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# Introduction: Access to Justice: It's Not for Everyone

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# INTRODUCTION: ACCESS TO JUSTICE: IT'S NOT FOR EVERYONE

*John T. Nockleby\**

What does it mean to have “access to justice”? Is it a procedural concept, such that when certain conditions are satisfied, we assume that people have effective access? Or does effective access require an assessment of whether justice has been achieved? Does meaningful access to civil justice require that people have lawyers to represent them? Does it mean that people should be provided with counsel if they cannot afford legal representation? Further, what is the relationship between providing an opportunity for justice and an effective justice system adequately supported by the state?

The articles in this Symposium issue on “Access to Justice: It’s Not for Everyone” wrestle with these questions. As the fifth in a continuing series of symposia<sup>1</sup> that challenge different facets of the civil justice system, this Symposium issue of the *Loyola of Los Angeles Law Review* challenges our existing notions of justice and provokes discussion about what it means to have access to justice. Is it truly the case, as many in this country believe, that access to justice is not for everyone?<sup>2</sup>

This Symposium is aptly named. Its title could be read descriptively—access to justice is *not for everyone*—as it is certainly

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1. The following is a list of previous symposia in this series sponsored by the Civil Justice Program at Loyola Law School Los Angeles: Symposium, *The Frontiers of Tort Law*, 41 LOY. L.A. L. REV. 1143 (2008); Symposium, *Access to Justice: Law and Popular Culture*, 40 LOY. L.A. L. REV. 539 (2007); Symposium, *Access to Justice: The Economics of Civil Justice*, 39 LOY. L.A. L. REV. 683 (2006); Symposium, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A. L. REV. 1009 (2005). The 2010 Symposium will address the following topic: injuries without remedy.

2. Deborah Rhode has written extensively about how the legal system meets—or doesn’t meet—the aspiration of achieving justice in the civil context. DEBORAH L. RHODE, *ACCESS TO JUSTICE* (Oxford Univ. Press 2004).

the case that the American legal system does not, in fact, provide “access” to everyone, if meaningful access includes meaningful legal representation. But, the title could also be read as an indictment—access to *justice* is not for everyone—because a civil justice system that excludes many, if not most, people cannot satisfy the standards of justice if justice is not equally available to everyone. Lastly, the title of this Symposium could be read prescriptively as an exhortation suggesting the importance to a justice system that ensures everyone’s access to it regardless of station or class. All three themes find resonance in the articles in this issue.

The Symposium authors challenge conventional ways of thinking about access issues. Deborah L. Rhode asks, *Whatever Happened to Access to Justice?*<sup>3</sup> Rhode has been at the forefront of legal scholarship on this issue, writing extensively about access issues and analyzing the problem from the perspective of both the legal professional as well as the individual who has a problem that she cannot resolve without judicial intervention.<sup>4</sup> In her article, Rhode notes the lack of concern by American politicians and the American public for the inadequacy and inaccessibility of legal representation to people who need it most.<sup>5</sup> She observes that an estimated 80 percent of poor and a majority of middle-income Americans have individual legal needs that do not receive legal attention.<sup>6</sup> Rhode comments, “‘Equal justice under law’ is a principle widely embraced and routinely violated.”<sup>7</sup> There are simply not enough government resources to sufficiently fund legal services providers and civil assistance programs.<sup>8</sup> Rhode considers the challenges that must be addressed to narrow the justice gap by

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3. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009).

4. See, e.g., Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369 (2004); *Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers*, 54 S.C. L. REV. 889 (2003); Deborah Rhode, *In the Interests of Justice: A Comparative Perspective on Access to Legal Services and Accountability of the Legal Profession*, 56 CURRENT LEGAL PROBLEMS 93 (2003); Deborah Rhode, *Pro Bono in Principle and in Practice*, 53 JOURNAL OF LEGAL EDUCATION 413 (2003).

5. Rhode, *supra* note 3, at 870.

6. *Id.* at 879–80.

7. *Id.* at 870.

8. *Id.*

examining the objectives of access to justice, the inadequacies of the current system, and the most common proposals for reform.<sup>9</sup>

In their articles, Gary Blasi and Rebecca L. Sandefur, respectively, propose alternative ways of reframing the problem of access to justice. Blasi suggests that the current vision of access to justice is focused too narrowly on individuals rather than on the broader problem of inequality. In *Framing Access to Justice: Beyond Perceived Justice for Individuals*,<sup>10</sup> Blasi urges that access to justice proponents consider adopting a broader frame that moves beyond an individual's access to an attorney or another form of legal assistance.<sup>11</sup> Blasi proposes that a socially-conscious vision of access would include nonlegal methods such as organizing, negotiating, and collective and collaborative action. His objective is to define "access" in ways that include achieving just outcomes for poor communities, not just procedural justice.<sup>12</sup> Blasi explores the issue of access to justice from the perspective of two slum housing eviction cases<sup>13</sup> to demonstrate how his proposed broader framing of the access issue can transform disputes while simultaneously addressing equality and efficiency norms.<sup>14</sup>

In contrast, Sandefur approaches the question of access to justice from a sociological perspective. In her article, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*,<sup>15</sup> Sandefur examines an equality-based approach to the access issue. For Sandefur, "equal access to justice" means "different groups in a society would have similar chances of obtaining similar resolutions to similar kinds of civil justice problems."<sup>16</sup> Sandefur believes that equal access to justice across all segments of society will enable a society's institutions of remedy to provide everyone—regardless of wealth, class, race, gender, or ethnicity—with equal and just outcomes to their civil justice

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9. *Id.*

10. Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913 (2009).

11. *Id.* at 915.

12. *Id.* at 947–48.

13. *Id.* at 916–25.

14. *Id.* at 929–37.

15. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949 (2009).

16. *Id.* at 951.

problems.<sup>17</sup> Sandefur notes that a law-centric approach, which is usually the approach taken by most legal professionals and involves subsidies to legal services providers and self-help clinics located at courthouses, may not be broad enough to solve the access problem.<sup>18</sup> Instead, Sandefur suggests broadening the access issue to incorporate public perceptions about the legal system, which may or may not revolve around access to lawyers or the court system.<sup>19</sup> Sandefur compares institutions of remedy in the United States with those available in England and Wales, and ultimately, she proposes change at the institutional level that includes an emphasis on all remedial institutions in order to reframe the problem of access to justice.<sup>20</sup>

Sande L. Buhai takes up one of the possibilities suggested by Sandefur and examines alternative ways of achieving access to justice. In *Access to Justice for Unrepresented Litigants: A Comparative Perspective*,<sup>21</sup> Buhai contrasts the access issue as it is perceived in the United States with the way in which it is perceived in civil law systems.<sup>22</sup> Buhai observes that middle-class individuals in the United States are often priced out of the legal system because their income level disqualifies them from being eligible for legal aid services, but they cannot actually afford to hire an attorney.<sup>23</sup> Moreover, even individuals who qualify for legal aid may not actually obtain the legal assistance they need because the legal services organizations that are tasked to provide such legal aid often do not have sufficient funds to service these clients.<sup>24</sup> Buhai opines that the most common ways in which the access problem is approached, which includes self-help centers, unbundled legal services, and alternative dispute resolution, have not fully solved the problem.<sup>25</sup> As an alternative consideration in the access discourse, Buhai compares and contrasts the judicial functions of American judges with those in civil and other foreign legal systems, with

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17. *Id.*

18. *Id.*

19. *Id.* at 955–56.

20. *Id.* at 957–62.

21. Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979 (2009).

22. *Id.* at 980–81.

23. *Id.* at 979–80.

24. *Id.*

25. *Id.*

particular focus on the different ways in which judges treat unrepresented litigants.<sup>26</sup> Based on her comparative analysis, Buhai offers ways in which the American legal system can improve the unrepresented litigant's access to justice by borrowing solutions that have been successfully employed abroad.<sup>27</sup>

Many of the authors in this Symposium issue bring substantial theoretical and practical experience to bear on the question of access to justice. Jeanne Charn, who for many years directed Harvard Law School's legal aid clinic in Jamaica Plain, a neighborhood in Boston, Massachusetts, asks whether the legal profession is ready to accept the responsibility of representing poor people. In *Legal Services for All: Is the Profession Ready?*<sup>28</sup> Charn notes that the American Bar Association has firmly supported federal legal services programs for the poor and has vigilantly protected the ability of legal aid attorneys to represent their individual clients without having to contend with interference from their funding institutions.<sup>29</sup> Charn observes that legal aid attorneys and their supportive bar associations agree that the access problem is defined by a lack of resources, and the only solution is greater funding and more free legal assistance (courtesy of "an army of pro bono lawyers").<sup>30</sup>

However, Charn laments that this simple agenda has not produced a sufficient increase in both money and pro bono services, and access to justice continues to be limited.<sup>31</sup> But, Charn argues that merely increasing resources will not solve the current problem of access to justice.<sup>32</sup> Instead, Charn proposes normative, structural, and institutional changes, which involve not only the funding of legal aid programs but also policymaking and consumer research.<sup>33</sup> According to Charn, such a multifaceted approach to solving the access problem will enable broad reforms that will challenge and

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26. *Id.* at 993–1006, 1015–16.

27. *Id.* at 1016–18.

28. Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021 (2009).

29. *Id.* at 1021–22.

30. *Id.* at 1022.

31. *Id.*

32. *Id.* at 1023.

33. *Id.*

engage the bench, bar, legal aid lawyers, private practitioners and firms, and the consumers who are in need of legal representation.<sup>34</sup>

Clare Pastore and Laura Abel both focus on a key element identified by many as the key factor inhibiting many people's effective access to civil courts. In her article, *A Right to Civil Counsel: Closer to Reality?*<sup>35</sup> Clare Pastore addresses one of the fundamental problems identified by proponents to greater access to justice: the lack of a guaranteed right to civil counsel.<sup>36</sup> Pastore believes that the possibility of expanding the right to counsel in civil cases is more likely today<sup>37</sup> than it ever has been since the U.S. Supreme Court struck down the broad right as a matter of law in 1981 in *Lassiter v. Department of Social Services*.<sup>38</sup> She examines recent legislation and court decisions in various states that have resulted in the right to counsel in certain civil proceedings to otherwise unrepresented litigants.<sup>39</sup> Pastore also discusses strategies that have already been used with success and should be used by advocates of a "civil *Gideon*" to further advance the civil right to counsel.<sup>40</sup>

Laura Abel addresses one important aspect of a strategy to expand the civil right to counsel. From her position as Deputy Director of the Justice Program at the Brennan Center for Justice at New York University School of Law, Abel has mapped how many states are gradually expanding the civil right to counsel within their jurisdictions. In *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*,<sup>41</sup> Abel analyzes the legislative motivations that led to the expansion and implementation of various state statutes providing for counsel in certain civil proceedings.<sup>42</sup> Although much of the legislation that includes provisions for civil counsel arises in the context of parental

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34. *Id.* 1044–57.

35. Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065 (2009).

36. *See id.* at 1065–67.

37. *Id.* at 1065–66.

38. 452 U.S. 18 (1981).

39. *Id.* at 1067–71.

40. *Id.* at 1071–81.

41. Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009).

42. *Id.* at 1090–1109.

termination and child welfare proceedings, Abel draws a number of insights from the passage of these statutes. She suggests that arguments drawn from civil proceedings involving the family are applicable to the ongoing movement to expand the civil right to counsel in other contexts.<sup>43</sup>

Ronald W. Staudt examines a fascinating alternative perspective on the access question. In *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*,<sup>44</sup> Staudt examines how technological innovations might enable greater access to information and greater access to legal services.<sup>45</sup> Although Staudt notes that some of his earlier predictions about the impact of technology on the legal industry did not come to fruition, he offers the possibility of expanding access to legal information and services through the medium of the Internet.<sup>46</sup> Staudt discusses the creation and function of a software tool called “A2J Author” that has already been implemented in courthouses across the United States and in several foreign countries.<sup>47</sup> A2J Author provides an interface for the public to access information about legal processes, court forms, and step-by-step ways of ascertaining and handling legal problems.<sup>48</sup> A2J Author allows attorneys a platform to build guided interviews on the Internet for prospective clients to increase access and improve the efficiency of legal assistance.<sup>49</sup> Staudt is hopeful that while A2J Author may not transform the legal industry, it can increase the delivery of legal aid and government services to the population that is otherwise priced out of the legal market.<sup>50</sup>

In the final article in the Symposium issue, William C. Vickrey, Joseph L. Dunn, and J. Clark Kelso collectively address the key institution that is ultimately charged with securing substantial justice in California: the state judiciary. These three authors bring perspectives based on years of experience dealing with the judicial

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43. *Id.* 1110–14.

44. Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 *LOY. L.A. L. REV.* 1117 (2009).

45. *Id.* at 1121–23.

46. *Id.* at 1119–21.

47. *Id.* at 1128–38.

48. *Id.*

49. *Id.*

50. *Id.* at 1141–45.

branch as well as the other two branches comprising the California political system. Vickrey is the administrative director of the courts of the State of California; Dunn was a two-term state senator who formerly chaired the California State Senate Judiciary Committee; and Kelso is a law professor with much experience working with all three branches.

In *Access to Justice: A Broader Perspective*,<sup>51</sup> the authors first consider various ways of conceptualizing what it means to have access to justice in the California courts, and the various interrelated factors that collectively determine whether ordinary Californians have access to justice.<sup>52</sup> According to Vickrey, Dunn, and Kelso, the issue of access should be considered holistically, focusing on more than just access to counsel, but also on whether the public has actual access to the California courts, judges, court facilities, and court personnel, whether the public can easily obtain legal services, and whether the public has sufficient confidence in the justice system and in the political independence of the judiciary.<sup>53</sup>

Thus, these authors perceive the problem of access to justice to be one that is systemic and structural in nature, and consequently, requires a comprehensive and multidimensional approach.<sup>54</sup> Access to the California justice system is impacted by short-term crises such as periodic budget dilemmas, but the authors do not believe that short-term solutions are sufficient to address the underlying barriers to access faced by ordinary Californians.<sup>55</sup> Vickrey, Dunn, and Kelso urge a rethinking of the role of the judiciary and its interaction with the other branches.<sup>56</sup> Most notably, they suggest that branch leaders should have a candid discussion about inter-branch accountability—one not limited to just “checkbook accountability.”<sup>57</sup> The issue for these authors is one of practical significance; despite the need for an independent judiciary, the judiciary cannot function alone because it needs the political branches to both enact adequate

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51. William C. Vickrey, Joseph L. Dunn & J. Clark Kelso, *Access to Justice: A Broader Perspective*, 42 LOY. L.A. L. REV. 1147 (2009).

52. *Id.* at 1147–51.

53. *Id.* at 1153–57.

54. *Id.*

55. *Id.* at 1178–80.

56. *Id.* at 1154–57.

57. *Id.* at 1151.

budgets and to administer the laws that support efficient functioning.<sup>58</sup> Furthermore, the judiciary is invariably impacted when political crises such as the recurring budget issues decrease the available funds and effectively undermine the public's access to justice.<sup>59</sup>

Vickrey, Dunn, and Kelso encourage the legal and scholarly community to become more engaged in the issue of access to justice.<sup>60</sup> An engaged and efficacious legal community can promote the interests of an effective and independent judiciary to the political branches, which allows the judicial branch to steer clear of partisan politics that would otherwise taint the public's perception of the independence of the judiciary.<sup>61</sup> Vickrey, Dunn, and Kelso believe that only through a collective effort by all stakeholders can we create meaningful access to justice.<sup>62</sup>

Finally, Luz E. Herrera, whose article, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*,<sup>63</sup> will be published in the forthcoming issue of the *Loyola of Los Angeles Law Review*, discusses the possibility of expanding the involvement of the legal profession's private sector through the integration of "low bono" services provided at reduced rates.<sup>64</sup> Herrera emphasizes that there are millions of low- and moderate-income Americans who are in need of legal services but who do not qualify for legal aid and cannot afford to hire legal counsel at market rates.<sup>65</sup> Herrera urges the legal profession to shift its focus from the pro bono model to one that is more inclusive and considers the needs of both the consumers requiring legal services and the private practice attorneys who provide them.<sup>66</sup>

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58. *Id.* at 1178–80.

59. *Id.*

60. *Id.* at 1186–88.

61. *Id.*

62. *Id.*

63. Luz E. Herrera, *Rethinking Private Attorney Involvement Through a "Low Bono" Lens*, 43 *LOY. L.A. L. REV.* 1 (2009).

64. *Id.* at 39–48.

65. *Id.* at 2–8.

66. *See id.* at 30–39.

Access to justice is a critical issue in the evaluation of the American legal system and its capacity to achieve justice. Currently, concerns abound that access to justice may, in fact, not be for everyone, and there is sufficient data to validate these concerns. Symposia like this one focus attention on access issues, however framed, and empower policy makers who aim to reform and improve the legal system. Critically, such symposia also mobilize the legal community to consider and address this pressing issue as a matter of fairness as well as legitimacy. The authors in this Symposium issue have spent years thinking about the issue of access to justice and the various related issues that impact and are impacted by the public's access to justice. The articles that follow reflect creative and substantial contributions to the literature concerning this topic. We hope that readers will enjoy the fruits of their efforts.