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ROGER C. CRAMTON AND THE AVAILABILITY OF LEGAL SERVICES

Thomas D. Morgan†

Roger Cramton was unforgettable. My most vivid early memory of him is of him lustily leading the singing of old songs at a Cornell faculty party. It was 1974, during what Cornell euphemistically calls the *Spring Semester*, and I was a young visiting professor teaching Antitrust. Not only was Dean Cramton welcoming and supportive, but he was intellectually rigorous and personally open and charming—a combination that somehow illustrated what lawyers in general should want to be.

Roger Cramton was a 1955 graduate of the University of Chicago Law School, and he started his teaching career there in 1957. It was a golden era at Chicago. Edward H. Levi, later University President and U.S. Attorney General, had become Chicago's Law Dean in 1950, and it was under his leadership that Roger Cramton's personal growth as a lawyer and scholar began.

Chicago had already embarked on the interdisciplinary approach to legal research and education that most law schools now routinely embrace. At its best, interdisciplinary work married traditional legal analysis with an eyes-wide-open willingness to see both the costs and benefits of how legal rules worked in real life. It is perhaps not surprising then that Roger's tenure at the University of Michigan, which began in 1962, included teaching administrative law and regulation.

It is easy to forget today that the Republican administration of Richard Nixon expanded economic regulation as much or more than any administration since the New Deal.¹ And while on leave from Michigan, in 1970, President Nixon made Roger Cramton the second person to chair the Administrative Conference of the United States, an agency devoted to ensuring

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¹ Among the Nixon Administration regulatory initiatives were environmental protection, affirmative action in government contracting, and wage and price controls. See generally, THOMAS D. MORGAN, *ECONOMIC REGULATION OF BUSINESS: CASES & MATERIALS* (1976).

that the administrative process runs as efficiently as possible and does more good than harm.²

The role of lawyers, accordingly, turned out to be part of the larger picture of administrative process operation and fair game for Administrative Conference interest.³ And when he became an Assistant Attorney General at the Department of Justice, Roger presumably saw some ethical issues up close. I did not discuss the Watergate period with him, but it was surely not accidental that questions of personal character and the impact of lawyer conduct on our society became such an important part of his later work.

Roger Cramton became Dean at Cornell Law School in 1973, and in 1975, President Gerald Ford named him the first Chair of the Board of the newly-created Legal Services Corporation (LSC). The LSC was not a darling of the conservative wing of the Republican Party, but Roger kept the new source of financial support for publicly-funded legal services moving forward until he was succeeded in 1978 by President Carter's appointee, Arkansas lawyer Hillary Rodham.⁴

It is interesting, but perhaps not surprising given his personal strength of character, that even with the varied experiences he had, Roger Cramton maintained a focus on the availability and delivery of legal services over the course of his career. One of the places that work is found today is in the casebook which he worked on with Professors Hazard, Cohen, Koniak, and Wendel until the time of his death.⁵

But perhaps his most systematic discussion of the issues was almost a quarter-century ago in his 1994 article, *Delivery*

² At the time he was appointed, being Chair of the Administrative Conference was a major distinction. Roger moved from that position to the Justice Department as Assistant Attorney General, Office of Legal Counsel. He was succeeded at the Administrative Conference by another young law professor, Antonin Scalia.

³ I did two projects on legal ethics for the Administrative Conference, then under the leadership of Cornell professor Robert Anthony, that illustrate the work the agency did. The reports were published as *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1 (1980), and *Public Financial Disclosure by Federal Officials: A Functional Approach*, 3 GEO. J. LEGAL ETHICS 217 (1989).

⁴ For a generous tribute and up-close report of Roger's work in that politically-perilous environment, see Thomas Ehrlich, *Four Cheers for Roger Cramton*, 65 CORNELL L. REV. 739 (1980).

⁵ GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK, ROGER C. CRAMTON, GEORGE M. COHEN & W. BRADLEY WENDEL, *THE LAW AND ETHICS OF LAWYERING* (6th ed. 2017). The issues addressed in this essay are found primarily in Chapter 10 on *Law, Lawyers & Justice*.

of *Legal Services to Ordinary Americans*.⁶ The article avoided what I believe is the most fundamental error in discussing that subject, the idea that legal services—important as they may be—are an unvarnished good and that more access to lawyers is the principal goal the legal services movement should seek.

Roger recognized that law and legal processes can make problem-solving more complex and more expensive. Many people can address substantial problems without going to court, and when lawyers get involved, their services often impose substantial costs on participants in the system, including the client, the client's opponent, the lawyer, and any third party who pays the lawyer's fees.

Thus, Roger saw that one fundamental way to address the perceived need for legal services is to reduce the complexity of the legal process, such as simplifying the substantive law.⁷ Or, clients might better be served by letting them pursue legal remedies using standardized plain-language forms and by increasing the use of mediation, arbitration, and informal court processes.⁸ Those alternatives impose their own costs, of course, and they may limit the nature and reduce the amount of relief a client can expect, but the important point to me was Roger Cramton's recognition that improvements in the provision of legal services must be measured by more than counting lawyer hours made available to individual clients.⁹

The focus of his article was "ordinary Americans." Roger relied on the image of lawyers serving two "hemispheres" of society, a view he borrowed from Professors Heinz and Laumann.¹⁰ The hemisphere of the bar serving business clients was effectively meeting the legal needs of those clients in 1994, as it does today, and business clients were able to obtain the amount and quality of services that they wanted. Indeed, as the years since *Ordinary Americans* have revealed, the rapid growth in the number of lawyers since 1970 has been primarily absorbed by the business-focused hemisphere.¹¹

It is in the hemisphere of the bar serving individual clients that the legal services market has broken down. Roger Cram-

⁶ Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994) [hereafter *Ordinary Americans*].

⁷ See Cramton, *supra* note 6, at 562–63.

⁸ See *id.* at 563–64.

⁹ *Id.* at 562–65.

¹⁰ JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 323–33 (1982).

¹¹ See generally, THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 80–83 (2010).

ton recognized that legal access problems faced by "ordinary" potential clients in that market arise in the areas of both demand and supply. On the demand side, the major challenges were to provide information that would make consulting a lawyer more appealing and get ordinary people to trust lawyers' reliability and integrity.

Bates v. State Bar of Arizona,¹² decided in 1977, partially de-regulated lawyer advertising, so the problem was not a legal limit on telling potential clients about lawyer availability. Instead, the problem was a lack of collective action. Buying television time and using other ways of providing information is costly. Individual lawyers who provide information about what they can do for a client tend to be those seeking to attract accident clients to personal injury firms, for example, because the fees in a few good cases can justify the cost of mass advertising. It is much harder to get lawyers to share the expense of explaining the value of preventive measures, on the other hand, because many potential clients will have trouble evaluating the information and the return on the advertising investment will be far less clear.¹³

The trust issue arises from the fact that lawyers for ordinary Americans tend to have a closer personal relationship with their clients than most business lawyers do. Getting a divorce often requires sharing painful personal realities; it is never "just business." Psychological defenses somehow get stripped away in typical relationships with an individual client, and a client who only rarely consults a lawyer may hesitate to trust that lawyer's advice. The effect may be that fewer individual clients use lawyers than their real interests might dictate.¹⁴

Looking at legal services from the supply side, Roger Cramton recognized that the cost of becoming a lawyer necessarily reduces the number of lawyers there will be.¹⁵ When lawyers regularly used to get jobs that paid enough to earn a return on their educational investment, such as working for corporate clients, the supply of lawyers seemed never-ending. But the risk is that not many lawyers will be willing to obtain a high-cost education to serve clients whose ability to pay is limited. Without a reduction in the cost of education that makes it possible for lawyers to attract clients at legal fees ordinary

¹² 433 U.S. 350 (1977).

¹³ See generally, Cramton, *supra* note 6, at 551-54.

¹⁴ See *id.* at 554-55.

¹⁵ See *id.* at 550.

Americans can pay, the perceived supply of lawyers available to serve ordinary Americans likely will remain an issue.¹⁶

At the same time, restrictions on how services can be delivered and by whom, only make the problem worse. Following the leadership principally of state bar associations, the ABA Model Rules, as implemented in state law, have prohibited lawyers both from aiding non-lawyers in the unauthorized practice of law and from forming partnerships or other practice organizations if any of the organization's activities involve the practice of law.¹⁷ That principle seems to be less than a century old,¹⁸ but it has effectively limited lawyers' ability to expand the services they deliver to clients and their ability to make those services more affordable.

It is worse than naïve to assert that the line between legal and non-legal services is sharp when dealing with individual clients. A divorce client, for example, may need advice about social services and medical care as much as he or she needs information about how and where to file the necessary legal papers. Roger Cramton was never a zealot about the need to break down limitations on forming interdisciplinary firms in which participants could share fees, but he did give the ideas prominence in *Ordinary Americans*.¹⁹

Document companies like LegalZoom,²⁰ and even compa-

¹⁶ A corollary to the cost of becoming a lawyer is the opportunity cost of continuing to remain a lawyer who will find it attractive to practice on behalf of ordinary Americans instead of use his or her legal education in some other way. Lawyers with a sophisticated education can run businesses, become real estate investors, lead non-profit groups, and the like. And they do so, leaving less lucrative legal work on behalf of individual clients to others.

¹⁷ See ABA MODEL RULES OF PROF'L CONDUCT, r. 5.4(a), 5.4(b), 5.4(d) and 5.5(a) (AM. BAR ASS'N 2013).

¹⁸ The present rules that lawyers may not form a partnership with a non-lawyer (Canon 47) and may not assist a non-lawyer in the unauthorized practice of law (Canon 33) seem to date from their entry into the ABA Canons of Ethics in 1937, although an earlier version of Canon 33 was adopted in 1928. AMERICAN BAR FOUNDATION, AMERICAN BAR ASSOCIATION OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND CANONS OF JUDICIAL ETHICS ANNOTATED 140–41, 193–94 (1967 ed.).

¹⁹ See Cramton, *supra* note 6, at 565–78.

²⁰ Early on, LegalZoom's activities got it into trouble. Some of its employees were accused of illegally practicing law even though their activities were limited to making sure its form documents were printed putting the relevant information in the correct paragraphs; they gave no advice and drew no substantive conclusions about the effectiveness of the documents. See *Jackson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053, 1054–57 (W.D. Mo. 2011). Similar issues were raised in North Carolina. Terry Carter, *LegalZoom Resolves \$10.5M Antitrust Suit Against North Carolina State Bar*, A.B.A. J. (Oct. 23, 2015, 3:15 PM), http://www.abajournal.com/news/article/legalzoom_resolves_10.5m_antitrust_suit_against_north_carolina_state_bar [<https://perma.cc/ZW7N-4SV4>]. LegalZoom now advises its cus-

nies who file appeals from parking tickets,²¹ have gained traction among middle-income clientele seeking legal services. Bar associations have been reduced to playing catch-up as they try to provide CLE training to lawyers on how to reduce the costs of running a practice and delivering their services at competitive prices. But Roger Cramton helped to dispel the fallacy that inefficient practice methods are somehow more “professional” than efforts to deliver higher-quality services at lower prices for consumers.

Of course, a vigorous effort to get lawyers to provide more pro bono service has been the fallback position for many who want to bring legal services to ordinary Americans.²² Few lawyers publicly dismiss the objective, but many lawyers do not provide the services voluntarily and requiring lawyers to do so has proved impossible politically.

Although he believed strongly in personal responsibility to others and to the community, Roger Cramton was quite cautious about demanding that lawyers assume duties they were not willing to assume. He believed that forcing people to serve others raises moral problems and practical challenges. Lawyers are specialized today, he argued, and poverty law itself presents a set of challenging issues that lawyers cannot effectively master in their spare time. That will inevitably tend to impose the burden to deliver quality legal services to the poor and middle class on lawyers who already do so more than others. Voluntary provision of legal services is appropriate and can provide a part of the answer to a shortage of help for

tomers to consult a lawyer if they have any questions about their documents, and bar associations seem to have backed off their objections. See [www.legalzoom.com \[https://perma.cc/Y9HN-X3MB\]](https://perma.cc/Y9HN-X3MB) (“We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies.”).

²¹ See, e.g., [www.ticketclinic.com, \[https://perma.cc/T2BC-RG7X\]](https://perma.cc/T2BC-RG7X) and [www.appwinit.com, \[https://perma.cc/2ZYA-HHCN\]](https://perma.cc/2ZYA-HHCN). See generally, Olga Kharif, *Apps That Fight Your Parking Tickets*, BLOOMBERG BUSINESSWEEK (Dec. 3, 2015) <https://www.bloomberg.com/news/articles/2015-12-03/apps-that-fight-your-parking-tickets> [<https://perma.cc/73RE-W6PD>].

²² While many have espoused this position, the consistently most articulate advocacy has come from Professor Deborah Rhode. E.g., DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004); Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 *GEO. J. LEGAL ETHICS* 485 (2017).

poor clients, he believed, but it is not a long-term model for meeting the legal needs of ordinary Americans.²³

Not surprisingly, given his earlier leadership of the LSC Board, Roger Cramton believed that helping poor Americans navigate the public legal system is ultimately a public responsibility.²⁴ Funding for the LSC is controversial almost every year, but the program has now survived for more than forty years at annual funding levels approaching \$400 million.²⁵

Roger was frustrated by the division among public-funding supporters between those who wanted to stress supporting personal legal services for individual clients and those who wanted to stress obtaining legal changes in the welfare of the poor more generally. In his view, it was the latter kind of class-focused effort that made the prospect of obtaining public provision of legal services much harder. Ordinary Americans should be entitled to “minimal access to justice” in pursuing their individual goals, he said. That may sound unambitious or even churlish, but at the time, the LSC estimated that “only about 20 percent of poor people needing legal help get it.”²⁶ His call for a right to legal services was, when made, and even today, a courageous appeal for a political result that has proved extraordinarily hard to achieve.

My own view is that efforts to provide legal services to ordinary Americans are too often presented as issues of lawyer *noblesse oblige* or finger-wagging at lawyer selfishness. More valuable are serious ideas about how we can make the legal services market work in ways that will be effective for both clients and lawyers. As the number of lawyers continues to exceed the business hemisphere’s demand for their services, more lawyers will strive to make legal services attractive and available to potential clients, only this time the lawyers are likely to have to compete with others for the chance to provide those services.

²³ See Cramton, *supra* note 6, at 581–87. He had addressed many of these issues earlier in Roger C. Cramton, *Mandatory Pro Bono*, 19 HOFSTRA L. REV. 1113 (1991).

²⁴ See Cramton, *supra* note 6, at 587–601.

²⁵ The appropriation for FY 2016 and FY 2017 were each \$385 million. The agency budget request for FY 2018 is \$527.8 million. LEGAL SERVICES CORPORATION, 2018 BUDGET REQUEST 1–2, published at www.lsc.gov/sites/default/files/LSC-FY2018-BudgetRequest.pdf [<https://perma.cc/745Q-6UW9>].

²⁶ Cramton, *supra* note 6, at 591.

Those of us fortunate enough to have known Roger Cramton miss his intelligence, grace, wisdom, and good humor. We are fortunate to have had his insights and his leadership, and we would do well to revisit those insights as we address issues of expanding the delivery of legal services in the years to come.