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The Digital Divide and Equal Access to Justice

Mark Lloyd

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The Digital Divide and Equal Access to Justice

by

MARK LLOYD*

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I. Introduction

This is the Court of Chancery; which has its decaying houses and its blighted lands in every shire; which has its worn-out lunatic in every madhouse, and its dead in every churchyard; which has it ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to monied might the means abundantly of wearing out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an

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honourable man among its practitioners who would not give - who does not often give - the warning, "Suffer any wrong that can be done you, rather than come here!"
Charles Dickens, *Bleak House*, 1852

Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. Hugo Black, *Griffin v. Ill.*, 351 U.S. 12 (1956).

We have not progressed especially far since the time Dickens decried the bleak house of justice. Despite the promise of equal justice for all emblazoned at the entrance of the Supreme Court, “monied might” still has the means of “wearing out the right” and those who need the courts protection are still wisely counseled: “Suffer any wrong that can be done you, rather than come here!” The advent of new communications technologies and the transformations they have brought to a myriad of social institutions begs the question — can new technology bring us closer to solving the “age-old problem” of equal justice? Will the problems of equal justice be exacerbated by unequal access to technology? If the digital divide is solved, if poor people are given access to computers and the telecommunications services to connect them, will that solve the problem of equal access to justice?

There should be little question but that communications technology can be a boon to civil society. Educators and scientists have found ways to make cyberspace extend the reach of both human wisdom and exploration, making available our finest libraries and museums, as well as up-to-the-second activities of NASA and the human genome project. However, as government, civil and religious forces have waned, the dominant and perhaps determinant forces behind how we use this technology and how it develops are global corporations. It should not be surprising that commercial market forces have solved a number of “consumer” problems that never before really seemed like problems. To wit: in the process of exploring the commercial possibilities of a communications system designed to send information even in the event of a military attack, American genius has found a way for us to purchase movie tickets without having to speak to a human being. The same force behind this seemingly innocuous convenience has also made the grossest excesses of pornography available to our children. There is little remarkable in the observation that new technologies offer both solutions and problems. Note, however, that these particular
solutions and problems were not created by technology *per se* but by commercial market forces, little hindered by other social forces.

There has been much work looking at the problems and solutions of new communications technologies concerning business and government, and far too little focus on what light-speed networked communications means for social programs. Despite all the talk about the digital divide, considerations of the real communications needs (both access to information and voice) of most Americans are warped by the twin paradigms which dominate current discourse: technology as road to paradise and laissez-faire economic (presently disguised as "market economics") theory as the road map. If it is true that the commercial market determines the current direction of technology, it is only because business leaders (today's monied might) have an excessive amount of power over our democratic representatives who make policy.

The problem of the diminished access poor people have to communications technology is not really a problem about access to entertainment, computer video games or DVD players. The problem is tied up in the notion that what is "digital" (communications technology) will become an integral part of our lives as students, workers and citizens. This article challenges the current market-centered technology-happy discourse by exploring some of the dangers and limits of new communications technology as a corrective to a problem that has long divided rich and poor, a problem that defines the degree to which we can truly call ourselves a civil society. It will also explore the real and important opportunities made possible by these new technologies. However, the first section will spend some time describing the problem of equal access to justice we would like new digital communications technologies to solve.

II. The Problem: Providing Needed Legal Services to Most Americans

Under these conditions the defense is naturally placed in a very unfavorable and difficult position. But that too is intentional. For the defense is not actually countenanced by the Law, but only tolerated, and there is even some controversy as to whether the relevant passages of the Law can truly be construed to include even such tolerance.

-Franz Kafka, *The Trial*, 1925
The poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away.
-Robert Kennedy

A. Millions of “Disconnected” Americans

As we begin an examination into equal access to justice, let us consider the courts as lawyers, and separate, at least for the moment, civil and criminal courts.

Regarding civil legal needs, Justice Sandra Day O'Connor told the American Bar Association in 1991:

Every day, all over the country people lose their homes or apartments when the law says they should keep them, and people can’t feed their children when the law says they should be able to feed them. People don’t know the rights they have; even if they know the rights they have, they don’t know how to enforce them. And it all has one cause — many people desperately need legal services but can’t afford to pay.

In 1993 the American Bar Association conducted a national survey to “learn about the legal needs of Americans, what they do about those needs and how satisfied they are with the outcomes.” A few years later, in its “Final Report on the Implications of the Comprehensive Legal Needs Study,” the ABA concluded that “our civil justice system is fundamentally disconnected from the lives of millions of Americans.”

The ABA placed special emphasis on the situations facing both poor and moderate-income households. They defined the poor as those with household incomes below $25,000. Moderate income households were defined as those between $25,000 and $65,000. According to the latest census reports there are over 65 million American households, two-thirds of the population, making $65,000 or less each year. The ABA found that each year about half of poor and moderate-income households face a serious legal situation, but only about one-third of this half bring their problem to either an


attorney or to court. Therefore, roughly 20 million Americans with real legal needs doubt that they will be helped by lawyers and the courts, and they doubt that they can afford the cost. While many have reason to doubt, others simply do not understand that they have rights which a lawyer or the court might help protect.

B. Federal Support for the Poor in Civil Cases

It is arguable that the poor have more legal resources available to them than those with moderate incomes. Beginning with the Johnson Administration’s support of the Office of Legal Services in 1965, and continuing to the present with the Legal Services Corporation, federal funding has supported access to civil courts by the poor.

Legal services can be credited with advancing substantial legal rights for the poor. Landmark court decisions are directly attributable to the work of the LSC: Shapiro v. Thompson,\(^5\) which ensures that public assistance recipients will not arbitrarily be denied benefits; Goldberg v. Kelly,\(^6\) which requires the government will follow due process when seeking to end benefits; and Fuentes v. Shevin,\(^7\) which ensures that financial institutions and other private parties must follow due process when seeking to repossess property.

LSC estimates that about 2400 offices in the country are supported by the Legal Services Corporation. Today, limited legal assistance is provided to persons with an income equivalent to 125% of the federal poverty level or below. In the contiguous 48 states, a family of four with a household income of $22,063 qualifies.\(^8\)

If you are unfortunate enough to benefit from LSC funds, there remain a few well-placed hurdles that will determine whether your particular circumstance can be addressed. Congress has placed many restrictions on the recipients (lawyers or community groups) of LSC funds. For example, LSC will not provide funds to recipients “that defend persons in public housing eviction proceedings, who have been charged with certain illegal drug activities, regardless of the source of the funds used to pay for the representation.”\(^9\) Nor can LSC recipients initiate or participate in any civil class action.\(^10\)

\(^5\) Shapiro v. Thompson, 394 U.S. 618 (1969)
\(^7\) Fuentes v. Shevin, 407 U.S. 67 (1972)
According to Alan W. Houseman, Director of the Center for Law and Social Policy, congressional cuts in appropriations and restrictions on the work of legal services are the result of a "substantial and unrelenting attack" by a well-organized and "well-financed cadre of right wing activists." In the absence of countervailing organization and funding, Houseman is left to declare that the "era of legal services is over."\(^1\)

C. Pro Bono Services

Beyond services provided by LSC, lawyers in private practice offer free or reduced fee services (pro bono services) to the poor. With few exceptions the private bar has adopted rule 6.1 of the ABA Model Rules of Professional Conduct. That rule encourages public interest legal service "at no fee, or a reduced fee to persons of limited means . . ."\(^2\) However, as the Illinois bar argues, "an appropriate disciplinary standard regarding pro bono and public service is difficult, if not impossible to articulate. That ABA Model Rule 6.1 itself uses the word "should" instead of "shall" in describing this duty reflects the uncertainty of the ABA on this issue."\(^3\)

In addition to encouraging pro bono service in their model rules, in 1993 the ABA challenged the nation's five hundred biggest law firms to contribute 3 to 5 percent of their billable hours. Many of the largest firms declined; by 1995, only 171 of the 500 largest firms had agreed.\(^4\)

The American Bar Association bills itself as "the largest voluntary professional membership association in the world." It has more than 400,000 members. However, despite a continuing effort to encourage pro bono activity, including the current ABA President's focus on pro bono work, the ABA estimates that only 130,000 lawyers take some pro bono or reduced-fee cases.\(^5\)

Quoting again from the ABA's Agenda for Access: "Even with their combined efforts, the private bar and publicly-funded legal

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12. Id.
14. Id. at 185.
services programs now serve only a small portion of legal needs reported by low-income households.”\textsuperscript{17} The problem is clear enough. Most Americans simply do not have adequate access to our judicial system, and neither government supported legal services nor private pro bono efforts are sufficient.

D. The Inadequacy of Constitutional Protections

What most Americans might consider to be a constitutional right of access to justice is very limited in the view of the Supreme Court, particularly regarding civil proceedings. However, the ideal of equal access to justice has some real, though fading, resonance in criminal proceedings. I begin here with a brief tour of the most pertinent provisions established in the Constitution.

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense.”\textsuperscript{18} The Warren Court generally interpreted this to mean that upon request the state shall provide a defendant with an attorney at the early stages of his interactions with police and the courts through to his probable conviction, sentencing, and first appeal.

The Fifth Amendment reads, “No person shall ... be compelled in a criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law.”\textsuperscript{19} Police and courtroom television dramas filled with phrases such as “taking the Fifth” and “Miranda warnings” have made this part of the Bill of Rights well-known by most Americans. Thanks to the seemingly endless variety of police dramas (Kojac, NYPD Blue, etc.), a person unfortunate enough to be arrested knows he has a right to remain silent, the right to be told that any statement he makes may be used against him, and the right to an attorney provided by the State if he cannot afford one.

In addition to applying the Bill of Rights to the states, the Fourteenth Amendment guarantees that “no State shall ... deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{20} It is this part of the Bill of Rights that might more broadly be perceived to protect access to justice, even beyond

\textsuperscript{17} Id.
\textsuperscript{18} U.S. Const. art. VI
\textsuperscript{19} U.S. Const. art. V
\textsuperscript{20} U.S. Const. art. XIV
criminal proceedings. But the courts have not generally interpreted either “due process” or “equal protection” to mean free-access to the courts or state-provided legal representation before a judge or jury. For example, the Court has limited access to civil courts to divorce proceedings.

In *Boddie v. Connecticut*, the Supreme Court held Connecticut’s requirement of a $60 fee to sue for divorce unconstitutional. Justice Harlan wrote for the majority that “given the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek a dissolution of their marriages.” Justice Brennan sought to expand this ruling beyond divorce proceedings, but there was not a majority for that assertion.

In *United States v. Kras*, the Court upheld a provision of the Bankruptcy Act requiring individuals seeking bankruptcy protection to pay costs and fees of about $50. Kras, an indigent man in sole care of several children, including one who was gravely ill, was denied his application to file for bankruptcy despite his inability to pay the required court costs. Justice Stewart wrote in dissent:

[The] bankrupt is bankrupt precisely for the reason that the state stands ready to exact all of his debts through [the] panoply of [creditor] remedies. [In] the unique situation of the indigent bankrupt, the Government provides the only effective means of his ever being free of these Government-imposed obligations. [Unless] the Government provides him access to the bankruptcy court, Kras will remain in the totally hopeless situation he now finds himself. [The] Court today holds that Congress may say that some of the poor are too poor to even go bankrupt.

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22. Id. at 387-88. “A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. [The] right to be heard [extends] to all proceedings entertained by the courts.”
23. 409 U.S. 434 (1973). Justice Marshall joined Stewart’s dissent, but took particular exception to the majority’s cavalier assumption that Kras could have saved to pay the filing fee. “It may be easy for some people to think that weekly savings of less than $2 are no burden. But no one who has had close contact with the poor can fail to understand how close to the margin of survival many of them are. A sudden illness, for example, may destroy whatever savings they may have accumulated, and by eliminating a sense of security may destroy the incentive to save in the future.”
Despite how the Supreme Court has interpreted the Constitution, there remains deeply rooted in most Americans a sense of what the Constitution stands for: that regardless of a person’s talents and abilities, regardless of her wealth or father’s status, all who are brought before the court will have a roughly equal opportunity to have their case fairly presented and considered before judge or jury. Mark Tushnet calls this “sense” the “thin Constitution” or populist constitutional law, the relatively small and cohesive set of general principles as understood and embraced by the people rather than the “thick” body of case law and doctrine promulgated by courts and the lawyers. In “Taking the Constitution Away From The Courts,” Tushnet challenges the tradition of judicial review, arguing that the attachment to respect for the Court’s final opinion interpreting the Constitution is due in part to a reverence some liberals have for the anomalous Court led by Chief Justice Earl Warren.24

“Gideon’s Trumpet,”25 by journalist Anthony Lewis, is a perfect example of this reverence. Lewis’ story suggests the power of populist constitutional law when he notes the labor of an indigent drifter, Clarence Gideon, to prove his assertion before a Florida state court that “[t]he United States Supreme Court says I am entitled to be represented by Counsel.”26 Gideon was wrong about what the Court said, but he was right about what at least the Warren Court would say. His populist understanding of the Constitution was unwavering.

The constitutional right to counsel in criminal proceedings has progressed substantially as a result of Gideon’s efforts and the Warren Court. A 2000 study released by the Justice Department reveals that 66 percent of federal felony defendants in 1998, and 82 percent of felony defendants in the 75 most populous counties in 1996, were represented by publicly-financed attorneys.27 In another study, it was reported that an estimated $1.2 billion was spent to provide legal services to criminal defendants in the nation’s 100 most populous counties.28

28. Carol J. DeFrances and Marika F.X. Litras, Indigent Defense Service in Large Counties, 1999, U.S. Dept. of Justice, Bureau of Justice Statistics (Nov. 29, 2000). “Ninety percent of the federal defendants and 75 percent of the defendants in the most populous
Despite the increased public support for criminal defense, Kate Jones of the National Association of Criminal Defense Lawyers (NACDL) writes:

[What] we actually have in almost every state and county across America is token adherence to the right to counsel without concern for the way this right is actually exercised. In many state justice systems (to use a pass from the Supreme Court's recent decision [Bush v. Gore]) “the problem inheres in the absence of specific standards to ensure its equal application.” . . . Countless dedicated public defenders and appointed counsel across the land labor under staggering caseloads and abysmal funding that may not even cover their costs on a case, let alone provide for a reasonable fee. State and local governments increasingly impose new criminal statutes and increase penalties without corresponding increases in resources for an adequate defense. 29

The Rehnquist Supreme Court is not the Warren Court which welcomed Gideon's petition in 1963. Tushnet argues that the Court has simply reverted to its more characteristic “conservative” nature “more or less in line with what the dominant national-political coalition wants.” 30 In the majority opinion of Strickland v. Washington, Justice O'Connor undertook a lengthy review of various standards used to determine whether counsel provided to indigent defendants was effective. The Court ruled that the defendant bears the burden of demonstrating that his attorney failed “a standard of reasonableness” and that the purported error was sufficient to determine the outcome of the trial. 31 The Court reversed an appellate court ruling that defendant Strickland was denied effective counsel in a sentencing proceeding in a death penalty case.

In dissent, Marshall wrote:

It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a “reasonably competent attorney” a reasonably competent adequately paid retained lawyer or a reasonably competent appointed counsel?

competent appointed attorney?\(^3\)

As a result of *Strickland*, David Cole writes, “the Court has destroyed any real meaning of the right to counsel by allowing virtually any attorney • even one who slept through the trial or was drunk throughout the trial • to meet the standard of ‘effective assistance of counsel.’”\(^3\) Moreover, the Court has eroded the right to counsel where defendants may need it most, before indictment but after police investigation. Nor is counsel guaranteed during appeal. “Today,” Cole writes, “after thirty-six years, Gideon’s horn sounds only a distant, and increasingly hollow, echo.”\(^3\)

E. Let the Market Decide?

Judge Richard Posner, renowned as a libertarian leader in what he grandly calls the “Law and Economics Movement,” would argue that any attachment to a populist constitution is idealistic and unhelpful in understanding how law is either created or applied. “The ‘thin’ Constitution,” Posner writes, “the Constitution that the judges do not enforce, might be a more effective vehicle for instilling a civil religion.”\(^3\)

Posner’s religion is constructed of economic formulas to arrive at what he deems to be sensible solutions to the contests real people bring to the courts. However, Posner’s brand of economic formula-making puts him into the trap of the neo-classical school of economists. These economists begin and end with the assumption of fully and unwaveringly rational behavior on the part of economic actors, and that whatever deviations occur from what is rational will be subject to appropriate market corrections. By ignoring historical context (historical context being one of the few strengths of traditional legal analysis), such as racism, sexism, and the distorting impact of poverty, Posner’s seemingly emotionless equations begin to veer toward the absurd.\(^3\) Other economists, most especially Amartya

\(^3\) Id. at 708.
\(^3\) Id. at 71-76.
\(^3\) Id. at 79. One example: in considering the costs and benefits of the display of pornography in the workplace, Posner argues that the benefits allowing maximum freedom of speech outweigh the offensiveness costs. The women “are compensated for having to put up with it, in the practical economic sense that wages reflect the amenities or disamenities of a job as well as the worker’s productivity.” Should we suppose that the
Sen in the tradition of Adam Smith, not only employ equations, but they also take a hard look at the way the market and the market players actually operate. We will do the same; looking not at the high ground of the Supreme Court, the Constitution, and legal theories, but at those small places where most Americans meet the law.

Law remains suspect if only a few can afford its protection, thus equal access to justice would seem to be a fundamental right enjoyed by anyone accused of a crime or anyone upon whom the state would enforce a penalty resulting from some non-criminal act. Unfortunately, our system of justice is similar more to a bazaar, with victory just another good to be bargained for, than to an arena where truth and falsehood do battle.

It is no surprise that when most Americans look at the costs of the law, they do all they can to avoid lawyers and the courts. An inexpensive, uncontested divorce with legal assistance will cost a minimum of $500. A contested divorce can mean thousands of dollars and financial ruin for many Americans. Fighting a well-heeled landlord is a financial impossibility for moderate income tenants, when lawyers' fees often begin at $100 an hour. In these so-called "private" disputes (where the state will ultimately take one party's side over the other, forcing one to give up custody of their child or to pay alimony, forcing the other from their home), the party with the most money to spend is heavily favored to win.

Most legal troubles faced by Americans revolve around consumer complaints and debt. In these situations the civil courts operate as a way to process judgments against the poor. Most small civil actions result in default judgments.\(^{37}\) While there is undoubtedly a realistic assumption that the poor simply failed to pay the debt, many of these judgments result from a failure to understand a summons, or a failure of the process server to deliver the summons in a poor and, no doubt, dangerous neighborhood. There may also be the problem of taking time off work, without pay, to appear at court for a day on the chance that the case will be called. As James Eisenstein writes:

> Even institutions and procedures designed specifically for the poor are not used by them. For instance, they do not utilize small claims courts. Established with the intent of providing the

indigent with a forum in which small claims could be brought without attorneys, intricate rules, or large fees, these courts in practice provide a convenient and inexpensive way for creditors (collection agencies, businesses, and government) to collect small debts from the poor. 38

In the late 1970's Charles Silberman reported that, even in the area of criminal justice, the "economics of private practice tend to militate against real concern for any but affluent clients. Few run-of-the-mill offenders can afford to pay large fees, and the fees paid court-appointed attorneys usually are modest."39 The statistics demonstrating that private defense attorneys are on balance about as successful as public defenders are little comfort when one takes into account that most lawyers in private practice try to offset low fees courts provide through large volume. Successful 'wholesalers,' as they are called, may handle five to ten cases a day, for fees ranging anywhere from $50 per case to $200, $300, or even $500 per case. The only way to handle that kind of volume is to plead everyone guilty; as one private defense lawyer puts it, "A guilty plea is a quick buck."40

A recent series in the New York Times confirms this sad state of affairs in 2001.41

Economists might argue that the trend toward private dispute resolution is a perfect example of how the market meets social demand. The legal economist might argue litigants are exiting the system of justice and choosing an alternative. This is a direct market response to the problem, the ultimate outcome of which will be either a correction of the defects of the judicial product or the creation of an alternative choice.

The reality of private dispute resolution is that only the wealthy can afford to choose it, usually to achieve quick (not just) results. Moreover, it is often imposed upon those who have both little real contract (i.e. economic) power to refuse it and no more ability to advance their own interest through investigation and effective

40. Id. at 303.
41. Jane Fritsch and David Rohde, Legal Help Often Fails New York's Poor, N.Y. Times (April 8, 2001) (This was the first in a three part report published in subsequent days under the titles, For New York City's Poor, a Lawyer with 1,600 Clients, and On Appeals, the Poor Find Little Leverage.).
argument before a private judge than in a courtroom. The economist
should look with a wary eye upon anyone who would seek to stain her
profession with the ancient problem of justice. The unequal
treatment of people at our courts is not a result of market failure and
it cannot be corrected by market action.

Any realistic assessment of the administration of justice in
America can identify the U.S. capitalist market, particularly its
excesses, at work. Any realistic assessment of the operation of the
U.S. market understands that it is not “free,” in the sense that it
operates within the constraints of U.S. law. While the law acts,
weakly I would argue, as a countervailing force, in John Kenneth
Galbraith’s terms, providing limited protections for labor and
consumers from corporate market power and excesses, one can
clearly see the impact of what Madison would call the mercantile
faction on our political choices and thus on our system of justice.

Still, the direction that corporate power would take our
government is in some active tension with fundamental constitutional
protections created for real people. The State of Washington and
other jurisdictions strive to implement policies which reach not
toward marketplace realities but toward Justice Marshall’s
enlightened society. There are jurisdictions with legislators and
lawyers who try to establish what the millions of Gideons have in
mind when they consider their constitutional rights. In these
jurisdictions, members of the public are given greater access to court
information and proper counsel to assist them.42 Regarding capital
criminal justice matters at least, most states public defenders and
court appointed counsel are compensated largely at par with public
prosecutors, and usually have access to a staff of investigators and
social workers to assist them, as well as time to research cases and
properly consult with defendants.43

The efforts of enlightened jurisdictions, the stated concerns of
Congress in establishing the Legal Services Act, and even the pro
bono “requirements” advanced by the ABA, are borne not of an

42. Robert L. Spangenberg and Marea L. Beeman, Improving State and Local
Criminal Justice Systems: A Report on How Public Defenders, Prosecutors, and Other
Criminal Justice System Practitioners are Collaborating Across the Country, U.S.
Department of Justice, Office of Justice Programs, Bureau of Justice Assistance
Monograph (October 1998).

43. The Spangenberg Group regularly monitors compensation and resources for
indigent defense. In their 1999 update on rates of compensation for Court-Appointed
Counsel in Capital Cases at Trial, Kentucky, Maryland, and Mississippi were the only
states with per case maximums which were not also routinely waived. See also Silberman
at 306-7.
acceptance of the American system of justice as a market, but are part of a steady march toward an American system of justice lit by the idea that “all men are created equal.” How will this march toward greater access to justice be helped or hindered by new communications technologies?

III. Considerations of Technology and Equal Access

This country has witnessed a dramatic increase of new lawyers and computers in the last decade - unfortunately for most of us, the lawyers did not get twice as intelligent, twice as fast, and half as expensive every two years!

- Author unknown.

Our inventions are wont to be pretty toys, which distract our attention from serious things. They are but improved means to an unimproved end, an end which it was already but too easy to arrive at; as railroads lead to Boston or New York. We are in great haste to construct a magnetic telegraph from Maine to Texas; but Maine and Texas, it may be, have nothing important to communicate.

-Henry David Thoreau, Walden, or, Life in the Woods, 1854

A. The Faustian Bargain of the Third Wave

Alvin Toffler, along with George Gilder and Esther Dyson, views the approach of new communications technology as the inevitable advent of a new order, a “third wave” resulting in the obsolescence of “all our congresses, parliaments... our courts and our regulatory agencies — in short, all the tools we use to make and enforce collective decision.”

What will this mean to the goal of equal justice for all? Neil Postman argues that “anyone who has studied the history of technology knows that technological change is always a Faustian bargain: Technology giveth and technology taketh away, and not always in equal measure. A new technology sometimes creates more than it destroys. Sometimes, it destroys more than it creates.”

What do we do to adapt new technology to our purposes? We face certain decisions regarding networked communications that are of special importance to a discussion about access to justice. What


information can be collected about the legal problem (physical evidence, emotional distress, data)? Can that information remain private (between the lawyer and the client, or the court and the citizen)? Can the information (legal advice and personal information) be authenticated?

As Lawrence Lessig notes, the limits and capabilities of computer technologies are not functions of natural law, "[it] is as it is designed."47 Thus, the answers to the above questions depend upon the choices we make, and failure to choose is simply another choice. While I do not quibble with the core of Lessig's point, it is important to recognize that "natural law" is, in a sense, built into the design. To the extent that computer technologies are limited or at least effected by the tendencies of their creators, flawed human beings, the computers replicate, in ways that are often not discovered until very late, human flaws. In addition to unforeseen errors, computer design reflects subtle and often unacknowledged value or moral choices. As we have seen with standardized exams, bias is built in.48 It is transferred into the code, as DNA is transferred from parent to offspring. Thus, while we can make intelligent choices regarding design architecture, there is perhaps little choice about the inevitable bias or flaw that may hide in the design. The impact of that bias or flaw, particularly whether it limits either access or justice for people of color or women or poor people, is more important in matters related to the operation of our courts than to the operation of a computer game.

What follows is a brief discussion of technological limits in legal applications.

**Information collection.** Simple forms can be created to collect some pertinent information about a client's needs. More sophisticated computer programs can lead clients through a maze of potential questions depending on the client's answers, utilizing voice-recognition or touch screen technologies, in addition to standard keyboard interactions. These computer programs can help create pro se petitions, simple briefs, and affidavits without support from counsel. It is also possible to record not only voice but video of the client as she provides information for counsel to check later. With polygraph machines and other devices to which a client might connect himself, it is possible to collect stress measurements and even take

and analyze skin and body fluid samples.

Obtaining accurate information from human beings is not easy.\textsuperscript{49} The myriad challenges a lawyer faces in understanding the legal needs of a client are compounded when that client is from a different culture (even within the same society), speaks a different language, holds fast to different customs, or has physical (including mental) limitations. When you replace a potentially sympathetic human with a machine, the problems are compounded still. Not all human beings are equally capable of, or comfortable, interacting with machines. There is a large body of literature regarding human interaction with computers and, while it is not within the scope of this paper to review that literature, it can be said that there remains a tremendous amount of work to do to simply capture the range of human expression into digital information by computers. A brief supported by information collected from a machine is simply not comparable to a brief filed by the opposing party, private or state, supported by information collected from a human. While we, along with Isaac Asimov, can conceive of this possibility, it is not possible now.

Privacy. A fundamental premise in the communications between lawyers, the courts, and individuals is that certain information exchanged will remain private. Even non-lawyers understand and assume that the information shared with their attorney will remain confidential, and that a judge may view records or potential evidence in chambers away from public view. This information may be as serious as unproven allegations of criminal behavior, past criminal behavior, by a juvenile for example, which has been sealed; or it may be as common as medical records, or a simple home address, a telephone number, or a social security number. To the extent that the information exchanged is conducted by or through machines, lawyers must worry whether third-party access breaks the seal of confidentiality, depriving the client of effective counsel.

Encryption technologies exist which create, in essence, a private language between the speaker and the listener. Much of electronic commerce depends upon encryption to protect credit card numbers and other sensitive information, providing a seemingly safe environment for financial transactions. However, neither government regulation nor market forces have established a means to keep private communications private.\textsuperscript{50} At worst, promises of privacy

\textsuperscript{49} There is a very good essay by Adam Smith, \textit{Why is usability so hard?}, on the Human-Computer Interaction Network (<http://www.hcirn.com/reflect/whyhard.html>). In addition there are thousands of academic articles on the difficulties still faced in this field.

\textsuperscript{50} See H.R. Subcomm. on Commerce, Trade, and Consumer Protection of the
are a comforting fraud allowing relatively easy access to information we citizens deem private. At great cost, the government uses very sophisticated technologies to protect its own secrets and it changes those technologies regularly to stay ahead, maybe just one step, of the hackers.51

The Legal Technology Institute reports that there are no nationwide standards for protecting private information from the public.52 Organizations such as credit reporting companies regularly conduct data sweeps of court records looking for financial information from divorce documents, adverse judgements, and liens, to provide information they have found, correct or not, as a commercial product to others. Much of this “data mining” is conducted without knowledge of the individual who provides information to the court, expecting perhaps that it will be secure from public view.53

Concerns about surveillance of computer systems in the courts erupted in the United States Court of Appeals for the Ninth Circuit, based in San Francisco. On March 5, 2001, the Administrative Office of the Courts in Washington, D.C. ordered the monitoring of all federal court workers, and installed software to monitor Internet use. The court responded by ordering its technology staff to disconnect the software, causing a shutdown that affected a third of the country and about 10,000 court employees. The Administrative Office, in turn, complained that the shutdown might have caused security breaches, allowing outsiders into the courts’ network.54

Whether the intruder is the government or a private person, communication through machines is not presently secure, and can be made secure only through expensive technologies and constant expensive vigilance.

Authentication. Bar associations exist in part to protect both the


public and the profession from unqualified individuals practicing law. Lawyers admitted to practice in Illinois will not necessarily be allowed to represent clients before the courts in California. Lawyers, even members of the relevant bar, who fail to represent their client in a knowledgeable fashion may be disbarred. Putting aside the financial incentives to restrict the supply of legal advice, when a woman goes to a lawyer to draft a will leaving her few possessions to her preferred heirs, or a man wrongly accused of some brutal act seeks an advocate, they are putting something important to them at stake. What assurance do they have that the counselor is informed enough to provide reliable advice?

Much has been written about the impact on journalism resulting from the spread of false information in cyberspace. The availability of quack remedies and medical advice over the Internet is also a problem. Less frequently reported are the incidents of legal services rendered by non-lawyers. The relative anonymity of cyberspace operates as a sort of wild west for con men; even con men who mean no harm. The New York Times provides an illustration of the problem.

A 15-year-old using the AOL name Marcus Arnold became the number one ranked legal expert on the website AskMe.com, dispensing legal advice to hundreds of people each day. Much of his information gleaned from television shows. We trust the story is true because we trust the New York Times.

Even when we rely upon a trusted Internet source for information, are we certain the information has not been altered in some small but legally important manner? The rules of cyberspace are not the rules of real space. Anonymity breeds anarchy, and some of that may be good, but that provides little comfort to people in real need of legal services.

B. The Digital Divide

Let us make the giant leap and assume that the difficulties of information collection, privacy and authentication mentioned above can be resolved with the proper software. We are left with the problem of unequal access to the Internet, sometimes called the “digital divide.” Much of the credit for the term “digital divide”

57. Michael Lewis, Faking It: The Internet Revolution Has Nothing to Do With Nasdaq, N.Y. Times (July 15, 2001).
should be given to Larry Irving, the former Assistant Secretary for Communications and Information and administrator of the National Telecommunications and Information Administration (NTIA) at the U.S. Department of Commerce. The authoritative examination of Internet, broadband, and computer connectivity is a series of NTIA reports called “Falling Through the Net.” In its simplest form these reports demonstrate, according to former Commerce Secretary William Daley, that while “Americans are more connected to digital tools than ever before, the report provides evidence that the ‘digital divide’ between certain demographic groups and regions of our country continues to persist and in many cases is widening significantly.” Just what are these “digital tools?”

In our discussion the terms “digital tools” or new technologies refer mainly to the transmission of digital codes via networks, known as the Internet or cyberspace. While this electronic communication may be carried by satellite, wireless terrestrial (broadcast or narrowcast) signals, cable, or telephone lines, most people access it through the telephone. An examination of Internet use then requires an examination of computer, modem, telephone, cable use, and sometimes, though rarely, satellite and digital broadcast. The question of access is addressed by NTIA with surveys that, since 1995, have examined where people log on to the Internet (at home, at school, at work, at libraries, or at community centers, for example). NTIA has also surveyed the quality of that access. In other words, are people using plain old telephone service to access the Internet or can they take advantage of high capacity transmission services (also called broadband)?

The new Republican administration at NTIA continued the “digital divide” reports of the Clinton administration, but altered the focus to emphasize the growing numbers of Americans with Internet access rather than the gap between those who had access and those who did not. The new administration also emphasizes individual use, rather than household use, in part because “Internet access is more frequently occurring outside the home, at locations such as work, schools, and libraries.” The very places the Clinton administration had been promoting universal service subsidies... through the “Gore

Tax” so derided by Republicans.

Where people access cyberspace is important to our examination of the implications for legal services. Legal matters often require both privacy, as discussed above, and convenience (physical proximity and timely availability). Computer access at work may not be useful if the employee needs to conduct either legal research or seek advice, particularly considering the fact that 63 percent of companies monitor employees’ computer use.\(^{61}\) If schools or libraries are very distant, closed after normal business hours, or severely limit computer time, access to legal services at these places may be impossible,\(^{62}\) and when convenient, communication using school or library (i.e. government) machines can hardly be considered private. Thus, access to the Internet at home is very important, so we will define the digital divide as the gap between those who have access to the Internet at home and those who do not.

*Income, Geography, Race, and the Digital Divide.* While there are extreme examples of the digital divide in states dominated by Native Americans (New Mexico, for example has an Internet penetration rate of 35.7 percent), and poor rural populations (Mississippi has a rate of 26.3 %),\(^{63}\) lack of access to the Internet at home correlates most strongly with race and income. The share of households nationwide with “Internet subscriberships” was 50.5% in September 2001, while “persons using home access” to the Internet was 43.6%.\(^{64}\) The home access to the Internet rate in 2000 was 41.5%. Given the difficulty in comparing what may be apples (home access) and oranges (Internet subscribership), we will stick with the 2000 figures. The percentage of those with home access to the Internet dipped slightly in rural areas in 2000 to 38.9%, while 37.7% of central city households had Internet access.\(^{65}\) (See Figure 1).

\(^{61}\) Neil A. Lewis, *supra* n. 49.


\(^{63}\) The recent report, emphasizing Internet users, rather than household use, reports that New Mexico with roughly 47 percent Internet users and Mississippi with roughly 39 percent Internet users. See *A Nation Online*, Table 1-1.

\(^{64}\) *See A Nation Online*, p. 6.

According to the NTIA, "households of Asian Americans and Pacific Islanders have maintained the greatest Internet penetration at 56.8% in 2000." Whites have access to the Internet at home at 46.1%. However, only 23.6% of Hispanics and 23.5% of blacks use the Internet at home. (See Figure 2).
Households with less than $15,000 in income had a 12.7% Internet penetration rate. At the $15,000 to $24,999 income levels, 21.3% of households had Internet access. The penetration rate for households with incomes between $25,000 and $34,999 stood at 34.0%. Households with income between $35,000 and $49,999 achieved a 46.1% Internet penetration rate in 2000. Households with incomes between $50,000 and $74,999 stood at 60.9%, while those above $75,000 were at 77.7%. (See Figure 3).

That the at-home Internet access penetration rate is one-fourth for the 32 million U.S. households with incomes under $25,000, as well as for African Americans and Latinos combined, is a strong indication of a significant gap in the availability of information services for those groups when compared to other Americans.

While there has been substantial growth across regions, income, and race, there remain significant gaps regarding access to the Internet at home. This paper is not going to devote room to the debates over whether the glass is half-empty, or why poor people

66. Id. at <http://www.ntia.doc.gov/ntiahome/fttn00/Falling.htm#20>
choose not to access the Internet in comparable numbers to wealthier Americans. As the recent NTIA report puts it: “Individuals living in low-income households or having little education, still trail the national average.” This is sufficient to note the fact of the digital divide. That the divide is real should come as no real surprise. Even in times of prosperity, as imagined prior to 2001, there remained tremendous divides in the United States along the lines of wealth and race, reflected in a divide in access to quality education and health care. And, perhaps most important, there is a divide in political influence. Of course there is a divide regarding access to new communications technologies. Since this divide exists, there will be limits as to what new communications technologies can do to help establish equal access to justice. However, there may be, within those limits, important opportunities.

C. The Opportunities Offered by Technology

The ABA sets out eleven agenda items to improve access to justice, one of which directly focuses on tasks new networked communications technologies might assist in accomplishing: informing people about their legal options, and helping them with legal referrals. Another agenda item touches on another goal with which the Internet might help: making the courts “more approachable” by using more simplified forms and procedures. In the fall of 1998, the Legal Services Corporation, the National Legal Aid and Defender Association, the Center for Law and Social Policy, the Project for the Future of Equal Justice, and the National Center for State Courts sponsored a conference on Technology and the Future of Legal Services. As a result of that work, Technology

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67. A Nation Online, p. 10.
69. See especially Jonathan Kozol, Savage Inequalities: Children in America’s Schools (New York, Crown: 1991); see also Peter T. Kilborn, Denver’s Hispanic Residents Point to Ills of the Uninsured, N.Y. Times (April 9, 1999); and Jo Becker, Racial Gap Found in Health Care, Montgomery Study Shows Black Children Face Tougher Odds, Washington Post*March 14, 2001).
70. Agenda for Access.
71. In a good, if overheated, report based on that meeting John Tull describes the possible benefits of communications technologies in advancing access to justice. While Tull dwells on none of the cautions mentioned above (information collection, privacy, authentication, the digital divide), if one is careful enough to read the cold water of the footnotes the problems are apparent enough. The second footnote reads: “at present the heralded web is painfully slow and cluttered with junk. Software is often idiosyncratic and fitful; access, while widespread, is very far from universal; and technology often produces
Initiative Grants from the LSC, and the profit-seeking work of corporations such as Lexis/Nexis and Westlaw, some consider the public interest legal community to be far ahead of most of the non-profit world in the use of the Internet and other communications technologies.  

**Educating citizens about legal rights and assistance.** The fact that responsible legal service providers can provide free and accurate information about legal rights (albeit in competition with frauds and pranksters) is a genuine improvement over an environment where there is no readily available source of easily understood legal information. Information technology can provide valuable services... potentially. There is even a likelihood that web searches will become more reliable, and more sophisticated in the ability to understand what a client needs through better prompting protocols, some perhaps with voice recognition capabilities.

Understanding one’s rights, and understanding the role lawyers and courts can play in protecting those rights, is a necessary first step in access to justice. In an important sense, making information available (about the reach or limitation of a product warranty, or a lease, for example) may help to prevent the need of court action by suggesting to unscrupulous sellers or landlords that the buyer or lessee is most likely informed, thus raising the perceived costs of improper action. Making this correct legal information available may also help a potential client avoid signing a lease or buying a lemon.

Legal referral services are also extraordinarily helpful in addressing one of the biggest difficulties people have in access to justice. Finding an appropriate attorney to provide basic counsel is not easy. Often the most useful and comfortable referral services are telephone answering services supported by accurate databases.

**Providing information to support pro se representation.** When armed with accurate legal information, it is possible to defy the adage that a man who would represent himself at court has a fool for a client. But, of course, adequate information is much more than basic information about rights and the role of lawyers, it must also include information about how to operate within the court’s procedures, such

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as how to obtain information from the clerk of the court and how to file papers. In addition, the basic forms and customs (such as the stilted and archaic language) of most courts and court proceedings can be easily provided in pre-produced forms, and can be filled out by a computer in communication with a pro se litigant, much the way “TurboTax” helps to prepare state and federal tax forms.

Many courts already make available basic information (such as court hours and contact information for the clerk of the court), case information (including case numbers and documents filed), as well as docket and calendar information. This information is made available at public terminals at the court, at kiosks in public places such as libraries, and even via web or direct dial up services. It is even possible to pay court fees and to file via computer interfaces.

Increasing capabilities of legal service organizations. Information technologies have already generated much improved systems for better case management. A lawyer, or team of lawyers, handling multiple cases at any one time, typical of public service practice, can create, file, and retrieve a wide range of legal documents without access to a team of legal secretaries to keep everything in order. The ability to access documents, even while in court, at the touch of a few keystrokes, should make already overextended public service lawyers more efficient. In addition, electronic filing can save substantial amounts of time and money on clerks, assistants, and copying.

The lawyer is in a much better position to weed out bad information from the Internet, so the dangers of relying upon Internet searches are far less for her than her client. This resource makes not only up-to-date case law and regulations available, replacing expensive and easily dated books, but scientific research and other “evidence” can also be more easily accessible to even the sole practitioner.

New communications technologies can improve access to legal services, but to suggest that because the technology is possible it will benefit most Americans is to indulge in the sort of fantasy more appropriate to futurists like Toffler. Widely accessible and intelligent use of technology is no more inevitable than widely accessible and intelligent application of our laws. As Benjamin Barber writes:

Where technology takes our political and social institutions will depend, in part, on where we take technology. Science and its products remain tools, and although the parable of the tools that come to enslave the tool-makers is an ancient one, it is not necessarily the only description of the modern technological
dilemma. Rather, we must see technological determinism as one among a number of possible scenarios that depend at least in part on the choices we make about technology's use.73

So again, we return full force to the field of politics, and law which results from politics. Below we briefly consider one reason we fall short of our goal of equal access to justice, and advance a proposal for reform.

IV. Playing Politics

The courts of justice are the visible organs by which the legal profession is enabled to control the democracy.... It must not be supposed, moreover, that the legal spirit is confined in the United States to the courts of justice; it extends far beyond them. As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law and upon its execution. The lawyers are obliged, however, to yield to the current of public opinion, which is too strong for them to resist, but it is easy to find indications of what they would do if they were free to act.

-Alexis de Tocqueville, Democracy in America, 1833

A. The System of Justice as Political Result

Our laws and courts, and the lawyers and judges who animate them, are neither market nor machine. Equal justice is at its core a social value, the tools of economists reach toward equilibrium and efficiencies, which cannot be intelligently confused with normative goals of equality and political efficacy. The tricks of the economist's sad trade are useful, but there must be a special place in hell for anyone who would make them determinative of the treatment of men who regularly fail most measurements of rational behavior. Markets (with their past and present tolerance of slavery, child labor and worker exploitation) are brutal enough without placing the courts under the jurisdiction of their "invisible hand."

Nor is justice a machine that can be fundamentally improved upon by the addition of new gadgets, in the way computers can

improve the performance of car engines. And while communications technologies can assist in a variety of ways to extend information about, and access to, the courts, they introduce additional problems and do not erase the disadvantages of moderate income and poor Americans at court. It is not difficult to see that access to new communications technologies may exacerbate the "justice divide" by increasing the ability of wealthier corporations or the government to be more effective litigants. The concern to increase access to communications technologies among the poor is, perhaps, less about achieving equal justice, and more about stalling the increasing inequality of justice which results from inequalities in wealth and the tools "monied might" is able to afford.

Unfortunately, as Eisenstein writes, "if we examine the patterns of who gets what as a result of the operation of the legal process, the inescapable conclusion is that these outcomes reflect the same values and balance of interests that characterize other components of the political system." Whatever we might think of the fact that our elected representatives cut funding to legal services and limited the work those services can perform, whatever we might think of what the post-Warren Courts have left of Gideon and Miranda, we must admit these are political acts. We, that is, our representatives or the judges our representatives appointed, acted to extend and to limit access to justice. There is nothing surprising about this, laws are, after all, determined through the political process; it is that process which gives law its legitimacy. The political process is what the phrase "government of the people, by the people and for the people" means. But to simply end the analysis with the observation that unequal access to justice is the result of politics as usual would be too easy. Leaving it here might suggest that, at best, the simple inertia of the political bureaucracy or the incremental nature of legislation is the problem, and that either patience is the solution or there is no solution.

 Perhaps unintentionally, Lawrence Lessig suggests a clue when he writes that, with the exception of the Warren Court, courts tend to act as translators of past constitutional doctrine but keep in mind present public opinion. "Courts are subject to the constraints of what ‘everyone’ believes is right, even if what ‘everyone’ believes is inconsistent with basic constitutional texts." Thus, African Americans were denied the right to vote in some states up until the

74. Eisenstein, supra n. 38, at 338.
75. Lessig, supra n. 47, at 214.
1960's, and Asian Americans could be taken from their homes and placed behind barbed wire during World War II, and laws punishing political speech could be upheld during the McCarthy era. The view that courts are actors in a political system is a little more complex (and, perhaps, more sympathetic) view than the suggestion that court decisions are the result of politics as usual.

The challenge then is to generate a discourse which compels the court to see unequal access to justice as a constitutional problem, and then to compel legislators to spend resources which further the goal of equal access to justice. Getting legislators to use tax dollars to pay for lawyers to create more work for the court may seem like a pipe dream. However, lawyers at the bar and the bench, with potentially enormous political resources, should see it in their interest to use what leverage they have to encourage legislators to advance this particular constitutional goal. There are a few signs that some in the legal community understand that to achieve equal justice they must engage in political action. For example, in early 2001, a New York trial court judge denied that State's motion to dismiss a lawsuit brought by the New York County Lawyers' Association (NYCLA), represented by pro bono lawyers from the large New York firm, Davis, Polk & Wardell. NYCLA is arguing that fees currently paid to court-appointed counsel are constitutionally inadequate. According to Marvin Schechter, co-chair of the National Association of Criminal Defense Lawyers' Indigent Defense Committee:

The Governor's and the legislature's unwillingness, year after year, to provide adequate funding for defenders of the poor has resulted in a crisis, evidenced in recent weeks by the inability of judges to find enough lawyers who are willing to take court-appointed cases. Those most harmed by the current system — children and poor adults — may not be able to raise objections to systemic inadequacies, and thus courts must recognize the crucial role of professional legal panels like NYCLA and NACDL stepping in to protect the rights of poor individuals.

76. Cole, supra n. 33, at 92.
The heart of the dispute brought by NYCLA is not really about the rights of the poor, but the fees paid to attorneys who represent the poor. One gets round to the rights of the poor by the logic that if the state increases pay to attorneys to represent the poor, there will be a corresponding increase in both the numbers of lawyers and the competency of legal service for the poor. But Schechter's core point is worth focusing on: that those most disadvantaged by inequality are not in a position to bring about needed change.

And here we come to the most important role new communications technologies can play in helping those concerned about equal justice to establish a closer rendering of its promise to the American public. The bar must see and utilize the true primary value of new communications technologies — to increase our capability for political communication. New communications technologies put lawyers in a position to begin a powerful debate about justice in America.

B. Delivering the Message

The true strength of communications technologies is the increased capability of organized groups to engage in public discourse. I am using discourse to mean not only delivering messages to mass audiences, but organizing, educating, communicating directly to large and small audiences around rather than through the traditional gatekeepers — global communications industries.

Internet as organizing tool. The American Bar Association, the American Trial Lawyers Association, and all the state bars have a tremendous ability to organize national recruitment efforts to generate petitions and conduct local seminars and issue statements to news organizations. The Internet is a perfect tool to generate and coordinate this activity. Through the Internet editorials can be distributed, information about the legal needs of citizens specific to the jurisdiction can be provided, and comparisons between jurisdictions can be demonstrated graphically. Information on why a campaign is needed, how to sign up, or how to donate can all be done via the Internet. The Internet can be the backbone of an interactive intense national campaign. As the 2000 presidential campaign demonstrated, the Internet can even help to raise money to spend it where the average American is most likely to get the message: radio and especially television.

Advertising as public education. Imagine a Harry and Louise commercial aimed not at defeating health care legislation, but at spurring legislation to support universal access to justice. As the
politicians know, if you want to reach the American public, buy television time. Well crafted messages, dramatic stories about the unmet legal needs of Americans should be created, tested, and aired in markets where state and national legislators do business. This is how political communication is conducted in America today. Spots on radio and television, combined with web-based interactivity and e-mail campaigns, are a sign of political sophistication, but they are not enough.

Getting attention and creating social pressure for reform. Members of the bar include corporate executives, an ex-president, judges, present and former legislators, and others who can capture the attention of not only the public but of state and local legislators. Lawyers can also raise money and donate to political PACs and candidates.

Modern communications technologies can play a more powerful role than ever before in bringing together the various interests, explaining the cause to the public, and persuading legislators to appropriate the necessary resources. A debate about equal access to justice should be vigorously pursued using advanced communications technologies.

V. Conclusion - Why It Must Be Done

If we are to keep our democracy, there must be one commandment: Thou shall not ration justice.
-Learned Hand

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

It is difficult to remember a time when the nation's highest legal officials have been so widely, and so fiercely criticized. When this is viewed along with the catalogue of ills already mentioned, it is apparent that the perception of justice in America is in crisis. This

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condition will not be altered by the manipulation of even a properly understood U.S. market. And even if you solve the considerable problems inherent in the introduction of new communications technologies, computers and the Internet will not reduce the justice divide in America. But, a nation, a society founded on law and operating through law, cannot put its head in the sand when our ideals of justice fall short. If we cannot fix our administration of justice, we will not only lose confidence in our selection of presidents, we will lose confidence in markets, and the introduction of new technologies, and all else.

American society is extraordinarily tolerant of political failure, perhaps too tolerant. To some extent this tolerance is the residual glow of the near religious nature of the respect Americans still have in their courts. As more citizens brush up against not only the televised failures, but face their own problems with courts and lawyers, this glow will dim. Those who will suffer most directly from the failure of our third branch are those least able to correct it; their answer is clear from the ABA survey. Too many simply do what they can to avoid contact with lawyers and the courts to their detriment. Others will take more destructive paths.

If exit is not an option for most Americans, voice is the appropriate response to state failure. Political scientist Robert Dahl argues that the usual failure of most citizens to use their political voice (contacting their representatives, organizing petitions, participating in political rallies, etc.) results in an unusual amount of force when they do speak, as seen in the protest against the military action in Vietnam.\(^8^0\) But as the responsibility for war policy was fairly clear, who will be the target of protest against the collapse of justice? Certainly not the legislators, or the executive. And what is the expression of political voice as directed against the courts? Perhaps demands for less support, except for police and jails — the worst possible result.

Social psychologists Caryl Rusbault and Dan Farrell suggest that if neither voice nor exit proves an effective option, there remains neglect. Neglect can be passive, sometimes mistaken for apathy or indifference, and can be destructive. Think of hackers. African-Americans have long employed this sort of reaction to political situations where they could neither exit nor express their voice.\(^8^1\) But

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81. Id.
it does not require a scientist to understand that any authority that
does not adhere to the standards by which it claims legitimacy risks
dissent. Once law begins to lose its legitimacy, civil society loses its
foundation.

New communications technologies can help correct this, if they
are properly used to focus and direct political dialogue. The justice
divide, just like the digital divide, can be closed, but first we must
understand that the divide is neither caused by, nor can it be
corrected by, the market or the machine. We must understand that
the digital divide, like the justice divide, is a political divide.
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