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Investigating Access to Justice, the Rural Lawyer Shortage, and Implications for Civil and Criminal Legal Systems

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Introduction

The phrase “access to justice,” coined in 1978, was defined as equal access to “the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state” (Cappelletti & Garth, 1978). Four decades later, use of the phrase has proliferated, along with the abbreviation A2J. Many U.S. stakeholders and scholars study A2J using simple metrics, e.g., number of people eligible for free civil legal assistance, size of public defender caseloads, though there are serious gaps in basic data, e.g., the number of civil cases filed each year (Sandefur, 2016a). Others have developed more sophisticated approaches, deploying mixed methods, qualitative studies, and the occasional ethnography to get at the multi-faceted reasons inequities persist (Hubbard et al., 2020; Legal Services Corporation [LSC], 2017b; Statz et al. (in press); Statz, 2021; Young, 2020). Randomized control trials are now being used, though not without controversy (Access to Justice Lab, n.d.; Albiston & Sandefur, 2013; Karp, 2021). Legal scholars are more likely to survey caselaw to supplement empirical A2J projects, though a widespread understanding exists that looking to reported cases to track the incidence of a phenomenon is of limited use because many judicial decisions are not reported.

Many issues implicated by A2J undermine parity in both civil and criminal justice systems. These issues include language access barriers; the irregular or infrequent presence of judges, including judges without legal training; and the rural lawyer shortage (Kang-Brown & Subramanian, 2017, p. 19; Pruitt et al. 2018; Pruitt & Colgan 2010; Southern Methodist University Deason Center, 2020). Further, life challenges such as instability in employment, housing, driving privileges, food security, and immigration—all of which may be remedied with civil legal assistance—may lead to involvement in the criminal justice system (Sudeall & Richardson, 2019, p. 2117). Thus, a “holistic” model of criminal defense seeks to resolve civil legal needs to prevent future criminal justice entanglement (Steinberg, 2005).

Many justice system deficits have been aggravated in the era of COVID-19 (Shanahan et al., 2020). These include spatial inequality in the availability of technological infrastructure to facilitate e-filing and remote court appearances. Indeed, the pandemic has heightened awareness of several factors where rural litigants, lawyers, and courts may lag, including inferior availability of broadband and cellular connectivity.

This chapter begins with a broad introduction to A2J before turning a geographic lens on the A2J landscape and highlighting spatial and place-specific issues as a prelude to discussing rural deficits, including the lawyer shortage. The chapter concludes by discussing rural criminal justice, with a focus on indigent defense. Tribal courts are beyond the scope of this chapter.

What We Measure When We Assess Access to Justice

The A2J concept has evolved over decades to consider an array of structural issues. Some are material and visible, such as barriers experienced by people with disabilities, e.g., lack of elevators or the absence of a sign language interpreter. Others are quite intangible, such as legal

consciousness—the extent to which people understand that the law may provide a solution to a problem they face (Sandefur, 2008; Sandefur, 2016b, p. 449). Still, the most prominent A2J issue remains whether someone can afford a lawyer. The U.S. Supreme Court in *Gideon v. Wainwright* (1963) dictated that states must provide a lawyer to any criminal defendant too poor to afford one, but no equivalent right exists in civil matters. This distinction between civil and criminal systems has spawned the “civil Gideon” movement, which advocates that the state provide free legal counsel when litigants in particular types of civil cases, e.g., housing, termination of parental rights, cannot afford one (CAL. GOV'T CODE ANN. § 68651, 2021; Sabbeth, 2018).

Thus income is an oft-referenced metric. Indeed, conversations about A2J often begin with availability of federally funded “legal aid,” the provision of free civil legal services to those whose income is less than 125% of the federal poverty line (FPL). As of 2017, when 60 million people were eligible for free civil legal services, a family of four had to earn less than \$28,000 to qualify (LSC, 2017b, p. 6). The Legal Services Corporation (LSC), the federal entity that dictates 125% FPL income eligibility, also limits the types of work funded organizations can do, precluding, for example, immigration and criminal defense (LSC, n.d.). These limitations mean that LSC-funded legal aid providers cannot meet the legal needs of all individuals, even among those below the income threshold. Based on intake data gathered by its 133 grantees over a six-week period, LSC concluded that 86% of civil legal problems received inadequate or no legal help because legal aid organizations lack sufficient resources (LSC, 2017b, p. 6).

Yet many who do not qualify for legal aid’s miserly income threshold also cannot afford to hire an attorney. This population is often referred to as “modest means.” Some legal aid organizations forego LSC funding and adjust their income threshold to serve this population, a phenomenon more common in areas with a high cost of living (Sandefur & Smyth, 2011, p. 10). Pro bono (free) and low bono (reduced fee) legal assistance, which is tracked by the ABA and also by many state authorities governing lawyers, alleviates some of this population’s need (American Bar Association [ABA], 2018).

These phenomena are reflected in growing numbers of litigants appearing in courts pro se, that is, without legal representation. In 2013, for example, 98% of New York tenants in eviction cases and 95% of parents in child support cases were unrepresented (LSC, 2017b, p. 9). In California, about 85% of the 450,000 individuals who use court-based self-help programs earn less than \$3,000 a month; 70% earn less than \$2,000 (Judicial Council of California, 2019, p. 2).¹ In spite of the theoretical availability of free services for indigent defense, up to 40% of California misdemeanor defendants represent themselves, at least initially to enter a plea (p. 1).

Early studies assessed a civil “justice gap” by simply comparing two data points: the ratio of legal aid attorneys to the low-income population and the ratio of private attorneys providing services to the general population (LSC, 2009, p. 19). Scholars and stakeholders have since developed more sophisticated methodologies. The LSC (2017b) often speaks in terms of “unmet legal need,” defined as “the difference between the civil legal needs of low-income

¹ An informal survey of attorneys practicing in small cities in California revealed that the cost of hiring a lawyer for a family law, estates and trust, criminal defense, or eviction defense matter ranges from \$150/hour to \$350/hour, depending on location, expertise of lawyer, and what the market will bear. In one impoverished California county, family lawyers regularly required a retainer of \$4000 to \$5000. Flat-fee arrangements are increasingly common for modest-means clients. One national report indicates the range of average hourly rates per state, with no differentiation between rural and urban, runs from \$175/hour to \$380/hour. (Clio, 2020, p. 80).

Americans and the resources available to meet those needs” (p. 6). Most recently, the LSC assessed that need by presenting respondents “with an extensive list of specific problems that usually raise civil legal issues” and asking whether they or anyone in their household had, in the past 12 months, experienced any of a range of problems related to health, employment, wages, estates, family, housing, or disability (p. 63). Screening phone calls, online forms, and face-to-face interviews were used to survey approximately 2,000 adults in households at or below 125% FPL (p. 40). The most common problems reported were health, consumer and finance, and rental housing issues (LSC, 2017a). Many individuals reported not seeking legal help because they believe they can handle their problems on their own or they do not know where to get help (p. 33).

The State Bar of California (2019) is the rare state to have conducted its own Justice Gap study. Modeled on LSC’s undertaking, California nevertheless expanded its scope to interview 3,885 Californians across all income levels and included questions about civil immigration legal needs (p. 6). The California study concluded that 60% percent of low-income Californians face at least one civil legal issue in a year, and 23% face six or more (p. 51). Yet, 85% receive inadequate or no legal assistance (p. 7). Those at or below 125% FPL were more likely (60%) to report at least one problem, compared to those above 125% FPL (54%) (p. 8). Both LSC and California studies tracked rural-urban difference among responses but did not find significant variations.

The Turn to Geography and the Rural Lawyer Shortage

A geographic turn in A2J scholarship and policymaking emerged about a decade ago. In 2011, an American Bar Foundation (ABF) report observed, “geography is destiny: the services available to people from eligible populations who face civil justice problems are determined not by what their problems are or the kinds of services they may need, but rather by where they happen to live” (Sandefur & Smyth, 2011, p. 9). The report presented an A2J profile of each U.S. state, noting the number of active attorneys and tracking the presence of vulnerable populations, including those who are LSC eligible (125% FPL), elderly, American Indian and Alaska Native, veterans, homeless, over age 5 with any type of disability, foreign-born, or living with a diagnosis of HIV or AIDS. Each profile also documented the presence of legal assistance hotlines, organized pro bono programs, and high-volume law school clinics, as well as the technological means for accessing legal services, as through web-, phone-, and court-based intake systems. Lastly, the profiles tracked internet access and literacy rates.

A more recent project builds on the ABF model by literally mapping factors associated with A2J, but doing so at the scale of the county. Georgia State University’s Access to Justice Center created an interactive map that shows a range of metrics: population; number of active lawyers; the legal aid organization functioning in that county, along with how many lawyers work there and number of counties the office serves; the percentage of households living within half a mile of public transit; the percentage of households without a vehicle; the percentage of the population who do not speak English at home; the percentage of the population at or below the poverty level; and the percentage of households without internet access (Wigington & Weitz, 2017). The map facilitates easy comparisons among counties. After all, every county has a courthouse, and as former Chief Justice Gilbertson of the South Dakota Supreme Court once remarked, a “judicial system with no lawyers faces the same grim future” as a hospital with no doctors (Bronner, 2013).

As illustrated by the Georgia map referenced above, the spatial turn in A2J scholarship eventually led to attention to scales lower than that of the state. This coincided to some extent with the burgeoning awareness that many rural areas were experiencing attorney shortages, another place-based challenge that has drawn attention to a range of rural socio-spatial and service deficits (Statz & Termuhlen, 2020). When, in 2013, South Dakota became the first state to pay lawyers to practice in rural places, it used the scale of the county to designate underserved areas, specifically counties with fewer than 10,000 residents (Pruitt et al., 2018, p. 105). While administratively convenient, that scale has proved less than ideal when county sizes vary greatly, even within one state.

When California mapped lawyer presence in 2016, it used a scale smaller than the county, a creature of California bureaucracy called Medical Service Study Areas (MSSA), which clusters census tracts and characterizes them as “urban,” “rural,” or “frontier” (Pruitt et al., 2018). The MSSA scheme defines rural as 50,000 or fewer residents with a density lower than 250 residents/square mile. Frontier is fewer than 11 residents per square mile. By these definitions, 13% of adult Californians reside in rural or frontier areas, where 18 percent of residents live at or below 125% of FPL (State Bar of California, 2019). In sharp contrast, by the narrower definition of the U.S. Census Bureau, less than 2% of California’s population is rural. The more robust rural population associated with the California definition may prove critical when rural interests lobby for funding and other supports, especially in an overwhelmingly metro-centric state like California.

Attorney data for all states were not mapped until 2020 when the ABA published its Legal Deserts report (ABA, 2020). Despite this delay, concern about the rural lawyer shortage has driven the emergence of additional metrics. Attorney counts are increasingly assessed in relation to population, e.g., lawyers per resident, and sometimes in relation to land area, e.g., lawyers per square mile (Pruitt et al., 2018; Pruitt et al., 2016). In addition, policy makers are paying more attention to the age of attorneys, as a “graying bar” indicates that an attorney shortage is on the horizon or about to worsen (New York State Bar Association, 2020).

In addition to age, for which year of bar admission may be the most readily available proxy, it is helpful to track status as active or inactive, as well as the type of work attorneys regularly do (Perlman, 2019). This is because an estate planning attorney may not be competent to represent someone in a criminal matter, and vice versa. Further, a simple attorney census based on state bar records may not indicate whether an attorney is in a private practice and therefore available to serve clients, something prosecutors, public defenders, judges and in-house counsel cannot do.

More research into the causes and consequences of the rural lawyer shortage would be beneficial. The reasons U.S. lawyers are not choosing rural practice has rarely been studied systematically (Pruitt et al., 2016; Pruitt et al., 2018). One consequence of the rural lawyer shortage that policymakers should systematically measure is the cost to public coffers when local lawyers are not available for hire. The shortage proves costly to government entities when they need counsel to advise on their operations or when they must appoint counsel to represent parties in child welfare matters, involuntary civil commitments, and criminal matters, among others (Haksgaard, 2020). When no local attorneys are available or those present have conflicts of interest, government entities must pay attorneys to travel from neighboring jurisdictions, thus raising the costs borne by taxpayers (Pruitt & Colgan, 2010, p. 316). Indeed, this practical, fiscal concern was a significant consideration when South Dakota decided to pay lawyers to move to

and work in rural areas (Pruitt et al., 2018). The next section discusses this issue in the context of indigent defense.

Access to Justice and Criminal Process

A series of mid-twentieth century decisions by the U.S. Supreme held that the state must provide a lawyer, free of charge, to every criminal defendant who cannot afford one (*Argersinger v. Hamlin*, 1972; *Gideon v. Wainwright*, 1963). While the LSC defines “low-income” eligibility as 125% FPL, no national authority defines “indigent” or “poor” for purposes of free legal representation in a criminal matter. Because states decide who qualifies for a public defender, an entity seeking to control costs might determine that few people are too poor to hire a lawyer (Gross, 2013; Spangenberg et al., 1986). States also have latitude to decide how to implement the constitutional mandate. Roughly half the states have delegated the responsibility to county governments, offering varying levels of financial and administrative support (National Right to Counsel Committee, 2009; Stevens et al., 2010; Strong, 2016).

One consequence of this devolution is that national data are hard to come by, a fact lamented by organizations dedicated to improving indigent defense (Beeman, 2014). Less often observed is that available “national” data are based only on the experience of urban areas. The most authoritative statistic for the proportion of felony defendants who use indigent defense services is 82% (Harlow, 2000, p. 1). The Bureau of Justice Statistics (n.d.) study on which the number is based is derived from a sample of urban counties’ 1996 data. It is thus not only dated, it reveals nothing about the rural experience.

The story of how this 82% figure was calculated should stand as object lesson for anyone studying indigent defense. Where quantitative, administrative data are available, they are often collected in a non-uniform fashion, making apples-to-apples comparisons difficult. Further, rural places are least likely to supply data readily because they lack infrastructure for gathering it.

While the omission of rural places from national data sets can be frustrating, the locally controlled nature of indigent defense services is an opportunity for the study of rurality’s relation to criminal justice. Indeed, with indigent defense, the extent of local control is, in some states, explicitly greater in rural jurisdictions. In Nebraska, for example, counties with more than 100,000 residents must establish public defender offices, but smaller counties have discretion whether to do so (Neb. Rev. Stat. Ann. §23-3401). Texas law specifies that an indigent defendant requesting counsel must have it appointed within a day in counties with populations greater than a quarter million but within three days in smaller counties (Tex. Code Crim. Proc. Art. 1.051(c)).

Given appropriate data on the state of indigent defense at the local level—whether its funding, its delivery, or its impact—it is relatively straightforward to look at the relationships among those data and the characteristics of places, including degree of rurality. Monitoring done by state oversight agencies such as that in New York is illustrative. That state’s Office of Indigent Legal Services (2013), created in 2011, prioritized gathering caseload, staffing, and expenditure data about those providing defense services. Graphing the results, the picture was stark in two senses. First, a comparison to national standards revealed that sixty-four of seventy-one public defender offices had excessive caseloads, a metric oft-discussed in indigent defense (Burkhart, 2017). Second, and more importantly for scholars of rurality, the variety across those sixty-four offices was enormous. Some were close to caseload standard compliance, with attorneys taking perhaps a few extra cases here or there; others had attorneys taking on four times as many cases as they could ethically handle. This kind of systematically gathered,

geographically specific data is of considerable value to the scholar attuned to rurality because of the opportunity to look for associations between A2J and quality metrics on the one hand and rurality on the other.

What we know generally about rural jurisdictions' provision of indigent defense services is not reassuring: the rural lawyer shortage, distance, and inability to achieve economies of scale in service delivery all increase costs. Pruitt and Colgan's (2010) detailed analysis of five Arizona counties, for example, revealed a pattern of generally declining spending on indigent defense as counties became more rural. Their conclusions were based on a wide variety of economic, demographic, and political factors, along with details—some derived from interviews—on who provides services and on what terms. Davies & Worden's (2017) work supplemented this picture with an analysis of fifty-seven New York counties. Their analysis controlled for many of the factors thought to mediate the effects of rurality, e.g., tax base, poverty rate. In doing so, the study revealed another important, underlying reality: Providing representation in rural counties costs significantly *more* than elsewhere, in part because the rural lawyer shortage necessitates attorney travel. Davies & Clark (2018) reported that attorneys in one rural county in central New York traveled an average of 195 miles per case.

Other scholars have systematically reviewed public documents, statutes, and case law to document strategies for reducing costs. Haksgaard (2020) reviewed details of how appointed counsel are compensated, studying hourly rates specified by statute to reveal how low hourly rates can undermine the fiscal feasibility of rural practice when attorneys are highly dependent on this work. Romero (2021) analyzed several rural jurisdictions' "request for proposals" to provide indigent defense in order to document those jurisdictions' cost-cutting strategies. Typical of scholarship by law professors, Romero also references case law. Finally, her work reflects the emerging trend of using media reports about criminal cases to emphasize scholarly points, with a view to attracting policy maker attention and pressing for reform (Pruitt & Colgan, 2010).

Davies and Clark (2018) used data from the Texas Indigent Defense Commission (TIDC) to investigate the connection between rurality and indigent defense service provision in Texas' 254 counties. TIDC tracks the proportion of defendants in criminal courts using indigent defense counsel. The analysis revealed that defendants in rural counties used indigent defense counsel at statistically significantly lower rates than urban defendants, though the reasons for this difference are unclear.

Various studies make logistical and financial obstacles for reform clear. Those obstacles can be more formidable in rural places, where taxpayers may be more averse to robust indigent defense funding. Yet researchers have documented highly successful indigent defense reform in some rural areas, reform that is typically the product of cooperation between state and local governments in support of motivated and capable local officials. Identifying these successes frequently involves analyses of qualitative data such as interviews and systematic court observation. These are often partnered with quantitative, administrative data to allow for verification that reform actually happened, i.e., by establishing that defense counsel was indeed more frequently present or did more work.

Worden and colleagues studied a program of reform to bring "counsel at first appearance" (CAFA), which sought to assure presence of a defense attorney at a defendant's side no later than the earliest appearance in court (Worden et al., 2017). In this multi-method study, the authors tracked the roll-out of CAFA and its impact on bail decisions statistically, while also

interviewing local attorneys and judges and directly observing their work in court. CAFA was generally a success in that judges either released more defendants or reduced bail amounts (Worden et al., 2018; 2020). One reason for this success in rural areas is that local leaders stepped forward to push the reform (Worden et al., 2016). These strengths in locally-run indigent defense systems might be overlooked by national reformers who frequently call for increased centralized oversight and regulation of the defense function (ABA, 2004), but they were detected by combining statistical analysis with interviews. Mixed methods have similarly facilitated scholars' ability to assess quantifiable financial outcomes such as funding (Davies & Worden, 2017)

The survey is another method researchers have used to tap the expertise of rural residents. Asking rural officials—defense lawyers, prosecutors, judges—how they deliver justice may be the only way to begin to grasp what is happening. In the late 1990s and early 2000s, Butcher and Moore surveyed thousands of Texas judges and attorneys, laying critical groundwork for reforming that state's indigent defense system (Butcher & Moore, 1995; Butcher & Moore, 2000). Their findings—including that a third of judges believed attorneys were more likely to be appointed to lucrative cases if they donated to judicial election campaigns—revealed in profound detail the contours of a system which, until that time, had been unknown. Indeed, their use of surveys was recently validated by data confirming these early surveys' contention regarding the relationship between election contributions and appointments (Sukhatme & Jenkins, 2020).

Similarly consequential surveys have been performed in Michigan, revealing that around half of attorneys struggle to find confidential meeting places for conferences with clients (Siegel, 2017). The same is true in other states, where surveys have sought attorneys' opinions regarding resource needs (ABA et al., 2017; ABA & RubinBrown, 2017). Researchers have used surveys to particular effect in rural jurisdictions because the starting point is often no data at all. The dearth of data is due to the typical lack of electronic data systems, a resource associated with urban centers. Provine (1986) used surveys to reveal and explore the attitudes and behaviors of non-lawyer judges in upstate New York. Years later, researchers surveying judges in local New York courts—many of them non-lawyers—were able to deduce how often counsel was present during ad hoc first appearances (Davies & Clark, 2017).

Conclusion

It is not surprising that tracking unidimensional quantitative metrics is the most common method that stakeholders and scholars use to research A2J. Yet quantitative data can be hard to come by in rural places without personnel or infrastructure to gather them consistently and reliably. Remedying this deficit is possible only at enormous cost and cannot be accomplished quickly. Further, these data ultimately reveal little that we need to know to understand the breadth, depth and complexity of inequities, including place-to-place variations. What is likely to be more useful is deploying qualitative methods, including interviews and surveys, which have the capacity to capture and reflect the richness of rural places and those who populate them. The urgency of these investigations is likely to be heightened in the wake of COVID, which has profoundly challenged people, attorneys, and justice systems, along and across the rural-urban divide.

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