“Too Many Lawyers? Too Few Jobs?  
Bridging the Justice Gap”  
by  
Phoebe A. Haddon  
Dean and Professor of Law  
University of Maryland Francis King Carey School of Law  
to  
American Law Institute, 2014 Annual Meeting, Washington, DC

Good afternoon. Today I would like to talk with you about the justice gap...a term which describes the fact that, according to our best calculation — and a guess is really all it is--there may be more than 100 million people in our country who don’t have access to an attorney or legal services they need to resolve a justiciable conflict.

Some of those touched by the justice gap fit our traditional expectations: they are indigent or poor people charged or erroneously convicted of criminal offenses.

But as the justice gap has grown, it’s come to include individuals of moderate income—including members of the middle class—struggling to resolve conflicts on their own.

My first glimpse of the magnitude, complexity and urgency of this problem came several years ago, soon after I became dean of Maryland Carey Law, when I listened to a panel discussion we hosted at the Law School. I heard Paul Grimm, then a federal magistrate and now a district judge in Maryland, describe his struggle to mete out justice to litigants who appeared in his courtroom without representation.

It was immediately apparent that Judge Grimm’s courtroom wasn’t unique. In fact, his fellow panelists--several local state judges--were embroiled in the same problem.

All of them candidly discussed the complexities of attempting to “level the playing field”, as they put it, for pro se litigants – from drafting do-it-yourself manuals to translating and simplifying court rules.

The judges’ stories were heart-wrenching because of the plight of the litigants. They were also troubling, since the judges were clearly frustrated, trying to weigh the competing rights and interests at stake in civil controversies. And the stories were especially disturbing because they were taking place in Maryland, a recognized leader in addressing the problem of access.

Thanks to the vision and commitment of Robert Bell, the recently retired Chief Judge of Maryland’s highest court, the state has a longstanding, 46-member Access to Justice Commission, one of few such state commissions housed within the judicial branch—and, thus, able to have an immediate impact on court practice.
Pamela Cardullo Ortiz, a Commission member, has observed: “The hallmark of a healthy democracy is one in which individuals can exercise their rights to enforce the protections, privileges, and opportunities available to them under the law. They can only do so, however if they can access the justice system through which those rights are enforced.”

Maryland has taken many steps to increase access to justice and protect democracy’s health.

For example, to help people representing themselves, it has self-help centers in all its circuit-court locations and its district court.

The state has a network of public law libraries (“People’s Libraries”) and a network of local pro bono committees; all of the 36,000 lawyers in Maryland must report their pro bono activity annually.

When interest rates plunged a few years ago, it passed legislation to increase the surcharge on court filing fees to fund its depleted Lawyers’ Trust Accounts (IOLTA), which had supported the state’s civil legal service providers.

During the recession it trained hundreds of lawyers in how to provide pro bono help to home owners at risk. And this fall the Access to Justice Commission will consider a report on how to implement a broad right to counsel in civil matters.

Despite this work, 60% of domestic cases in Maryland have at least one self-represented litigant. In 40% of those cases both parties are unrepresented. Fully three-quarters of domestic trials have at least one participant without a lawyer.

Sadly, this lack of representation is typical of other states.

In the Massachusetts Supreme Judicial Court, 75% of parties in the housing, family and probate courts were representing themselves.

In NY, 99% of tenants were unrepresented in eviction cases and 97% of parents were unrepresented in child support proceedings. Sixty percent of homeowners in foreclosure are unrepresented when attending mandatory settlement conferences.

There are other disturbing signs of under-representation. Nationally, in 2009, about half of all appeals filed in federal courts were done so without representation, largely because litigants were unable to afford counsel.

And we know that approximately 20% of the total U.S. population is by law eligible for legal representation. Of these 60 million people, about half—or 30 million—who actually seek legal counsel are denied it every year. Why? State and federal programs are underfunded or there
are simply no pro bono lawyers available. Those turned away are overwhelmingly women, veterans, the elderly and families with children.

According to Professor Deborah Rhode, of Stanford Law, approximately 80 percent of the legal needs of poor individuals and a majority of the legal needs of middle-income Americans remain unmet. Millions of people cannot afford to pay the $200 to $300 per-hour fees often charged for the most routine legal services.

Three points about the acute lack of adequate representation across income groups in both criminal and civil matters are worth further noting:

First, the justice gap is taking place at the same time that pundits talk about a “glut” of lawyers.

By these critics’ estimates, we have been producing about 20,000 more new lawyers every year than “the market” demands.

I’ll accept that assertion—as long as our definition of “market” is restricted to organizations that provide permanent, full-time employment at healthy six-figure salaries to individuals with newly minted JDs.

True, there aren’t nearly enough of these positions; they began to evaporate a few years ago, just as the escalating costs of law school led students to incur increasing amounts of debt.

The fact is, we have a bitterly ironic mismatch: On the one hand, we have thousands of highly trained but unemployed or under-employed recent law school grads. And, on the other, we have millions of moderate and lower-income people who need legal counsel and others who may not know they are at risk because of self-representation.

Our challenge as a profession—and a DEMOCRACY—is to change that...to redistribute the skills of legal service providers to a significantly larger portion of our population.

But at the same time, we must contain law school costs...offer loan forgiveness through federal, state, non-profit or law school endowed funds...and explore changes in fee arrangements and other innovations such as low-bono and unbundled services—all steps that will enable young lawyers to engage in access to justice work.

The second point worth making is that there is no uniform national compilation of statistics on unrepresented litigants. None.

Data from the states—like those I’ve cited--may appear random and thus not comparable; some of the figures are certainly outdated. But even haphazard reporting confirms a national access crisis.
The absence of uniform statistical data on unrepresented litigants prevents us from fully grasping the dimensions of the access problem, and the complexities of solutions that might actually succeed; it compromises our ability to make sound strategic decisions. We don’t know how to allocate scarce resources or which kind of initiatives ought to take priority over others. We need sustained, evidence-based studies to inform our access work.

For example, as Professor Rhode points out, does access to justice mean access to legal services or access to a just resolution of legal disputes? They are different.

Access—or the lack of it—is also a function of the population to be served. Unbundling services can reduce costs, but lower fees won’t help clients who don’t understand they have a legal need. Easily available court documents and call stations for routine landlord-tenant disputes may not be useful to immigrants or others who have language or literacy barriers.

Even with inadequate information, it’s obvious that our justice gap is actually a justice chasm, so wide and so deep that only the wealthiest individuals among us can bridge it.

Finally, there are signs all around us that our country’s legal system faces serious problems that go beyond the costs and complexities of service delivery to the poor and middle class.

- Notably -- We incarcerate more people than any nation and the majority of our inmates are black and male. As Michelle Alexander, author of The New Jim Crow observes, racial bias can be linked to government drug policies—policies that have destroyed communities and drastically reduced the opportunities for the incarcerated ever to lead productive lives.

- And, whether or not you agree with the perspective of commentators about a “glut” of lawyers, it is apparent that structural changes are transforming the business model of our profession. Spend even a few hours reading Richard Susskind, Paul Lippe or Bruce McEwan and it’s clear that we are in the midst of replacing a system based on the traditional law firm hierarchy and fee arrangements with new approaches that are the consequence of technology, globalization and cost conscious clients.

How do we best respond to the challenges I’ve described?

I believe that they demand important, collaborative work from the bench, the bar and the academy. I also want to argue that law schools, and the larger universities in which many of them reside, should assume a more active role in defining the future of the profession and of legal education. Public institutions-- given their history, mission and responsibility to serve the citizens who support them—could lead the way in defining more clearly the causes of the justice gap and the strategies for bridging it.

There are signs that the profession has begun to grasp the importance of the justice gap, particularly as it touches more people of moderate incomes and the middle class.
It appears that the bar may be more receptive to innovative service delivery and willing to collaborate with law schools and public interest organizations in gathering the solid, baseline “access to justice” data that is so critical.

For example, in 2012, the ABA gave its annual award for access to legal services to a for-profit, virtual firm in suburban Detroit that uses of-counsel attorneys with existing practices to provide contract reviews and other common legal services to middle class people who could not otherwise afford them. Flat fees hover in the $300 to $500 range, not thousands.

At about the same time, after years of debate, the judiciary in Washington State created a new category of legal service provider: a Limited License Legal Technician, who can help with court forms, procedures, timelines, and pleadings. Although they can’t represent clients, technicians can alleviate some of the most frustrating aspects of pro se litigation for both judges and unrepresented litigants.

The bar has also started to work with law schools to address the “mismatch”—the daunting job prospects for many recent graduates and the unmet need for legal services-- by actively participating in law school incubators, firms and other new venues for individuals needing representation.

For example, Maryland Carey Law, works with a local public interest law organization to offer Just Advice, a service that provides 30 minutes of legal advice and referrals for $10 at roving locations throughout Baltimore and across the state. Our students team up with practicing attorneys who donate their time and provide one-on-one advice to clients. The students manage all the business aspects of the program—they screen clients, run the office and promote the service.

Maryland Carey Law also runs an incubator program with Civil Justice, a network of small firms and solo practitioners who help train new grads how to serve low-income clients and successfully manage this kind of practice.

The project is similar to one at Rutgers Law Newark, which now runs a law firm staffed with recent graduates who have passed the bar [an idea first proposed by my former Maryland Carey Law colleague, Rob Rhee]. Supervised by experienced attorneys, the fellows at the firm provide a range of legal services at well below market rates to low and moderate-income clients.

I like these programs because they teach third-year law students or young alumni how to manage a practice, work in organizations and acquire the business skills needed to support themselves. They also expose students to devices for working with low-income clients, like sliding pay scales, alternative billing arrangements, contingency work and fee-shifting statutes.
Finally, the bar, law schools and nonprofit organizations have joined forces to address the lack of evidenced-based empirical work on the justice gap.

In 2011, the American Bar Foundation hired Rebecca Sandefur, a sociologist at the University of Illinois College of Law, to survey the patchwork of civil legal services in all the states. The study found that “geography is destiny”—the civil legal resources available to an individual are determined largely by where they happen to live.

In addition to Sandefur’s work, the US Justice Department also created an Access to Justice Office in 2010. A year later, the American Bar Foundation, Stanford’s Center on the Legal Profession and the Harvard Program on the Legal Profession created a Consortium on Access to Justice—a group committed to promoting research and teaching on access to justice. Deborah Rhode is a vital contributor and Maryland Carey Law and a number of other diverse institutions participate.

These are all positive, important steps, but they are also comparatively small, isolated and incremental.

As the dean of a public law school and soon-to-be chancellor of a public research university, it should not be surprising that I’m particularly interested in how law schools can harness the work of students and faculty in the social sciences and humanities to strengthen law schools’ role in defining and successfully bridging the justice gap.

Here are some obvious departure points for law schools that build on their existing strengths:

As communities of scholars, law schools should lead the research that focuses on access to justice here and internationally and suggest new solutions, including the use of alternative dispute mechanisms.

This knowledge, combined with data-driven analysis of where the justice gaps are greatest, would allow law schools to conduct an access-to-justice audit of their curricula that went beyond clinical law to include securities, banking, tax and businesses courses as well as the transactional services of consumer law—practice areas that touch not only the middle class but also affect indigent or very poor people.

Law schools must learn to collaborate. There should be no reason why Maryland Carey Law duplicates an innovative clinic at the University of Baltimore, just a few miles up the road. We need cooperating academic consortia like those among undergrad and grad institutions in New England and outside of Philadelphia.

Law schools are also laboratories—they could be what incubators or start ups are to the technology sector: thinking outside of the box, exercising their academic freedom—and their imaginations!—on behalf of the underserved.
Using evidenced-based research—and the assistance of courts—law schools could reshape their clinical programs to meet the most pressing legal needs of their communities—a benefit not only to clients, but to students, who would gain practical experience addressing the most acute legal needs in a given geographical area. Research could also help us identify and formalize best practices in service delivery.

Finally, we must do more work as reformers and lobbyists to shine a bright, public spotlight on the problem of access to justice—one that reaches well beyond our profession.

For example, working with an ABA survey done in the 70s— the only data available—Rebecca Sandefur discovered that cost wasn’t the only factor which kept people of moderate means from seeking counsel. Some people didn’t know how to find a reputable lawyer; others didn’t recognize they needed one.

This finding suggests that we need a vast public education campaign about the importance of law in our everyday lives. Adolescents need more than a basic civics course about the three branches of government and when to vote—though that would help.

As models, I’m thinking of the large, public health campaigns that got Americans to quit smoking, cut their intake of red meat and worry about their own weight and that of their children. Thank you, Michelle Obama, for “Let’s Move”, your campaign to end childhood obesity.

Our profession has seen nothing remotely comparable. And I believe it should.

Clearly, millions of Americans do not grasp how the law can be of value to them or their loved ones—perhaps as a consequence of a meager education or pundits who have bemoaned our litigious society and devalued the service of lawyers in settling disputes and ensuring justice.

But we must acknowledge our own role. Once, people valued our profession for the work of its practitioners—they didn’t envy wealth or power; they admired lawyers’ work and how it could protect or advance the lives of those who were neither wealthy nor powerful.

But today, for many people, law is not power or even order over evil and anarchy. And they believe it has nothing to do with the poor or marginalized. Many would be surprised to learn that law—at least in America—is founded on the principle of equality and justice for all. For them, justice is merely an elusive phantom. Literally millions of Americans are without access to justice for lack of financial resources, information or will in the face of overwhelming obstacles, despite the fact that our nation was founded on the conviction of “justice for all.” It is the responsibility of every lawyer in this room to deliver on that promise.

I’m willing to try. I hope you are too.