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RANDALL T. SHEPARD LECTURE

THE FUTURE OF ACCESS TO JUSTICE

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Randall T. Shepard, a native of Evansville, was appointed to the Indiana Supreme Court in 1985, became Chief Justice of Indiana in 1987, and served in that position until assuming senior status in 2012.¹ He was instrumental in modernizing the Indiana court system and creating programs to improve the administration of justice.² The Evansville Bar Association sponsors the Shepard Lecture Series, which brings speakers to Evansville to present on topics such as the rule of law, professionalism, and leadership.³ The lecture series is endowed with funds provided by the 2012 class of the Indiana State Bar Association Leadership Academy.⁴ This Article is based on the first Shepard Lecture, which was delivered on September 13, 2016, in the Randall T. Shepard Courtroom in the Old Vanderburgh County Courthouse.⁵

This lecture is about the future of access to justice seen through the eyes of someone who has had the luxury of viewing it from several sides. I will particularly tell the story today from the point of view of my current clients, the low-income Hoosiers who seek our help at Indiana Legal Services. I'll begin by speaking just a bit about how change comes to our profession, then I will focus

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1. KEVIN W. BETZ ET AL., JUSTICES OF THE INDIANA SUPREME COURT 395, 396 (Linda C. Gugin & James E. St. Clair eds., 2010).

2. *Id.* at 395-98.

3. Marilyn Odendahl, *Plaque and lecture series established to honor Randall Shepard*, IND. LAW. (Mar. 13, 2015), <http://www.theindianalawyer.com/articles/36616-plaque-and-lecture-series-established-to-honor-randall-shepard> [<https://perma.cc/JD5H-S9YJ>].

4. *Id.*

5. *Evansville Bar hosts inaugural lecture series*, IND. LAW. (Sept. 13, 2016), <https://www.theindianalawyer.com/articles/41426-evansville-bar-hosts-inaugural-lecture-series> [<https://perma.cc/EGK8-WQCL>].

<http://doi.org/10.18060/4806.1180>

on the recent ABA Report on the Future of Legal Services in the United States.⁶ Then I'll talk about our clients at Indiana Legal Services and the issues they face, and I'll close with some thoughts on moving forward.

I. MY CONTEXT

My background colors my perspective. I grew up in Plymouth, Indiana, which is a county seat town near South Bend. Growing up, I knew many of the lawyers in Plymouth, and I could see that they played an essential part in the life of our community, including politics and government. I decided pretty early that I wanted to go to law school.

After law school, I worked as a legal aid lawyer for five years in Massachusetts. Then I went into government, where my litigation work involved defending government agencies and decisions. Later, I advised two governors on matters including vetoes of bills, clemencies, and judicial appointments. Then I worked for ten years as a partner at a large law firm, where I did mostly appellate work.

In 2015, I went back into the legal aid world as executive director of Indiana Legal Services. Just as in my government and private practice jobs, the work is challenging and the colleagues are great. My current colleagues bring more passion to their work than in some of my prior jobs, and there is no question that we help clients with crucial problems – often survival issues – every day. I think I was invited to deliver this lecture in part because of my diverse background, and I'll try to reflect those perspectives in my remarks.

II. CHANGE IN THE LEGAL WORLD

A premise of this lecture is that the legal profession usually doesn't lead professional change, but rather changes only when outside forces require it. As a profession, lawyers are slow to change. We're conservative. We rely on precedent. And in many of these areas, a change occurred not because we embraced it or supported it, but because it happened independently of us.

For example, the profession has been slow to move away from the hourly billing model.⁷ As a result, more law-related tasks are being performed outside the usual law firm environment.⁸ Corporate clients are moving work in-house, turning to tech firms to address discovery in civil litigation and to other outsourced resources to perform other tasks.⁹ The profession has not led on this

6. *See generally* COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES (2016), *available at* <http://abafuturesreport.com/2016-fls-report-web.pdf> [<https://perma.cc/7MCG-KBQH>] [hereinafter AM. BAR. ASS'N REPORT]

7. *See, e.g.*, Mark A. Cohen, *Why is there a disconnect between what firms are doing and what clients want?*, LEGAL REBELS (Aug. 18, 2016, 8:30 AM), http://www.abajournal.com/legalrebels/article/the_law_firm_disconnect [<https://perma.cc/8GH7-SZTW>].

8. *See id.*

9. *Id.*

issue.

The profession has resisted non-lawyer ownership of entities that practice law.¹⁰ Only one or two jurisdictions allow non-lawyer ownership.¹¹ As a result, entities that want to invest in the legal sector will take their money elsewhere – away from traditional law firms to alternative providers like Avvo and LegalZoom that aren't regulated like we are.¹² Again, we have not led.

Our profession also has not been out in front on technology that would allow us to be more efficient in tasks like producing and filing documents. Therefore, tech-based providers like Avvo and LegalZoom have arisen, and people are using them.¹³ They allow individuals to generate documents like simple wills and incorporation papers, often for free.¹⁴ These services also will sell you unbundled legal services, or at least answers to basic legal questions, from a human lawyer.¹⁵ There are debates about how to regulate this law practice properly, but it's out there, and it's here to stay.

The changes that have occurred mostly are not ones that our profession has initiated.¹⁶ They have come from the outside.¹⁷ I hope that when we look at access to justice, change will be driven by the profession itself – otherwise outsiders like legislators and regulators may do it for us.

III. ABA REPORT

In August 2016, the ABA issued the report of its Commission on the Future of Legal Services in the United States.¹⁸ The report broke some new ground. Its lead findings and several of its recommendations address the people I'll describe to you later as my clients – low-income people who need legal help with problems that are vital to their everyday lives.¹⁹ The ABA Report's focus on people who have difficulty being served in our legal system is new, in my view.²⁰

The study's lead finding is that most people living in poverty and the majority

10. See Joe Patrice, *Should Non-Lawyers Own Firms? Do They Already?*, ABOVE THE LAW (Jan. 20, 2014, 2:02 PM), <https://abovethelaw.com/2014/01/should-non-lawyers-own-firms-do-they-already/> [<https://perma.cc/W2RK-HBMZ>].

11. *Id.*

12. See Carolyn Elefant, *The Commercialization Of Legal Ethics, And The Avvo Defense*, ABOVE THE LAW (Jan. 31, 2017, 6:22 PM), <https://abovethelaw.com/2017/01/the-commercialization-of-legal-ethics-and-the-avvo-defense/> [<https://perma.cc/MH8D-8BYW>].

13. Ben Barton, *Lessons From the Rise of LegalZoom*, BIG L. BUS. (June 18, 2015), <https://biglawbusiness.com/lessons-from-the-rise-of-legalzoom/> [<https://perma.cc/E36Q-P98N>].

14. See, e.g., *Avvo Legal Services*, AVVO, <https://www.avvo.com/legal-services> [<https://perma.cc/Y427-AUGY>] (last visited Nov. 29, 2017).

15. *Id.*

16. AM. BAR. ASS'N REPORT, *supra* note 6, at 8-9.

17. *Id.*

18. *Id.* at 1-97.

19. *Id.* at 5.

20. See *id.* at 11-15.

of moderate-income individuals do not receive the legal help they need.²¹ This unserved group includes most people living in poverty – which is about fifteen percent of the U.S. population – and a majority of moderate-income individuals.²² The study found that these individuals don't obtain effective assistance with legal problems for two reasons: one, they can't pay for lawyers; and two, they often lack the knowledge to recognize a problem as having a legal dimension.²³

The study recognized the huge problem created by this lack of legal resources.²⁴ Millions of individuals go to court each year without a lawyer, and that adversely affects all litigants, including those who have lawyers.²⁵ Many Indiana judges will tell you that a large number of unrepresented litigants show up in their courtrooms and what a big problem it creates. The ABA report made recommendations to improve this situation,²⁶ and I'll talk about them shortly.

The ABA report's findings are supported by a more recent study released by the Legal Services Corporation, which concluded that more than half of the low-income people who seek civil legal aid each year receive no help or only limited help, usually because there are insufficient legal resources to assist them.²⁷ Survey data for the report showed that seventy-one percent of low-income households experience at least one legal need in any given year, and many experience more than one.²⁸ They seek help for only about twenty percent of those problems, however, often because they do not recognize them as legal in nature.²⁹ Of those who sought help from civil legal aid programs funded by the Legal Services Corporation during the survey period, forty-one percent were not served at all; twenty-one percent were served, but not fully; and twenty-eight percent were fully served.³⁰ Indiana data compiled for this report were similar, showing that twenty-nine percent of those seeking legal help from Indiana Legal Services were fully served; forty-one percent were served, but not fully; and twenty-six percent were not served at all.³¹

21. *Id.* at 5.

22. *Id.* at 11-15; *see also* Max Van Zile, *The New Faces of U.S. Poverty*, U.S. NEWS (July 6, 2016, 6:00 AM), <https://www.usnews.com/news/articles/2016-07-06/the-new-faces-of-us-poverty> (listing poverty rates of 2014 as approximately fifteen percent).

23. AM. BAR. ASS'N REPORT, *supra* note 6, at 14-15.

24. *Id.* at 15.

25. *Id.*

26. *Id.* at 37-57.

27. *See* LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 44-45 (2017) (This report was not available at the time this lecture was given; it is mentioned here to support other data in this Article and because it is a helpful resource.) [hereinafter *THE JUSTICE GAP*].

28. *Id.* at 21.

29. *Id.* at 30.

30. *Id.* at 42 (these figures do not sum to 100% because they do not include the intakes performed during the survey period for which no decision about level of service had yet been made).

31. The author has this data, which was compiled for inclusion in the Legal Services

IV. WHO ARE THE CLIENTS?

With this focus on low-income participants in the legal system, I want to tell you a little bit about these low-income clients I've been talking about.

The poverty rate in Indiana is 14.4%, which is a little below the national average,³² and that means that well over 900,000 people in Indiana live in poverty as measured by the federal government - \$11,880 a year for a single person, \$24,300 for a family of four.³³ Indiana Legal Services sets 125% of the poverty standard as our eligibility standard, meaning that well over a million people in Indiana are qualified for our services.³⁴

The poverty research in recent years has revealed some appalling numbers. A million and a half households in the United States live on no more than two dollars per person, per day, in cash income.³⁵ For a family of four, that's \$240 per month.³⁶ By simple math, about 30,000 families in Indiana live at that level.³⁷

This leads me to a digression or maybe a pet peeve. It's the question about welfare. People ask, "Well, why don't they just live on welfare?" Or politicians say they'll get people off welfare. In 2016, that's just wrong.³⁸ There is no welfare. There is no readily available cash benefit like there was before welfare reform in 1996.³⁹ About 8,000 families in Indiana received TANF, which is the

Corporation's Justice Gap survey. Indiana's data varies from the national data because Indiana Legal Services chooses to deploy its resources to provide more advice and less extended representation than some other civil legal aid providers. These figures do not sum to 100% because they do not include the intakes performed during the survey period for which no decision about level of service had yet been made.

32. *Small Area Income and Poverty Estimates*, U.S. CENSUS BUREAU, http://www.census.gov/did/www/saie/data/interactive/saie.html?s_appName=saie&map_yearSelector=2015&map_geoSelector=aa_c&s_state=18&menu=grid_proxy#view=StateAndCounty [<https://perma.cc/XCB3-PY4J>] (last visited Sept. 27, 2017) (at the time of the lecture, the 2014 data available showed a sixteen percent poverty rate, slightly higher than the national average).

33. *Id.* (showing 924,000 in poverty in 2015 in Indiana. At the time of the lecture, the number was 968,000 for 2014. For poverty level numbers see *Federal Poverty Guidelines*, FAMILIES USA, <http://familiesusa.org/product/federal-poverty-guidelines> [<https://perma.cc/DP6Y-NND8>] (last visited Sept. 27, 2017).

34. LEGAL SERVS. CORP., FISCAL YEAR 2017 BUDGET REQUEST 7 (2016), <https://www.lsc.gov/media-center/publications/fy-2017-budget-request> [<https://perma.cc/C3UC-EQP3>] (estimating 1.3 million eligible clients in Indiana) [hereinafter FISCAL YEAR 2017 BUDGET REPORT].

35. KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA 17 (Mariner Books 2015).

36. $4 \times \$2 \times 30 = \240 .

37. This calculation assumes that families living on two dollars or less per day per person are distributed proportionately to the poverty population. Indiana has about two percent of America's population living below the poverty level. $.02 \times 1,500,000 = 30,000$.

38. See EDIN & SHAEFER, *supra* note 35, at 7 ("There are more avid postage stamp collectors in the United States than welfare recipients.").

39. *Id.*

cash program for families with children, last year.⁴⁰ That's only about four percent of the families living below the poverty line, and it's less than a third of the families in Indiana that I estimate are living on less than two dollars per person per day.⁴¹ There are time limits on cash assistance, but more to the point it is very difficult to qualify.⁴² Many low-income people don't even apply for these benefits because it's so difficult to qualify, and, in effect, there is no more welfare as we routinely used to think of it.⁴³

There are Food Stamps, technically Supplemental Nutrition Assistance Program (SNAP) benefits and those are much more widely available.⁴⁴ But they purchase only food.⁴⁵ They can't be used to pay rent, child care, or transportation.⁴⁶

There is also the Earned Income Tax Credit, which is now the largest income transfer program to the poor.⁴⁷ It transfers billions of dollars through tax credits that can be paid out as refunds, and it does so without requiring a poor person to ever visit a welfare office.⁴⁸ To qualify, an individual must have earned income and a child in the household, and the individual's income has to be below or near the poverty level.⁴⁹ Earned income is a prerequisite.⁵⁰ A person must have a job for at least part of the year.⁵¹ If we had an economy in which those at the bottom end economically could get and keep steady jobs, even low-wage jobs, the EITC would go far to eliminate poverty.⁵² But we have not had that economy for several years, if ever. EITC does not address the worst poverty because it's the poverty of people without earned income, and they cannot participate in the program.⁵³

40. Info. For Ind., *Data Access*, STATS IND., http://www.stats.indiana.edu/dms4/new_dpape.asp?profile_id=314&output_mode=1 [<http://perma.cc/B7ES-HMAB>] (last visited Dec. 21, 2017).

41. This conclusion comes from arithmetical calculations using TANF and poverty data from Stats Indiana and Indiana's proportionate share of below two dollars a day population derived from EDIN & SHAEFER, *supra* note 35.

42. *See id.* at 8.

43. *Id.* at 2-10.

44. *Id.* at 8.

45. *Id.* at 9-10.

46. *Id.*

47. *Id.* at 157.

48. *Id.* at 157, 172; MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 350 n.4 (Crown 2016).

49. *See* EDIN & SHAEFER, *supra* note 35, at 46-47.

50. *See generally id.*

51. *Id.*

52. *See id.* at 30.

53. As an aside, ILS operates a low-income tax clinic, financed by a grant from the IRS. There are dozens of these clinics across the country funded by the IRS. And last year on our \$95,000 grant we reduced our low-income clients' tax liability by more than half a million dollars and got them more than \$50,000 in refunds. Thirty years ago when I started in legal services, I never thought we'd be practicing tax law.

Here are the two biggest changes I have seen since returning to legal aid work after twenty-five years. First, welfare is almost nonexistent and instead people rely on low-wage, sporadic work. Second, what you read in the papers about increasing economic inequality is really true. Even as we see the unemployment rate go down in Indiana, the percentage of people living in poverty still goes up almost every year.⁵⁴ More and more people end up at the bottom of the economic ladder as economic gains go to those of us in the top ten percent.⁵⁵ Since 1970, the share of total income going to the bottom quarter of the U.S. income distribution has fallen by twenty-five percent, while the share of total income going to the top five percent has risen by thirty-two percent.⁵⁶

54. *Local Area Unemployment Statistics (LAUS) – Seasonally Adjusted*, HOOSIERS BY THE NOS., http://www.hoosierdata.in.gov/dpage.asp?id=54&view_number=2&menu_level=smenu1&panel_number=2 [<https://perma.cc/A6W8-KG8K>] (last visited Nov. 29, 2017); *Poverty Data Output*, STATS IND., <http://www.stats.indiana.edu/poverty/index.html> [<https://perma.cc/7YAD-NSRT>] (last visited Nov. 29, 2017).

Year	Poverty rate	Unemployment rate
2015	13.5	4.6
2014	14.6	5.5
2013	11.6	6.3
2012	15.2	8.4
2011	15.6	8.8
2010	16.3	9.3
2009	16.1	10.8
2008	14.3	8.3
2007	11.8	4.8
2006	10.6	4.8
2005	12.6	5.3
2004	11.6	5.6
2003	9.9	5.2
2002	9.1	5.0
2001	8.5	5.3
2000	8.7	3.1

55. *Id.*

56. *Income and Poverty in the United States: 2015 App. Table A2, Data*, U.S. CENSUS

To summarize, our clients are the working poor – if they're lucky. If they don't work or somehow find income, they are destitute. But their work is low-paid, sporadic, and fragile.⁵⁷ They're in the kinds of jobs where you get fired if you miss a shift or are late because you have a child in the emergency room or your car breaks down and you can't get a ride from someone else. Or you get fired because you can't come in for an extra shift because you can't get childcare or you're supposed to be in court defending your eviction. Their lives move from crisis to crisis, and their days often consist of deciding which crisis is worst and needs to be dealt with first.⁵⁸

For some of our clients, a regular source of income is selling their blood plasma.⁵⁹

V. OUR CLIENTS' LEGAL PROBLEMS

What legal problems do they bring us?⁶⁰ They have family law problems, including divorce, paternity, and support; clients come to us to get support orders reduced based on their low incomes. They come with housing problems, often at the point of eviction, and sometimes we can keep an eviction off their record, defeat a claim for damages, or maintain a right to a housing subsidy. They come with criminal convictions to be expunged so that fewer doors are closed on them in the job market and for limited driver's licenses so they can get to work. And they come with what we call consumer cases, often as defendants in collection matters. Remember, most of our clients are working and are not judgment proof, and for them, even a small garnishment order can be the difference between paying the rent that month or missing the rent payment and starting a cycle of eviction and perhaps homelessness.

Not all the legal work our clients need involves courts. They also need meaningful access to the administrative systems that often govern their lives. They come because their disability payments are being cut off or because the state's HIP 2.0 medical insurance program isn't working as it is supposed to.⁶¹

BUREAU, <https://census.gov/data/tables/2016/demo/income-poverty/p60-256.html> [<https://perma.cc/X7TC-VTRX>] (last visited Nov. 29, 2017).

57. See generally EDIN & SHAEFER, *supra* note 35; see generally DESMOND, *supra* note 48.

58. See, e.g., DESMOND, *supra* note 48, at 99-100 (individual chooses not to miss work rather than attend eviction court), 244 (tenant's loss of work hours leads to cascade of events culminating in eviction).

59. See, e.g., EDIN & SHAEFER, *supra* note 35, at 95-97; see also DESMOND, *supra* note 48 (for its description of the reality of current poverty); Kathryn Edin & H. Luke Shaefer, *Blood Plasma, Sweat, and Tears*, ATLANTIC (Sept. 1, 2015), <https://www.theatlantic.com/business/archive/2015/09/poor-sell-blood/403012/> [<https://perma.cc/7XQS-8DXJ>].

60. See generally *Case Services Provided*, LEGAL SERVS. CORP., <https://www.lsc.gov/national-data-case-services-provided> [<https://perma.cc/7AME-NGKU>] (last visited Dec. 21, 2017).

61. See, e.g., Jake Harper, *Indiana's Model For Medicare Could Spread—But It's Not Working For Everyone*, SIDE EFFECTS (Jan. 10, 2017), <http://sideeffectspublicmedia.org/post/indiana-s-model-medicaid-could-spread-it-s-not-working-everyone> [<https://perma.cc/R5Y5->

They need lawyers. The kinds of defenses we raise in consumer cases are technical; they're difficult for unrepresented litigants.⁶² Chief Justice Shepard did these defendants a service in his decision in *Branham v. Varble*,⁶³ where he re-emphasized that small claims judges must be sure to apply the constitutionally mandated exemptions against execution in these debt collection cases, to protect unrepresented litigants.⁶⁴ This appeal was brought by Katherine Rybak, an ILS attorney from here in Evansville.⁶⁵ But sadly, that decision is often not followed by busy judges in crowded courtrooms, which is where the litigants need it the most. Our clients need representation in disability and HIP cases too because the rules are complex and the law often is unfamiliar to the administrative judges. Similarly, the expungement statute is complicated for non-lawyers to apply in cases that involve multiple convictions or certain types of offenses.⁶⁶ Our clients truly need us.

But we often lack the capacity to serve them. Nationally, legal aid programs turn away about one person for every person they serve.⁶⁷ Indiana Legal Services has a better ratio than that because we give so much advice.⁶⁸ We give less than full service to about ninety percent of those who come to us, but we turn away only about thirty percent with no help at all.⁶⁹ This situation illustrates the ABA report's finding that for poor people looking for legal help, "geography is destiny."⁷⁰ Availability of services depends not on what they need, but rather on where they happen to live and whether funding has been allocated for that particular legal need in that place.⁷¹

There are national measurements of how states address low and moderate-income participants in the civil legal system.⁷² The primary measure, called the

QG98].

62. AM. BAR ASS'N REPORT, *supra* note 6, at 34.

63. 952 N.E.2d 744, 747 (Ind. 2011).

64. *Id.*

65. *Id.* at 745.

66. See Dave Stafford, *Complexity of new expungement law raises questions*, IND. LAW. (July 17, 2013), <https://www.theindianalawyer.com/articles/31913-complexity-of-new-expungement-law-raises-questions> [<https://perma.cc/ZHB2-4J2B>].

67. FISCAL YEAR 2017 BUDGET REPORT, *supra* note 34, at 4-5; see also THE JUSTICE GAP, *supra* note 27, at 39.

68. *Compare LSC By The Numbers 2015*, LEGAL SERVS. CORP., <https://www.lsc.gov/media-center/publications/lsc-numbers-2015> [<https://perma.cc/6XD8-VQ56>] (last visited Sept. 29, 2017) (showing seventy-six percent of cases nationally consisting of advice or brief service), *with* Indiana Legal Servs., Legal Servs. Corp. Form G-3 (2015) (showing eighty-four percent of cases consisting of advice or brief service).

69. Indiana Legal Serv.'s, Legal Serv.'s Corp. Form G-3 (2015); see also various Indiana Legal Services case management reports (on file with the author).

70. AM. BAR ASS'N REPORT, *supra* note 6, at 13.

71. *Id.*

72. See, e.g., *Composite Index: Overall Scores and Rankings*, JUSTICE INDEX, justiceindex.org/2016-findings/findings [<https://perma.cc/N8GZ-JJL>] (last visited Sept. 29, 2017).

Justice Index, has found that Indiana isn't doing as well as many other states.⁷³ The Justice Index measures the number of lawyers for people in poverty and other factors like the support a state provides for people without lawyers.⁷⁴ Indiana ranks forty-seventh out of fifty-two jurisdictions measured.⁷⁵ Nationally we're forty-fifth on attorney access and twenty-fourth on help for self-represented people.⁷⁶ Of the eleven midwestern states, we're lowest on attorney access, and fourth in terms of resources we provide for self-represented litigants.⁷⁷

I can't tell you as much about the moderate-income slice of the population that the ABA report says also are not well served by our current system, nor does the ABA report go into much detail.⁷⁸ My background is at the two ends of the client spectrum – wealthy individual and corporate clients, and impoverished clients. I have heard many anecdotes about the lack of availability of low-cost legal services for middle-income clients, including personal stories from those who have had trouble finding affordable legal help. These anecdotes go along with the ABA's conclusion that “legal services are growing more expensive, time-consuming, and complex, making them increasingly out of reach for most Americans.”⁷⁹

VI. WHAT CAN WE DO?

The ABA study recommends increasing public and private resources for legal aid and improving systems to allow for easier participation in pro bono programs.⁸⁰ I believe these are the right answers.

The report notes that the ABA House of Delegates in 2006 passed a resolution “encouraging [state] legislatures to provide legal counsel as a matter of right at public expense to low income persons in . . . adversarial proceedings where basic human needs are at stake.”⁸¹ The resolution defined basic human needs as shelter, sustenance, safety, health, and child custody.⁸² Similarly, in 2011 the Conference of Chief Justices, representing the state chief justices, set an “aspirational goal” of 100% access to effective assistance for essential civil legal

73. *Id.*

74. *Id.*

75. *Id.*

76. *Attorney Access: Number of Attorneys for People In Poverty*, JUSTICE INDEX, justiceindex.org/2016-findings/attorney-access [<https://perma.cc/PKU3-W8GS>] (last visited Sept. 29, 2017) [hereinafter *Attorney Access*]; *Self-Representation Access: Support for Self-Represented Litigants*, JUSTICE INDEX, justiceindex.org/2016-findings/self-represented-litigants [<https://perma.cc/PDP3-AYAY>] (last visited Sept. 29, 2017) [hereinafter *Self-Representation Access*].

77. *Attorney Access*, *supra* note 76; *Self-Representation Access*, *supra* note 76.

78. AM. BAR ASS'N REPORT, *supra* note 6, at 12.

79. *Id.* at 8.

80. *Id.* at 54-55.

81. *Id.* at 12.

82. *Id.*

needs.⁸³

If the United States took the path the ABA and Conference of Chief Justices advocate – providing civil legal services as a matter of right in cases involving basic human needs – we wouldn’t be the first to do so. In the 1970s, the European Court of Human Rights found a right to counsel in civil matters in EU countries.⁸⁴ It thereby ratified what had been the law in many European countries. Germany has guaranteed counsel in civil cases since 1877, Italy did so in 1865, and France provided a right to counsel in civil cases in 1851.⁸⁵ And England, which we claim as our legal ancestor, first provided a right to counsel in civil proceedings in 1495, right about the time of Christopher Columbus.⁸⁶ To be fair, Indiana gives counsel in CHINS, termination of parental rights, and civil commitment cases,⁸⁷ but Hoosiers are not entitled to counsel when they could lose their housing, lose their income, or when they need a civil protective order for self-protection.⁸⁸

The ABA study also concluded that pro bono alone could not provide the poor with adequate legal services to address their unmet legal needs. “Even with the profession’s deep commitment to pro bono and further innovations, pro bono work alone will not resolve the tremendous need for civil legal representation. Data shows that annually ‘U.S. lawyers would have to increase their pro bono efforts . . . to over nine hundred hours each to provide some measure of assistance to all households with legal needs.’”⁸⁹ Based on my experience, a similar number of hours would be necessary in Indiana.

There has been some controversy over pro bono in Indiana because of some recent changes, and our profession is suspicious about changes.⁹⁰ This is the first year for mandatory reporting of pro bono hours in the state lawyer registration

83. CONF. OF CHIEF JUSTICES, RESOLUTION 5: REAFFIRMING THE COMMITMENT TO MEANINGFUL ACCESS TO JUSTICE FOR ALL, *available at* <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07252015-Reaffirming-Commitment-Meaningful-Access-to-Justice-for-All.ashx> [<https://perma.cc/ML49-WK7N>].

84. EARL JOHNSON, JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 886-88 (2014).

85. *Id.* at 883.

86. *Id.* at 881.

87. *See* IND. CODE § 12-26-2-2 (2017) (describing the right to be represented by counsel during civil commitment proceedings); *id.* § 31-32-2-5 (describing a parent’s right to counsel in “proceedings to terminate the parent-child relationship”); *see generally* G.P. v. Ind. Dep’t of Child Servs., 4 N.E.3d 1158 (Ind. 2014) (discussing an indigent parent’s right to counsel in a CHINS review hearing to terminate that individual’s parental rights).

88. *See* SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES 8-9 (2016), *available at* http://sixthamendment.org/6ac/6AC_indianareport.pdf [<https://perma.cc/4EDE-BQFH>].

89. AM. BAR ASS’N REPORT, *supra* note 6, at 14.

90. *See* Marilyn Odendahl, *Pro bono reporting results draw mixed reaction*, IND. LAW. (May 3, 2017), <https://www.theindianalawyer.com/articles/43575-pro-bono-reporting-results-draw-mixed-reaction> [<https://perma.cc/H9NU-HPQT>].

system.⁹¹ This project is not mandatory pro bono, just mandatory and *anonymous* reporting to help the Indiana Supreme Court determine how much pro bono really is being done in Indiana.⁹² Simultaneously but entirely separately, the federal court in the Southern District of Indiana has amped up its pro bono program, mainly to assist on prisoner claims regarding poor medical care and failure to protect prisoners from violence.⁹³ And if the voluntary federal program doesn't provide enough help, a mandatory component kicks in that requires those who do a certain amount of work in the Southern District to take assigned cases.⁹⁴ The Southern District's program is in response to the Seventh Circuit's requirement that there be a volunteer or appointed counsel in certain cases to ensure that there is *effective* access to justice – sometimes access can't be *effective* without a lawyer.⁹⁵ We all know that.

VII. CHANGES IN THE COURTS

The ABA report advocated full funding by states for civil legal aid in basic needs cases and improving systems to allow pro bono lawyers to provide representation easily.⁹⁶ It also went further, recommending systemic changes in our courts.⁹⁷ “Courts should be accessible, user-centric, and welcoming to all litigants, while ensuring fairness, impartiality, and due process.”⁹⁸ User-centric – what would that mean? Evening hours so that one of my clients shouldn't have to choose between going to a court hearing and losing her job because she had to take off work? Some kind of advice available on the basics – what to wear, where to stand, who's who, when to speak? Hearings by Skype? These changes would make the courts more “user-centric.”

One of the most significant changes Indiana could make would follow some other states that have modified their codes of judicial conduct to allow judges to be more helpful to unrepresented litigants, in ways that are even-handed and that

91. See IND. R. PROF. COND. 6.7 (requiring reporting by October 1, 2016 on pro bono work done in 2015).

92. *Id.*

93. See S.D. IND. R. 87 (representation of indigent litigants); see also Letter from C.J. Richard L. Young to Members of Southern District of Indiana Bar (May 13, 2016), available at <http://www.insd.uscourts.gov/sites/insd/files/LetterfromChiefJudge.pdf> [https://perma.cc/R6AX-XJ6N]; Dave Stafford, *Magnus-Stinson takes helm as chief of Indiana's Southern District*, IND. LAW. (Dec. 14, 2016), <https://www.theindianalawyer.com/articles/42259-magnus-stinson-takes-helm-as-chief-of-indianas-southern-district> [https://perma.cc/4CXR-GUPH]; Marilyn Odendahl, *Southern District proposes mandatory pro bono program*, IND. LAW. (June 15, 2016), <https://www.theindianalawyer.com/articles/40603-southern-district-proposes-mandatory-pro-bono-program> [https://perma.cc/V3DP-T6ZD].

94. S.D. IND. R. 87.

95. See, e.g., *Rowe v. Gibson*, 798 F.3d 622, 631 (7th Cir. 2015); *Henderson v. Ghosh*, 755 F.3d 559, 564 (7th Cir. 2014).

96. AM. BAR ASS'N REPORT, *supra* note 6, at 54-55.

97. *Id.* at 45-47.

98. *Id.* at 45.

make proceedings move smoothly and with dispatch.⁹⁹ States that have done this have found positive results without complaints by the opposing party – who also may be helped in the same way if he or she is self-represented.¹⁰⁰ This change would help level the playing field for unrepresented litigants and would do so at little cost.¹⁰¹

Another innovation that would promote access to justice is limited scope representation, also known as “unbundling” legal services.¹⁰² Limited scope representation allows the client to limit the attorney-client relationship to a specific task such as document preparation or procedural advice or for a single issue like custody in a divorce.¹⁰³ Limited scope representation already is permitted under Indiana rules, and it can give clients an affordable alternative for legal work in areas like family law, landlord-tenant, and consumer law.¹⁰⁴ For example, in a divorce case, the client and lawyer might agree that the lawyer would draft all the documents and coach the client on what to do in court, and the client would be responsible for all remaining matters of the case.¹⁰⁵ This approach can make some legal services affordable for low-income clients and position them far better than they would be with no legal assistance at all. Limited scope representation is frequently used in some jurisdictions, and helpful guidance is available to lawyers who want to apply this technique.¹⁰⁶

99. See generally Cynthia Gray, *Pro Se Litigants in the Code of Judicial Conduct*, 36 JUD. CONDUCT REP. 1 (Fall 2014), available at <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Fall%202014.ashx> [<https://perma.cc/K4N9-NA7D>].

100. See Dorothy L. Wilson & Miriam B. Hutchins, *Practical Advice From the Trenches: Best Techniques for Handling Self-Represented Litigants*, 51 COURT REV. 54, 60-61 (2015), available at <http://aja.ncsc.dni.us/publications/courtrv/cr51-2/CR51-2Wilson.pdf> [<https://perma.cc/7T6L-FDCB>].

101. See generally Paula L. Hannford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 COURT REV. 8 (2003), available at http://aja.ncsc.dni.us/courtrv/cr39_4/CR39-4Hannaford.pdf [<https://perma.cc/S46Y-BM34>].

102. *Limited scope representation helps lawyers expand practice*, AM. BAR ASS'N (Apr. 2015), www.americanbar.org/publications/youraba/2015/april-2015/limited-scope-representation-helps-lawyers-expand-practice.html [<http://perma.cc/X7CS-4RNM>].

103. *Id.*

104. See IND. R. PROF. COND. 1.2(c) (authorizing limited scope representation); *Limited scope representation helps lawyers expand practice*, *supra* note 102.

105. *Limited Scope Representation*, TEX. ACCESS TO JUSTICE COMM'N, www.texasatj.org/limited-scope-representation [<http://perma.cc/F45N-2MQP>] (last visited Sept. 27, 2017).

106. See, e.g., Forrest S. Mosten, *Unbundle Your Practice*, GP/SOLO (Oct./Nov. 2001), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/mosten.html [<https://perma.cc/Z9HN-MTBU>]; Eileen Pruett & Bert Tiger Whitehead, *Limited scope representation: A new way of thinking about accessible legal services*, OHIO STATE BAR ASS'N (Sept./Oct. 2016), <https://www.ohiobar.org/NewsAndPublications/OhioLawyer/Pages/Limited-scope-representation-A-new-way-of-thinking-about-accessible-legal-services.aspx> [<http://perma.cc/PW3B-A8X6>].

Another important recommendation from the ABA study is the adoption of uniform, plain-language forms.¹⁰⁷ Uniformity is important so that people like us at ILS can help someone fill out a form and know it will be accepted in that person's county, that they won't come back because there wasn't a draft order, or some kind of CCS entry, or some other item that a particular county requires.

Additionally, the ABA report details a list of programs that could provide help to low and moderate-income litigants and that have proved effective in some locations.¹⁰⁸

The report talks about self-help centers in courts.¹⁰⁹ These can be online centers that include a mechanism for generating certain kinds of documents, often by typing in answers to simple questions posed by software; and they can provide web-based information.¹¹⁰

There also can be staffed self-help centers that provide assistance at various levels.¹¹¹ Clark County, Indiana, has had one of these centers, and they exist in other places as well.¹¹² The ISBA Futures report advocated putting a pro se coordinator in every courthouse.¹¹³ That person would be a lawyer or law student who would not give legal advice but could familiarize self-represented litigants with court procedures and rules and could provide referrals.¹¹⁴

Some jurisdictions provide individuals who go a bit further, actually accompanying self-represented litigants in court without giving legal advice or representation.¹¹⁵ These people are called navigators in the New York housing courts and the Arizona family courts.¹¹⁶ They are called facilitators in California and Washington State.¹¹⁷ They also are tasked with helping self-represented litigants with understanding the process, where to go, and what to say.¹¹⁸

Washington State has gone still further, creating a classification of limited

107. AM. BAR ASS'N REPORT, *supra* note 6, at 46-47.

108. *Id.* at 19-26.

109. *Id.* at 19.

110. *Id.* at 19, 25.

111. *Id.*

112. Rebecca Berfanger, *Clark County self-help center helps pro se litigants*, IND. LAW. (Dec. 22, 2010), <https://www.theindianalawyer.com/articles/25396-clark-county-selfhelp-center-helps-pro-se-litigants> [<https://perma.cc/6GAG-T2ZC>]. The author is aware that Delaware County has established a similar center in the months since this lecture was delivered.

113. House of Delegates, *Future of the Provision of Legal Services Committee Report & Recommendations*, RES GESTAE, July/Aug. 2016, at 27-28, available at <http://c.ygcdn.com/sites/www.inbar.org/resource/resmgr/carissa/Futures-Report-2016.pdf> [<https://perma.cc/ZN9S-MKUE>]. This recommendation by the Commission was not adopted by the ISBA House of Delegates, so it is not official policy of the ISBA.

114. *Id.* A variation of this approach was enacted in Vanderburgh County in 2017, creating a position in the court library to assist unrepresented litigants.

115. AM. BAR ASS'N REPORT, *supra* note 6, at 20.

116. *Id.*

117. *Id.* at 22-23.

118. *Id.*

license legal technician who take two years of specialized training in one particular field of law and then can provide representation – including in court – limited to that area of law.¹¹⁹ This program is just beginning – the first LLLTs are just being licensed now in the area of family law.¹²⁰

We also have online legal resources. The Indiana Bar Foundation operates Indiana Legal Answers, which allows individuals to submit legal questions online that are answered in due course by volunteer lawyers, and similar programs exist elsewhere.¹²¹

Another push now is for what's called a legal access portal, which is designed to help direct low-income people to appropriate legal resources, all online. Several states are developing these, including Alaska and Hawaii in an initiative funded by a gift from Microsoft.¹²² An individual logs into the system and is walked through a series of questions aimed at learning as much as possible about the person's legal problem. The portal then applies an algorithm that guides the individual.

- The person may be directed to a legal aid program;
- Or may be provided a pro se packet that she can fill out herself and submit to court;
- Or she may get an answer to a specific legal question.

All of these choices are made by the computer based on the information provided by the person seeking help. I wonder if Indiana is ready for this approach, where a computer digests facts provided in response to questions online and makes a decision about what services are appropriate for the person seeking help. Indiana's new Coalition for Court Access is just beginning to discuss this possibility.¹²³

VIII. STRENGTHENING STAFFED LEGAL AID PROGRAMS

Both the ABA and the Indiana State Bar Association reports brought up

119. *See generally Become a Legal Technician*, WASH. STATE BAR ASS'N (Nov. 28, 2017), <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Limited-Licenses/Legal-Technicians> [<https://perma.cc/C5MZ-T42H>].

120. *Id.* Twenty-seven Limited License Legal Technicians are now licensed. *See Licensed Legal Professional Search Results*, WASH. STATE BAR ASS'N, <https://www.mywsba.org/Default.aspx?tabid=191&ShowSearchResults=TRUE&LicenseType=LLLT&Page=0> [<https://perma.cc/PY28-9B88>] (last visited Dec. 21, 2017).

121. *See Ind. Free Legal Answers, How it Works.*, AM. BAR ASS'N, <https://indiana.freelegalanswers.org> [<http://perma.cc/QY5U-ZMVN>] (last visited Sept. 27, 2017).

122. Microsoft Corporation, in conjunction with the Legal Services Corporation, is funding development of state-of-the-art portals in Hawaii and Alaska with the intention of making the technology available to other states for free. *See The Legal Services Corporation Announces Pilot States for Innovative Program to Increase Access to Justice*, LEGAL SERVS. CORP. (Apr. 24, 2017), <https://www.lsc.gov/media-center/press-releases/2017/legal-services-corporation-announces-pilot-states-innovative> [<http://perma.cc/QQR8-ANKY>].

123. *See Coalition for Court Access*, IND. JUD. BRANCH, www.in.gov/judiciary/iocs/3149.htm [<http://perma.cc/U6MN-BFPS>] (last visited Sept. 27, 2017).

another issue – the mismatch between client needs and unemployed lawyers.¹²⁴ We all know that there is a group of law school graduates who recently have had a difficult time finding legal work.¹²⁵ The numbers out there from one recent graduating class is that barely sixty percent have found work that requires a law degree.¹²⁶ So there are thousands of unemployed lawyers out there at the same time there are millions of low and moderate income clients who need legal help.¹²⁷ How do we bridge that gap?

Just as many college athletes think they'll make their fortunes in the pros, many college students think that the law degree will be a pass to a big law firm partnership and a consistent six-figure or even seven-figure income.¹²⁸ But those jobs – both in sports and in law – are difficult to get.¹²⁹ We need to look for practice models that connect underemployed lawyers with clients who have needs and ways to pay the people in those legal jobs. The limited scope representation model discussed earlier in this lecture may be one of those models.¹³⁰ We also have to find ways to ameliorate the constraints felt by law graduates who leave school with six-figure debts and feel that the debt burden precludes them from taking lower-paying jobs. Programs exist to assist loan repayment by those doing

124. AM. BAR ASS'N REPORT, *supra* note 6, at 16; House of Delegates, *supra* note 113, at 28; see also Theresa Amato, *Put Lawyers Where They're Needed*, N.Y. TIMES, June 17, 2015, <https://www.nytimes.com/2015/06/17/opinion/put-lawyers-where-theyre-needed.html?mcubz=3> [<https://perma.cc/TJ32-S3EM>].

125. See *Statistics, SEC. ON LEGAL EDUC. & ADMISSION TO THE BAR*, available at http://www.americanbar.org/groups/legal_education/resources/statistics.html [<https://perma.cc/54FE-2SP4>] (data shows that over the last several years, only sixty to sixty-five percent of law school graduates have found employment requiring a law degree). *Id.*

126. Steven J. Harper, *Too Many Law Students, Too Few Legal Jobs*, N.Y. TIMES, Aug. 25, 2015, <https://www.nytimes.com/2015/08/25/opinion/too-many-law-students-too-few-legal-jobs.html?mcubz=3> [<https://perma.cc/L556-N9ML>].

127. Amato, *supra* note 124.

128. See Jake New, *A Long Shot*, INSIDE HIGHER ED (Jan. 27, 2015), <https://www.insidehighered.com/news/2015/01/27/college-athletes-greatly-overestimate-their-chances-playing-professionally> [<https://perma.cc/8LSD-CFUG>] (three quarters of Division I basketball players believe they will play professionally, when in fact only two percent play in the NBA); AME3bg, *Realistic Expectations: Starting Salaries for New Attorneys*, LEXISNEXIS LEGAL NEWSROOM (July 29, 2008, 3:00 PM), https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/careerguidance/archive/2008/07/29/realistic-expectations_3a00_-starting-salaries-for-new-attorneys.aspx?Redirected=true [<https://perma.cc/D75X-YXF6>] (“Many people, law students included, have the impression that lawyers routinely start out at six figures” when the true average starting salary is less than \$60,000). *Id.*

129. New, *supra* note 128; AME3bg, *supra* note 128.

130. *Supra* notes 102-06.

legal work in the public interest,¹³¹ and they should be expanded.¹³²

The traditional model – from back in the day of Reginald Heber Smith, who invented modern legal aid and then went on to join a law firm where he invented the billable hour (I’m not kidding about that) – is having paid lawyers in legal aid programs to do this work.¹³³ We need to find more funding or find other models to employ lawyers who will do free legal work for the poor.

We also need to show law students the dignity and value of these jobs even when they don’t pay six and seven-figure salaries. We need to show them the satisfaction that comes from the work and that they can live good lives while doing the work. This is something we’re working on at Indiana Legal Services.

Two stories from Indiana Legal Services illustrate this point. They’re simply the most recent in a consistent line of similar stories.¹³⁴

My colleague Dennis Frick represented a married couple with medical needs who were able to live at home because of the Medicaid Waiver program, which pays for medical care to keep individuals out of institutions, which is not only better for the individuals, but also saves the state money. Ultimately, the husband’s condition deteriorated, and he had to enter a residential facility. The state Medicaid agency decided that all the family’s income had to be attributed to him, leaving nothing for the wife to live on at home – she therefore would have to enter the residential facility although she still could live independently. Dennis did the legal research and decided that the state’s decision conflicted with federal Medicaid law. Before he filed a lawsuit, as a courtesy, he contacted lawyers at the state Medicaid agency. Knowing Dennis’s reputation as among the most knowledgeable Medicaid lawyers in Indiana, the state’s lawyers asked him to hold off on filing for a day or two. They called him back to tell him that not only would they change the attribution method for his client so she could remain at home, they would change their attribution method statewide to apply to all Medicaid Waiver recipients – meaning that no other person in Indiana would face this problem.

The second story is shorter. It comes from one of our partners in a medical-legal partnership¹³⁵ at an Indianapolis clinic, and it features my colleague Amy Freeland. The email I received said that Amy

131. See *Loan Repayment Assistance Program*, AM. BAR ASS’N, https://www.americanbar.org/groups/probono_public_service/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_lrap.html [https://perma.cc/BNY3-JP3N] (last visited Dec. 2, 2017).

132. Marilyn Odendahl, *Federal loan repayment program set for expansion*, IND. LAW. (June 18, 2014), <https://www.theindianalawyer.com/articles/34385-federal-loan-repayment-program-set-for-expansion> [https://perma.cc/XE88-BBDZ].

133. See REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919) (regarding legal aid for the poor); *Slice of History: Reginald Heber Smith and the Birth of the Billable Hour*, WILMERHALE (Aug. 9, 2010), <https://www.wilmerhale.com/pages/publicationsandNewsDetail.aspx?NewsPubId=95929> [https://perma.cc/69QF-4HLS].

134. These stories are documented in files and emails in the author’s possession.

135. See the website of the National Center for Medical-Legal Partnerships, *available at* <http://medical-legalpartnership.org> [https://perma.cc/B8WT-PCHH].

Is currently working with a client who is terminally ill. She helped with advance directives, expediting Social Security benefits, getting her added to her daughter's subsidized housing, and processing a divorce from her estranged husband so he wouldn't come in and make nefarious decisions while she's dying. It's like she scooped up this dying lady and helped her solve all her worldly problems. She deserves superhero status.¹³⁶

IX. WHERE DO WE GO FROM HERE?

We live in a highly law-bound society.¹³⁷ We live under rules imposed at the federal, state, and local level. And we live in a system that adjudicates a lot. Many disputes are handled through our legal system.¹³⁸ That's why the United States has such a high number of lawyers per capita compared to other countries.¹³⁹

We thrust the poorest members of our society into this system to decide some of their most basic rights – can they continue to live where they've been living, can they keep receiving disability benefits or are they now able to work, how much will be taken from their meager paycheck to support a child or pay back the payday loan they had to get to pay the rent? And because of their economic status, they cannot pay for a lawyer to help them through that process.

Of course, lawyers should volunteer their time to help in these cases. It's part of our oath of attorneys, when we promise "I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance."¹⁴⁰ It's also in the disciplinary rules, which encourage us to support legal aid programs financially.¹⁴¹ But we also should do it because it's the right thing to do. I believe it's a duty that comes with the privilege of practicing. As Justice Dickson put it in his dissent in *Sholes v. Sholes*,¹⁴² "The obligation to the public is an inherent aspect of being a lawyer. It comes with the territory."¹⁴³

But I also agree with the ABA Futures study that pro bono will not fill the gap.¹⁴⁴ If we're going to fill it, it has to be mostly through staffed programs like Indiana Legal Services. I already referred to the ABA resolution on legal counsel

136. Email from Anna O. Kirkman to Adam Mueller (Sept. 8, 2016, 3:19 PM) (on file with author).

137. See generally Rebecca L. Sandefur, *White Paper: What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443 (2016).

138. *Id.*

139. *NZ world leader in per capita lawyer stakes*, N.Z. HERALD (July 15, 2010, 8:11 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10659064 [<https://perma.cc/BEC7-YW82>] (listing the United States, Brazil, and New Zealand as having the most lawyers per capita, with the United States first, at one lawyer per 265 citizens). *Id.*

140. IND. ADMIS. DISC. R. 22 (2017).

141. IND. R. PROF. COND. 6.1 (2017).

142. 760 N.E.2d 156, 168 (Ind. 2001).

143. *Id.* at 164.

144. AM. BAR ASS'N REPORT, *supra* note 6, at 14.

in civil cases and the Council of Chief Justices' resolution on 100% access.¹⁴⁵ This work now comes under the heading "Civil Gideon," developing a right to counsel in some civil matters that is like the right to counsel in some criminal matters.¹⁴⁶ I'm for it.

The greatest American judge never to be on the Supreme Court, Learned Hand, said it best: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."¹⁴⁷ In Indiana, we have about 16,500 lawyers for our 6.6 million people, which is about one lawyer for every 400 people.¹⁴⁸ If we had one lawyer for every 400 people below the poverty line, that would be about 2,500 lawyers for the poor in Indiana. We now have roughly 100 working in civil legal aid programs statewide.¹⁴⁹

There is an alternative to this approach. It's ratcheting down how legalized our society is. Eliminating the ability to vindicate our rights in the courts, or perhaps just cutting back on rights altogether; moving more toward arbitration or other dispute resolution mechanisms; and perhaps putting these programs online.

While there are undoubtedly some sound ways to simplify our legal system, we must avoid rationing justice. We have to be careful not to take away important process – and especially we have to be careful not to create special systems for low-income litigants that give them short shrift because they can't afford counsel. Our small claims courts – at least in some parts of Indiana – are headed that direction or are already there.¹⁵⁰ They have moved from tribunals for small

145. *Id.* at 12; CONF. OF CHIEF JUSTICES, *supra* note 83.

146. *See, e.g.*, David J. Dreyer, *Indiana Judges Association: Are we ignoring an obvious truth?*, IND. LAW. (Dec. 14, 2016), <https://www.theindianalawyer.com/articles/42266-are-civil-courts-ignoring-an-obvious-truth> [<https://perma.cc/W6RK-YGEA>]; John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, AM. BAR ASS'N HUMAN RIGHTS MAG. (2013), http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/its_all_about_justice.html [<https://perma.cc/62U3-W9XT>](states look to provide lawyers for the poor in civil cases).

147. Learned Hand, Address to the New York Legal Aid Society (Feb. 16, 1951).

148. The number of Indiana lawyers is extrapolated from the Am. Bar Assn's 2013 count. *See* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf. The 2016 U.S. Census population estimate for Indiana is at *QuickFacts Indiana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/IN> [<https://perma.cc/29KZ-7PPC>] (last visited Dec. 21, 2017).

149. This figure refers to paid, full-time equivalent attorneys providing free representation to low-income Hoosiers. We have approximately sixty at Indiana Legal Services, Inc. Others work at legal aid societies in Indianapolis, Hammond, Lafayette, Elkhart, Columbus, and Evansville, and at Indiana's twelve pro bono district offices. This figure does not include the 220,000 hours reported as donated by pro bono attorneys in 2015 in Indiana, which is the equivalent of approximately 100 additional lawyers. *See* Indiana Legal Services website at <https://www.indianalegalservices.org/about> [<https://perma.cc/KWH5-JAVB>].

150. *See, e.g.*, *Attorney's report alleges trucking school small-claims abuses*, INDIANAPOLIS BUS. JOURNAL (July 26, 2013), <https://www.ibj.com/articles/42673-attorney-s-report-alleges-trucking-school-small-claims-abuses> [<https://perma.cc/J72M-5SDA>] (alleging significant venue

disputes to being solely collection and eviction courts, where a poor person without counsel is one party in nearly every case.¹⁵¹ And although the amount in dispute may seem small, for our clients it can be the difference between being able to buy her medication or pay her rent. In courts I'm familiar with, the whole atmosphere changes when there's a lawyer for a defendant in the room who can assert defenses and, God forbid, counterclaims and who can be sure that the procedures work correctly.¹⁵² We should be moving in the direction of *Branham v. Varble*,¹⁵³ to protect the rights of unrepresented litigants, not in the other direction.

It is important to give the poor the same processes and rights as the wealthy. That's part of the bedrock of our society. Bryan Stevenson, the great civil rights lawyer of our time, said "My work with the poor and incarcerated has persuaded me that the opposite of poverty is not wealth; the opposite of poverty is justice."¹⁵⁴

We can work together to provide justice to those in poverty and the rest of our citizens. Lawyers have to be an integral part of that effort. I talked a little at the beginning about my background and my decision to become a lawyer because lawyers in my hometown seemed vital to the success of the community. Perhaps some of you had a similar motivation. Yes, you want to make a decent living, but you care about your community; and if you're like most Indiana lawyers, I know you care at a deep level about making our system of justice work. Let's try to make it work for everyone.

Thank you for inviting me to deliver this first Shepard Lecture, and thank you for listening.

abuses); *see generally* Christopher S. Axworthy, *Controlling the Abuse of Small Claims Courts*, 22 MCGILL L.J. 480 (1976).

151. *See generally* Ryan Craig Munden, *Access to Justice: Pro Se Litigation in Indiana* (2005), available at <https://web.archive.org/web/20120527203946/http://www.ajs.org/prose/pdfs/Pro%20Se%20Final%20Report.pdf> [<https://perma.cc/E3BD-BD6F>]; Bryce Covert, *Poor people don't stand a chance in court*, THINKPROGRESS (May 11, 2016, 12:00 PM), [https://thinkprogress.org/poor-people-don't-stand-a-chance-in-court-7e46bd4e5719/](https://thinkprogress.org/poor-people-don-t-stand-a-chance-in-court-7e46bd4e5719/) [<https://perma.cc/W4UC-8F98>].

152. AM. BAR ASS'N REPORT, *supra* note 6, at 34 (citing Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 910 (2015)).

153. 952 N.E.2d 744 (Ind. 2011).

154. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 18 (Spiegel & Grau, 2014).