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**RATIONING JUSTICE IN THE 21ST CENTURY:
TECHNOCRACY AND TECHNOLOGY
IN THE ACCESS TO JUSTICE MOVEMENT**

REBECCA KUNKEL*

INTRODUCTION

More than fifty years since the creation of a federal Legal Services Program with the mission to “marshall the forces of law to combat the causes and effects of poverty,”¹ a growing proportion of the legal needs of the nation’s poor and working classes are going unmet.² Awareness that there is a broadening “justice gap” is widespread in the legal profession.³ However, the inherently political questions raised by this state of affairs, and what it suggests about our national commitments to ideals of justice and equality, have been largely obscured by a barrage of policy discussions proposing modest technical interventions.⁴

This paper will attempt to bring the technocratic discourse surrounding the justice gap into dialog with these larger political questions. The argument proceeds in three parts. In Part II, I place the justice gap discussion into the wider context of the history of federally funded legal aid. While major events in this history have been documented elsewhere, the tendency of many recent proposals aimed at redressing the

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¹ William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241, 246 (1998) (quoting a speech given by then-director of LSP in 1965, delivered to the National Legal Aid and Defender Association).

² See *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVS. CORP. 1, 30 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [hereinafter *The Justice Gap*] (“Low-income Americans receive inadequate or no professional legal help for 86% of the civil legal problems they face in a given year.”).

³ See James D. Abrams & Ann Hancock, *The Justice Gap and Pro Bono Legal*, AM. BAR ASSOC. (Feb. 14, 2017), <https://www.americanbar.org/groups/litigation/committees/commercial-business/spotlight/2017/justice-gap-pro-bono-legal/>.

⁴ See *infra* Part IV.

justice gap has been to gloss over historical and political conditions, obscuring the relationship between the justice gap, conservative opposition to federal legal aid, and the broader bipartisan project of welfare retrenchment and neoliberalization that took place over the past four decades.⁵ Part III will shift focus to the normative discourse surrounding access to justice.⁶ In this part, I argue that a major current of thought within the access to justice movement has chosen to focus on narrow, technical interventions in the court system and legal services agencies. This current of thought—which takes both poverty and inadequate levels of investment in services to the poor as a given—developed out of a pervasive neoliberal political rationality which limits the parameters of acceptable discourse, and operates to suppress awareness of the ideological or structural dimensions of these policy discussions.⁷ Part IV develops this thesis in further detail by analyzing a particular but frequently repeated theme: that technological developments will “fix” to the problems presented by the justice gap.⁸

II. THE ACCESS TO JUSTICE MOVEMENT IN THE UNITED STATES

The contemporary understanding of the term access to justice emerged from the legal profession's mid-century debates over provision of legal representation to the poor, where it was often used to describe the purpose of legal aid.⁹ By the late 1970s, federal funding for legal aid had become firmly established, and the model of the public interest law firm appeared to have taken hold as a means to continue to enforce and expand the gains of the rights revolution of the 1960s.¹⁰ It was at this time that access to justice began to take on the appearance of a cohesive social movement.¹¹ This appearance was fostered in large part by Mauro Cappelletti and Bryant Garth's influential four volume study, published in 1978, which documented access to justice in Europe and the United

⁵ See *infra* Part II.

⁶ See *infra* Part III.

⁷ *Id.*

⁸ See *infra* Part IV.

⁹ Marc Galanter, *Access to Justice in a World of Expanding Social Capability*, 37 *FORDHAM URB. L.J.* 115, 116 n.3 (2010).

¹⁰ See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 56 (2008) (discussing the “development of the liberal legal network” based on numerous factors, including the “social disruptions of the 1960s,” and “critical funding and strategic coordination for its emerging infrastructure”).

¹¹ See MAURO CAPPELLETTI & BRYANT GARTH, *ACCESS TO JUSTICE: A WORLD SURVEY* 21 (Mauro Cappelletti & Bryant Garth eds., 1978).

States.¹² This study was structured around what Cappelletti identified as three “waves” of the movement: legal aid, followed by public interest litigation, and more recently, efforts to simplify the legal process and introduce alternative dispute resolution measures.¹³ Although few discussions of access to justice since this time have treated the phrase as narrowly signifying the purpose of legal aid, the availability of legal representation for the poor remained a central concern.¹⁴ Cappelletti was careful to stress the limits of the wave metaphor, emphasizing the continued relevancy and even centrality of legal aid in ensuring access to justice.¹⁵ Today, it is frequently the case that contemporary authors point out the basic inadequacy of legal aid and the need for access to justice to involve major departures from the premise of attorney-provided legal representation for the poor.¹⁶ Nonetheless, the legal aid paradigm still functions as a starting point for this discussion, indicating its continued significance.

The nation’s legal aid system went through rapid change and expansion in the 1960s, as funding for legal aid attorneys went from being almost entirely private and locally provided, to being supported by a federal agency with a broad mission to provide legal services to all Americans who were in need of but unable to afford them.¹⁷ From the time of the earliest legal aid societies in the 1870s until 1964, legal aid

¹² The four-volume study is based on a four-year comparative research project entitled “Florence Access-to-Justice Project,” sponsored by the Ford Foundation and, with slightly more local focus, the Italian National Council of Research (CNR). The volumes, under the general editorship of Mauro Cappelletti are: VOLUME I. ACCESS TO JUSTICE: A WORLD SURVEY (Mauro Cappelletti & Bryant Garth eds.); VOLUME II. ACCESS TO JUSTICE: STUDIES OF PROMISING INSTITUTIONS (Mauro Cappelletti & John Weisner eds.); VOLUME III. ACCESS TO JUSTICE: EMERGING PERSPECTIVES AND ISSUES (Mauro Cappelletti & Bryant Garth eds.); and VOLUME IV. PATTERNS IN CONFLICT MANAGEMENT: ESSAYS IN THE ETHNOGRAPHY OF LAW. ACCESS TO JUSTICE IN AN ANTHROPOLOGICAL PERSPECTIVE (Klaus-Friedrich Koch ed.). Bryant G. Garth & Mauro Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFFALO L. REV. 181, 181 (1978).

¹³ CAPPELLETTI & GARTH, *supra* note 11, at 21.

¹⁴ *See infra* Part III.

¹⁵ Mauro Cappelletti & Bryant Garth, *Access to Justice and the Welfare State: An Introduction*, in ACCESS TO JUSTICE AND THE WELFARE STATE 5–6 (Mauro Cappelletti et al. eds., 1981). In response to the question of whether the wave metaphor should be taken literally to imply a succession that replaces the previous waves, the authors commented:

Our view is that the third phase in the access-to-justice movement should be seen as an absorption, not a replacement of the first two. The three should embody a coherent effort to enforce and expand the new rights that now belong to the underprivileged sectors of society—the poor, tenants, consumers, environmentalists, employees.

Id.

¹⁶ *See infra* notes 83–85 and accompanying text.

¹⁷ *See infra* notes 19–29 and accompanying text.

had been administered locally through charitable organizations, municipalities, and attorney pro bono, resulting in a patchwork system which tended to concentrate around large urban centers.¹⁸ The 1960s saw the country's first efforts to coordinate and fund legal aid on a national scale through the Legal Services Program (LSP), a department within the Office of Economic Opportunity (OEO).¹⁹ Part of LSP's agenda was to support the work of existing legal aid societies by funding individual representation, and the program was credited with more than quadrupling the number of lawyers able to devote their careers to legal aid from about 600 nationally in 1964 to over 2,500 a decade later.²⁰ However, due partly to the larger goals of the OEO and its role in the Johnson administration's War on Poverty, and partly in recognition of the limits that its budget placed on the goal of universal representation, the early LSP also stressed a more ambitious goal: to use legal aid cases instrumentally to accomplish systemic reforms that would mitigate and address the causes of poverty.²¹

The idea of using public funds to effectuate changes in the established legal order was never without tension, and the Legal Services Program met with vigorous opposition almost from its inception.²² Perhaps the most notorious examples took place in California in the 1960's. In 1967, California Rural Legal Assistance (CRLA) won several high-profile victories in short succession with the aid of funds from LSP.²³ In the first high-profile case, *Morris v. Williams*, CRLA lawyers successfully invalidated restrictions on California medical assistance which had been promulgated by recently-elected governor Ronald Reagan as part of a larger effort to cut the state's various welfare programs.²⁴ In a second case, *Ortiz v. Wirtz*, CRLA won a victory against the state's powerful agricultural interests when it invalidated a Department of Labor ruling that had permitted

¹⁸ Quigley, *supra* note 1, at 243–45.

¹⁹ *Id.* at 245.

²⁰ Gary Bellow, *Legal Services to the Poor: An American Report*, in *ACCESS TO JUSTICE AND THE WELFARE STATE* 49, 49–50 (Mauro Cappelletti ed., 1981).

²¹ See Stephen K. Huber, *Thou Shalt Not Ration Justice: History and Bibliography of Legal Aid*, 44 *GEO. WASH. L. REV.* 754, 759–60 (1976) (“Law reform through test case litigation had become the primary goal of local Legal Services Programs because they had far more clients than could be served effectively.”); Quigley, *supra* note 1, at 245–46 (noting that LSP “placed a high priority on reform of the law to make it more responsive to the poor”).

²² Walter Karabian, *Legal Services for the Poor: Some Political Observations*, 6 *U. S.F. L. REV.* 253, 256 (1972).

²³ *Id.* at 257.

²⁴ *Morris v. Williams*, 67 Cal. 2d. 733, 784 (Cal. 1967); EARL JOHNSON, JR., *TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES* 122–23 (2014).

farm owners to bring in low-wage workers from Mexico.²⁵ Governor Reagan responded in 1968 with a thwarted attempt to veto CRLA's receipt of federal funds,²⁶ a move which foreshadowed what would become continued antagonism towards LSC during his presidential administration.²⁷ CRLA's successes also propelled California Senator George Murphy to propose legislation that would have prevented LSP-funded attorneys from suing government entities,²⁸ the first in a series of efforts to restrict the efficacy of legal services lawyers which would eventually prove successful.²⁹

At the time that the Legal Services Corporation (LSC) was created in 1974, supporters widely viewed it as a means to isolate the Legal Services Program from direct political pressure by removing it from the executive branch.³⁰ This danger posed by direct executive control of the agency was poignantly exposed during the Nixon administration, with Nixon's appointment of Howard Philips to head LSP.³¹ Philips was a vocal opponent of legal services who "had as his first order of business a plan to dismantle the program."³² Although Nixon vetoed the original bill in 1971, a compromise bill creating the Legal Services Corporation was eventually signed into law in 1974, shortly before his resignation.³³ The 1974 Act successfully placed the administration of Legal Services in an independent government corporation, but the hope that this move would insulate the program from political interference proved to be short lived.³⁴ As it stood, LSC depended on Congress to re-appropriate funds for the program annually.³⁵

Conservative opponents were galvanized by the idea of "leftist" attorneys receiving public funds to further the "radical" agenda of

²⁵ Ortiz v. Wirtz, No. 47803 (N.D. Cal. 1967); JOHNSON, *supra* note 24, at 124.

²⁶ Jerome B. Falk, Jr. & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and The Future of Legal Services*, 24 HASTINGS L.J. 599, 609 (1973).

²⁷ Robert Hornstein et al., *The Politics of Equal Justice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1089, 1096 (2003). See Quigley, *supra* note 1, at 257–59 (discussing how LSC was "being starved financially" in the 1980s).

²⁸ Falk & Pollak, *supra* note 26, at 609 (citing 113 CONG. REC. 27,871 (1967)).

²⁹ See *infra* notes 44–60 and accompanying text.

³⁰ Quigley, *supra* note 1, at 251–52.

³¹ *Id.* at 253.

³² Hornstein et al., *supra* note 27, at 1094.

³³ Quigley, *supra* note 1, at 252–53.

³⁴ *Id.* at 253–54.

³⁵ *Id.*

reshaping the legal system,³⁶ and the annual battle over appropriations proved to be an opportunity ripe for opposition.³⁷ In 1981, President Reagan's first annual budget proposal eliminated all direct funding for LSC.³⁸ While Congress ultimately rejected the plan, the resulting compromise cut the agency's budget by over 25% in a single year, from \$321 million to \$241 million.³⁹ While Reagan failed in his attempt to abolish LSC completely, a major consequence of the attempt was that much-reduced levels of funding became the agency's new normal.⁴⁰ After reaching a high point in 1981, federal funding for legal services did not recover to prior levels until 1992.⁴¹ When adjusted for inflation, the descent was even more striking—in real dollars, LSC has never come close to its 1981 level of funding in all of the years since.⁴² This decline in LSC's funding has occurred in spite of the fact that over the same period, the poverty rate has continued to fluctuate between about 12-15% of the total population, and the total number of Americans living in poverty has grown from about 30 million in 1980 to 43.1 million in 2015.⁴³

Since LSC fixes its eligibility criteria as a percentage of the national poverty level, the number of Americans living in poverty has a direct bearing on the demand for its services.⁴⁴ However, the period of time between 1980 and 2015 also saw precipitous growth in rates of income and wealth inequality after a brief leveling off during the mid-

³⁶ *Id.* at 255 n.88 (quoting a 1981 letter written by Howard Phillips on behalf of the National Defeat Legal Services Committee).

³⁷ *See id.* at 255–59 (discussing the constant struggle LSC faced in terms of federal funding).

³⁸ Stuart Taylor, Jr., *House Action Near in Fight Over Legal Aid*, N.Y. TIMES (June 16, 1981), <http://www.nytimes.com/1981/06/16/us/house-action-near-in-fight-over-legal-aid.html>.

³⁹ Stuart Taylor, Jr., *Legal Services Agency Struggles for its Survival*, N.Y. TIMES (Nov. 13, 1981), <http://www.nytimes.com/1981/11/13/us/legal-services-agency-struggles-for-its-survival.html>.

⁴⁰ Quigley, *supra* note 1, at 256–58 (noting Reagan's strategies of “reduced funding, increased restrictions and unsympathetic leadership” to bring about a “slow, painful death” to LSC).

⁴¹ *2013 LSC by the Numbers: The Data Underlying Legal Aid Programs*, LEGAL SERVS. CORP. (July 2014), <http://www.lsc.gov/media-center/publications/2013-lsc-numbers> [hereinafter *2013 LSC by the Numbers*].

⁴² *Id.*

⁴³ BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, P60-256(RV), INCOME AND POVERTY IN THE UNITED STATES: 2015 12 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf>.

⁴⁴ *See* 45 C.F.R. § 1611.3(c)(1) (2017) (“As part of its financial eligibility policies, every recipient shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Guidelines amount.”).

twentieth century.⁴⁵ While the relationship between rising material inequality and the need for legal services is less obvious, this trend may be at least partly responsible for an increasing number of individuals who do not meet the formal criteria for pro bono legal services but who are also unable to afford legal representation at market rates.⁴⁶ Some authors have noted the existence of an “access to justice paradox” in that high levels of potential clients who cannot afford the services of attorney currently exist alongside high levels of underemployment or unemployment among recent law graduates.⁴⁷ Lobel and Chapman cite evidence that during the period between 2000 and 2012, the median household income had a net gain of only 3% while average hourly legal fees increased 12%.⁴⁸ This evidence suggests that demand at the top of the income scale has played a role in pricing potential low and middle-income clients out of the legal services market, as has the overall decline in working and middle class economic standing.⁴⁹

The narrowing potential for LSC attorneys to engage in broad law reform efforts have compounded the difficulties associated with severely limited funding. Over the years, political clashes over LSC have resulted in substantive restrictions on the types of cases and activities that LSC-funded law offices are permitted handle, in turn negating the early LSP/LSC strategy of using law reform to make the most effective use of its limited budget.⁵⁰ The initial compromise that established the LSC in 1974 was an early example: the law that attempted to save the Legal Services Program by insulating it from politics also prevented attorneys from using LSC funds to represent clients in certain types of controversial cases, including abortion and school desegregation cases.⁵¹ By the 1990s, despite more than a decade of declining funding, renewed conservative opposition to LSC in Congress, led by Newt Gingrich, nearly resulted in the agency once

⁴⁵ THOMAS PICKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 294 (Arthur Goldhammer trans., 2014).

⁴⁶ See Vincent Morris, *Navigating Justice: Self-Help Resources, Access to Justice, and Whose Job is it Anyway?*, 82 MISS. L.J. SUPRA 161, 165 (2013) (noting that as funding for free legal services declines, the number of pro se litigants will likely increase).

⁴⁷ Jules Lobel & Matthew Chapman, *Bridging the Gap Between Unmet Legal Needs and an Oversupply of Lawyers: Creating Neighborhood Law Offices – The Philadelphia Experiment*, 22 VA. J. SOC. POL’Y & L. 71, 72 (2015).

⁴⁸ *Id.* at 79.

⁴⁹ See *id.* at 79–80 (showing that as median household income contracted, average hourly legal fees continued to rise leaving middle-income legal consumers “worse” off).

⁵⁰ See Quigley, *supra* note 1, at 248–60 (highlighting LSC’s clash with the federal government beginning in the 1960’s which “ultimately damaged the LSC by a combination of drastic funding cuts and the most severe restrictions on law reform activity”).

⁵¹ *Id.* at 253.

again being phased out of existence completely.⁵² In another compromise designed to save LSC from oblivion, the 1996 appropriations bill—which continued to fund LSC albeit at a much reduced rate—included even more draconian restrictions on the activities of those receiving LSC funds.⁵³ These restrictions, many of which remain in effect,⁵⁴ included prohibitions on some of the most effective tools for effectuating legal change, including class action lawsuits,⁵⁵ lobbying,⁵⁶ and training for political activities.⁵⁷ It also included further subject matter and clientele restrictions, preventing LSC attorneys from representing clients in abortion cases,⁵⁸ in prisoners' rights cases,⁵⁹ and in litigation undertaken on behalf of non-citizens under certain circumstances.⁶⁰

In 2005, after many years faced with efforts to undermine its mission through a combination of declining funding and activity restrictions, LSC published the first version of its widely cited report, *Documenting the Justice Gap in America*.⁶¹ Among the report's conclusions, about one in every two potential legal services clients were being turned down due to insufficient agency resources.⁶² Moreover, this "gap" did not appear to be filled either through alternate funding sources such as state or local level public funding or attorney pro bono.⁶³ An

⁵² JOHNSON, *supra* note 24, at 734.

⁵³ Quigley, *supra* note 1, at 260–61.

⁵⁴ See Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, 131 Stat. 218 (2017). The restrictions adopted in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-53 (1996), subject to amendments passed by Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriation Act, 1998, Pub. L. No. 105-119, 111 Stat. 2510-11 (1998), have been carried forward as conditions on LSC's funding to the current fiscal year. *Id.* In 2001, the Supreme Court upheld the act in part. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (invalidating Pub. L. No. 104-134, § 504(a)(16) which prohibited the LSC from participation in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system[.]" but finding that it was severable from the rest of the act).

⁵⁵ § 504(a)(7), 110 Stat. at 53.

⁵⁶ § 504(a)(2)–(4), 110 Stat. at 53.

⁵⁷ § 504(12), 110 Stat. at 55.

⁵⁸ § 504(14), 110 Stat. at 55.

⁵⁹ § 504(15), 110 Stat. at 55.

⁶⁰ § 504(11), 110 Stat. at 54–55.

⁶¹ *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. (2005), <http://www.lsc.gov/sites/default/files/LSC/images/justicegap.pdf>. Although this is the second edition of *Documenting the Justice Gap in America*, it is "virtually the same" as the 2005 edition and the "only substantive changes are the addition of [a] Preface and [an] updated list of the Board of Directors . . ." *Id.*

⁶² *Id.* at 4.

⁶³ *Id.*

updated report published in 2009 found that despite a slight increase in funding in the intervening years, about half of the individuals who sought assistance from LSC-funded offices were still being turned away due to insufficient resources.⁶⁴

Documenting the Justice Gap in America and its conclusions about the unmet need for civil counsel have been widely cited in subsequent discussions of access to justice.⁶⁵ Curiously, the result of much of this influence has not generally been, as one might assume, to renew a vigorous critique of the substantive and financial restrictions on federally funded legal aid offices, but rather a growing sense of the justice gap as a given and the chronic state of inadequate funding as an immovable force of nature.⁶⁶

Part of what has enabled this reification of the justice gap is a common tendency to consider the problem separately from the larger political context from which it emerged. As the CLRA incidents illustrated, a vigorous legal aid system could be used to directly challenge both state power and the power of private business interests.⁶⁷ Whether accurately perceived or not, this threat inspired decades of sustained, ideologically motivated opposition to LSC in Congress and the Executive Branch.⁶⁸ It is only by ignoring this context that the justice gap could appear to be either natural or inevitable.

The failure to attend to this historical context continues to obscure the relationship between the decline of LSC, the growth of the justice gap, and the broader process of welfare retrenchment and

⁶⁴ *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. 1–2 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

⁶⁵ See, e.g., Debra Gardner, *Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases*, 37 BALT. L. REV. 59, 61 n.20 (2007); Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 247, 352 n.25 (2012); Daniel Vandekoolwyk, *Threshold Obstacles to Justice: The Interaction of Procedural and Substantive Law in the United States, France, and China*, 23 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 187, 192 n.33 (2010).

⁶⁶ See John P. Gross, *Dispelling the Myth that Law Students Can Close the Justice Gap*, 58 B.C. L. REV. 26, 32–33 (2017) (arguing that “states need to adequately fund the indigent defense delivery systems”); James J. Sandman, President, Legal Services Corporation, Hawaii Access to Justice Conference: Rethinking Access to Justice (June 20, 2014) (transcript available at <https://www.lsc.gov/rethinking-access-justice-james-j-sandman-hawaii-access-justice-conference>) (asserting that “accepting” the lack of legal services as the result of inadequate funding is a form of “complacency”).

⁶⁷ See *supra* notes 22–26 and accompanying text.

⁶⁸ See *supra* notes 26–49 and accompanying text.

neoliberalization in American domestic policy. The economic crises of the 1970s helped to destabilize the dominant paradigm of Keynesian economic policy typified by the New Deal and Lyndon Johnson's Great Society.⁶⁹ This legitimization crisis helped fuel the electoral successes for Reagan and other New Right politicians, who wove the neoliberal critique of Keynesianism into narratives of rugged individualism, personal responsibility, and family values.⁷⁰ The goals of economic prosperity and moral rectitude were tightly intertwined in this narrative: both would require dismantling the overgrown "nanny state"⁷¹ and empowering the private sector through schemes of deregulation, privatization, and tax cuts.⁷²

Neoliberalism's ascendance unleashed what David Harvey described as a sustained "assault upon institutions, such as trade unions and welfare rights organizations, that sought to protect and further working-class interests," accompanied by "savage cutbacks in social expenditures and the welfare state, and the passing of all responsibility for their well-being to individuals and their families."⁷³ The fact that these efforts were ever only partly successful has nonetheless left a much tattered social safety net to cope with the problems brought on by rising wealth inequality. Unfortunately, in the case of legal aid, even its supporters have tended focus rather myopically on the "justice gap" as an isolated phenomenon, rather than as a symptom of the broader problem of widening inequality associated with widespread adoption of neoliberal social policies.⁷⁴ This narrow focus has, in turn, severely constrained the ability to engage in a critique of the chronic state of

⁶⁹ JAMIE PECK, CONSTRUCTIONS OF NEOLIBERAL REASON 122 (2014).

⁷⁰ DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 11–12, 86 (2012).

⁷¹ A "nanny state" is described as a "paternalistic government" in which the "nanny who, by intervening in her protégés' autonomy ostensibly for their own good, infantilizes them and renders them incapable of exercising that autonomy." JULIAN LE GRAND & BILL NEW, GOVERNMENT PATERNALISM: NANNY STATE OR HELPFUL FRIEND? 109 (2015).

⁷² See *id.* at 263–64 (discussing Reagan's economic policy which focused on four things: "increased deregulation and market liberalization, tighter control of the money supply, tax cuts, and cuts in public spending"). See generally Edward L. Rubin, *Deregulation, Reregulation and the Myth of the Market*, 45 WASH. & LEE L. REV. 1249, 1258 (1998) ("In its classic form, economic analysis demonstrates that a free market will maximize wealth, while a regulated market, one in which the government intervenes for reasons other than the correction of market failure, will not.").

⁷³ David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 32 (2007).

⁷⁴ See generally *What We Do*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/what-we-do> (last visited Dec. 24, 2018) (stating that the Legal Services Corporation's mission is focused on "providing legal assistance to those who face an economic barrier to adequate counsel will serve best the ends of justice and assist in improving opportunities for low-income persons").

underfunding for legal services or to imagine responses to the problem from outside the framework of neoliberal assumptions.

III. TECHNOCRACY

Over the past four decades, neoliberalism has gone from an explicit challenge to Keynesianism to constituting a large part of the status quo in not only economics but in political thought as well.⁷⁵ As this process unfolded, the normative discourse explicitly directed at justifying neoliberal policy prescriptions has given way to what political philosophers have termed a “political rationality”: a mode of reasoning, with a set of more or less implicit metaphysical and ethical assumptions, which sets the terms for discussing the legitimate exercise of power.⁷⁶ In Wendy Brown’s⁷⁷ account of neoliberal political rationality, a central feature that marks neoliberalism as distinct from other normative discourses is the emergence of market-based norms as the dominant ones across all spheres, including what, under classical liberal thought, was typically regarded as a separate realm of political life.⁷⁸

This proliferation of market norms has far reaching consequences, but of particular relevance to the topic at hand is the emergence of the concept of “governance,” which replaces the political act of governing with dissemination of managerial norms and application of expertise.⁷⁹ Brown argues that as a consequence of neoliberalism’s substitution of the managerialist concept of governance:

[P]ublic life is reduced to problem solving and program implementation, a casting that brackets or eliminates politics, conflict, and deliberation about common values or ends As problem solving replaces deliberation about social conditions and possible political futures, as consensus replaces contestation among diverse perspectives, political life is emptied of what theorists such as

⁷⁵ JONES, *supra* note 70, at 263.

⁷⁶ WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 120–21 (2015).

⁷⁷ Wendy Brown is Class of 1936 First Chair of Political Science at the University of California, Berkeley. Professor Brown’s fields of interest include the history of political theory, nineteenth and twentieth century Continental theory, critical theory, and theories of contemporary capitalism. *Wendy Brown*, BERKELEY POL. SCI., <http://polisci.berkeley.edu/people/person/wendy-brown> (last visited Dec. 16, 2018).

⁷⁸ BROWN, *supra* note 76, at 108–09.

⁷⁹ *Id.* at 126–27.

Machiavelli took to be its heart and the index of its health: robust expressions of different political positions and desires.⁸⁰

These observations provide a useful starting point for understanding the proliferation of technocratic responses to the justice gap. LSC's own recent direction has reinforced the ahistorical impression that the justice gap is an intractable problem built into the nature of the project of providing full service legal assistance to the poor.⁸¹ The premise of a 2012 LSC-sponsored Summit on the Use of Technology to Expand Access to Justice was the need to transform LSC's mode of "service delivery" through the use of technology in light of the conclusions it reached in *Documenting the Justice Gap in America*.⁸² Others have taken up the suggestion that there is something flawed in the basic idea of legal services programs. For example, one 2015 article remarked:

After a generation of efforts to increase the funding for legal services, to expand the types of cases in which indigent civil litigants are entitled to counsel at public expense, and to expand the amount of pro bono services donated by the private bar, it is unrealistic—given current resource limitations and demand for legal help—to expect that we can provide a lawyer for every poor person with an essential civil legal need, let alone every person of modest means with such a problem.⁸³

⁸⁰ *Id.* at 127.

⁸¹ See *The Justice Gap*, *supra* note 2, at 9 ("This 'justice gap' – the difference between civil legal needs of low-income Americans and the resources available to meet those needs – has stretched into a gulf.").

⁸² *Report of The Summit on the Use of Technology to Expand Access to Justice*, LEGAL SERVS. CORP. 1–2 (2013), https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf [hereinafter *Summit Report*] ("Technology can and must play a vital role in transforming service delivery so that all poor people in the United States with an essential civil legal need obtain some form of effective assistance.").

⁸³ John M. Greacen et al., *From Market Failure to 100% Access: Toward a Civil Justice Continuum*, 37 U. ARK. LITTLE ROCK L. REV. 551, 552–53 (2015). See James J. Sandman, *The Current State of Access to Justice in the United States*, 22 GEO. J. ON POVERTY L. & POL'Y 453, 458 (2015) ("We are in many ways still dealing with a service delivery model that was originally created with the noble goal of providing a lawyer for every individual person We need to identify other types of service that might provide meaningful assistance to unrepresented people."); James J. Sandman, President, Legal Services Corporation, Hawaii Access to Justice Conference: Rethinking Access to Justice (June 20, 2014) (transcript available at <https://www.lsc.gov/rethinking-access-justice-james-j-sandman-hawaii-access-justice->

Such accounts of the failure of legal aid ignore its highly politicized history, and instead attribute its failure to provide universal access to justice to poor “design.”⁸⁴ This causal narrative helps to frame the pursuit of access to justice as an essentially apolitical project of fixing a flawed but ideologically neutral design. Particular suggestions for the nature of the improved design vary: they range from the creation of new, more efficient, forms for the organization of law offices;⁸⁵ to the development and improvement of self-help tools;⁸⁶ to the deregulation of legal practice.⁸⁷ In a 2011 article, court consultant

conference) (“In light of the realities we face, we need to rethink the goal of the access to justice movement. Is it to provide full representation for every client in every case? That is not realistic The fact is that some assistance is better than no assistance.”).

⁸⁴ See CHARLES L. OWEN ET AL., ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF REPRESENTED LITIGANTS 3 (2002) (arguing that the “American ideal for justice” is attainable by “systematically removing the unnecessary, simplifying the necessary, and rethinking processes from the standpoints of those who must use them”).

⁸⁵ See generally Raymond H. Brescia et al., *Embracing Disruption: How Technological Changes in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 554 (2015) (discussing how “true disruption” in the legal field is “likely to come from those serving the ‘lower end’ of the market,” including “solo practitioners, legal services lawyers, and ‘low bono’ providers of legal services”); Benjamin P. Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205, 208 (2014) (describing the rise of standardized pro se forms in various jurisdictions); Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 759, 771–72 (2012) (outlining nascent collaborative legal technologies and tools which low-income individuals “understand and [can] use to efficiently engage with the legal forum”).

⁸⁶ See Rochelle Klempner, *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System’s “DIY” Forms*, 41 FORDHAM URB. L.J. 1189, 1189 (2014) (exploring New York’s pro se form programs and court-based document assembly programs); Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1117 (2009) (discussing the new software tool “A2J Author” which serves as an “interface for public access to legal processes” and provides “the connection to the customer”); Richard Zorza, *Self-Represented Litigants and the Access to Justice Revolution in the State Courts: Cross-Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative Law System*, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 63, 68–78 (2009) (describing “accessing the system innovations” which “provide...a comprehensive picture of the claim” and “give the litigant himself a fuller understanding of the claim” thus making the hearing “more efficient and more comprehensive”). See generally Cooper, *supra* note 85; Wolf, *supra* note 85.

⁸⁷ See generally Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 FORDHAM L. REV. 883 (2004) (reviewing the case for eliminating unauthorized practice of law restrictions); Cooper, *supra* note 63 (examining ways in which “consumers are gaining greater access to the justice system without using lawyers”); Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Service to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191 (2016) (arguing that “good regulatory solutions are available to ensure that more open and flexible professional models – ones that allow the practice of law by alternative providers and business structures – deliver high quality, lower cost, greater innovation, and more access to those currently excluded from our justice systems”); Marcus J. Lock, *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459 (2001)

Richard Zorza dubbed a confluence of such approaches—which he summarized as “court simplification and services, bar flexibility, legal aid efficiency and availability, and systems of triage and assignment”—part of an “emerging consensus” on how best to deal with the justice gap.⁸⁸ The common denominator which links these suggestions together is the underlying promise that individual action, entrepreneurialism, and innovation will generate a universally palatable solutions without the need to engage conflicting viewpoints or make difficult decisions between competing values.

These uncritical concessions neoliberal rationality—and especially to the primacy of individualistic norms emphasizing voluntary, technical solutions to social problems—undermine the very vocabulary that would allow us to conceive of problems faced by the poor in the legal system as raising essential questions of justice. While alternative versions of access to justice concept have not disappeared from the intellectual landscape completely, the connection between legal aid and more fundamentally egalitarian concerns about the distribution of wealth and power in society is hard to make out in the midst of a common presupposition that “access to justice” poses no more than a design problem, with claims of justice amounting to no more than a mandate for efficient resolution of this problem. This is a result with a distinct ideological dimension, as it tends to obscure the role of political and material inequalities in producing disparate outcomes in both the justice system and the larger society—the very problem that many had once hoped legal aid and access to justice measures could help to overcome.

The technocratic impulse has, in recent years, been taken to its logical conclusion in an access to justice project implemented in the New York State courts.⁸⁹ Following draconian budget cuts in the 2011-2012 fiscal year, the New York court system implemented a celebrated self-help forms program designed to “address barriers to access to justice that litigants face when they create their court papers.”⁹⁰ The forms

(exploring the de-regulation of the Colorado legal market via a limited representation rule that allows an attorney to provide discrete legal services to an otherwise pro se party and to charge the client accordingly); Richard Zorza & David Udell, *New Role for Non-Lawyers to Increase Access to Justice*, 41 *FORDHAM URB. L.J.* 1259 (2014) (surveying the current access to justice reform initiatives and their results and noting that the “pressure for deregulation comes from the perception that lawyer self-regulation is the cause of barriers to access”).

⁸⁸ Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 *JUDICATURE* 156, 156–57 (2011).

⁸⁹ See Klempner, *supra* note 86, at 1204–14.

⁹⁰ *Id.* at 1193.

program began as a way to help ease interactions for people who typically came to court without lawyers because they were unable to afford them: tenants in landlord and tenant court.⁹¹ As tenant's forms program began to meet with some success, the court then started making pro se forms for landlords as well.⁹² This concession, while framed in terms of providing access to justice, ignores the idea that some people already have access to a bit more justice than others, and that the demands of justice may therefore require a positive intervention on behalf of the poor in order to level the playing field.

The New York courts' concern with formal neutrality is symptomatic of a retreat from access to justice based on a model of full-service advocacy that could be a tool in the service of leveling class-based power differentials in the justice system, to an increasingly common view that access to justice is a mechanism for improving courtroom efficiency and spurring investment in technology. On a more fundamental level, this development marks a turn away from more substantive egalitarian concerns, towards a thin conception of equality as consisting of nothing more than the chance to buy a ticket in a social and economic lottery, in which the odds of winning are vanishingly small. This turn away from substantive equality between outcomes is similarly reflected by a shift in the rhetoric employed by LSC and its leaders.⁹³ As LSC has become resigned to its inability to affect not only sweeping changes in the law but also to scrape together sufficient funding to ensure a moderate level of representation of poor people in most of their day to day legal problems, the agency has recast its aspirations to providing "*some* form of effective assistance to 100% (emphasis added)" of its potential clientele.⁹⁴ One finds in subsequent iterations this already milquetoast rendition of the agency's mission diluted to the even more anemic slogan of "100% access" without a referent.⁹⁵

IV. TECHNOLOGY

While not all of the technocratic solutions proposed in the access to justice literature are expressly technological, the promise of technology as a way to fill the justice gap has emerged as a central preoccupation. A major source of this interest is no doubt LSC's Technology

⁹¹ *Id.* at 1205–06.

⁹² *Id.* at 1208.

⁹³ *Summit Report*, *supra* note 82, at 1.

⁹⁴ *Id.*

⁹⁵ *See generally* Greacen, et al., *supra* note 83.

Initiative Grant (TIG) program, which incentivizes legal services providers to generate technological interventions to cope with what had become, by the time of the grant program's creation, chronically inadequate levels of funding.⁹⁶ The grant program was the suggestion of the first summit LSC convened on the use of technology to improve access to justice in 1998⁹⁷—a scant two years after the largest one-year drop in funding in the Corporation's history.⁹⁸ Congress began approving funding for the program in 2000 and the grants have continued to be awarded throughout the subsequent years.⁹⁹ Over this period, LSC disbursed TIG grants for two major categories of projects: upgrades to internal IT infrastructure for legal services agencies and development of end user applications.¹⁰⁰ Examples of the latter include legal aid websites, self-help legal forms, instructional videos, and online intake and “triage” web interfaces.¹⁰¹

TIG program's technological imperative has been further promoted through an annual Technology Initiative Grants Conference,¹⁰² as well as a 2012 “Summit on the Use of Technology to Expand Access to Justice,” which resulted in the publication of an official report by LSC and a special issue of the Harvard Journal of Law and Technology reporting the proceedings of the first half of the summit.¹⁰³ The mission of the summit, as stated by the planning committee, was “to explore the potential of technology to move the United States toward providing some form of effective assistance to 100% of persons otherwise unable to afford an attorney for dealing with essential civil legal needs.”¹⁰⁴ The resulting report, articulates a “vision of an integrated service-delivery system” consisting of 5 components:

⁹⁶ *Technology Initiative Grant Program*, LEGAL SERVS. CORP., <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig#Overview> (last visited Dec. 17, 2018).

⁹⁷ John Graecan, *Introduction: Using Technology to Enhance Access to Justice*, 26 HARV. J. L. & TECH. 243, 244 (2013).

⁹⁸ *2013 LSC By the Numbers*, *supra* note 41. Between 1995 and 1996, LSC experienced a -30.5% percentage change in funding. *Id.*

⁹⁹ *Technology Initiative Grant Program*, *supra* note 96.

¹⁰⁰ *See 2012 TIG Project Descriptions*, LEGAL SERVS. CORP., <https://www.lsc.gov/2012-tig-project-descriptions> (last visited Dec. 20, 2018).

¹⁰¹ *Id.*

¹⁰² *See Past TIG Conferences Materials*, LEGAL SERVS. CORP., <https://www.lsc.gov/meetings-events/tig-conference/past-tig-conferences-materials> (last visited Dec. 20, 2018). TIG has hosted its annual legal aid technology conference since 2000 and is the only national event focused exclusively on the use of technology in the legal aid community. *Id.*

¹⁰³ James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J. L. & TECH. 243 (2012); *Summit Report*, *supra* note 82.

¹⁰⁴ *Summit Report*, *supra* note 82, at 1.

1. Creating in each state a unified “legal portal” which, by an automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire legal process 2. Deploying sophisticated document assembly applications to support the creation of legal documents by service providers and by litigants themselves and linking the document creation process to the delivery of legal information and limited scope legal representation 3. Taking advantage of mobile technologies to reach more persons more effectively 4. Applying business process/analysis to all access-to-justice activities to make them as efficient as practicable 5. Developing “expert systems” to assist lawyers and other services providers.¹⁰⁵

A. *Technology and Exclusion*

While the Summit report¹⁰⁶ and associated white papers¹⁰⁷ are long on visionary rhetoric, they are short on the sorts of empirical data that might serve to justify the major premise of the TIG program: that technology would effectively function as a lower cost replacement of legal aid and thus succeed where society had failed at providing meaningful access to justice to the poor.

The need for such justification appears particularly pressing given the prominent role of end user applications in the summit’s “vision.” The bearing of income and wealth on relative levels of computer use and proficiency are well known.¹⁰⁸ Moreover, as the “vision” was outlined in the summit report, technology would play a key gatekeeping role in determining the extent of the services available to prospective

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ James E. Cabral et al., *supra* note 103.

¹⁰⁸ See JAN A.G.M. VAN DIJK, *THE DEEPENING DIVIDE: INEQUALITY IN THE INFORMATION SOCIETY* (2005) (noting the societal and political implications on the deepening digital divide); LISA J. SERVON, *BRIDGING THE DIGITAL DIVIDE: TECHNOLOGY, COMMUNITY, AND PUBLIC POLICY* (2002) (assessing the policies in the United States designed to address the social problems created by low-income individuals’ lack of access to technology).

clients in the initial “triage” step.¹⁰⁹ In other words, technology would be used to determine which clients would be provided with full service by an attorney and which would be relegated to some form of self-help, technologically assisted or otherwise.

A typical response to potential objections along these lines rebuffs such concerns with evidence that the “digital divide” is closing. For example, Bonnie Rose Hough’s contribution to the summit papers acknowledges the objections surrounding potential disadvantage to residents of rural areas that lack IT infrastructure, people with disabilities, and people with limited English proficiency.¹¹⁰ However, the paper remains silent on the larger issue of whether the self-help with the assistance of technology really represents a reasonable alternative to full-service legal representation.¹¹¹ It concludes on an upbeat note, observing that:

When LSC and state courts began their statewide self-help websites, of the half of American adults without Internet access, 57% did not wish to gain access. Yet the digital divide was never a sufficient reason not to make maximal use of the Internet for persons who did have access to it. The percentage of Americans who use the Internet has continued to rise, reaching nearly 80% in 2011. Today, virtually everyone has some means of obtaining online access — whether through her own computer, through that of a relative or neighbor, or through a public access computer at a court or public library.¹¹²

This emphasis on the digital divide presents a misleading dichotomy between technological “haves” and “have nots”, with the dividing line between the two groups being determined by physical access to the internet.¹¹³ This rhetorical framework tends to deflect questions that would implicate a more nuanced analysis of the role that existing social structures and inequalities play in peoples’ interactions with

¹⁰⁹ *Summit Report*, *supra* note 82, at 2. The term “triage” is used to characterize a “range of strategies for allocating scarce resources most effectively.” *Id.* at 13 n.4.

¹¹⁰ Bonnie Rose Hough, *Let’s Not Make It Worse: Issues to Consider in Adopting New Technology*, 26 HARV. J.L. & TECH. 256, 261–63 (2012).

¹¹¹ *Id.*

¹¹² *Id.* at 266.

¹¹³ Mark Warschauer, *Reconceptualizing the Digital Divide*, FIRST MONDAY (July 1, 2002), <https://journals.uic.edu/ojs/index.php/fm/article/view/967/888>.

technology.¹¹⁴ While virtually everyone may have some sort of physical access to a computer, the quality of this access varies greatly with advantages and disadvantages conferred according to one's level of wealth.¹¹⁵ Even if one accepts that the nature of the problem is adequately captured in terms of an access/non-access binary, the evidence technology boosters typically rely upon to establish that the digital divide is "closing"¹¹⁶ itself suggests that class continues to play a central role in determining what side of the divide people find themselves on. The same Pew research study that indicated that nearly 80% of Americans were using the internet in 2011 also indicated that only about 62% of individuals with an annual household income of less than \$30,000 a year were using the internet, with higher rates of internet usage the farther up the income scale one went.¹¹⁷

B. Technology and Customer Service Ideology

When one considers that access to justice movement has historically been concerned with the quality of justice available to the poor, the apparent indifference to the impact of poverty on the fairness and efficacy of its technological vision seems puzzling. However, this indifference becomes easier to comprehend when one replaces the idea of a client as a citizen seeking justice with the client as a customer or consumer in the justice system.¹¹⁸ The idea of the "justice customer" or consumer is a recurring theme in this literature, along with is the concern with customer or consumer-oriented design of systems for administering legal justice.¹¹⁹ If potential clients are conceived as consumers—rationally self-interested actors seeking to maximize

¹¹⁴ Siobhan Stevenson, *Digital Divide: A Discursive Move Away from the Real Inequities*, 25 INFO. SOC'Y 1, 1–2 (2009).

¹¹⁵ *Id.*

¹¹⁶ Kathryn Zickuhr & Aaron Smith, *Digital Differences*, PEW RESEARCH CTR. (Apr. 13, 2012), <http://www.pewinternet.org/2012/04/13/digital-differences/> (noting that "some" gaps in internet adoption have narrowed in the past, specifically the "gap closest to disappearing is that between whites and minorities" and differences in access have become "significantly less prominent over the years").

¹¹⁷ *Id.*

¹¹⁸ See, e.g., Ronald W. Staudt, *Technology for Justice Customers: Bridging the Digital Divide Facing Self-Represented Litigants*, 5 U. MD. L.J. RACE RELIG. GENDER & CLASS 71 (2005).

¹¹⁹ See, e.g., *id.*; Robert B. Yegge, *Access to Justice*, 40 JUDGE'S J. 4 (2001); OWEN ET AL., *supra* note 84; Katherine Alteneder & Linda Rexer, *Consumer Centric Design: The Key to 100% Access*, 16 J.L. SOC'Y 5 (2014).

utility¹²⁰—in some sort of market for justice, the unconcern with actual material inequalities as an impediment to effective use of the services begins to reflect a perverse sort of logic. What the absorbing faith in self-help technologies presume, and the phrase justice customer belies, is an essentially economic conception of the person as, above all else, an actor whose agency is expressed through actions and decisions that take place within markets.¹²¹ This conception presupposes a radically individualist idea of agency and utter disregard for inequalities—be they material, social, or physical—as factors which may limiting or preventing some people from doing things that seem quite trivial to others. In this sense, moral standing is measured in market terms—only insofar as individuals are able to engage in adequate levels of “self-care” according to their choices in a given marketplace are they worthy of moral consideration.¹²² The conclusion that follows from this conception is that if a justice customer fails to take adequate care by availing themselves of the new technological products in the justice marketplace, they ultimately have only themselves to blame.

The foregoing explanation leaves some uncertainty surrounding the question of why designers should continue to bother with the needs of low-income consumers who are, after all, only able to participate in the “market” for justice in an at best dysfunctional manner requiring state intervention. Even the presupposition that access to justice remains primarily concerned with the needs of the “justice consumer” may still a bit off the mark. As Hilary Sommerlad phrased it in a critique of neoliberal reforms of the United Kingdom’s legal aid system, “the legal aid client is the product and her production is facilitated by her reconstruction as a self-entrepreneurial actor who should be able to access justice with a minimal level of professional assistance.”¹²³

The foregoing perspective helps to explain why so many contemporary discussions of access to justice slide seamlessly between the language of justice and the language of efficiency as rationales for

¹²⁰ Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1762 (2003) (recognizing that consumers are often defined as seeking to maximize utility).

¹²¹ Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 694 (2006).

¹²² *Id.*

¹²³ Hilary Sommerlad, *Reflections on the Reconfiguration of Access to Justice*, 15 INT’L J. LEGAL PROF. 179, 188 (2008).

their proposals.¹²⁴ While overall system-wide efficiency matters little from the perspective of a client, there are two ways in which efficiency is a key interest of other actors in the legal system. For those who work in the courts, efficiency translates into the ability to process dockets with minimal friction, an interest which is jeopardized by a glut of pro se litigants.¹²⁵ *Pro se* litigants—unlike professional attorneys—cannot be depended upon to internalize the rules of the system or the language used to communicate their positions to the court, with the result that judges and other court staff are likely to require much additional time reviewing their filings and interacting with them during court appearances.¹²⁶ What is typically presented as providing access to justice for unrepresented individuals is actually more concerned with bringing standardization and order to their interactions with the court—for example, through the use of electronically assembled forms—that will facilitate smooth processing of their claims.¹²⁷ Once the original claim to justice is conflated with this efficiency aim, the concern that some may be disadvantaged by the displacement of professional service with self-help facilitated by technology is of less concern than whether the system has introduced enough regularity to the proceedings to be worth the cost of its development.

C. Access to Justice and Techno-Entrepreneurship

A second common meaning that efficiency takes on in the discussion of access to justice concerns the efficient allocation of the resources available to provide legal services.¹²⁸ In this sense, what is efficient is that which optimizes the amount of justice dispensed, given the amount of resources available. Leaving aside for a moment the dissonance introduced by the idea of plugging an immeasurable like justice into the cost-benefit calculus, this conception raises a larger question about what seems to be a rather bold assumption that technology will necessarily deliver on this promise of efficiency. In candid

¹²⁴ See, e.g., Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, JUDGE'S J. 16 (2003); Bonnie Rose Hough & Richard Zorza, *Tech-Supported Triage: The Key to Maximizing Effectiveness and Access*, 26 HARV. J.L. & TECH. 292 (2012); Chase T. Rogers, *Access to Justice: New Approaches to Ensure Meaningful Participation*, 90 N.Y.U. L. REV. 1447 (2015); Wolf, *supra* note 85; *Summit Report*, *supra* note 82.

¹²⁵ See Rebecca A. Albrecht et al., *supra* note 124, at 16 (discussing the “dilemma” judges face in trying to “facilitate” a *pro se* litigant while remaining impartial).

¹²⁶ Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 449 (2009).

¹²⁷ See *Summit Report*, *supra* note 82.

¹²⁸ See Raymond H. Brescia et al., *supra* note 85.

moments, even the most enthusiastic proponents of technological solutions have admitted that there can be significant expense involved with developing these solutions.¹²⁹ If a central problem of legal services is its inadequate levels of funding, why is expenditure on technology assumed to be necessarily a more efficient way of allocating scarce resources than direct expenditure on legal services?

Justification for this tendency to equate a technological solution with increased efficiency has been deemed largely unnecessary, which suggests something significant about the normative assumptions embedded in the TIG program and the literature celebrating it.¹³⁰ Many popular depictions of high technology present it as forward-thinking, futuristic, morally and ideologically neutral, rendering many possible claims about its future potential intuitively plausible.¹³¹ This techno-optimistic impulse, combined with the neoliberal fetish for entrepreneurialism, generates ready acceptance of the idea of legal services providers should be encouraged as producers but especially as consumers of technology. Congress began appropriating funds specifically for TIGs even at a time when overall agency funds were at an all-time low in inflation-adjusted dollars.¹³² However, by limiting the recipients discretion over the funds to the implementation of technological projects, it allowed TIGs to be recast from a pure social welfare expenditure—disfavored in neoliberal discourse for its tendency to induce an unhealthy dependency on the state for services that ought to be provided by individuals for themselves—to a means of seeding economic growth by creating a new market for technological developments, ultimate control over which remain in private hands.¹³³

Ultimately, while legal representation remains difficult to commodify, the incorporation of technology into the provision of legal services allows the funding nominally allocated to that purpose to “trickle up” to the private firms who develop, market, and maintain these

¹²⁹ Staudt, *supra* note 86, at 1145 (“This emerging and fully transformative model for delivering legal information and legal services to low-income people requires a significant investment in core technologies.”).

¹³⁰ See *supra* notes 96–105 and accompanying text.

¹³¹ Staudt, *supra* note 86, at 1145.

¹³² See 2013 LSC by the Numbers, *supra* note 41.

¹³³ See Michael J. Carbone, *Critical Scholarship on Computers in Education: A Summary Review*, in CRITICAL APPROACHES TO INFORMATION TECHNOLOGY IN LIBRARIANSHIP 52 (1993) (noting the potential for a “transform[ation] into a lucrative market for technological innovation”).

tools.¹³⁴ This is true not only in the case of the direct expenditure of the grant to create the new program, which, in the grand scheme of the federal budget, constitutes a fairly negligible amount.¹³⁵ The development of new technological “initiatives” can lock grant recipients into continued dependence on commercial vendors for service and updates, requiring the agency to continue spending scarce discretionary funds on continued maintenance over a number of years even after the initial funds have been spent. Through these mechanisms, private firms are afforded an ongoing and not altogether transparent voice over the agency’s continuing priorities.¹³⁶

CONCLUSION

The access to justice movement in the United States took root in the mid-20th century welfare state and revolved around the creation of a federally funded legal aid program.¹³⁷ However, the history of publicly funded legal aid was punctuated by acrimonious political battles almost from the start. Eventually, Reagan’s presidential administration coupled a revanchist posture toward the Legal Services Corporation with a more general anti-welfare philosophy to induce a long period of decline in funding for legal aid from which it has never recovered.¹³⁸ This decline, coupled with the broader pattern of rising wealth inequality, have contributed to the widening “justice gap” in America.

While contemporary access to justice initiatives are nominally concerned with alleviating the justice gap, these measures now tend to proceed from a narrow neoliberal frame wherein both poverty and inadequate financial support for public institutions and programs are taken as a given. In years past, the goal of legal aid, especially when formulated as the concern with *equal* access to justice—carried with it a reminder of one of the tensions that lies at the heart of the American

¹³⁴ For a discussion of the relationship between state programs and the upward redistribution of wealth, see Werner Bonefeld, *Free Economy and the Strong State: Some Notes on the State*, 34 *CAPITAL & CLASS* 15, 16 (2010).

¹³⁵ For example, in 1998 the overall federal budget comprised over 1.3 trillion dollars. See H.R. Con. Res. 84, 105th Cong. (1997).

¹³⁶ In a more obvious sense, LSC has also afforded Information Technology firms a privileged voice in setting policy agendas through participation in the TIG conferences and summit. Attendance rosters from the 2012 Summit on the Use of Technology to Expand Access to Justice indicate that a significant number of the participants in the by invitation only program were senior officers in technology firms, there was not a single participant in the program drawn from the rank and file of legal aid attorneys or their clients. See *Summit Report*, *supra* note 82.

¹³⁷ See *supra* Part II.

¹³⁸ See Falk & Pollak, *supra* note 26.

justice system: in a legal system predicated on adversarial process, where freedom from state infringement on the ability to hire the best counsel that money can buy is a right regarded as sacrosanct, inequalities in wealth are all but guaranteed to affect outcomes in the courts. By working to resolve this tension without addressing the underlying problem of inequality, the uncritical embrace of neoliberalism within the access to justice movement serves to undermine other possible visions of legal aid (and the legal profession more broadly) as a democratizing force capable of challenging the extant class structure.

As federal funding for legal services—along with the other tattered remnants of the American welfare state—have once again come into the cross-hairs of a presidential budget proposal, it is likely that legal aid lawyers along with other public service providers will continue to face intensifying downward pressure to “do more with less” in the coming years. While the forceful rejection the ideological framework in which such austerity measures take place is not a sufficient condition for successfully resisting those measures, it is undoubtedly a necessary one.