead to acknowledge that change is not easy or welcome. In fact, real change most often occurs when the system is faced with a crisis.¹⁸

In times of crisis, reevaluation is possible and necessary. In this way, crises bring about a “paradigm shift” in how the legal system operates.¹⁹ A paradigm shift represents a fundamental change and break from the old system. It is a time when processes and rules previously enacted—and assumed to be true—are called into question. These shifts have occurred in the past, and the current economic downturn and funding crisis facing courts seem to be leading to another shift.²⁰

The current economic downturn has impacted both access to courts, and access to lawyers and justice. Severe budget cuts—at both the state and federal level—have compromised access to courthouses.²¹ Second-order access has also been compromised. Not only have the types of problems normally associated with economic hard times increased—unemployment, foreclosures, and domestic issues²²—but the downturn also pushed a

¹⁸ *Id.* (“[W]e must pay a price for certainty and uniformity. The law does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely. The moral or intellectual or economic change must come first.”). In 1967, another time of paradigm shift, an author began an article on access to justice: “With startling suddenness the legal profession has recently come to realize that a society can guarantee equal justice only by providing all citizens with effective access to the institutions by which justice is obtained and that for millions of Americans the unavailability of lawyers’ services has made justice inaccessible.” Daniel H. Lowenstein & Michael J. Waggoner, Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805, 805 (1967).

¹⁹ Thomas Kuhn introduced the concept of a paradigm shift in 1962. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 159-72 (1962). Kuhn posited that scientific understandings operate within a framework of what is termed “normal science” until enough contrary evidence is developed that what was previously considered to be accepted (i.e., normal) can no longer stand. The scientific theory is thrown into a state of crisis, as defenders of the old science contend with those arguing for a new approach. Out of this debate comes a new view of the scientific world. This new “worldview” becomes the norm until it is challenged. At that point a new crisis emerges, and with it the potential for a new paradigm. Paradigm shifts, however, are neither quick nor easy. *See id.* at xi, xii.

²⁰ Other phrases also recognize the need for underlying change to the system. For example, during the symposium Lewis H. Spence, Massachusetts Civilian Court Administrator, used the phrase “crisis of modernization” and cited the need for a “fundamental change in the culture of the [judicial] organization.” It is this recognition of the need to reevaluate and change underlying assumptions of the judiciary that brings about a new paradigm. Lewis Spence, Court Adm’r, Mass., Trial Courts, Address at the New England Law Review Symposium: Crisis in the Judiciary (Nov. 15, 2012).

²¹ Herbert B. Dixon, Jr., *The Real Danger of Inadequate Court Funding*, 51 JUDGES’ J. 1, 42-43 (2012).

²² LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET

number of individuals into poverty. In fact, in Michigan, between 2000 and 2010, the number of people who qualified for free legal aid (those below 125% of the federal poverty line) increased by 50%.²³ While the number and needs of those impoverished have increased, funding for traditional methods of access to lawyers for this segment of society has been slashed.²⁴ This has resulted in a record number of self-represented litigants who cannot hire a lawyer.²⁵ In short, the economic downturn created the perfect storm—decreased access to courthouses, decreased access to lawyers, and an increased need to assert legal rights.

In addition to the economic downturn, individuals across the economic spectrum face challenges associated with severe weather events and other disasters—Hurricane Katrina in 2005, Gulf of Mexico Oil Spill in 2010, and Superstorm Sandy in 2012.²⁶ These types of events further expose the weaknesses and inefficiencies of the current system and increase calls for reform.²⁷ As these types of large-scale destructive events increase, the legal

CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 5 (2009), available at www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (“The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress, has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time.”).

²³ Julie I. Fershtman, *Michigan’s “Justice Gap”: Seeking Solutions Through Innovation and Collaboration*, MICH. B.J., June 2012, at 16, 16.

²⁴ Press Release, Legal Servs. Corp., Funding Cuts Expected to Result in Nearly 750 Fewer Staff Positions at LSC-Funded Programs (Aug. 15, 2012), available at <http://www.lsc.gov/media/press-releases/funding-cuts-expected-result-nearly-750-fewer-staff-positions-lsc-funded>.

²⁵ Karen McGlone, *Framing the Fight for Justice*, 72 OR. ST. B. BULL. 30, 30 (2012).

Funding for Legal Aid has been slashed which, when combined with issues that mushroom in a poor economy—debt collection, foreclosures and marriage dissolution—drives more and more people to represent themselves. The responsibility for educating them about court proceedings, legal issues, and how to represent themselves increasingly falls to the underfunded courts.

Id.

²⁶ See generally Jeffrey A. Groen & Anne E. Polivka, *Hurricane Katrina Evacuees: Who They Are, Where They Are, and How They Are Faring*, 131 MONTHLY LAB. REV. 32, 32 (2008) (discussing the devastation of Hurricane Katrina and its effect on low-income residents); *Gulf of Mexico Oil Spill* (2010), *Times Topics*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html (last visited Apr. 13, 2013) (discussing the environmental and corporate harms associated with the major disaster); Andrew Miga, *Superstorm Sandy Flood Aid to Get Vote in Congress on Friday*, HUFFINGTON POST (Jan. 3, 2013, 4:26 PM), http://www.huffintonpost.com/2013/01/03/superstorm-sandy-flood-aid_n_2404871.html (discussing the political impact of Superstorm Sandy).

²⁷ See, e.g., Frank X. Neuner, Jr., *The Funding Crisis in Louisiana Public Defender System*, 60

system is going to face even more challenges in assuring access to both the courts and justice.²⁸

There is a persistent feeling in the current crisis that courts can no longer operate within the status quo, and that change is needed on a fundamental level. The questions that the legal profession now faces are: What changes are going to come out of the crisis, and, How will avenues of access to courts and justice evolve? Symposiums, such as this one, allow for collective evaluation of the changes necessary to ensure that our legal system does not become viewed as inaccessible, or merely as an avenue to justice for someone else (wealthy or well-connected) and not for the citizenry as a whole. While the current situation is often discussed in dire terms, such as “crisis,” the reality is that this is not the first reassessment that the profession has undertaken. Historically crises, while painful at the time, have ultimately yielded positive results.

This Article will consider the current crisis in a broad historical context. This larger narrative can provide a helpful perspective in the current debate. It offers a glimpse into how we came to the current system and allows us to question our assumptions regarding the way the system currently works. Historical context is an important (and under-discussed) aspect of this crisis. As the leaders of the bench and bar come together to evaluate changes to the current system, the discussion should begin with understanding how the system evolved to where it is now and with appreciating the fact that the current situation may call for solutions very different from those that worked in the past. This Article is structured around three broad themes of access to the legal system: (1) access to the courthouse;²⁹ (2) access to lawyers;³⁰ and (3) substantive and procedural access to justice.³¹ While the purpose of this Article is to encourage leaders in the judiciary to view the current crisis differently—and not necessarily

LA. B.J.110, 111 (2012) (“Hurricanes Katrina and Rita struck Louisiana, washing away most of the criminal justice system in south Louisiana. For public defense, this was a needed cleansing that served as a catalyst for necessary and constitutionally mandated reform.”).

²⁸ See, e.g., Greg G. Guidry, *The Louisiana Judiciary: In the Wake of Destruction*, 70 LA. L. REV. 1145, 1145-46 (2010) (discussing the Louisiana Supreme Court’s Continuity of Operation Plan implemented after Hurricanes Katrina and Rita); Angela A. Allen-Bell, *Bridge Over Troubled Waters and Passageway on a Journey to Justice: National Lessons Learned About Justice from Louisiana’s Response to Hurricane Katrina*, 46 CAL. W. L. REV. 241, 241-42 (2010) (discussing crime in certain parishes following Hurricane Katrina and the concerns regarding the prosecutions that followed); Sarah S. Vance, *Justice After Disaster—What Hurricane Katrina Did to the Justice System in New Orleans*, 51 HOW. L.J. 621, 621-22 (2008) (discussing chaos and lack of order due to failures by the state justice system in New Orleans).

²⁹ See *infra* Part I.

³⁰ See *infra* Part II.

³¹ See *infra* Part IV.

to propose solutions—this Article includes some suggestions for consideration.

I. First-Order Access Concern: Lack of Access to the Courthouse

The most unique aspect of this particular crisis is the limitation on physical access to courthouses. If the lack of other types of access (such as access to effective legal representation) is denial of the “golden key” to the courthouse, lack of physical access might be described as denying the “iron key.” Closed and inaccessible courts deny the basic right of physical access. In the last few years, jurisdictions have retrenched funding available to the judicial branch, resulting in courts facing the prospect of closing or reducing services.³² Honorable Robert J. Cordy, an Associate Justice of the Massachusetts Supreme Judicial Court, called the current funding retrenchment a “deconstruction” or “devolution” of the court system.³³ The President of the American Bar Association (“ABA”) used similar language of decay to describe the current state of affairs: “States are grappling with a funding crisis, a chronic disease that is wasting away our state courts, diminishing their ability to serve the public they protect. The crisis was born from sustained fiscal instability and magnified by two financial catastrophes in the last decade.”³⁴

The genesis of the current funding crisis can be traced to budget decisions by state legislatures. In recent years, legislatures have cut funding to the judiciary at an alarming rate. For example, in Massachusetts, court funding consisted of 2.16% of the state budget in 2008, while in 2013 that number has decreased to 1.7%.³⁵ In Pennsylvania, the percentage is even more shocking, comprising only .5% of the state budget in 2011.³⁶ While both federal and state courts have faced cuts, the cuts at the state level are particularly worrisome not only because state courts deal with the overwhelming amount of litigation in the country, but also because state courts are more likely to deal with the issues faced by the poor and middle class.³⁷

³² William T. Robinson III, *A Troubling Trend Across the Country in Our State Courts*, J. KAN. B. ASS’N, Mar. 2012, at 8, 8 [hereinafter Robinson, *A Troubling Trend*].

³³ Honorable Robert J. Cordy, Assoc. Justice, Mass. Supreme Judicial Court, New England Law Review Symposium: Crisis in the Judiciary (Nov. 15, 2012).

³⁴ William T. Robinson III, *No Courts, No Justice, No Freedom*, PA. LAW., Feb. 2012, at 50, 50 [hereinafter Robinson, *No Courts, No Justice*].

³⁵ Cordy, *supra* note 33.

³⁶ Robinson, *No Courts, No Justice*, *supra* note 34, at 51.

³⁷ See *Understanding Federal and State Courts*, USCOURTS.GOV, <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx> (last visited Apr. 13, 2013) (highlighting the distinction in jurisdiction between

The impact of budget cuts is both tangible and intangible. Courts have been forced to close early.³⁸ Litigants have been required to furnish paper for their cases before filing suit.³⁹ Courts have fired staff and frozen hiring, leaving vacant positions unfilled.⁴⁰ For example, a San Francisco judge was recently forced to lay off two hundred court employees.⁴¹ A study from New York, after a particularly drastic set of budget cuts, found that the courthouse was inaccessible for as much as one month a year, resulting in increased delay and costs to litigants.⁴² These cutbacks are particularly hard-felt by self-represented individuals who rely on court staff for assistance in filing and court procedures.⁴³ Funding cuts also have a ripple effect: some jurisdictions have refrained from pursuing certain crimes to avoid the costs involved with prosecution.⁴⁴

There is a concern that individuals will lose faith in a justice system that they cannot access—or a system that, once they enter, they cannot

federal and state courts).

³⁵ See, e.g., Jeffrey D. Jackson, *Judicial Reform: Project Pegasus and the Study of the Kansas Judiciary*, 51 WASHBURN L.J. 477, 477 (2012) (“In 2009, the Kansas judiciary was faced with a budget crisis that forced it to take the unprecedented step of closing all state courts and furloughing personnel for four days.”).

³⁹ Robinson, *A Troubling Trend*, *supra* note 32, at 8.

⁴⁰ Julie I. Fershtman, President’s Note, *No Courts, No Justice, No Freedom: You Don’t Know What You’ve Got Till It’s Gone*, MICH. B.J., May 2012, at 16, 16.

⁴¹ Nancy McCarthy, *Budget Cuts Hit Home*, CAL. B.J., Aug. 2011, available at <http://www.calbarjournal.com/August2011/TopHeadlines/TH5.aspx>.

⁴² N.Y. STATE BAR ASS’N, REPORT OF THE EXECUTIVE COMMITTEE ON THE IMPACT OF RECENT BUDGET CUTS IN NEW YORK STATE COURT FUNDING 9 (2012), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=62098&Template=/CM/ContentDisplay.cfm>.

⁴³ Vincent E. Doyle III, *Our Goal: Justice for All*, N.Y. ST. B. ASS’N J., May 2012, at 5, 5, available at 85-MAY N.Y. ST. B.J. 5 (WestLaw).

Important programs and resources are casualties of drastic budget cuts: courthouses have had to reduce their hours and staff; there is less administrative help for the many pro se parties seeking assistance with filings and paperwork; library services have been limited; pro bono coordinators who would ease the burden have been laid off; child care resources have been cut. One particularly disturbing finding is that jury pools have been reduced; in some instances, courts have run out of potential jurors.

Id.

⁴⁴ Robinson, *Justice in Jeopardy*, *supra* note 11, at 4 (“Faced with a 10 percent budget cut, a district attorney’s office in Shawnee County, Kansas, announced domestic violence cases would no longer be prosecuted. Then the Topeka City Council voted to decriminalize misdemeanor domestic battery, also for budgetary reasons. The decision was reversed only after a public outcry.”).

escape because of long delays.⁴⁵ Of course in an economic downturn, legislative branches cut funds in many areas and make difficult decisions about funding priorities. Courts are particularly vulnerable because they do not have vocal constituents in the budgeting process.⁴⁶ State legislatures have been accused of “brazenly us[ing] the judicial branch as their ATM in an attempt to solve the budget crisis.”⁴⁷ This concern is enhanced because not only do legislatures have the power to determine the amount of funding, they also have the power to increase courts’ workload. For example, the “war on drugs” of the 1980s and 1990s led to increased prosecution of individuals under expanded drug laws—consuming scarce judicial resources—without a commensurate increase in funding.⁴⁸ While court jurisdiction and workload may be expanded, when making funding decisions, courts often are not a top priority, and may not even have a voice in the negotiation process.⁴⁹

Of course, legislative bodies have always had to make tough funding decisions, and courts have often been vulnerable—particularly in times of economic distress. In prior crises, however, courts have looked externally for methods of ensuring adequate funding. For example, a survey of law review articles between 1972 and 1995 found that the phrase “court funding” yields two primary areas of focus with regard to inadequate funding. The first area of focus is the courts’ inherent power to order adequate funding.⁵⁰ These articles emphasize the place of courts as a co-equal branch of government and the right of courts to acquire sufficient

⁴⁵ See Rebecca Baker, *State Bar: Justice Delayed for Litigants, Poor by Funding Cuts*, LOHUD.COM (Jan. 3, 2012), http://www.lohud.com/apps/pbcs.dll/article?AID=/201201190230/NEWS05/301180086&nclink_check=1.

⁴⁶ See Robinson, *Justice in Jeopardy*, *supra* note 11, at 4.

⁴⁷ McCarthy, *supra* note 41 (internal quotation marks omitted).

⁴⁸ See Thomas E. Baker, *A View to the Future of Judicial Federalism: “Neither Out Far Nor In Deep”*, 45 CASE W. RES. L. REV. 705, 712-13 (1995).

⁴⁹ Thomas Kaplan, *Chief Judge Says Deal Will Require Hundreds of Layoffs in Court System*, N.Y. TIMES, Mar. 29, 2011, at A28.

⁵⁰ See generally Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 111-12, 149-50 (1994); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 217-18, 254-55 (1993); Gabrielle Tracey Letteau, Note, *Crisis in California: Constitutional Challenges to Inadequate Trial Court Funding*, 22 HASTINGS CONST. L.Q. 557, 563-64, 575, 577, 598 (1995) (arguing that, in addition to inherent powers to order funding, courts should look to the First, Sixth, and Fourteenth Amendments); Ted Z. Robertson & Christa Brown, *The Judiciary’s Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY’S L.J. 863, 864-69, 880, 882-83 (1989) (reviewing cases addressing inherent power of courts to order funding from political branches); Walter E. Swearingen, Note, *Wachtler v. Cuomo: Does New York’s Judiciary Have an Inherent Right of Self-Preservation?*, 14 PACE L. REV. 153, 155-57, 163, 166, 175 (1994);.

funding by ordering legislative bodies to allocate funds.⁵¹ The second area of focus is on reforms to the court funding system that maximize the ability to most efficiently use court budgets.⁵² These articles discuss the need for legislative action to modify the method of court funding from local governing authorities to the state level.

The current crisis, while still at the core about funding, is of a different tenor. The judiciary has largely acquiesced in funding reductions.⁵³ Since

⁵¹ See generally Robertson & Brown, *supra* note 50, at 866-67, 882; Jackson, *supra* note 50, at 218; Glaser *supra* note 50, at 111-12, 149; Swearingen, *supra* note 50, at 155-57, 163, 166; Letteau, *supra* note 50, at 575, 577, 598.

⁵² See Victor E. Flango, *Court Unification and Quality of State Courts*, 16 JUST. SYS. J. 33, 33 (1994) (noting that the primary way to approach court system reform is through court unification); James D. Gingerich, *Out of the Morass: The Move to State Funding of the Arkansas Court System*, 17 U. ARK. LITTLE ROCK L.J. 249, 249-50 (1995) (discussing the mechanisms used by the Arkansas legislature to reform the courts); Geoffrey C. Hazard et al., *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1286-87 (1972) (noting that shrinking monetary budgets are the driving factor pushing reform and modernization of the courts); Harry O. Lawson, *State Court System Unification*, 31 AM. U. L. REV. 273, 273-74 (1982) (analyzing components of unification of the court systems and their effect on efficiency); Jonathan P. Nase, *Court Unification as Constitutional Law: The Pennsylvania Experience*, 16 JUST. SYS. J. 123, 123-24 (1992) (looking at court unification through constitutional provision to reform and modernize Pennsylvania state courts).

⁵³ *State v. Lewis*, 33 So.3d 1046, 1079-81 (La. Ct. App. 2010) (reviewing prior cases involving the inherent right to order funding for representation of indigent defendants in light of subsequent statutory amendments); *DeWolfe, Jr. v. Richmond*, No. 34, 2012 WL 10853, at *18 (Md. Jan. 4, 2012) ("We cannot declare . . . a . . . statutory right to counsel at bail hearings and, in the same breath, permit delay in the implementation of that important right and thereby countenance violations of it, even for a brief time."); *In re Parole of Hill*, No. 301364, 2012 Mich. App. LEXIS 2207, at *1, *28 (Mich. Ct. App. Nov. 8, 2012) (holding not to "compel funding" under inherent power where court redirected funds that had already been appropriated); *Fraternal Order of Police v. Erie Cnty. Sheriff*, No. E-10-005, 2010 WL 3820328, slip op. at *18 (Ohio Ct. App. Sept. 30, 2010) (holding that the court has the authority to allocate trial budget and hire individuals to operate x-ray screening machines as part of the court's inherent power to order "reasonable funding request"); *Pa. State Ass'n of Cnty. Comm'rs v. Commonwealth*, 52 A.3d 1213, 1231-33 (Pa. 2012) ("[Funding problems] arise out of the intrinsic difficulties of maintaining the delicate balance of a tripartite system of government. . . . At this point in time, there are unique challenges that all branches of the Commonwealth's government face as a result of a continuing economic crisis and concomitantly diminished revenues."). *But see State ex rel. Hague v. Ashtabula Cnty. Bd. of Comm'rs*, 918 N.E.2d 151, 158 (Ohio 2009) ("While we appreciate the dilemma that the commissioners encounter in promulgating a budget during difficult economic times, we are compelled to remind the commissioners that the courts must not be held hostage to competing interests when the courts . . . submit budgetary requests that are reasonable and necessary.") (internal citation and quotation marks omitted); *State ex rel. Smith v. Culliver*, 929 N.E.2d 465, 471 (Ohio App. Ct. 2010) (holding that the court appropriately utilized mandamus power to order funding of court's proposed budget pursuant to inherent power where budget

2007, most cases citing the inherent power of courts to order funding have dealt with the issue of funding attorneys for indigent criminal defendants and not budgets and funding generally.⁵⁴ There has not been a movement to rely on inherent powers to force legislatures to increase court budgets. Instead, state bar associations and other stakeholders have started looking toward internal court functions for ways to operate with reduced funding.⁵⁵ To do this, a number of jurisdictions have established committees or task forces to provide recommendations on how to streamline or “reengineer” the court system.⁵⁶

This change in tone is important. Stakeholders in this crisis are not merely asserting a right to more funding, instead, as Massachusetts Court Administrator Lewis H. Spence described it, courts are facing a “crisis of modernization” that requires a “fundamental change in the culture of the [judicial] organization.”⁵⁷ This willingness to reassess the current system is a central aspect of a paradigm shift. It is not sufficient to say that all that is needed is more funding. Current ways of doing things must be open for debate, reevaluation, and innovation.

was “reasonable and necessary to the courts’ administration of their business”) (internal citation omitted).

⁵⁴ See generally Paige Masters, Note, *Caught Between a Rock and a Hard Place: A Missouri Court’s Tough Choice and the Power to Change the Face of Indigent Defense*, 37 OKLA. CITY U. L. REV. 97, 97-99 (2012) (noting that the funding problems pose a serious threat to a criminal defendant’s constitutional right to counsel).

⁵⁵ See Eric Holder, Attorney General, Speech at the Brennan Center for Justice Legacy Awards Dinner (Nov. 16, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html>) (noting his commitment to addressing the “crisis in indigent defense”).

⁵⁶ For samples of reports issued in various jurisdictions since 2006, see AM. BAR ASS’N TASK FORCE ON PRESERVATION OF THE JUSTICE SYS., REPORT TO THE HOUSE OF DELEGATES 1-3, available at http://www.prisonpolicy.org/scans/aba/aba_report_to_the_house_of_delegates.pdf (last visited Apr. 13, 2013) [hereinafter ABA, TASK FORCE REPORT ON JUDICIARY]; JUDICIAL CROSSROADS TASK FORCE OF THE MICH. BAR, REPORTS AND RECOMMENDATIONS: DELIVERING JUSTICE IN THE FACE OF DIMINISHING RESOURCES 2-5 (2d ed. 2011), available at <http://www.michbar.org/judicialcrossroads/JudicialCrossroadsReport.pdf>; MASS. BAR ASS’N, CRISIS IN COURT FUNDING TASK FORCE 3-4 (2010), available at http://www.massbar.org/media/750271/courtsincrisis0510_web.pdf; N.Y. ST. B. ASS’N, REPORT OF THE EXECUTIVE COMMITTEE ON THE IMPACT OF RECENT BUDGET CUTS IN NEW YORK STATE COURT FUNDING iii, 1 (2012), available at http://www.nysba.org/AM/Template.cfm?Section=News_Center&ContentID=62098&template=/CM/ContentDisplay.cfm; THE WASH. ECON. GRP., INC., THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA’S STATE COURTS DUE TO UNDER-FUNDING 1-3 (2009), available at [http://www.floridabar.org/TFB/TFBResources.nsf/0/1C1C563F8CAFFC2C8525753E005573FF/\\$FILE/WashingtonGroup.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/1C1C563F8CAFFC2C8525753E005573FF/$FILE/WashingtonGroup.pdf?OpenElement).

⁵⁷ Spence, *supra* note 20.

This change in tone is noted in the reports from a number of the task forces created to evaluate the funding crisis.⁵⁸ Consider some of the recommendations made by the ABA Task Force Report on Preservation of the Justice System.⁵⁹ The Report proposes that courts should be accountable for providing outcome measures to legislative branches, and that there should be a focus on increasing efficiency and reducing waste: including an increased use of technology, an introduction of business management principles into the running of the judiciary, and actively communicating with (lobbying) legislatures regarding court funding.⁶⁰ This is a change in strategy and tenor from prior funding disputes, where the focus was on the uniqueness and difference of the judiciary from other branches of government. Arguments relying on the judiciary as a “co-equal branch” and the need for “judicial independence” are not being utilized as swords to justify more funding while maintaining the status quo.

History tells us that this shift in thinking will not be easy to implement. The status quo in the law is difficult to change.⁶¹ Many recommendations challenge procedures and methods that have been in place for a long time.⁶² There is a natural tendency for those benefiting from the current system to look for alternatives that do not bring about fundamental change.⁶³ Consider the push for alternative dispute resolution (“ADR”) as a method to alleviate a problem.⁶⁴ While some cases are certainly best resolved through ADR, that system operates within the current system. In other words, from an administrative standpoint, ADR helps by shifting disputes (and the cost of those disputes) into private hands while inefficiencies in the current system remain.⁶⁵ Critics are right to question

⁵⁸ *Id.*

⁵⁹ ABA, TASK FORCE REPORT ON JUDICIARY, *supra* note 56, at 12.

⁶⁰ *See id.* at 12-15.

⁶¹ *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1266-67 (2003).

⁶² *See, e.g.*, Jack Sullivan, *Reigning Supreme: Clerk-Magistrates, with Lifetime Tenure and No Mandatory Retirement Age, Rule the Roost in Massachusetts Courthouses*, COMMONWEALTH (Apr. 12, 2011), <http://www.commonwealthmagazine.org/Investigations/Investigative-Reports/2011/Spring/Reigning-supreme.aspx> (noting an example of how these ingrained processes can be difficult to change in Massachusetts where the clerk-magistrate position is appointed for life). When making an evaluation from a business perspective, these types of unaccountable positions cannot be justified on an efficiency basis. However, because they are ingrained into the current system and have strong political constituencies, attempts to eliminate the life tenure aspect of these jobs will be very difficult—even though the proposal will make courts more efficient.

⁶³ *See* Korobkin, *supra* note 61, at 1266-67.

⁶⁴ ABA, TASK FORCE REPORT ON JUDICIARY, *supra* note 56, at 12.

⁶⁵ *See* 1 JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 1.1, at 2-3 (3d ed. 2005).

why the public should settle for private dispute resolution when they are paying for a dysfunctional public court system.⁶⁶ Therefore, while proposals such as ADR certainly have their place, they should not be viewed as a method to resolve the current crisis. The same is true when courts look to additional fees or fines to merely fund the current system.⁶⁷ These actions are counterproductive when the entire purpose of the court system is to ensure access to all citizens. For example, in Colorado, where filing fees and attorney licensing fees increased by 114% over a ten-year period, those most impacted by the fees were the poor.⁶⁸

The types of changes that will be necessary for a paradigm shift will be difficult for a legal profession that instinctively resists change.⁶⁹ Modernization will result in fewer court employees; this will be inevitable because court budgets are overwhelmingly allocated to personnel costs.⁷⁰ In this regard, established and ingrained interests will withstand changes to the current system.⁷¹ Add to this that every jurisdiction is different and the specific changes must be unique to the state's circumstances, and it will be impossible to develop a uniform method of resolving the crisis. The key, however, is for bar leaders and lawyers to be open to fundamental changes in court administration. Failure to take advantage of this crisis to modernize the system will make it difficult to convince legislators to increase funding to the courts. After all, members of the legislature are responsive to the needs of their constituents, and if a majority of their constituency views the court as irrelevant, no one should be surprised when pleas for additional funding fall on deaf ears.

II. Second-Order Access Concerns: Legal Rights, Lawyers, and Justice

The lack-of-access problem is broader than simply access to courts. Limiting the debate to how the judiciary can negotiate higher budgets does a disservice to the purpose of the judiciary—ensuring that justice is administered fairly. Concerns about funding must be tied to second-order access problems. These issues are more intransigent and remain even if a

⁶⁶ Symposium, *Crisis in the Judiciary*, 47 NEW ENG. L. REV. (2012), available at http://newenglawrev.com/symposia/vol_47_fall_symposium/.

⁶⁷ See Steve C. Briggs, *The CBA, the Judicial Funding Crisis, and the CRR Statement of Agreement*, 41 COLO. LAW. 15, 16 (2012).

⁶⁸ *Id.*

⁶⁹ See Korobkin, *supra* note 61, at 1266.

⁷⁰ See ABA, TASK FORCE REPORT ON JUDICIARY, *supra* note 56, at 1 (“[S]ince judicial budgets consist almost entirely of personnel costs, the courts do not have the ability simply to postpone expensive items to a more robust economic time; and thus reductions in court funding directly and immediately curtail meaningful access to the justice system.”).

⁷¹ See Korobkin, *supra* note 61, at 1266-67.

fully funded judicial branch is achieved. These access crises can be divided into three main categories: (a) access to knowledge about legal rights; (b) access to lawyers; and (c) access to justice.

In a 2010 speech, Attorney General Eric Holder said: "Today, the current deficiencies in our indigent defense system and the gaps in legal services for the poor and middle class constitute not just a problem, but a crisis. And this crisis appears as difficult and intransigent as any now before us."⁷² The Attorney General's reference to the past raises an interesting and empirical question. Is the crisis today different and worse than past crises? In evaluating this question it is important to examine it through the lens of history, and evaluate how to respond to the current access shortcomings with an understanding of how the current structures developed.

A. *Increasing Knowledge About Legal Rights*

Those in need of legal services face a dual challenge. They often need an advocate to assist in pressing their claim.⁷³ However, they must first know that they have a legal claim to press. Information asymmetry is a real problem with regard to legal rights—lawyers know about potential claims and individuals with these claims do not. In a not-too-distant past, individuals with valid claims had a much more difficult time with knowing about the nature of their rights and finding a lawyer to pursue them. Relying on the professional nature of the practice, early canons of ethics sought to prohibit legal advertising in any form—with the exception of placing certain biographical information in "reputable law lists."⁷⁴ The belief was that advertising would impinge on the professional image of the bar and create "costly and indecorous competition for clients."⁷⁵ The 1908

⁷² Eric Holden, U.S. Attorney Gen., Remarks at the Shriver Center Awards Dinner (Oct. 14, 2010), *quoted in* U.S. DEP'T OF JUSTICE, THE ACCESS TO JUSTICE INITIATIVE OF THE U.S. DEPARTMENT OF JUSTICE (2012), *available at* <http://www.justice.gov/atj/accomplishments.pdf>.

⁷³ See *infra* Part II.B (discussing the issue of access to lawyers).

⁷⁴ MODEL CODE OF PROF'L ETHICS Canon 27 (1908), *reprinted in* A CENTURY OF LEGAL ETHICS 258 (Lawrence J. Fox et al. eds., 2009).

⁷⁵ CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 14.2.2 (1986); see also Carl Frederick Cook, *The Young Lawyer's Proposition*, 4 AM. L. SCH. REV. 142, 144 (1915). Cook advised young lawyers that:

[U]nprofessional competition, in that certain lawyers, properly termed shysters, advertise in street cars, on billboards, and in newspapers; solicit business by giving free advice, making no charge, if not successful, and paying the expense of suits; search for defects in titles; follow up arrests and accidents, and similar disreputable practices. . . . [T]his class of lawyers seriously interferes with the practice of reputable lawyers.

Id.

ABA Canons provided:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.⁷⁶

In addition to prohibiting advertising, the 1908 rules also made it unethical to "volunteer advice to bring a lawsuit . . ." ⁷⁷ The underlying belief was that it was inappropriate to "breed," or stir up, litigation.⁷⁸ These professional restrictions limited the ability of those with viable legal claims to know that such claims existed.

The prohibition on advertising was adopted in a society where the ability to qualify as a lawyer was limited by family connections.⁷⁹ This meant that the profession was limited largely to the wealthy and well-connected.⁸⁰ These individuals did not have to worry about earning a living and could view the practice of law as more of a public service.⁸¹ This

⁷⁶ CANONS OF PROF'L ETHICS Canon 27 (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf. The 1908 Canons were established in response to conduct that we would recognize today as advertising. For example, in 1902, in a speech to Northwestern University School of Law, Mitchell Follansbee set out a number of examples of advertisements which were placed on business cards and distributed with newspapers. He cited to a Wisconsin lawyer who had printed on his business card: "If a man is in love, that is his business. If a girl is in love, that is her business. If they contemplate matrimony that is my business. . . . P.S.—I always reserve the right to kiss the bride." Mitchell D. Follansbee, *The Lawyer's Method of Advertising*, 10 AM. LAW. 486, 487 (1902).

⁷⁷ CANONS OF PROF'L ETHICS Canon 28 (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf.

⁷⁸ *Id.*

⁷⁹ See HENRY S. DRINKER, *LEGAL ETHICS* 210 (1953).

⁸⁰ *See id.*

⁸¹ *Id.* These young men (who would soon become lawyers):

were practically all the sons of well-to-do parents, who did not have to worry about earning their keep, and who traditionally looked down on all forms of trade and the competitive spirit characteristic thereof. They regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident. The profession of the law hence acquired a certain traditional dignity which it has been the aim of the bar to preserve ever

view changed as the profession opened up, and individuals became lawyers who could not afford to view the profession purely as a calling without concern for remuneration.⁸² The traditional view also collided with the reality of a growing need for legal services as individual rights increased and the government's role expanded.⁸³ In response, the substance and tenor of a lawyer's ethical obligations shifted with the ABA's adoption of the Code of Professional Responsibility in 1969.⁸⁴ The first Canon of the 1969 Code provided: "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence."⁸⁵ Canon 2 was even more explicit:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.⁸⁶

Canon 2 goes on to say that lawyers should participate in programs that inform citizens regarding legal issues that commonly arise.⁸⁷ This is a far cry from the 1908 Canon's concern over stirring up litigation, but strict restrictions on advertising remain.⁸⁸

This tension between the need to educate the public about legal rights and the prohibition on lawyers' right to advertise created a disconnect

since.

Id.

⁸² Russell G. Pearce, *The Lawyer and Public Service*, 9 AM. U. J. GENDER SOC. POL'Y & L. 171, 173-75 (2001).

⁸³ For example, in property law, rights of tenants to assert claims for breach of the implied warranty of habitability or to assert a defense of constructive eviction were established in the mid-twentieth century. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970) ("[T]he tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition.").

⁸⁴ See MODEL CODE OF PROF'L RESPONSIBILITY Preface (1980), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc.authcheckdam.pdf>.

⁸⁵ *Id.* at EC 1-1.

⁸⁶ *Id.* at EC 2-1.

⁸⁷ *Id.* at EC 2-2.

⁸⁸ See CANONS OF PROF'L ETHICS Canon 28 (1908), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf; MODEL CODE OF PROF'L RESPONSIBILITY 2-3 (1980), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf>.

between policy and societal expectation that led to a paradigm shift. In a society in which greater information was privileged, an ethics rule that stood in the way of such information was destined to come under attack. The Supreme Court ultimately was the catalyst for that change. In the 1977 case *Bates v. Arizona*, the Court held that the state could not entirely prohibit lawyer advertising.⁸⁹ The Court recognized that restrictions on advertising had a long history, but tradition alone could not justify maintaining the restriction.⁹⁰ For the Court, it was no longer feasible to justify the prohibition which denied the public information about legal services:

Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the bar acknowledges, the middle 70% of our population is not being reached or served adequately by the legal profession. . . . Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange.⁹¹

The *Bates* Court could not foresee what would happen after advertising was allowed. The Court presumed that lawyers would be honest and would not mislead in advertising.⁹² The Court noted that for those lawyers who did overreach, "there will be thousands of others who will be candid and honest and straightforward."⁹³ The Court went further: "And, of course, it will be in the latter's interest, as in other cases of misconduct at

⁸⁹ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 382-83 (1977).

⁹⁰ *Id.* at 371-72.

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

Id. (internal citation omitted).

⁹¹ *Id.* at 376 (internal quotation marks and citations omitted).

⁹² *See id.* at 372-75.

⁹³ *Id.* at 379.

the bar, to assist in weeding out those few who abuse their trust."⁹⁴ Thus the Court believed that the market—along with the bar sanction for outliers—would keep lawyers honest.⁹⁵ For the Court, the availability of information to the public outweighed any potential abuse that might occur.⁹⁶

After *Bates*, lawyers were able to enter the marketplace and make the public aware of potential claims. The decision aligned lawyers' obligations with the realities of the changing role of government and societal expectations. It should be unsurprising that the ABA filed an amicus curiae brief opposed to allowing a constitutional right to advertise because paradigm shifts always challenge the status quo.⁹⁷ The ABA argued that the interest of maintaining the image of the profession outweighed lawyers' First Amendment rights:

The interest of the public [image] vastly outweighs the interest of attorneys themselves in being able to broadcast commercial messages intended to increase the "volume" of their business. A lawyer is granted a license to practice by the State, and he holds a position of special trust and obligation.⁹⁸

This reliance on the past and tradition is common when faced with a paradigm shift. Established and entrenched interests have an incentive to continue with the status quo—and to support changes only at the edges—leaving the underlying structure in place.

The current method of access to information about legal rights is built on a post-*Bates* foundation. Bar associations continue to struggle with the proper balance between access to legal information and the desire to limit lawyer advertising.⁹⁹ However, the parameters of the debate have changed and the old paradigm is no longer effective.¹⁰⁰ The growth of the Internet, including websites and social media, introduced methods of communication that the *Bates* Court could not have anticipated.¹⁰¹ Ethics

⁹⁴ See *id.* at 379.

⁹⁵ See *Bates* at 374-75.

⁹⁶ See Brief for ABA as Amicus Curiae Supporting Appellees, at 8, 14, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1976) (No. 76-316), 1976 WL 178671 at *1-3.

⁹⁷ *Id.* at *8.

⁹⁸ MODEL RULES OF PROF'L CONDUCT R. 7.1 (2011) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."). The comment to the rule demonstrates a concern for advertisements and articulates a reasonable person standard for evaluating truthfulness. See *id.* cmt. 2, 3.

⁹⁹ See *id.*

¹⁰⁰ See, e.g., Michael H. Hoeflich & Karenbeth Farmer, *Legal Services and Advertising in Cyberspace*, KAN. B. ASS'N, May 2001, at 20, 21 (noting that legal ethics cannot keep up with the rapid development of technology).

¹⁰¹ See, e.g., *id.* at 21 (noting that use of the Internet in small firms grew from 38% in 1996 to

opinions dealing with websites¹⁰² and other methods of online advertising demonstrate how this new media does not fit nicely into traditional streams of communication.¹⁰³

Bates viewed the opening up of lawyer advertising as a benefit to both the public and the profession.¹⁰⁴ Certainly, after *Bates*, lawyer advertising increased.¹⁰⁵ The problem is that a market-based approach to advertising—where the public is reliant on lawyers publicizing legal rights—creates a situation in which only certain types of claims are broadcast. Lawyers will naturally have a tendency to expend resources on advertising to obtain the most lucrative claims.¹⁰⁶

Technological advances make advertising difficult, if not impossible, to regulate.¹⁰⁷ This reality combined with lawyers' incentive to provide information to the public through advertisements—but only for lucrative claims—raises the following question: How is the profession going to ensure that as many individuals as possible are made aware of their legal rights? Bar associations can continue to look for ways to limit and regulate advertisements, or communications, from lawyers based on arguments that they are deceptive or misleading.¹⁰⁸ Alternatively, they can shift their focus from regulating speech to providing speech. For example, bar associations could shift resources from pursuing disciplinary actions for advertising to providing the public with better information regarding selecting lawyers, including information on lawyers who have engaged in misconduct. Perhaps this can be achieved by publicizing imposed disciplinary sanctions and the conduct that led to the discipline.¹⁰⁹

nearly 100% in only four years).

¹⁰² See *Committee Proposes Guidelines for Including a Verdict Record on Website*, N.C. ST. B.J., Spring 2000, at 38, 39 (allowing verdict record on firm website so long as put in "context" and was not misleading).

¹⁰³ For example, advertising avenues such as Groupon challenge traditional notions of what is ethical and unethical. See N.C. St. B. Comm. on Ethics, Formal Op. 10 (2006), available at 2006 WL 980309 (using Groupon not unethical); S.C. B. Comm. on Ethics, Advisory Op. 11-05 (2011), available at 2011 WL 7657361 (using Groupon not unethical).

¹⁰⁴ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 351 (1977).

¹⁰⁵ See Elizabeth D. Whitaker & David S. Coale, *Professional Image and Lawyer Advertising*, 28 TEX. TECH L. REV. 801, 801-02 (1997).

¹⁰⁶ Cf. *Bates*, 433 U.S. at 403 (Powell, J., dissenting) (noting the fear that this decision would be an "invitation" for attorneys to "engage in competitive advertising on an escalating basis").

¹⁰⁷ See Hoeflich & Farmer, *supra* note 100, at 21 (noting that the Internet is still a frontier for ethical regulation; uncertainty is increased by ethical rules's inability to form as quickly as technological progress).

¹⁰⁸ See Ralph H. Brock, "This Court Took a Wrong Turn With *Bates*": Why the Supreme Court Should Revisit Lawyer Advertising, 7 FIRST AMEND. L. REV. 145, 152 (2009) (footnotes omitted).

¹⁰⁹ See, e.g., Sandra L. DeGraw & Bruce W. Burton, *Lawyer Discipline and "Disclosure Advertising": Towards a New Ethos*, 72 N.C. L. REV. 351, 395-97 (1994).

To clarify, the point is not to say that the best policy requires bar associations to cease regulating lawyer advertising, but to stress that current limitations are built on assumptions about the state of communications in the late 1970s that are no longer applicable.¹¹⁰ The bar, the bench, and the public should be willing to question these underlying assumptions. While technological advances have passed *Bates* by, there are certain fundamental propositions from *Bates* that should guide future groups determining how to proceed. First, is the importance of ensuring that the public has as much information as possible about their legal rights:

Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered. . . . The rule at issue prevents access to such information by the public.¹¹¹

Second, the Court opined that lawyer advertising does not make the public disillusioned with the legal profession.¹¹² Instead, it is the lack of information that the public has about lawyers and the profession that leads to disillusionment:

[I]t has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.¹¹³

¹¹⁰ See Hoeflich & Farmer, *supra* note 100, at 21, 24 (noting that law firm use of the Internet increased dramatically since the 1990s, but cautioning attorneys that the "old rules" still apply).

¹¹¹ *Bates*, 433 U.S. at 358 (alteration in original) (quoting *Matter of Bates*, 555 P.2d 640, 648-49 (Ariz. 1976) (internal quotation marks omitted)).

¹¹² *Id.* at 370.

¹¹³ *Id.* at 370-71. The majority cited to a number of law review articles that emphasized the shifting needs of society and the disparate impact of advertising restrictions on the poor. These articles questioned the underlying presumptions and justifications of the restrictions. See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 113-16 (1975); John G. Branca & Marc I. Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 UCLA L. REV. 475, 515-17 (1977); Note, *Advertising Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1190-91 (1972).

The goal here is not to provide definitive solutions or proposals to the problem. The goal is to encourage reformers who are considering new ways to provide legal information and willing to think outside the box when developing solutions. The bottom line is that creating a constitutional right to advertise resulted in an advertising directed at certain types of claims. If bar associations and the judiciary are concerned that all individuals have access to information regarding legal rights, this will require a paradigm shift in how the profession perceives and regulates the dissemination of information. Instead of being responsive, lawyers should be active in ensuring it occurs.

B. Access to Legal Representation

A fundamental aspect of access to justice and our adversarial system is the ability to retain and rely upon a lawyer to press a claim.¹¹⁴ In fact, representation by a lawyer has been called the “golden key” to the courthouse.¹¹⁵ There is a general understanding that without the assistance of a lawyer, those in need of legal services are substantially disadvantaged.¹¹⁶ Just as funding issues come to the forefront during times of crises, questions of access are also exacerbated.¹¹⁷ Two particular past crises resulted in a reevaluation and fundamental change—that is, a paradigm shift—in access to lawyers: industrialization and World War II.¹¹⁸

At the turn of the twentieth century, society was rapidly changing with increasing industrialization and democratization.¹¹⁹ No longer was the concept of citizenship limited to a select few. Until that time, access to courts was denied to large segments of the population, including African-

¹¹⁴ See Marlene Coir, *Pro Bono and Access to Justice in America: A Few Historical Markers*, MICH. B.J., Oct. 2011, at 54, 54 (“[I]t is also opined that equal access to justice means equal access to legal representation.”).

¹¹⁵ See SMITH, *supra* note 11, at 12.

¹¹⁶ While lawyers are viewed as central to individuals receiving the full benefit of the legal system, this has not always been the case. Prior to the American Revolution, several colonies outlawed lawyers in their courts or greatly limited their practice. After the Revolution, while anti-lawyer sentiment remained, a lawyer class arose. The issue of the role of the lawyer remained ambiguous, however. A number of colonies preferred that lay persons represent themselves without the involvement of a lawyer.

¹¹⁷ Peter T. Grossi, Jr. et al., *Crisis in the Courts: Reconnaissance and Recommendations*, in FUTURE TRENDS IN STATE COURTS, 82, 85, available at http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/BetterCourts/~media/Microsites/Files/Future%20Trends%202012/PDFs/Crisis_Grossi.ashx (last visited Apr. 13, 2013).

¹¹⁸ See Project, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 125-27 (1980).

¹¹⁹ See DEBORAH L. RHODE, ACCESS TO JUSTICE 49, 52 (2004).

Americans and women.¹²⁰ As court access became more democratic, additional and different demands were placed on the legal system. At the same time, there was also a large influx of poor immigrants into the United States.¹²¹ The needs of these groups formed a stark reality of the inequities of the legal system. The system treated the poor unfairly—they faced situations for which remedies at law existed, but were, as a practical matter, unavailable.¹²² To give an example used at the time, if an employer refused to pay a worker for a day's wage, the worker—although entitled to recover those funds from the employer at law—faced a system in which he probably could not find a lawyer. But even if he could, and could afford the fee, the expense of the suit would cost more than the amount the employee sought to recover.¹²³

In his famous 1919 book, *Justice and the Poor*, Reginald Smith examined the inadequacy of legal services at that time and access to lawyers was a particular concern.¹²⁴ Smith argues that when the state creates a judiciary in which only some citizens have access to lawyers, the state is "abnegat[ing] the very responsibility for which it exists, and is to accomplish by indirection an abridgement of the fundamental rights which the State is directly forbidden to infringe."¹²⁵ Smith describes the effect of the foregoing as "[t]o deny law or justice to any persons is, in actual effect, to outlaw them by stripping them of their only protection."¹²⁶ The question for Smith

¹²⁰ See *id.*

¹²¹ SMITH, *supra* note 11, at ix-x ("[T]he rapid growth of great cities, the enormous masses of immigrants (many of them ignorant of our language), and the greatly increased complications of life have created conditions under which the provisions for obtaining justice which were formerly sufficient are sufficient no longer.").

¹²² See *id.* at xii ("If for any reason this necessary machinery of justice cannot be employed, then the theoretical protection that the individual possesses under the law is of no practical use to him.").

¹²³ *Id.* at 9 (noting that the cost of pursuing a claim gave incentives to the unscrupulous to take advantage of the poor, because "[t]he system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented").

¹²⁴ *Id.* at ix. Smith goes on to note that:

No one . . . doubts that it is the proper function of government to secure justice. In a broad sense that is the chief thing for which government is organized. Nor can any one question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights. This book shows that we have not been performing that duty very satisfactorily, and that we ought to bestir ourselves to do better.

Id.

¹²⁵ *Id.* at 5.

¹²⁶ *Id.*

was how to provide access to lawyers for those with valid legal claims, but without the funds to hire a lawyer. One possibility was for non-lawyers to satisfy unmet legal needs, and indeed a market of non-lawyers developed, providing low-cost legal services.¹²⁷ The profession reacted by lobbying for passage of (or strengthening of) laws regulating and criminalizing the unauthorized practice of law ("UPL").¹²⁸ Bar associations vigorously enforced the restrictions.¹²⁹ While there is an open question as to whether the public actually wanted or benefited from the protection that the UPL regulations provided, these restrictions remain in effect today preventing some individuals from receiving legal assistance.¹³⁰

To resolve the lack-of-access problem, the profession developed legal-aid organizations.¹³¹ These organizations provide free legal advice to qualified individuals. The movement from private lawyers, or organizations providing lawyers, to a publicly-funded system of lawyers was a fundamental shift in access. Leaders in the profession believed that these offices were the answer to the problem of the unmet legal needs of the poor.¹³² However, subsequent events proved otherwise. By 1948, there were only fifty-five legal-aid offices in the United States with full-time, paid lawyers.¹³³ In addition, the offices exist primarily in urban areas in the north—leaving those in rural areas and the south without access.¹³⁴

Our current system of access to lawyers for the poor is largely built upon the legal-aid model (supplemented by pro bono representation discussed below).¹³⁵ The belief is that society has an obligation to ensure that the very poor have access to free lawyers and that society as a whole should bear the cost of providing lawyers. Recognizing that "there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances" and who cannot afford legal representation, Congress established the Legal Services Corporation

¹²⁷ See SMITH, *supra* note 11, at 28.

¹²⁸ Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2582 (1999).

¹²⁹ WOLFRAM, *supra* note 75, at § 15.1. After 1930, unauthorized practice of law committees "were hounding alleged unauthorized practitioners with a zeal and sense of purposes that was not often matched by bar disciplinary committees in their attempts to control wayward lawyers." *Id.*

¹³⁰ See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 43-44 (1981).

¹³¹ *History of Civil Legal Aid*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/About/About_HistoryCivil (last visited Apr. 13, 2013).

¹³² See *id.*

¹³³ Lee Silverstein, *Thoughts on the Legal Aid Movement*, 40 SOC. SERV. REV. 135, 140 (1966).

¹³⁴ *Id.*

¹³⁵ See Denckla, *supra* note 128; *see infra* notes 137-47.

("LSC") in 1974.¹³⁶ Public funding of lawyers for the poor was the best way to serve "the ends of justice and assist in improving opportunities for low-income persons."¹³⁷

Unfortunately, the legal-aid model never sufficiently satisfied the need for access to lawyers.¹³⁸ Not only have the LSC and other legal-aid offices faced funding cuts—often precisely at the time that legal assistance is most needed¹³⁹—Congress also attempted to limit the types of cases that LSC can pursue.¹⁴⁰ The reality is that the current system does not meet the needs of the poor, which today include "protection from abusive relationships, safe and habitable housing, access to necessary health care, disability payments to help lead independent lives, family law issues including child support and custody actions, and relief from financial exploitation."¹⁴¹ The LSC reported that only one-in-five of low-income individuals receive the legal assistance they need either through legal-aid lawyers or pro bono representation.¹⁴²

The second prong of the current model of providing access to lawyers is pro bono representation.¹⁴³ The argument is that private lawyers have a moral and ethical obligation to provide some amount of free legal services to those unable to afford a lawyer.¹⁴⁴ While pro bono representation is not a new concept, it became an institutional priority after World War II.¹⁴⁵ President Johnson's War on Poverty had significant impact on providing

¹³⁶ 42 U.S.C. § 2996 (2006).

¹³⁷ *Id.*

¹³⁸ LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 3 (2009) [hereinafter DOCUMENTING THE JUSTICE GAP], available at http://www.lafla.org/pdf/justice_Gap09.pdf.

¹³⁹ *Id.*

To fund . . . [the current] need, the federal share must grow to be five times greater than it is now, or \$1.6 billion. IOLTA and other state, local and private funding sources, which are being hard hit by the economic downturn at present, will also have to grow in the future to contribute their proportionate share of the increase necessary to fund civil legal services.

Id.

¹⁴⁰ Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 533 (2001) (striking down restrictions on challenging welfare law).

¹⁴¹ DOCUMENTING THE JUSTICE GAP, *supra* note 138, at 1.

¹⁴² *Id.*

¹⁴³ *Id.* at 2.

¹⁴⁴ William J. Dean, *Pro Bono Digest*, N.Y. L.J., Nov. 22, 2006, at 1, 2.

¹⁴⁵ Andrew Cohen, *In Defense of Pro Bono Legal Service, Whatever Form it Takes*, ATLANTIC (Aug. 24, 2008, 7:52 AM), <http://www.theatlantic.com/national/archive/2012/08/in-defense-of-pro-bono-legal-service-whateve-it-takes/261465>.

legal services to the underserved. First, it provided federal funding for legal services.¹⁴⁶ It soon became clear, however, that even with the additional funding, the legal-aid model alone would not be sufficient to satisfy the demand.¹⁴⁷ When the War on Poverty became a political and societal priority, the ABA and other bar associations began to consider methods to fill the gap and turned to pro bono representation.¹⁴⁸ A 1975 ABA House of Delegates resolution stated that it is the "basic professional responsibility of each lawyer engaged in the practice of law to provide public interest legal services" and ordered consideration of how to operationalize this obligation.¹⁴⁹

The original recommendation to the ABA's Commission on Evaluation of Professional Services was a mandatory pro bono requirement.¹⁵⁰ The thought was that if each lawyer provided only a small amount of pro bono assistance—between five to ten percent of their time—the problem would be resolved.¹⁵¹ There was vigorous opposition to a mandatory pro bono requirement and it was ultimately defeated.¹⁵² The compromise was a rule creating an aspirational obligation. The current rule continues this aspirational approach—stating that lawyers "should aspire to render at least (50) hours of pro bono publico legal services per year."¹⁵³

Lack of legal representation in the civil context is truly a crisis. The current model simply does not satisfy the need. Once again, the bench and bar need to be willing to consider methods of providing access that fall outside the current system. For example, lawyers should reevaluate the prohibition on UPL, and shift to providing oversight and regulation of non-lawyers providing legal assistance in certain areas of law. Perhaps the bar should shift resources to providing more educational opportunities for the public in areas where pro se litigants appear most often and increase the amount of assistance (forms and other information) in these areas. It is important to note that the question here is how to *reallocate* funding

¹⁴⁶ Eric W. Wright, *Competition in Legal Services Under the War on Poverty*, 19 STAN. L. REV. 579, 579 (1967) (discussing the creation of the Economic Opportunity Act of 1964 as a result of President Johnson's War on Poverty).

¹⁴⁷ See DOCUMENTING THE JUSTICE GAP, *supra* note 138, at 2-3 (arguing that the inadequate legal representation of the poor has not been remedied by legal-aid organizations).

¹⁴⁸ See Cohen, *supra* note 145.

¹⁴⁹ *Federal Criminal Code, Amnesty, Gun Control, Bank Secrecy Are Debated by the House of Delegates*, 61 A.B.A. J. 1079, 1084 (1975).

¹⁵⁰ John A. Humbach, *Serving the Public Interest: An Overstated Objective*, 65 A.B.A. J. 564, 566 (1979); Chesterfield H. Smith, *A Mandatory Pro Bono Service Standard—Its Time Has Come*, 35 U. MIAMI L. REV. 727, 727-28 (1981).

¹⁵¹ Humbach, *supra* note 150, at 564.

¹⁵² Smith, *supra* note 150, at 727-29.

¹⁵³ MODEL RULES OF PROF'L CONDUCT R. 6.1 (1983).

priorities—it is not a question of merely what could be accomplished with more funding. The same issues arise with regard to pro bono representation. The current system simply does not align with lawyer incentives.¹⁵⁴ Perhaps bar associations should partner with law schools to train lawyers to handle the areas of law in which the poor most often need assistance and provide a level of competence with the obligation to handle a certain number of pro bono cases in those areas within a five-year period.

The discussion of pro bono representation above focuses largely on civil representation, where there is no constitutional right to representation.¹⁵⁵ In the criminal area there are a different set of concerns. In *Gideon v. Wainwright*, the Supreme Court held that indigent criminal defendants have a constitutional right to legal representation.¹⁵⁶ The *Gideon* holding instituted a paradigm shift in access to lawyers. One lawyer said the decision “sh[ook] the profession to its roots.”¹⁵⁷ Therefore, in the criminal context, the crisis is not one of access to lawyers, but of access to competent lawyers.

We enter our current access crisis operating with the tools that were crafted after the Industrial Revolution and World War II.¹⁵⁸ This system is no longer adequate. The legal profession must be willing to learn the lessons of the past and to think about ways to address the current crisis. The current model does nothing about the inability of the poor to afford legal representation, while at the same time promotes a pro bono system that is an anachronism. This will lead to a society in which the public loses respect for the sanctity of the judicial branch and views the law as “devised by the rich to oppress the poor.”¹⁵⁹

¹⁵⁴ B. George Ballman, Jr., *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?*, 7 GEO. J. LEGAL ETHICS 1139, 1148 (1994) (noting that forcing lawyers to provide pro bono services may end up affecting a lawyer's incentive to provide adequate legal care).

¹⁵⁵ *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 24-27, 31-32 (1981) (holding that the due process clause of the Fourteenth Amendment, insofar as it guarantees representation, only applies to criminal trials not civil litigation).

¹⁵⁶ *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963).

¹⁵⁷ Eugene L. Smith, *Canon 2: “A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available”*, 48 TEX. L. REV. 285, 303 (1970).

¹⁵⁸ Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 659-60 (1981) (explaining that in the 1950s and 1960s, the existing pro bono recommendations of the ABA—the substance of which called for every lawyer to participate—were not meeting the needs of the poor seeking legal representation, leading to pressure on Congress to increase legal-aid budgets); see Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61, 65 (1994) (stating that the first movement to encourage pro bono work was the result of an 1892 congressional act creating a government-funded budget for legal services).

¹⁵⁹ SMITH, *supra* note 11, at xiii (stating that the inability of the poor to find quick and adequate relief for their claims leads to a deprivation of their rights); see also Ballman, Jr., *supra*

C. Lack-of-Access to Justice

The last of these second-order categories is access to justice. This is the broadest and least defined of the categories. Of course all legal systems have as their underlying goal a search for “justice” —however imagined.¹⁶⁰ The question is how to choose a system that best puts into practice a procedural and substantive mechanism that results in a legitimate and respected outcome. In the United States, the procedural mechanism for achieving justice is through the adversarial litigation system. Parties hire lawyers who press their claim before an impartial arbiter (judge) who, applying the substantive law to the facts of a particular case, rules in favor of one party or another.¹⁶¹ Underlying this approach, of course, is the presumption that this results in a just outcome because both sides have put forth their best arguments.

Appeals are allowed, but as the case moves up through the court system, fewer and fewer questions are open for reconsideration.¹⁶² After all, the theory goes, lawyers below put forth the best case and the fact finder (judge or jury) was in the best position to witness the dispute and decide a winner.¹⁶³ But adoption of this method of determining justice has consequences. Winning the game for the client may be more important than ensuring that justice is done. This “leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional foot ball [sic] coach with the rules of the sport.”¹⁶⁴ In the end, no one is well served.

note 154, at 1148 (noting that a system of forced pro bono may lead to inadequate results, as lawyers have less of an incentive to put forth their best effort).

¹⁶⁰ See Robert Araujo, S.J., *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433, 436, 441-42 (1997).

¹⁶¹ See Joel B. Grossman et al., *Do the “Haves” Still Come Out Ahead?*, 33 LAW & SOC’Y REV. 803, 803-05 (1999) (noting the system operates under the presumption that the parties are “endowed equally with economic resources, investigative opportunities, and legal skills”).

¹⁶² See Debra Lyn Bassett, *“I Lost at Trial—In the Court of Appeals!”: The Expanding Power of the Federal Appellate Courts to Reexamine Facts*, 38 HOUS. L. REV. 1129, 1130 (2001).

¹⁶³ See *Appeals Process*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, <http://www.courts.ca.gov/12431.htm> (last visited Apr. 15, 2013).

¹⁶⁴ Pound, *supra* note 1, at 405. It is amazing that in 1906, Pound criticizes the media for sensationalizing the courts and reinforcing the impression that litigation is just a game:

[T]he ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge of the daily work of the courts, completes the impression that the administration of justice is but a game. There are honorable exceptions, but the average press reports distract attention from the real proceeding to petty tilts of counsel,

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses, and jurors in particular cases, but also to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, then neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it.¹⁶⁵

The court abets the game in two primary ways. First, by acting solely as an umpire, the court may allow an unjust outcome—citing its obligation to remain independent and neutral.¹⁶⁶ Second, the court may allow procedural mechanisms to defeat an otherwise valid claim.¹⁶⁷

This version of litigation worked well prior to industrialization, when access to the courthouse was limited, and disputes were largely between individuals or local organizations.¹⁶⁸ In such situations, lawsuits impacted the parties' reputations in the community. Industrialization presented a new challenge to the very structure of the legal decision-making process. Justice no longer meant deciding small-claim, local disputes between two landowners or two contracting parties. Individuals instead found themselves facing large organizations capable of doing great harm, yet not dissuaded by the prospect of individual lawsuits.¹⁶⁹ As Roscoe Pound noted, "An action for damages is no comfort to us when we are sold diseased beef or poisonous canned goods."¹⁷⁰ Add to this the fact that the country was becoming more secular and theories of morality that in the past may have restrained certain deviant conduct, was no longer a

encounters with witnesses and sensational by-incidents.

Id. at 415-16. See also Edward Manson, *Cross-Examination: A Socratic Fragment*, 8 L.Q. REV. 160, 161 (1892) ("[L]aw is in the nature of a cock-fight, and that the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs . . .").

¹⁶⁵ Pound, *supra* note 1, at 406.

¹⁶⁶ Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 347 (1905) ("We strive in every way to restrain the trial judge and to insure the individual litigants a fair fight, unhampered by mere considerations of justice.").

¹⁶⁷ Pound, *supra* note 1, at 408-13.

¹⁶⁸ *Id.* at 403-04.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 404. For Pound, the problem was that the common law focuses on an individualized conception of justice, which courts saw as their position to protect—both procedurally and substantively. Procedurally, courts require action by individuals seeking a remedy. Substantively, courts struck down social welfare legislation as violating the rights of individuals. Pound noted that this put courts in a position of risking their legitimacy: "[T]he courts have been put in a false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright." *Id.*

deterrent.¹⁷¹

What do the institutional barriers to equal access to justice mean in the current crisis in funding? In a cruel twist of irony, the system that already intrinsically favors those with the most resources, for the reasons discussed above, makes the divide between access to justice for the rich and the poor even greater. Unemployed workers are more likely to settle for less than their claims are worth because they cannot afford the delay imposed by far-off court dates.¹⁷² Lawyers who depend on court appointments may feel an even greater pressure to resolve cases as quickly as possible—at the cost of pressing rights for clients—to make as much money as possible and ensure that the court is sufficiently pleased to provide future appointments.¹⁷³

In his seminal article, Galanter divides litigants between the “haves,” the “have nots,” the “one-shotters,” and the “repeat players.”¹⁷⁴ Galanter argues that the deck is stacked against the “have nots” such that they will always come out on the losing end.¹⁷⁵ “Repeat players” in the legal system are typically large companies (e.g., insurance companies) that have many cases before a court, anticipate having many more in the future, and engage in litigation strategy with this in mind.¹⁷⁶ The “one-shooter,” on the other hand, has a single case, and the value of the case may either be high or low, but the “one-shooter” is only involved in the legal system for this one case.¹⁷⁷ The “one-shooter” may be the plaintiff in a personal injury case or the defendant in a criminal case.

“Repeat players” have a number of advantages in the litigation process. First, because they have litigated similar cases in the past, they are able to structure future transactions to their advantage and overcome prior

¹⁷¹ *Id.* at 415. Pound wrote:

The present is a time of transition in the very foundations of belief and of conduct. Absolute theories of morals and supernatural sanctions have lost their hold. Conscience and individual responsibility are relaxed. In other words, the law is strained to do double duty, and more is expected of it than in a time when morals as a regulating agency are more efficacious.

Id.

¹⁷² *Cf.* Norton, *supra* note 9, at 601-02 (describing how the financially troubled population is underrepresented and unfairly treated in the legal system because of its inability to afford a role in the legal process).

¹⁷³ See Jeff Blackburn & Andrea Marsh, *The New Performance Guidelines in Criminal Cases: A Step Forward for Texas Criminal Justice*, 74 TEX. B.J. 617, 617 (2011).

¹⁷⁴ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97-98 (1974).

¹⁷⁵ *Id.* at 103-04.

¹⁷⁶ *Id.* at 97-98.

¹⁷⁷ *Id.* at 98.

mistakes they may have made.¹⁷⁸ They also develop expertise in the area they often litigate and have low start-up costs for any particular case.¹⁷⁹ The goals of the "repeat player" are long-term. Therefore, they can suffer a loss in any particular case in an effort to minimize losses in future cases.¹⁸⁰ "Repeat players" engage in litigation as much to establish a favorable rule as to win any particular case.¹⁸¹ To put this in Galanter's terms, "repeat players" will be willing to forego "tangible gains" in any particular case (and even suffer a loss) in order to acquire a "rule gain."¹⁸² A "repeat player" can settle cases that would result in an unwanted rule and can pursue those where a favorable rule can be obtained.¹⁸³

"One-shotters" are greatly disadvantaged in this regard. One advantage noted above is the ability of the "repeat player" to engage in the litigation process for a rule that would favor them in future cases. This is not the case with regard to "one-shotters," whose incentive is to achieve the greatest gain possible in this particular case without concern for the long-term establishment of rules.¹⁸⁴ This directly affects the nature of the legal rules that develop. While "repeat players" are not concerned with the outcome of a particular case, and will take steps to dispose of cases—for example by settlement—where a harmful rule might result, "one-shotters" are willing to trade the possibility of making "good law" for tangible gain.¹⁸⁵ The result of this disparity is the development of substantive laws that favor "repeat players" over "one-shotters."¹⁸⁶

The system itself is set up to favor "repeat players." Although there is nothing inherent in this system that says that those with the most money will have the advantage, the reality is that often the financially well-off (what Galanter calls the "haves") are the "repeat players" in our system, and the less well-off are the "one-shotters."¹⁸⁷ Therefore, this "one-shotter" versus "repeat player" dynamic in practice becomes a "haves" versus the "have nots"—with the latter facing legal barriers to pursuing a claim that the former are not.

The result is a legal system in which the "haves" are in a perpetually

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Galanter, *supra* note 174, at 98.

¹⁸¹ *Id.* at 100.

¹⁸² *Id.* at 101.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 100.

¹⁸⁵ *Contra id.* at 101.

¹⁸⁶ Galanter, *supra* note 174, at 102.

¹⁸⁷ *See id.* at 103.

favorable position. They can afford more and better lawyers.¹⁸⁸ In addition, lawyers for the “one-shotters” are ethically prohibited from engaging in the type of conduct that benefits “repeat players.” Ethics rules prohibiting, for example, “solicitation, advertising, referral fees, [and] advances to clients” limit the lawyer’s ability to select particular cases to level the playing field.¹⁸⁹ Furthermore, lawyers representing “one-shotter” clients (criminal defense lawyers or personal injury lawyers) cannot ethically advise a client to forego their rights in a particular case so a favorable rule can be developed for future cases.¹⁹⁰

However, it is not only the self-interests of the parties that lead to the disparity. Lawyers and courts also contribute to the problem. Lawyers for “one-shotters”—particularly in the criminal context—are also guilty of perpetuating the benefit of the “haves.” The criminal defense lawyer has a permanent “client” that she must satisfy in order to continue receiving appointment: the court.¹⁹¹ This creates an inherent conflict of interest between the lawyer and the client. Courts, because of heavy workloads, can create pressure for parties to settle rather than litigate. To do this, courts create rules that discourage or limit litigation.¹⁹² This systematic preference for clearing the docket and restricting the right to bring claims that challenge current rules operates to favor those who are benefited by the status quo—most likely the “repeat players.”¹⁹³

In the current debate over the funding crisis in the judiciary, there has been very little discussion of the inequities of the system itself.¹⁹⁴ This problem, while easy to identify, is very difficult to resolve. In fact, it may be impossible to resolve as long as our legal system is based upon the adversarial model. This does not mean, however, that members of the legal profession should not strive to find ways to seek justice. In fact, problem-solving and therapeutic courts are steps in this direction.¹⁹⁵ These courts allow a judge to step outside her traditional neutral role and obtain the best outcome.¹⁹⁶ For example, in youth courts, judges can communicate with social workers, medical officials, and other officials about an offender’s

¹⁸⁸ See *id.* at 114.

¹⁸⁹ *Id.* at 116-17.

¹⁹⁰ *Id.* at 117 n.52.

¹⁹¹ *Id.* at 117.

¹⁹² Galanter, *supra* note 174, at 121.

¹⁹³ See *id.* at 121.

¹⁹⁴ See generally Jon D. Wisman, *Wage Stagnation, Rising Inequality and the Financial Crisis of 2008*, AMERICAN.EDU (Jan. 2012), <http://www.american.edu/cas/economics/pdf/upload/2012-1.pdf>.

¹⁹⁵ See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055-56 (2003).

¹⁹⁶ *Id.* at 1056-57.

status—even though such contact would be prohibited as *ex parte* communication under the Code of Judicial Conduct.¹⁹⁷ These courts are positive examples of what can happen by applying innovative solutions to the problems of today—even if that means that current rules of ethics, evidence, or procedure need to be modified to ensure that justice is done.

CONCLUSION

Winston Churchill said, “The era of procrastination, of half-measures, of soothing and baffling expedients, of delays, is coming to its close. In its place we are entering a period of consequences.”¹⁹⁸ The judiciary is currently in a time of consequences. This symposium joins a long list of stakeholders studying what to do in the midst of the current judicial crisis.¹⁹⁹ While often described as a funding crisis, the monetary aspect is merely the visible and tangible symptom of the problem. The problems faced by the judiciary and legal system run deep. The crisis includes not only issues of funding, but also issues of access to legal services and justice. This Article argues that the only way to have proper perspective, and develop the most effective methods to resolve the current crisis, is to adopt an objective approach to evaluating the current crisis with an understanding of whether the crisis falls in the historical evolution of access to justice issues..

A critical eye is willing to put the current crisis in historical context, and to realize that prior decisions (which constitute the way things are done now) were made at a particular time and in response to a particular crisis. While current decision-makers should learn the lessons of these prior decisions, they should not be tied or bound by them. The current crisis could result in a paradigm shift in the provision of legal services—making the legal system more accessible, responsive, and fair.

¹⁹⁷ *Id.* at 1060.

¹⁹⁸ 317 Parl. Deb., H.C. (5th ser.) 1081(1936) (U.K.), available at http://hansard.millbanksystems.com/commons/1936/nov/12/debate-on-the-address#column_1117.

¹⁹⁹ See, e.g., James Podgers, *O'Connor: Lawyers & Judges Need to Wake Up to Judicial Funding Threat, Prep for Political Battle*, FLORIDIANS FOR FAIR & IMPARTIAL COURTS (Aug. 8, 2011), <http://www.fairandimpartial.com/2011/0%E2%80%99connor-lawyers-judges-wake-judicial-funding-threat-prep-political-battle/>; ABA, TASK FORCE REPORT ON JUDICIARY, *supra* note 56; ABA Resources for Symposium on Court Funding, ABANOW.ORG (Sept. 22, 2011), <http://www.abanow.org/2011/09/aba-resources-for-symposium-on-court-funding/>.

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