V

LUNCHEON ADDRESS

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(Representing the class of new life members of ALI)
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The Tuesday luncheon session
honoring new life (25-year) members
and new 50-year members
convened in Salon III of
the Ritz-Carlton, Washington, DC,
on May 20, 2014.
President Roberta Cooper Ramo presided.

President Ramo: One of the few things that the President of The American Law Institute gets to do all by herself is choose the speaker for this lun-cheon, and it is always really hard because when you look at the list of everybody in the class, there are such incredibly able people, who have accomplished such astonishingly wonderful things. But in this case, given the time, it was not that hard for me to immediately settle upon somebody who is right at the forefront of one of the most challenging issues facing not just the profession, in my view, but the country, and that is the future of legal education.

Phoebe Haddon, I am happy to say, has been a friend of mine for a very long time. I am honored to be her friend. Unlike me—I had nobody in my family that had ever been a lawyer—Phoebe is the fourth generation in her family to come to the law, and so she has a genetic predisposition to solving these problems.

She has been very active in legal education nationally. Sometime earlier this year, there was a list of the 25 most important people in legal education in America, and Phoebe was one of them. I am proud to say that was after I had already asked her to speak. And her intellect is well known. She went to Smith College. She was vice-chair of the Smith College board until she left to become the dean at the University of Maryland Francis King Carey School of Law, where she has been an incredibly innovative force nationally and also at that law school.

She decided that she had had enough fun as a dean last year, or maybe the year before, and indicated that she would retire from the deanship at the end of this year and that she would take a year-long sabbatical. That lasted about 20 minutes because it was announced, a

few months ago, that Phoebe was going to become, on July 1st, the Chancellor of Rutgers University's Camden campus. (*Applause*)

So let me welcome to the podium my friend, whom I guess I will have to call "Dean Soon-to-be Chancellor." Thank you. (*Applause*)

Dean Phoebe A. Haddon: It is a pleasure to be with you this afternoon, and I have to say that one of the advantages of being a 25th-year member is that you are sure to meet old friends and new friends, and in this room I have so many old and new friends, including some that date back to about four decades ago. I only say that quietly in this room. I am also tempted to just adjourn, let us all have a nice conversation among friends, and call it a great afternoon.

But I do have something very important to talk about, something that I feel passionate about, so I am going to talk to you about the justice gap. Most of you know that that is a term that now really starts to capture the fact that, according to our best calculations—and it is really just a guess at this point—there may be about a hundred million people in our country who do not have access to an attorney or needed legal services. A hundred million people!

Now some of those touched by the justice gap fit our traditional expectations. They are ones I became very familiar with as a law clerk. They are indigent or poor people charged or erroneously convicted of criminal offenses. But as the justice gap has grown, it has come to include individuals of moderate income, and members of the middle class—those who are struggling to resolve domestic conflicts on their own.

My first glimpse of the magnitude of and complexity and urgency of this problem really came several years ago, quite frankly, soon after I became dean at the University of Maryland Carey School of Law.

When I listened to a panel discussion we hosted at the law school, I heard the concerns of Paul Grimm. Many of you may know him; he was then a federal magistrate in Maryland, but now he is a district-court judge. He described his struggle to mete out justice to litigants who appeared in his courtroom often without representation.

It was immediately apparent that Judge Grimm had a courtroom that was not unique. In fact, his fellow panelists, several local state judges, were embroiled in the same problem. All of them candidly described the complexities of attempting to level the playing field, as they put it, for pro se litigants with do-it-yourself manuals, translating and simplifying court rules, and making their clerks and other people responsible for the gaps in knowledge of the novices they were confronting.

The judges' stories were heart-wrenching because of the plight of the litigants, of course. They were also disturbing because the judges were clearly frustrated trying to weigh the competing rights and interests at stake in these civil controversies, not criminal, and the stories were especially disturbing because they were taking place in Maryland, a recognized leader in addressing the problem of access.

Thanks to the vision and commitment of Robert Bell, the recently retired chief judge of Maryland's highest court, the state has a 53-member Access to Justice Commission, one of few such commissions that is connected to the judicial branch and thus able to have an immediate impact on court practice. The Executive Director of the Commission, Pamela Cardullo Ortiz, has said, "The hallmark of a healthy democracy is one in which individuals can exercise their rights to enforce the protections, privileges, and opportunities available to them under the law. They can only do so, however, if they can access the justice system through which those rights are enforced." [Pamela Cardullo Ortiz, *Courts and Communities: How Access to Justice Promotes a Healthy Community*, 72 Md. L. Rev. 1096, 1096 (2013).]

Maryland has taken steps to increase access to justice and protect democracy. For example, there are self-help centers in all of the state circuit-court and district-court locations so that people can better represent themselves. There is a network of public law libraries called "the people's libraries" and a network of local pro bono committees. All of the 36,000 lawyers in Maryland have to report their pro bono activity.

When interest rates plunged a few years ago, they passed legislation to increase the surcharge on court filing fees to fund the

depleted lawyers' trust accounts, or IOLTA [Interest on Lawyers' Trust Accounts], which had supported the civil legal-service providers. During the recession, hundreds of lawyers in the state were trained in how to provide pro bono help to homeowners at risk, and this fall, the Access to Justice Commission is going to consider a report on how to implement a broad right to counsel in civil matters.

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

Sadly, this lack of representation is replicated in many other states these days. In Massachusetts, in the Supreme Judicial Court, 75 percent of parties in the housing, family, and probate courts were representing themselves. In New York, 99 percent of tenants were unrepresented in eviction cases, and 97 percent of parents were unrepresented in child-support proceedings. Sixty percent of homeowners in foreclosure are unrepresented when they are attending mandatory settlement conferences.

There are other disturbing signs of underrepresentation, including some national figures. In 2009, about half of all appeals filed in federal courts were done so without representation, largely because litigants were unable to afford counsel, and we now know that approximately 20 percent of the U.S. population is by law eligible for legal representation, but of these 60 million people, about half, or 30 million, who actually seek legal counsel are denied it every year. Why? Because state and federal programs are underfunded, as many of you know, or simply because no pro bono lawyers are available. Those turned away are overwhelmingly women, veterans, the elderly, and families with children.

So according to Professor Deborah Rhode of Stanford, approximately 80 percent of the legal needs of poor individuals and a majority of the legal needs of middle-income Americans now remain unmet. Millions of people cannot afford to pay the hourly $200 to $300 rates often charged for routine legal services. But I also want to point out some other consequences that contribute to or shape this problem.

First, the justice gap is taking place at the same time that pundits talk about a glut of lawyers. By these critics' estimates, we have been producing about 20,000 more new lawyers every year than the market demands. Now I am going to accept that assertion only if we are describing the market as restricted to organizations that provide permanent full-time employment at healthy six-figure salaries to individuals with newly minted JDs, otherwise I am going to take issue with that point.

True, there are not enough of these kinds of positions. They began to evaporate a few years ago, just as I became dean, (*laughter*) and escalating costs of law school led students to incur increasing amounts of debt.

The fact is we have a bitterly ironic mismatch. On the one hand we have thousands of highly trained but unemployed or underemployed recent law grads, and on the other hand we have millions of moderate- and lower-income people who need legal counsel and others who may not know they are at risk because of self-representation. So our challenge as a profession and a democracy is to change that, to redistribute the skill of legal-service providers to meet the needs of a significantly larger portion of our population.

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

The second point worth making is that there is no uniform national compilation of statistics on unrepresented litigants, none. Data from states like those I have cited may appear random and thus not comparable. Some of the figures are certainly outdated. I know that from looking at studies. But even haphazard reporting confirms that a national crisis exists. The absence of uniform statistical data on unrepresented litigants prevents us from fully grasping the dimensions of this access problem and the complexities of solutions that might actually succeed.

I think it compromises our ability to really think very constructively and make sound strategic decisions. We do not know how to allocate scarce resources or which kind of initiatives ought to take priority over others. We need sustained evidence-based studies to inform our access work.

For example, as Deborah Rhode points out, does access to justice mean access to legal services or access to a just resolution of legal disputes? They are different objectives. Access or the lack of it is also a function of the population to be served. Bundling services can reduce costs, but lower fees will not help clients who do not understand they have a legal need. Easily available documents and call stations for routine landlord–tenant disputes may not be useful to immigrants or others who have language or literacy barriers.

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

So why the gap? There are signs all around us that our country's legal system faces serious problems that go beyond the costs and complexities of service delivery to the poor and middle class. Notably we incarcerate more people than any other nation, and the majority of our inmates, as you know, are male and black. As Michelle Alexander, author of *The New Jim Crow* [*: Mass Incarceration in the Age of Colorblindness* (2010)], observes, racial bias can be linked to government drug policies, policies that have destroyed communities and drastically reduced the opportunities for the incarcerated ever to lead productive lives. That has an impact. And whether or not you agree with the perspective of those commentators like Professor Alexander or those who talk about a glut of lawyers, it is apparent that structural changes are transforming the business models of our profession in ways that affect the delivery of services.

If you have spent even a few hours reading authors like Richard Susskind, Paul Lippe, or Bruce McEwen, it is clear that we are in the midst of a transformative time, replacing a system based on the traditional law-firm hierarchy and fee arrangements with new approaches

that are the consequences of technology, globalization, and cost-conscious clients. We do not know where all that is going, but it is going someplace different.

As an example, I heard a great NPR story on innovation and business models on the way here while stuck in traffic in the cab, which told the story of the demise of Kodak. Remember Kodak?

Innovation is what we need. I believe innovation through collaborative work from the bench, the bar, and the academy is critical, to respond to these challenges. I also want to argue that law schools—hear me out, my fellow academicians—law schools and the larger universities in which they reside should assume a more active role in defining the future of the profession and of legal education. Public institutions, given their history, mission, and responsibility to serve the citizens who support them, could lead the way in defining more clearly the causes of the justice gap and the strategies for bridging it.

Now I know that there are signs that the profession has begun to grasp the importance of the justice gap, particularly as it touches more people of moderate income and the middle class. It appears that the bar may be more receptive to innovative service delivery and willing to collaborate with law schools and public-interest organizations in gathering the solid baseline access-to-justice data that I have said is so critical. For example, in 2012, the ABA gave its annual award for access to legal services to a for-profit virtual firm in suburban Detroit that used of-counsel attorneys with existing practices to provide contract reviews and other common legal services to middle-class people who could not otherwise afford them. Their flat fees hovered in the $300 to $500 range, not thousands.

At about the same time, after years of debate, the judiciary in Washington State created the highly controversial new category of legal-service providers called limited licensed legal technicians. These technicians can help with court forms, procedures, and pleadings. Although they cannot represent clients, technicians can alleviate some of the more frustrating aspects of pro se litigation for both judges and unrepresented litigants.

Now some of these kinds of proposals are very, very controversial, and I am not endorsing any one in particular; I am just suggesting it is time to try some new things.

The bar has also started to work with the law schools to address this mismatch, the daunting constriction of traditional job prospects for many recent graduates and the unmet need for legal services, by actively participating in law-school incubators, firms, and other new venues for assisting individuals needing representation. I will speak about just a few of them.

Maryland Carey Law, for example, works with a local public-interest-law organization to offer assistance to underserved communities. "JustAdvice," it is called. It is a service that provides 30 minutes of advice and legal referrals for $10, at roving locations throughout Baltimore and across the state. Our students team up with practicing attorneys, many of them retired, who donate their time and provide one-on-one simple advice to clients, not formal legal representation but advice about whether they in fact have a legal problem or what they should do to address a problem they do have. The students manage all the business aspects of the program. They screen clients, run the office, and promote the service, and they are supervised by our faculty.

The law school also runs an incubator program with Civil Justice, which is a network of small firms and solo practitioners who help train new grads how to serve low-income clients and successfully manage this kind of practice. This is a project that is similar to others across the country, and Rutgers Law School in Newark now runs a law firm staffed with recent graduates who have passed the bar and are supervised by experienced attorneys. The fellows at the firm provide a range of legal services at well below market rate to low- and moderate-income clients.

I like these programs in part because they teach second- and third-year law students and graduates how to manage a practice, work in organizations, and acquire the business skills needed to support themselves. These are things that we have not always helped them do in law school perhaps as much as we should have, but we are moving

in that direction. They also expose students to devices like sliding pay scales, alternative billing arrangements, and contingency work, and fee-shifting statutes that might be used in the future to address the problem of mismatch and access.

Finally, the bar, law schools, and nonprofit organizations have joined forces to address the lack of evidence-based empirical work on the justice gap, and that is critical.

In 2011, the American Bar Foundation hired Rebecca Sandefur, a sociologist at the University of Illinois College of Law, to survey the patchwork of state civil work. The study found that "geography is destiny." [Rebecca L. Sandefur and Aaron C. Smyth, "Access Across America: First Report of the Civil Justice Infrastructure Mapping Project," American Bar Foundation (October 7, 2011) at v.] The civil legal resources available to an individual are determined largely by where they happen to live.

In addition to Sandefur's work, the United States Justice Department also created an access-to-justice office in 2010, and I think many of you know about that. In addition, Deborah Rhode, the American Bar Foundation, the Center on the Legal Profession at Stanford, and Harvard's Program on the Legal Profession, created a Consortium on Access to Justice, which is a group committed to promoting research and teaching on access to justice. Deborah is a vital contributor, but many, many law schools are now participating in this consortium, including Maryland Carey Law.

These are all positive, important steps that are working or that are at least trying to address this issue, but many of them, most of them, I should say, are comparatively small, isolated, and incremental. So as the dean of a public law school and soon to be chancellor at a public research university, it should not be surprising that I am particularly interested in how law schools can complement their work with that of students and faculty in the social sciences and humanities to strengthen our law schools' roles in defining and successfully bridging the justice gap, and I am looking forward to that.

Here are some obvious departure points for law schools that build on their existing strengths. First of all, we know that we are communities of scholars. We should be more fully engaged in research that focuses on access to justice here and internationally and search for new solutions, including the use of alternative dispute mechanisms and pay arrangements. This knowledge, combined with data-driven analysis of where the justice gaps are greatest, would allow law schools to conduct an access-to-justice audit of their curricula that goes beyond clinical law to include things like securities, banking, tax, and business courses, as well as transactional consumer law, all practice areas that not only touch on the needs of the middle class but today also affect the interests of poor people.

Law schools must learn how to better collaborate. There need not be duplicates of innovative clinics at the University of Baltimore, which is right down the street, and the Carey School of Law, since they are in the same city. We need cooperative academic consortia like those I knew as an undergraduate at Smith College, like the Five College Program, and graduate and undergraduate institutions that work together in the Philadelphia area. I have been encouraging other law deans to think about engaging in those kinds of collaborations.

Law schools are also laboratories. They could be what incubators or start-ups are to the technology sector, thinking outside of the box, exercising their academic freedom in imaginative ways on behalf of the underserved.

Using evidence-based research and with the advice and assistance of courts, law schools should reshape their clinic programs to meet the most pressing needs of their communities, a benefit not only to the clients but to students who would gain practical experience addressing the most acute legal needs in a given geographic area. Research could also help us to identify best practices in service delivery.

Finally, we must do more work as reformers and lobbyists to shine a bright public spotlight on the problem of access to justice, one that reaches well beyond our profession. For example, working with an ABA survey done in the '70s, the '70s, this is the latest data, Rebecca

Sandefur discovered that cost was not the only or even the predominant factor that kept people of moderate means from seeking counsel. Some people didn't know how to find a reputable lawyer. Others did not recognize they needed one. Some were ashamed of going to a lawyer because they thought that going to a lawyer said that they had failed in some way to work out social problems.

So we need to build on some of the existing strengths of law schools, use this kind of data that has been collected, develop new data, and adopt new strategies that build on the understanding of mismatch. We also need, I believe, a vast public-education campaign about the importance of law in our everyday lives. Adolescents need more than a basic civil course about the three branches of government and when to vote. They need that, but I am also thinking about more deeply embedding into K-12 school children an understanding of what law means and how it affects the lives of everyday people.

So I am thinking of the large public-health campaigns that got Americans to quit smoking or some of us to lose a little weight or to help our children lose weight, like the campaign Michelle Obama is pushing. We need to have something like that, and we have not anything remotely comparable to that kind of education or other opportunity to expose people to the value of law.

And clearly, millions of people do not grasp how law can be useful to them or their loved ones, and perhaps as a consequence of this lack of education or because of what the pundits have talked about in bemoaning our litigious society and devaluing the service of lawyers, they need to have reinforced and come to understand the importance of law in a positive light.

We must reclaim the pulpit. Not so long ago (particularly during the civil-rights era) more people valued our profession for the social-justice work of its practitioners. They admired lawyers' work for how it could protect or advance the lives of those who were neither wealthy nor powerful. Today, for many people, law is often equated with power but not necessarily defending the rights of the poor or the

marginalized. This likely lies behind some of the burgeoning self-help movement.

Many people would be surprised to learn of lawyers' professional commitment to principles of equality and justice for all. For them, justice is merely an elusive phantom. Literally millions of Americans are without access to justice for lack of financial resources, information, or will in the face of overwhelming obstacles, despite the fact that our nation was ostensibly founded on a promise of justice for all.

So I believe it is the responsibility of every lawyer in this room, and those of you who are not lawyers, to undertake the responsibility of delivering on that promise. I am willing to try, and I hope you will, too. Thank you. (*Applause*)

President Ramo: Well, I think in hearing the about-to-be chancellor, you understand what your role is now, and that is you have had 25 years of training at The American Law Institute, and now she has enlisted you in a new war.

Phoebe, I cannot thank you enough for this challenging and important talk, but I want to give you, and each of your classmates will receive this in the mail, your 25-year life-member certificate. Thank you.

Dean Haddon: Thank you very much. (*Applause*)

President Ramo: Thank you. I am so proud of you.

So, as always, these lunches are the most energetic and moving of any lunch I have had this year. We are now ready to adjourn, but let me tell you—this is something former Secretary Napolitano will understand—not at Justice Ginsburg's request but at the request of her security detail, will you all please exit out this door instead of the doors at the back. And I know that will slow you down a little bit, and she would be embarrassed that they asked it, but do not tell her, if you would, I would appreciate it.

See you in just a few minutes.