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The Justice Gap Problem Solving: History and Innovation

KATSIARYNA STSEPANIUK*

ABSTRACT

The issue of addressing the justice gap in civil cases has been and continues to be the subject of research and suggestions by many authors across the United States, especially in the face of additional complexities arising from the COVID-19 pandemic. This Article introduces a description of the traditional approaches that have been proposed to close the justice gap and highlights the innovative ways to address this problem that have been offered over the past twenty years. Part I is devoted to the history of pro bono legal services and the reasons for the impossibility of solving the problem of access to justice using these approaches exclusively. Parts II, III, and IV describe other models of delivering legal services that have the potential to make legal services more affordable to clients who cannot obtain legal services at prevailing market rates, thus addressing the justice gap problem.

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INTRODUCTION

The justice gap can be defined as “the number of people who have at least one unmet justice need.”¹ Gaps in the access to justice arise from the existence of unresolved problems with access to justice in society. Today, this is not a problem that individual states face. Problems with access to justice exist in almost every country, even in countries with a high level of democracy and social welfare. According to the 2019 World Justice Project Report, there were an estimated 1.5 billion people in the world who could not “obtain justice for civil, administrative, or criminal justice problems.”²

Despite the existence and maintenance of one of the most advanced and complex justice systems in the world, the United States still has problems with access to justice that continue to exist today. In 2017, the Legal Services Corporation (“LSC”) reported that eighty-six percent of low-income³ Americans did not receive adequate legal help for their civil legal issues.⁴ And it is not just low-income individuals who experience these hardships; forty to sixty percent of the legal needs of middle-income, or middle class, Americans remain unmet.⁵

In a worldwide context, the barriers that impede individuals around the globe from accessing justice can be divided into three categories: (1) “[s]ocietal and cultural barriers, including literacy, education, poverty, and discrimination”; (2) institutional barriers, including “insufficient governmental resources . . . , inadequate organisational structure of justice institutions, limited legal assistance,” costly legal representation, “and the lack of

1. SARAH C. LONG & ALEJANDRO PONCE, MEASURING THE JUSTICE GAP: A PEOPLE-CENTERED ASSESSMENT OF UNMET JUSTICE NEEDS AROUND THE WORLD 4 (Camilo G. Patiño et al. eds., 2019), https://worldjusticeproject.org/sites/default/files/documents/WJP_Measuring%20the%20Justice%20Gap_final_20Jun2019_0.pdf [<https://perma.cc/DH2E-7XGP>].

2. *Id.* at 5.

3. L. SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6, 16 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/V97Y-Z4VR>] (defining “low-income” for determining eligibility for legal aid as individuals with “a family income below 125% of the Federal Poverty Level (FPL)[, which] corresponds to \$30,750 per year or less for a family of four.”).

4. *Id.* at 28.

5. Jennifer S. Bard & Larry Cunningham, *The Legal Profession is Failing Low-Income and Middle-Class People. Let’s Fix That*, WASH. POST (June 5, 2017), https://www.washingtonpost.com/opinions/the-legal-profession-is-failing-low-income-and-middle-class-people-lets-fix-that/2017/06/02/e266200a-246b-11e7-bb9d-8cd6118e1409_story.html [<https://perma.cc/A9F5-KAPZ>].

enforcement of decisions”]; and (3) intersectional barriers, such as “lack of trust in lawyers and judges, and corruption.”⁶

While the LSC noted several reasons why individuals lack legal assistance in civil cases in the United States, the cost of legal services remains one of the most constant, contributing factors.⁷ Thus, it seems that the greatest problem impeding the access to justice in the United States is the institutional barrier, which encompasses limited access to free and low-cost legal services. In contrast, in Eastern European countries with lower levels of democracy, intersectional barriers are more pressing. For example, in Belarus, while legal services are more affordable, “[m]ajor problems include lack of independence of the judiciary and the legislature; restrictions on freedom of opinion and expression, freedom of association, and the right to privacy; and limitations on citizens’ right to petition the government and to access official information.”⁸

Regardless of the nature of the barrier to justice, the COVID-19 pandemic further hindered individuals’ access to justice in every context and in every country. Similar to 2009, when the economic crisis in the United States increased the need for civil legal assistance and the number of unrepresented individuals who could not afford counsel,⁹ the current economic and legal crises caused by COVID-19 have brought similar negative consequences. For example, in Virginia, long delays in processing unemployment benefits led to Legal Aid groups and pro bono partners filing class actions against the Virginia Employment Commission (“VEC”).¹⁰ In addition to the overwhelming effects on individuals and families, businesses of all sizes saw disastrous effects at the hands of COVID-19 as well. Despite the measures implemented by both state and federal entities, such as the Coronavirus Aid, Relief, and Economic Security Act, and the \$660 billion Paycheck Protection Program, businesses were left in vulnerable positions

6. JULINDA BEQIRAJ & LAWRENCE MCNAMARA, INTERNATIONAL ACCESS TO JUSTICE: BARRIERS AND SOLUTIONS 9 (2014).

7. L. SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 24 (2009), https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [<https://perma.cc/7DSS-ZDXN>] [hereinafter DOCUMENTING THE JUSTICE GAP IN AMERICA].

8. THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014 45 (2014), <https://worldjusticeproject.org/sites/default/files/documents/RuleofLawIndex2014.pdf> [<https://perma.cc/NK9T-DAB5>].

9. DOCUMENTING THE JUSTICE GAP IN AMERICA, *supra* note 7, at 26.

10. Jeff Jones, *Class Action Lawsuit – VA Unemployment Insurance*, LEGAL AID JUST. CTR. (Apr. 15, 2021), <https://www.justice4all.org/2021/04/15/class-action-lawsuit-va-unemployment-insurance/> [<https://perma.cc/F6UK-GWAU>].

and with urgent needs for professional legal assistance in understanding the “complicated requirements” of the government loan programs.¹¹

As a result, discussions regarding ways to overcome barriers to accessing justice have recently received an even greater resonance among authors and readers across the country. This Article aims to describe the traditional ways of solving the justice gap problem, as well as highlight new, innovative approaches adopted in the last two decades within the United States.

I. PRO BONO LEGAL SERVICES AS THE OLDEST WAY TO ELIMINATE THE JUSTICE GAP

The use of organized legal volunteering for those who cannot otherwise afford legal assistance in civil cases has more than a century of history. Institutionalized legal aid for low-income communities began with in 1863 with the founding of the Working Women’s Protective Union in New York, which consisted mainly of female non-lawyers.¹² The creation of this and other similar unions gradually led to the formation of the Legal Aid Society in 1876, a large organization of volunteer lawyers that continues to operate today.¹³ This movement resulted in the formation of a legal aid program in almost every major city in the United States by 1965.¹⁴ However, given the lack of available resources and central management system, these legal aid programs “reached less than 1 percent of those in need.”¹⁵

A big step forward was made in 1965 with the establishment of the Office of Equal Opportunity Legal Services Program, which has since been reorganized as the Legal Services Corporation (“LSC”),¹⁶ and is now the

11. Amanda Robert, *Small Businesses Have COVID-19 Questions, and the Legal Profession is Working to Answer Them*, A.B.A. J. (June 29, 2020, 12:40 PM), <https://www.abajournal.com/web/article/law-firms-and-legal-service-providers-help-small-businesses-with-covid-19-questions> [<https://perma.cc/6BRD-4VQU>].

12. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History*, DÆDALUS, Winter 2019, at 177, 179.

13. See ALAN HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 8 (4th rev. 2018), https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf [<https://perma.cc/49D2-RJTW>]; see also *1876: The Legal Aid Society is Founded*, THE LEGAL AID SOC’Y, https://legalaidnyc.org/historical_event/modest-beginnings/ [<https://perma.cc/Z2W5-U6UB>].

14. HOUSEMAN & PERLE, *supra* note 13, at 8.

15. *Id.*

16. Gordon, *supra* note 12 at 180.

largest sponsor of civil legal aid in the country.¹⁷ LSC is a grant-allocating organization that distributes funds received from the federal government to “eligible, nonprofit organizations delivering civil legal aid.”¹⁸ However, during the decade before 2017, the average number of households served by LSC-supported legal aid programs was just 815,000 households, “about one-twelfth of the need.”¹⁹

Therefore, despite their efforts, LSC is not as successful at closing the justice gap as one could hope. Several reasons have been identified as contributing to LSC’s failure to close the justice gap: (1) chronic underfunding²⁰ and (2) subject matter limitations restricting “how LSC can spend its money.”²¹ Subject matter constraints prevent legal aid organizations receiving LSC grants from participating in class-action lawsuits, immigration matters, legislative lobbying, and cases involving abortion, assisted suicide, and the desegregation of public schools.²² LSC funds also cannot be used to provide legal assistance to people with an annual income above the level established in relevant regulations or to people with moderate means. Section 1611.3(c) of LSC’s regulations establishes the maximum income level for individuals eligible to receiving such legal aid.²³ Currently, this level is equal to 125% of the Federal Poverty Guidelines (“Guidelines”), which corresponds to \$33,125 per year or less for a family of four.²⁴ Therefore, LSC is objectively unable to provide legal services to all people who otherwise could not afford legal help; LSC is regulatorily barred from assisting a considerable portion of communities who need access to legal services but make just enough money to push them over the Guidelines amount.

Unfortunately, other providers of pro bono legal assistance, such as state bar associations, despite their efforts, cannot meet the overall need for legal services. For example, in California, State Bar-funded legal aid organizations reported that due to “insufficient resources, conflicts of

17. *Strategic Plan*, L. SERVS. CORP., <http://www.lsc.gov/about-lsc/leadership/strategic-plan> [<https://perma.cc/HX36-TZL2>].

18. *Id.*

19. Lincoln Caplan, *The Justice Gap: America’s Unfulfilled Promise of “Equal Justice Under Law”*, HARV. MAG. (Nov.–Dec. 2017), <https://harvardmagazine.com/2017/11/unequal-justice-america> [<https://perma.cc/P49N-T2TU>].

20. David Reich, *Additional Funding Needed for Legal Service Corporation*, CTR. ON BUDGET AND POL’Y PRIORITIES (Feb. 1, 2021, 2:15 PM), <https://www.cbpp.org/blog/additional-funding-needed-for-legal-service-corporation> [<https://perma.cc/6XF6-S5AY>].

21. *See* Caplan, *supra* note 19.

22. *Id.*

23. Income Level for Individuals Eligible for Assistance, 86 Fed. Reg. 7350, 7350 (Jan. 28, 2021) (to be codified at 45 C.F.R. pt. 1611).

24. *Id.*

interest,” and other related problems, “they cannot resolve every case presented to them: help was inadequate for 63 to 70 percent of problems reported.”²⁵

Individual lawyers have a professional responsibility to provide pro bono service under ABA Model Rule 6.1,²⁶ and many attorneys put forth extensive efforts to help close the justice gap. In 2016, attorneys dedicated, on average, 36.9 hours of pro bono services.²⁷ However, “approximately one out of every five attorneys . . . ha[ve] *never* undertaken pro bono [service] of any kind.”²⁸ Regardless, even if every attorney was compelled to perform 100 more hours of pro bono service per year, “all of that additional work would be enough to secure only 30 minutes per [legal] problem per household in America,”²⁹ which is definitely not enough.

Notably, though, using pro bono legal aid as the only mechanism to close the justice gap is impossible, as the availability of such services is very limited and often completely impossible for people with moderate incomes and small businesses to access. At the same time, though, this category of clients cannot afford private legal assistance, especially during the COVID-19 pandemic.³⁰ Therefore, even though providing pro bono services is still very important, there is a strong need for greater innovation in legal services.³¹ Some of these innovations are discussed below.

25. AVALOS ET AL., STATE BAR OF CAL., 2019 CALIFORNIA JUSTICE GAP STUDY: EXECUTIVE REPORT 13 (2019), <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf> [<https://perma.cc/LSB5-E7F5>].

26. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS’N 2021) (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.”).

27. STANDING COMM. ON PRO BONO & PUB. SERV., AM. BAR ASS’N, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA’S LAWYERS 6 (2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_supporting_justice_iv_final.pdf [<https://perma.cc/N246-GQ68>].

28. *Id.* at 7.

29. 3 Ways to Meet the “Staggering” Amount of Unmet Legal Needs, A.B.A. (July 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/july-2018/3-ways-to-meet-the-staggering-amount-of-unmet-legal-needs/> [<https://perma.cc/B257-2D3B>].

30. See Deborah L. Rhode & Jason M. Solomon, *Access to Justice During COVID-19*, THE RECORDER (May 12, 2020, 7:10 PM), <https://www.law.com/therecorder/2020/05/12/access-to-justice-during-covid-19/?sreturn=20210801112206> [<https://perma.cc/Y6D2-8S88>] (“Even middle-class consumers and small businesses are adversely affected, now more than ever.”).

31. *Id.*

II. THE USE OF “UNBUNDLING” LEGAL SERVICES AS ANOTHER SOLUTION TO PROVIDE GREATER ACCESS TO JUSTICE

Another possible solution to increase the access to justice is unbundling legal services, also known as limited-scope representation. Unbundling is “a model of providing legal services where the lawyer and client agree at the beginning of the representation that the lawyer will provide certain services and the client separately will address the remaining aspects of the case.”³² “These services include providing brief advice, drafting letters and complaints, helping complete forms, making telephone calls, or some combination of these.”³³

Unbundling, though, is relatively dated. The opportunity to provide legal services in such a manner was officially confirmed in ABA Model Rule 1.2(c) that was revised in 2002.³⁴ However, “[l]imiting the scope of legal representation . . . was recognized by courts long before the drafting of ABA Model Rule 1.2(c).”³⁵

A 2018 study, which focused on the effectiveness of limited-scope representation, showed that the clients who were provided with unbundled, limited-scope representation were more successful in resolving their legal issues than self-represented clients.³⁶ Given the proven effectiveness of this tool, in-court, limited-scope representation should be permitted and “direct

32. *National Conclave on Unbundled Legal Services Will Focus on Closing National Justice Gap*, A.B.A. (Sept. 21, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/09/national_conclaveon/ [<https://perma.cc/22NN-9YRW>].

33. Deborah L. Rhode et al., *Access to Justice Through Limited Legal Assistance*, 16 *Nw. J. Hum. Rts.* 1, 5 (2018).

34. Ethics 2000 Commission, Center for Professional Responsibility, *Model Rules of Professional Conduct as Adopted by ABA House of Delegates*, AM. BAR ASS’N, (May 21, 2021), https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_redline/ [<https://perma.cc/PJR7-3XSD>]; see also MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 6 (AM. BAR ASS’N 2021) (“The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client.”).

35. Stephanie Kimbro, *Using Technology to Unbundle in the Legal Services Community*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES, Feb. 2013, at 3 (citing earlier court cases allowing limited legal representation).

36. See James G. Mandilk, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 *YALE L.J.* 1828, 1876 (2018) (evaluating the success of limited-scope representation in mortgage foreclosure litigation) (“By keeping everyone honest, limited-scope representation increases not only the quality of outcomes for clients, but also the fairness and transparency of the judicial process.”).

service organizations should consider limited-scope representation in crafting their overall approach to ameliorating access to justice issues.”³⁷

However, while the use of unbundled legal services has real advantages and has proven to be effective, this method has not become very popular. Although there has been significant progress in favor of promoting limited-scope representations, and there are real benefits to the litigants, some courts continue to reject or “impose hurdles on such representations.”³⁸ For example, in *Hammett v. Sherman*, the court denied plaintiff’s “motion for leave to retain an attorney for the sole purpose of collecting fees and costs incurred in connection with process of service . . . [because] neither the Federal Rules of Civil Procedure nor th[e] District’s Civil Local Rules” permitted limited-scope representations.³⁹ “As a result of this uncertainty, many attorneys are afraid to engage in the [unbundling services] practice.”⁴⁰

Moreover, the practice of unbundling legal services presents some ethical challenges. Such ethical complications include requiring “a precise and detailed ‘informed consent,’ malpractice considerations, disclosure of the attorney’s limited services to the courts and opposing counsel, restrictions on communicating with counsel and the opposing litigant and the requirement for diagnosing and communicating with clients on limitations in the delivery of the legal services.”⁴¹ These obligations lead to the limited use of unbundled legal services by lawyers across the United States.

On the other hand, some jurisdictions have taken steps to enhance the capacity of unbundled legal services as an effective tool to close the justice gap. In 2017, a Limited Scope Representation Toolkit was released in Illinois, which included “rules, forms, checklists, and a sample engagement letter, all intended to help Illinois lawyers understand the rules regarding unbundling or limited-scope representation and how to make it a part of

37. *Id.*

38. Dalton Courson, *Limited-Scope Representation: Preparing for the COVID-19 Influx of Cases*, A.B.A. (Mar. 25, 2021), <https://www.americanbar.org/groups/litigation/committees/access-justice/articles/2021/winter2021-limited-scope-representation-preparing-for-the-covid-19-influx-of-cases/> [<https://perma.cc/X433-7VTZ>].

39. *Id.* (citing *Hammett v. Sherman*, No. 19-CV-605, 2020 U.S. Dist. LEXIS 146155, at *4 (S.D. Cal. Aug. 13, 2020)).

40. Kristy D’Angelo-Corker, *When Less is More: The Limitless Potential of Limited Scope Representation to Increase Access to Justice for Low- to Moderate-Income Individuals*, 103 MARQ. L. REV. 111, 158 (2019).

41. Hon. Richard Dollinger, *Part 2: Limited Scope Representation in NY*, BUFF. L.J. (Feb. 8, 2017, 9:00 AM), <https://www.bizjournals.com/buffalo/news/2017/02/08/part-2-limited-scope-representation-in-new-york.html> [<https://perma.cc/6A33-4QHL>].

their practice.”⁴² In the same year, “the Arkansas Supreme Court made changes to the Rules of Professional Conduct and Rules of Civil Procedure to facilitate offering unbundled services and lend more transparency”⁴³ in the application of this model for attorneys and potential clients. The next year, at a sold-out symposium, a presentation was given to “help lawyers understand the rule changes and learn the nuts and bolts of offering unbundled services.”⁴⁴ In 2018, the Supreme Court of Virginia began allowing “lawyers employed by legal aid, and pro bono attorneys acting on a referral from a qualified legal services provider, to file notices of limited-scope appearance for just a part of a pending litigation, with a right to withdraw once [they] completed the limited scope representation.”⁴⁵ These measures that are designed to clarify problematic issues and train lawyers in the field of unbundled legal services will help promote this model of legal support.

As such, the use of unbundling legal services is a capable and effective instrument in addressing the problem of access to justice, especially in the “new era” of remote work, which began with the COVID-19 pandemic. However, the lack of transparency of ethical rules, as well as the need to provide additional education on specific rules for interested lawyers, should be addressed by jurisdictions in order to give this instrument a jump-start for further development and expansion.

III. THE USE OF NON-LAWYERS IN LIMITED LEGAL SERVICES AS A POSSIBLE WAY TO ELIMINATE THE JUSTICE GAP

Over the past decade, the use of non-lawyers as a method of overcoming barriers to the access to justice has received widespread attention from researchers and practitioners. The idea has even been put into practice in some states.

Washington was first state to allow non-lawyers to participate in a limited practice of law.⁴⁶ In 2013, the Washington Supreme Court authorized

42. Marilyn Cavicchia, *Unbundled Legal Services: Some Recent Developments Across the Country*, A.B.A. (Jan.–Feb. 2019), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2018_19/january-february/unbundled-legal-services-some-recent-developments-across-the-country/ [https://perma.cc/E8DA-6DCH].

43. *Id.*

44. *Id.*

45. *Id.*

46. Patrick McGlone, *Can Licensed Legal Paraprofessionals Narrow the Access-to-Justice Gap?*, A.B.A. J. (Sept. 6, 2018, 6:05 AM), https://www.abajournal.com/news/article/can_licensed_legal_paraprofessionals_narrow_the_access_to_justice_gap [https://perma.cc/JP4K-94JP].

non-lawyer, limited license legal technicians (“LLLT”) “to perform specific legal services in the area of domestic relations.”⁴⁷ The requirements to become a LLLT included an associate’s degree or higher, forty-five credit hours of core curriculum from an ABA-approved law school or ABA-approved paralegal program, 3,000 hours of core work experience under the supervision of a licensed lawyer, and passing several exams.⁴⁸ However, due to the high costs of sustaining the program and the small number of interested individuals, the program was suspended in June 2020.⁴⁹ The Washington Supreme Court allowed current LLLT candidates to complete all licensing and admission requirements by the July 31, 2022, deadline; after that, only currently licensed LLLTs and any new LLLTs who met the deadline will remain licensed and will be eligible to continue working as LLLTs in Washington.⁵⁰

Following Washington’s innovation, in 2015, the Utah Supreme Court authorized “licensed paralegal practitioners to assist clients in family law, eviction, and consumer debt matters.”⁵¹ Additionally, in response to the economic impact of the COVID-19 pandemic, the Utah Supreme Court “unanimously approved a slate of reforms that allow for nonlawyer ownership or investment in law firms,” authorized the sharing of attorney fees with non-lawyers, and “permit[ted] legal services providers to try new ways of serving clients during a two-year pilot period.”⁵² For example, the first entirely non-lawyer-owned law firm in Utah, Law on Call, applies an innovative way of serving clients: “clients pay \$9 per month to get unlimited phone access to lawyers who can offer advice in the areas of business law,

47. *Id.*

48. Stephen R. Crossland, *The Evolution of Washington’s Limited License Legal Technician Rule*, BAR EXAM’R, June 2014, at 20, 21, <https://thebarexaminer.org/wp-content/uploads/PDFs/830214-Crossland.pdf> [<https://perma.cc/2MUK-4DCE>].

49. Lyle Moran, *Washington Supreme Court Sunsets Limited License Program for Nonlawyers*, A.B.A. J. (June 8, 2020, 3:35 PM), <https://www.abajournal.com/news/article/washington-supreme-court-decides-to-sunset-pioneering-limited-license-program> [<https://perma.cc/PK9R-4JQR>].

50. *Id.*; *Limited License Legal Technician Licensing and Admission*, WASH. ST. BAR ASS’N (Oct. 8, 2021), <https://wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician> [<https://perma.cc/RQ2R-XVEA>].

51. McGlone, *supra* note 46.

52. Lyle Moran, *Utah Embraces Nonlawyer Ownership of Law Firms as Part of Broad Access-to-Justice Reforms*, A.B.A. J. (Aug. 14, 2020, 3:45 PM), <https://www.abajournal.com/web/article/utah-embraces-nonlawyer-ownership-of-law-firms-as-part-of-broad-reforms> [<https://perma.cc/GH6D-J2LY>].

end-of-life planning, contracts, employment, housing and real estate.”⁵³ If further “legal work is needed, the discounted rates start at \$100 per hour.”⁵⁴ This initiative has great potential to improve accessibility to legal advice for those who cannot afford standard legal fees and who cannot obtain access to legal aid.

Arizona also decided to undergo the same kind of “revolution” in response to COVID-19 challenges. On August 27, 2020, the Arizona Supreme Court eliminated the rule of professional conduct which prohibits lawyers from sharing legal fees with non-lawyers and forming partnerships with non-lawyers.⁵⁵ Moreover, non-lawyers were allowed to “provide limited legal services to the public, including being able to go into court with their client.”⁵⁶ With regard to professional regulation and liability, these non-lawyers are considered “affiliated members” of the bar and therefore must comply with the regulations and disciplinary rules that apply to attorneys.⁵⁷

Similar steps in this direction, although more cautious than those taken in Washington, Utah, and Arizona, have also been taken in other states.

For example, in New York in 2012, the New York Task Force recommended “the implementation of a pilot program to permit appropriately trained nonlawyer advocates to provide out-of-court assistance in a discrete substantive area.”⁵⁸ In February of 2014, New York Chief Administrative Judge A. Gail Prudenti issued an administrative order establishing a pilot “Court Navigators Program” for the “purpose of providing essential non-legal services, without cost, to unrepresented litigants by qualified non-lawyers (“Navigators”).”⁵⁹ The Navigators “provide general information,

53. Debra Cassens Weiss, *First Law Firm Owned Entirely by Nonlawyers Opens in Utah*, A.B.A. J. (Mar. 17, 2021, 10:50 AM), <https://www.abajournal.com/news/article/first-law-firm-owned-entirely-by-nonlawyers-opens-in-utah> [<https://perma.cc/Q43S-T66M>].

54. *Id.*

55. C. Thea Pitzen, *Can Nonlawyers Close the Legal Services Gap?*, A.B.A. (Feb. 26, 2021), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2021/can-nonlawyers-close-legal-services-gap-two-states-remove-ban-fee-sharing-and-partnerships-nonlawyers/> [<https://perma.cc/65MC-WVSM>].

56. *Id.*

57. *Id.*

58. COMM. ON PRO. RESPONSIBILITY, N.Y.C. BAR ASS’N, *NARROWING THE “JUSTICE GAP”: ROLES FOR NONLAWYER PRACTITIONERS 1*, 1 (2013), <http://www2.nycbar.org/pdf/report/uploads/20072450-RolesforNonlawyerPractitioners.pdf> [<https://perma.cc/Z2BJ-ZS7R>].

59. Admin. Order Establishing the Court Navigators Program, AO/42/14 (Feb. 10, 2014).

written materials, one-on-one assistance.”⁶⁰ The Navigators also “provide moral support to litigants, help them access and complete court forms, assist them with keeping paperwork in order, [and] assist them in accessing interpreters and other services.”⁶¹ After the positive outcome following the evaluation of the program, The Regulatory Innovation Working Group, a special commission composed of eminent New York lawyers and judges, proposed the expansion of the Navigator program “both in scope and substance.”⁶² In addition, this group offered to allow “[t]he provision of certain ‘legal’ services and advocacy by trained and certified social workers” in New York.⁶³

The biggest challenge for this model is that while involving non-lawyers to provide certain simple legal services is viable, there is currently no practical data proving that this is an effective way to address the access to justice problem. Among other difficulties of involving non-lawyers in legal practice is the need to determine the sufficient, but not excessive, education level of such specialists and to define the boundaries of their limited practice. Achieving the perfect balance is not so easy in practice. After the failure in Washington, an unambiguous conclusion regarding the reasonableness of non-lawyers participating in providing certain legal services could be reached over time but only after trying different models and approaches. Therefore, in light of the growing problem with the justice gap, complicated by the COVID-19 emergency, it is necessary to begin developing and implementing programs for non-lawyers to work parallel with licensed professionals.

IV. LOW-BONO AND NONPROFIT LAW FIRMS AS TOOLS TO OVERCOME THE JUSTICE GAP

Although the topic of encouraging the creation of low-bono and non-profit law firms is not as much of a debate in the context of bridging access to justice as the other proposals, this method seems to be effective and, to some extent, underestimated. Low-bono and not-for-profit firms that provide legal services can be characterized as sliding scale law firms (“SSLF”),

60. Fern Fisher, *Navigating the New York Courts with the Assistance of a Non-Lawyer*, 122 DICK. L. REV. 825, 829 (2018) (footnote omitted).

61. *Id.*

62. COMM’N TO REIMAGINE THE FUTURE OF N.Y.’S CTS., REPORT AND RECOMMENDATIONS OF THE WORKING GROUP ON REGULATORY INNOVATION 3 (2020), https://www.nycourts.gov/LegacyPDFS/publications/RWG-RegulatoryInnovation_Final_12.2.20.pdf [<https://perma.cc/TR85-RKBM>].

63. *Id.*

charging clients by a rate based on that client's income.⁶⁴ In 2017, more than thirty nonprofit SSLFs were operating across the U.S.⁶⁵ Notably, these firms can be tax-exempt under section 501(c)(3) of the Internal Revenue Code as charitable legal aid organizations, even though they charge "clients for services, provided that (1) the fees are based upon clients' ability to pay, and (2) all of the firm's clients are indigent or unable to otherwise afford legal services."⁶⁶

To understand the essence of operating such a firm, the following key differences between a for-profit law firm, which may apply reduced fees in certain situations, and a nonprofit SSLF must be highlighted: (1) the clients of a nonprofit SSLF should be indigent or unable to otherwise afford legal services; (2) the fee rates "charged by a nonprofit SSLF must be based solely upon a client's ability to pay"; and (3) there are restrictions in governance structure because the lawyers at a nonprofit SSLF usually do not have ownership rights, as a SSLF is operated by a volunteer board of directors.⁶⁷

However, private law firms are concerned that "SSLFs will reduce their business as clients seek out lower fees."⁶⁸ Based on the key characteristics of the nonprofit law firms described above, this concern cannot happen because clients served by SSLFs simply cannot afford an attorney employed by a classical law firm, so "[f]or example, a low-income parent who cannot access a consumer or employment attorney may illegally lose their home or job."⁶⁹ Therefore, SSLFs do not take away work from private firms; they only fill the existing gap in the access to justice for people with limited financial resources.

One of the "loudest" experiences of a nonprofit law firm offering sliding-scale, low-cost legal help was Open Legal Services, the Utah-based law firm co-founded by Shantelle Argyle and A. Daniel Spencer in 2013.⁷⁰ The

64. See Mitch, *Tipping the Scales of Justice: The Role of the Nonprofit Sliding Scale Law Firm in the Delivery of Legal Services*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 375, 377–78 (2017).

65. *Id.* at 379.

66. *Id.* at 380 (citing Rev. Rul. 78-428, 1978-2 C.B. 177).

67. *Id.* at 381–82.

68. *Id.* at 385 (citing Geoffrey A. Schoos, *Working on the Outskirts of Hope: One Independent Legal Services Organization's Struggle to Survive and Serve Rhode Island's Low Income Communities*, 18 CUNY L. REV. 229, 249 (2016)).

69. *Id.* at 386.

70. Lyle Moran, *Hope for Nonprofit Law Firm Model Remains Despite Closing of Open Legal Services*, A.B.A. J. (May 12, 2020, 10:21 AM), <https://www.abajournal.com/web/article/hope-for-nonprofit-law-firm-model-remains-despite-open-legals-closing> [https://perma.cc/ZA7R-DYUS].

firm was dedicated to “serving consumers whose income was not low enough to qualify for free legal assistance but who also could not afford most lawyers.”⁷¹

Open Legal Services’ experience showed that operating such a firm provides benefits not only to the general public seeking low-cost legal services but also to legal professionals. Attorneys who choose an SSLF business model pay less in taxes, have “the ability to solicit donations and to receive referrals from courts” and attorneys are “eligible to apply for student loan relief through the Public Service Loan Forgiveness Program” (“PSLF”).⁷² In addition, “[s]ome benefits Open Legal Services receive[d] as a 501(c)(3) include[d] less expensive legal malpractice insurance through the National Legal Aid and Defender Association and discounted health insurance through the Utah Nonprofits Association.”⁷³

Based on this experience, it seems that some categories of legal professionals, such as newly admitted lawyers and recent law school graduates, might be especially interested in starting their own nonprofit law firms, especially given the difficulties in finding a job amid the pandemic. As an alternative to a nonprofit corporate model, which may have some special requirements depending on state law—for example, certain New York nonprofit corporations must have a board of directors of at least three members⁷⁴—the option to start a low-bono law firm⁷⁵ by serving people of moderate means also exists. However, some of the biggest obstacles to this idea faced by recent law school graduates are the large loan debts of law students and the lack of experience in the practice of law.⁷⁶ In this regard, some additional guidance and incentives need to be provided to facilitate the expansion of this innovative model.

Notably, there have been some attempts to help recent law school graduates open and operate low-bono law firms for low-income and

71. *Id.*

72. *Id.*

73. Stephanie Francis Ward, *Can Nonprofit Firms Bridge the Access-to-Justice Gap?*, A.B.A. J. (Jan. 1, 2017, 3:40 AM), https://www.abajournal.com/magazine/article/low_bono_access_justice [<https://perma.cc/YWW7-MJ45>].

74. N.Y. NOT-FOR-PROFIT CORP. § 702 (McKinney 2020).

75. See generally Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 3 (2014) (“Low bono is used synonymously with the practices of offering reduced legal fees.”).

76. See Jordan Rothman, *Student Debt Makes It Very Difficult to Start A Law Firm*, ABOVE THE L. (Mar. 6, 2019, 10:03 AM), <https://abovethelaw.com/2019/03/student-debt-makes-it-very-difficult-to-start-a-law-firm/> [<https://perma.cc/8J28-DZSZ>].

middle-class individuals through the use of legal incubators.⁷⁷ Legal incubators can be understood as “programs providing space and support for newly admitted lawyers in exchange for representing underserved clients.”⁷⁸

The first legal incubator was opened in 2007 at the City University of New York School of Law and, during the last decade, the number has grown to over sixty incubators in the United States and across the globe.⁷⁹ Importantly, legal incubators “provide training and educational programs for lawyers seeking to establish their own firms”; “help fledging lawyers reduce their overhead”; “advance social responsibility by providing lawyers with opportunities to serve low- and moderate-income populations”; and “provide a safe place of camaraderie, community, and innovation among lawyers.”⁸⁰ The American Bar Association and the Incubator Consortium conducted a survey of legal incubators, which showed that 70.4% of law school graduates participating in incubator programs “went into solo or small firm practice after leaving the incubator.”⁸¹

Along with the creation of legal incubators, law schools can have a large impact on the expansion of low-cost legal services by teaching law students core business concepts, such as project management training, process improvement, design thinking, and data analysis, in order to improve efficient law firm management.⁸² In addition, law schools can make law education more affordable, which would reduce the education debt of graduates and increase the pool of graduates who might choose to start firms serving people of modest means.⁸³

Without any doubt, setting up and running a low-income or nonprofit law firm is not an easy task. Luz Herrera, one of the first lawyers to start a nonprofit who later worked on a legal incubator to teach students how to do it said, “low bono is not for attorneys who just want to make six-figure

77. See Lyle Moran, *Legal Incubator Programs are Poised for Continued Growth, Techshow Speaker Says*, A.B.A. J. (Mar. 11, 2021, 5:22 PM), <https://www.abajournal.com/news/article/legal-incubator-programs-are-poised-for-continued-growth-techshow-speaker-says> [<https://perma.cc/J9K2-6WDX>].

78. *Id.*

79. Dawn Young, *Musings from an Incubator Director: Do Legal Incubators Really Work?*, A.B.A. FOR L. STUDENTS (Oct. 3, 2019), <https://abaforlawstudents.com/2019/10/03/do-legal-incubators-really-work/> [<https://perma.cc/TD3M-YPWN>].

80. *Id.*

81. *Id.*

82. See Andrew M. Perlman, *The Public’s Unmet Need for Legal Services & What Law Schools Can Do About It*, DÆDALUS, Winter 2019, at 75, 78.

83. See *id.* at 77.

salaries at big law firms. It's for those who want to help people and still make a living. It's about work-life balance."⁸⁴

However, creating additional incentives for starting and running such firms, as well as maintaining and expanding training in law firm management, could attract additional lawyers willing to help people with limited financial abilities. The benefit to this model of delivering legal services is the ability to directly impact the expansion of the access to justice. Hence, all further efforts to stimulate interest in the creation and promotion of low-bono and nonprofit law firms are reasonable and substantially justified.

CONCLUSION

Despite the best efforts from the professional legal community, most of the legal needs of low- and middle-income people in the United States remain unmet, which is largely due to the unaffordable cost of legal services. As the above data show, the various models for providing pro bono legal services, which undoubtedly remain important in addressing the problem of the access to justice, are objectively not able to single-handedly satisfy the need for affordable legal support for those who cannot otherwise afford it. On the other hand, introducing other innovative approaches, such as allowing non-lawyers to practice limited legal practice, using unbundled legal services, and encouraging low-bono law firms and nonprofit organizations, have their own specific challenges. Due to the lack of ideal means to fill the justice gap, employing a diverse set of methods for solving this problem and continuing to develop each approach separately are the most likely and reasonable strategies towards achieving true equal access to justice.

84. William Vogeler, *You Know About Pro Bono, What About Low Bono?*, FINDLAW (June 7, 2019, 6:00 AM), <https://www.findlaw.com/legalblogs/strategist/you-know-about-pro-bono-what-about-low-bono/> [<https://perma.cc/6E5J-2QEP>].