

BEYOND THE JD: HOW ELIMINATING THE LEGAL PROFESSION’S
MONOPOLY ON LEGAL SERVICES CAN ADDRESS THE ACCESS-TO-JUSTICE
CRISIS

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INTRODUCTION

The legal profession faces an access-to-justice crisis: tens of millions of Americans are unable to afford a lawyer for civil legal services.¹ Studies suggest that over 80% of low-income and middle-income individuals are unable to afford a lawyer when they need one.² These individuals have no recourse but to represent themselves *pro se* – which one or both parties in the vast majority of civil legal disputes do.³ Lawyers and legal scholars have decried this access-to-justice gap for decades, but the gap has persisted and grown.⁴ With income inequality rising every year,⁵ lawyers' hourly fees are becoming more and more unattainable for average Americans.

In the face of this crisis, the supply of newly minted lawyers is diminishing, with 28% fewer graduates annually.⁶ Those who do enter law school face skyrocketing tuition⁷ and up to hundreds of thousands of dollars in student debt.⁸ Young lawyers are stuck for years in financial limbo, “drowning” under “unmanageable” debt loads.⁹ The economics of law school and legal

¹ See, e.g., Robert Ambrogio, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA JOURNAL, Jan. 2015, at 5 (noting that “low-income people in Washington face 88 percent of their legal problems without help from an attorney”).

² *Id.* at 2 (“[M]ultiple state and federal studies [show] that 80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation.”).

³ See, e.g., Lisa Needham, *Measuring the Access to Justice Gap*, LAWYERIST.COM (Aug. 27, 2016), <https://lawyerist.com/measuring-access-to-justice/> [<https://perma.cc/3T5T-UWPD>] (citing study by Richard Zorza finding that in 76% of civil legal disputes in ten randomly selected urban counties, either one litigant or both were represented *pro se*).

⁴ See Jeffery Leon, *No Access, No Justice*, WASHINGTON LAWYER (May 2016), <https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2016-access-to-justice.cfm> [<https://perma.cc/3PLN-2Q4C>] (noting that state bar associations and commissions have attempted to address the justice gap since at least 1994, with limited success in the face of rising income inequality); James George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. LAW 293, 294 (2006) (describing the “access to justice” problem).

⁵ See, e.g., *Income Inequality*, INEQUALITY.ORG, <https://inequality.org/facts/income-inequality/> [<https://perma.cc/8AAQ-TXV8>] (“[T]he gap between the rich and everyone else, has been growing markedly, by every major statistical measure, for some 30 years.”).

⁶ See, e.g., Kelly McEvers, *As Law School Applicant Pool Shrinks, Student Bodies Diversify*, NPR (April 26, 2016), <https://www.npr.org/2016/04/26/475773282/nations-top-law-schools-face-near-record-enrollment-decline> [<https://perma.cc/PK6F-UU7R>] (“The number people [sic] applying to law school is down - way down, about a half of what it was a decade ago”); Bill Henderson, *Supply of Law Graduates is Shrinking, But So Is Demand*, LEGAL EVOLUTION (May 14, 2017), <https://www.legalevolution.org/2017/05/supply-law-graduates-shrinking-demand-006/> [<https://perma.cc/5MGH-JSTK>] (noting 28% drop in number of law school graduates).

⁷ See, e.g., Paul Campos, *Has the Increased Cost Of Law School Improved Legal Education?*, 50 WAKE FOREST L. REVIEW 101, 101 (2016) (noting that, “adjusted for inflation, [there has been], in constant dollars, a 626% increase in resident public law school tuition, and a 292% increase in private law school tuition” from 1974 to 2004).

⁸ See, e.g., *Which Law School Graduates Have the Most Debt?*, US NEWS, <https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings> [<https://perma.cc/SYG8-WAEE>] (noting average debt loads for students at various law schools).

⁹ See, e.g., Staci Zaretsky, *Recent Grads Are Drowning In Debt, Think It's Too Easy To Get Into Law School*, ABOVE THE LAW (Apr. 12, 2017), <http://abovethelaw.com/2017/04/recent-grads-are-drowning-in-debt-think-its-too-easy-to-get-into-law-school/> [<https://perma.cc/7FSS-DRXE>] (noting that, of 350 “recent law school graduates” surveyed, 58% described their debt loads as “unmanageable”).

practice sustain the access-to-justice gap:¹⁰ law students get mired in debt to pay for law school and then try to escape that debt by charging fees that low-income and middle-income individuals cannot afford.¹¹

Law schools and bar associations, acting to protect their financial interests, perpetuate the status quo. First, bar associations' vigorous prohibitions on unauthorized practice of law¹² restrict non-lawyers from providing legal services at a lower cost than lawyers. Second, virtually all aspiring lawyers are required to attend three years of law school before being allowed to sit for the bar exam.¹³ These two factors combine to sustain the vicious economic cycle driving the access-to-justice gap.

In this article, I first review the access-to-justice crisis and its two underlying economic causes: the legal community's monopoly on legal services and the prohibitively high cost of law school.¹⁴ In Part III, I consider four frequently proposed solutions to the accessibility gap: reducing the length of law school from three years to one or two,¹⁵ expanding student loan forgiveness for public service work,¹⁶ increasing funding for legal aid programs,¹⁷ and a "Civil Gideon" mandating a government-provided lawyer for civil legal matters.¹⁸ I then argue that none of these solutions

¹⁰ See, e.g., Robert Ambrogi, *Who Says You Need A Law Degree to Practice Law?* WASHINGTON POST (Mar. 13, 2015), https://www.washingtonpost.com/opinions/closing-the-justice-gap/2015/03/13/a5f576c8-c754-11e4-aa1a-86135599fb0f_story.html?utm_term=.b5c05e912d4f [<https://perma.cc/3PH2-LJ3V>] ("Many clients can't afford what lawyers need to recoup to service their debt load").

¹¹ See, e.g., Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA JOURNAL (2015), http://www.abajournal.com/magazine/article/washington_state_moves_around_upl_using_legal_technicians_to_help_close_the [<https://perma.cc/4JZ8-BPFN>] ("The economics of traditional law practice make it impossible for lawyers to offer their services at prices these people can afford.").

¹² See generally Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REVIEW 2581(1999) (providing an overview of UPL policies nationally); Selina Thomas, *Rethinking Unauthorized Practice of Law in Light of the Access to Justice Crisis*, ABA Center for Professional Responsibility (published in *The Professional Lawyer*, Volume 23, Number 3, 2016) (noting how UPL enforcement exacerbates the access-to-justice crisis).

¹³ Over 99.9% of people sitting for the bar exam attended three years of law school (83,836 out of 83,896 bar examinees). 43 states require a full three years of law school for all bar examinees; an additional three states require at least one year of law school as well as a legal apprenticeship. Four states permit legal apprenticeships in lieu of law school. Corey Adwar, *How to Become a Lawyer Without a Law Degree*, SLATE (Aug. 2, 2014), <https://slate.com/business/2014/08/states-that-allow-bar-exams-without-law-degrees-require-apprenticeships-instead-of-law-school.html> [<https://perma.cc/L2K8-MQFU>].

¹⁴ *Id.*; See also Laurel Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683, 2683 (2014) ("[R]estricting the practice of law to those who have completed a juris doctor has constrained the market options so that many consumers have no access to legal services at all.").

¹⁵ See, e.g., Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, NY TIMES (Aug. 23, 2013), <https://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/> [perma.cc/CHE2-KGJB].

¹⁶ See, e.g., NLADA, *THE CRITICAL ROLE OF PUBLIC SERVICE LOAN FORGIVENESS IN ACCESS TO COUNSEL AND EQUAL JUSTICE* (2015).

¹⁷ See, e.g., Bob Wieckowski and Salena Copeland, *Why California Should Boost Legal Aid Funding*, THE MERCURY NEWS (March 23, 2017), <https://www.mercurynews.com/2017/03/23/opinion-why-california-should-boost-legal-aid-funding/> [<https://perma.cc/ZJE2-5U72>].

¹⁸ See, e.g., Anne Puluka, *Costs of Law School and Costs of Legal Aid: Expanding Legal Aid and Increasing*

alone can effectively and sustainably bridge the accessibility gap since they do not address its underlying economic causes.

In Part IV, I explore the possibility of addressing the justice gap by creating a new category of legal professional: a legal technician, without a JD, who is qualified to provide legal assistance in certain civil matters. I first examine the parallel challenges faced by the medical industry and highlight how the industry has been able to reduce healthcare costs and improve accessibility by allowing medical care to be given by lower-cost providers such as nurse practitioners and physician assistants.¹⁹ I then examine pilot programs in Washington and New York²⁰ that take steps toward creating similar professional roles: Washington's Limited Licensed Legal Technician program²¹ and New York State's Court Navigator program.²² Finally, I argue that this approach presents the strongest chance of an economically sustainable, long-term solution to the access-to-justice crisis.

I. THE ACCESS TO JUSTICE CRISIS AND ITS CAUSES

A. A Shortage of Affordable Legal Services

The United States suffers from a lack of affordable legal services.²³ A wide range of studies concludes that between 80 and 90 percent of low-income and middle-income Americans are unable to obtain or afford a lawyer for civil legal services.²⁴ Many litigants don't even bother trying to find a lawyer: in one study, 78 percent of low-income individuals tried to address civil legal matters by themselves or with friends and family, or simply did nothing.²⁵ Even when they do seek a lawyer,

Access to Justice in Housing Law, MICH. STATE UNIV. COLL. OF LAW DIGITAL COMMONS (2016), <https://www.law.msu.edu/king/2015-2016/Puluka.pdf> [perma.cc/N2BU-JZG2].

¹⁹ See, e.g., *Five New Studies: Nurse Practitioners Expand Access to Health Care, Lower Costs, Improve Outcomes*, PENNSYLVANIA COALITION OF NURSE PRACTITIONERS (March 1, 2016), <https://www.pacnp.org/news/277542/Five-New-Studies-Nurse-Practitioners-Expand-Access-to-Health-Care-Lower-Costs-Improve-Outcomes.htm> [perma.cc/W75X-ZGTK] ("Five separate studies concluded that nurse practitioners (NPs) expand access to care, improve patient health outcomes, boost rural health care, lower primary care costs and reduce emergency room admissions"); Sophia Garcia, *The Doctor Is Out, But the Advanced Practice Provider Can See You Now*, HUFFINGTON POST (July 17, 2014), http://www.huffingtonpost.com/sofia-f-garcia/post_8045_b_5592401.html [perma.cc/XA2U-EYYC] (describing the benefits of the shift of medical care to lower-cost providers).

²⁰ In choosing these two state programs, I am indebted to Professor Benjamin Cooper, who highlighted these programs in his study of proposed ways to increase access to legal services without lawyers. See generally, Benjamin Cooper, *Access to Justice Without Lawyers*, 47 AKRON L. REV. 205 (2014).

²¹ See, e.g., Lori Nelson, *LLLT-Limited License Legal Technician: What It Is, What It Isn't, and the Grey Area in Between*, 50 FAM. L.Q. 447, 448 (2016).

²² *Id.* at 459.

²³ See, e.g., LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1-3 (2009) <https://mlac.org/wp-content/uploads/2015/08/Documenting-the-Justice-Gap.pdf> [perma.cc/6N3M-LUHZ] (documenting the lack of affordable legal services in the United States).

²⁴ Ambrogi, *supra* note 1 (highlighting that "multiple state and federal studies [show] that 80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation"); LEGAL SERVICES CORPORATION, *supra* note 23, at 13-18 (detailing the results of seven studies of low-income legal needs across seven geographically and socioeconomically diverse states).

²⁵ Rebecca Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and*

low-income individuals frequently find that they cannot afford it: in New Jersey, for example, of the 19.4 percent of litigants in one study who sought help from a lawyer, only 30.6 percent were able to get assistance – resulting in less than 6 percent of the original group of litigants having legal representation.²⁶

The lack of affordable legal services also impacts middle-class Americans. Litigants of middle-income backgrounds may find that they “[earn too much to] qualify for civil legal aid, and yet cannot afford traditional legal services.”²⁷ One study estimates that up to 60 percent of the legal needs of middle-income persons go unmet.²⁸

Short-staffed Legal Aid services are unable to bridge this gap. There is only one civil Legal Aid lawyer for every 15,625 people in poverty in the U.S., compared to an overall ratio of four lawyers for every 1,000 people.²⁹ For every individual who seeks assistance from an LSC-funded program, another is turned away due to lack of resources.³⁰ Nearly one million cases per year are rejected from LSC-funded offices due solely to resource constraints.³¹ Considering how often low-income and middle-income litigants do not even seek legal assistance, the number of would-be Legal Aid recipients may be much higher.

Due to the lack of affordable legal services, litigants have faced an “explosion in self-representation.”³² Millions of Americans each year are forced to navigate the legal system without a lawyer or anyone else to guide them.³³ In Georgia alone, over 800,000 state court cases in 2016 involved at least one *pro se* party.³⁴ In New Hampshire state courts, at least one party was *pro se* in 85 percent of civil district court cases and nearly half of civil appellate court cases.³⁵ In certain areas of the law, this number is even higher: for example, in family law, 97 percent of domestic abuse

Services Study, AMERICAN BAR FOUNDATION at 11-12 (2014), http://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf [perma.cc/9L9U-F4EN] (see graph and discussion).

²⁶ LEGAL SERVICES CORPORATION, *supra* note 23, at 16.

²⁷ Thomas, *supra* note 12, at 18.

²⁸ James McCauley, *The Future of the Practice of Law: Can Alternative Business Structures for the Legal Profession Improve Access to Legal Services?*, 51 U. RICH. L. REV. 53, 55-56 (2017) (quoting the Virginia State Bar’s Study Committee on the Future of Law Practice).

²⁹ The Justice Index, *Number of Attorneys for People in Poverty*, NATIONAL CENTER FOR ACCESS TO JUSTICE AT FORDHAM LAW SCHOOL (2016) <http://justiceindex.org/2016-findings/attorney-access/> [perma.cc/C5L2-XXJ8] (noting there are .64 Legal Aid attorneys for every 10,000 people in poverty); McCauley, *supra* note 28, at 54 (noting that there are four lawyers for every one thousand Americans).

³⁰ LEGAL SERVICES CORPORATION, *supra* note 23, at 27.

³¹ *Id.* at 9.

³² McCauley, *supra* note 28, at 56.

³³ See Lauren Sudeall Lucas & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, THE CONVERSATION (Sept. 21, 2017, 8:36 PM), <http://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159> [https://perma.cc/782L-HCE9] (noting several statistics highlighting the number of *pro se* litigants in US courts).

³⁴ *Id.*

³⁵ See LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 25 (Sept. 2009) (detailing several studies that show a high incidence of *pro se* litigants in state courts).

cases in New Hampshire and 90 percent in California had at least one *pro se* party.³⁶ In housing disputes, there is a stark contrast between landlords and tenants: in New York City and Washington, D.C., nearly 90 percent of landlords are represented by lawyers whereas 90 percent of tenants are not.³⁷ This is particularly disturbing given the consequences that legal representation can have: in New York, for example, tenants with a lawyer win 90 percent of housing disputes; without a lawyer, tenants are evicted approximately 50 percent of the time.³⁸

B. Underlying Causes of the Accessibility Gap

There are two primary reasons for the lack of affordable legal services: first, the legal profession artificially limits the supply of legal services through a monopoly that keeps prices high; and second, rising law school tuition and student debt loads create further barriers to affordability as young lawyers focus on lucrative practice areas to pay off their loans.

1. The Legal Profession's Monopoly on Legal Services

The legal profession's stranglehold on the market for legal services creates higher prices and effectively shuts out millions of Americans from the marketplace for legal services.³⁹ The lawyers' monopoly is pervasive: it prohibits anyone but bar-certified, juris doctor attorneys from providing most kinds of legal services.⁴⁰ In another industry, such a monopoly might have caught the ire of federal and state antitrust regulators, but lawyers are largely permitted to regulate themselves.⁴¹

The lawyers' monopoly has well-intentioned goals. A major goal is to protect consumer-litigants from the consequences of inept legal advice.⁴² Legal action can lead to potential confiscation of property, eviction from housing, or even deportation from the country.⁴³ Given the grave consequences of inadequate representation, the state courts that regulate the legal industry have aimed to protect consumers by limiting the provision of legal services only to those who are licensed and vetted by the state bar association.⁴⁴

³⁶ *Id.*

³⁷ Lucas & Meals, *supra* note 33; see also REBECCA BUCKWALTER-POZA, CTR. FOR AM. PROGRESS, MAKING JUSTICE EQUAL 1 (Dec. 8, 2016), [https://www.americanprogress.org/issues/criminaljustice/reports/2016/12/08/294479/making-justice-equal/\[https://perma.cc/B9AP-L4WZ\]](https://www.americanprogress.org/issues/criminaljustice/reports/2016/12/08/294479/making-justice-equal/[https://perma.cc/B9AP-L4WZ]) (noting that in Washington, D.C., housing courts, "90 to 95 percent of landlords are represented by lawyers . . . [whereas] only 5 to 10 percent of tenants have legal assistance").

³⁸ Lucas & Meals, *supra* note 33; see also NAT'L LEGAL AID & DEF. ASS'N, THE CRITICAL ROLE OF PUBLIC SERVICE LOAN FORGIVENESS IN ACCESS TO COUNSEL AND EQUAL JUSTICE 11 (Jun. 2015) ("For our [housing] clients, having an attorney can mean the difference between whether they will be sleeping on the street or not.").

³⁹ See Laurel Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM LAW REVIEW 2683, 2683 (2014) ("[R]estricting the practice of law to those who have completed a juris doctor has constrained the market options so that many consumers have no access to legal services at all.").

⁴⁰ *Id.* at 2687 ("[T]he legal profession's monopoly prohibits almost all consumer options for legal advice and representation other than licensed attorneys.").

⁴¹ *Id.* at 2694.

⁴² *Id.* at 2690.

⁴³ *Id.*

⁴⁴ *Id.*

Another goal of the monopoly is to ensure the integrity of the judicial system. Lawyers have long worried that unqualified legal practitioners could damage the rule of law and impair the public perception of the justice system.⁴⁵ As one commentator in the 1920s warned, “[a] loss of confidence in the courts and lawyers is a sign of governmental decline, and a forerunner of disintegration and anarchy.”⁴⁶

While both goals are laudatory, they come with tradeoffs. Monopolies lead to higher prices – one of the primary reasons that antitrust laws prohibit them.⁴⁷ In this case, the lawyers’ cartel “has driven up the cost of legal services” and rendered legal services unaffordable for tens of millions of Americans.⁴⁸ Further, it has shielded lawyers from disruptive innovation that could lower costs for consumers.⁴⁹

For the millions of litigants who are unable to afford a lawyer, the legal services monopoly leaves them with no real alternative but to represent themselves *pro se*.⁵⁰ This in turn undermines the very two principles that the monopoly purports to uphold: first, rather than protecting consumers, it leaves consumers alone to face off against legal counsel with no representation of their own; and second, it weakens the faith of the American public in the legal system.⁵¹ Rather than having trustworthy legal counsel, many Americans are left “wandering around the self-help section of bookstores and self-help kiosks in courthouses,” trying to navigate civil legal actions without any professional guidance.⁵² Resentful Americans increasingly see lawyers as “hired guns for the wealthy” rather than “affordable advocates for the average citizen.”⁵³ The vast inequities in legal representation and judicial outcomes lead to an overall loss of faith in the rule of law and notion of equal justice.⁵⁴

2. Ballooning Student Debt and the Rising Cost of Law School

For those who may want to address this “crisis of access,”⁵⁵ the only path to serving low-

⁴⁵ *Id.* at 2691.

⁴⁶ *Id.* at 2691 (quoting SPECIAL COMM. OF THE CONFERENCE OF BAR ASS’N DELEGATES, ON WHAT CONSTITUTES PRACTICE OF THE LAW AND WHAT CONSTITUTES UNLAWFUL AND IMPROPER PRACTICE OF THE LAW BY LAYMEN OR LAY AGENCIES (1919), *reprinted in* 44 N.Y. STATE BAR ASS’N, PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING HELD AT NEW YORK, JANUARY 21–22, 1921, AND CHARTER, CONSTITUTION, BY-LAWS, LISTS OF MEMBERS, OFFICERS, COMMITTEES AND REPORTS FOR 1920 app. A at 302–03 (1921)).

⁴⁷ *Id.* at 2694 (“The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”) (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978)).

⁴⁸ *Id.* at 2694.

⁴⁹ *Id.* at 2697.

⁵⁰ *Id.* at 2696.

⁵¹ Laurel Rigertas, *The Legal Profession’s Monopoly: Failing to Protect Consumers*, 82 FORDHAM LAW REVIEW 2683, 2683 (2014) at 2690-91 (“Consumer protection is not advanced when there is a group of highly trained lawyers that large segments of the population cannot access”).

⁵² *Id.* at 2696.

⁵³ *Id.* at 2692.

⁵⁴ *Id.*

⁵⁵ Brennan Center, *Closing the Justice Gap*, Brennan Center for Justice at New York University School of Law, <https://www.brennancenter.org/issues/closing-justice-gap> [<https://perma.cc/9HHD-ZZXC>].

income and middle-income litigants has been to become a lawyer. Yet, as law school has become more and more prohibitively expensive,⁵⁶ the barriers to entry to the legal profession have made it harder for would-be lawyers to provide affordable legal services.

In nearly every state, the only way to become a lawyer is to attend three years of law school.⁵⁷ This requires an enormous financial investment: the average cost of a law school education is \$143,400 at private law schools and \$81,336 for in-state tuition at state schools.⁵⁸ Some schools are even more expensive: three years of *in-state* tuition at the University of Virginia Law School costs \$174,900.⁵⁹ These costs do not include the cost of living during law school, the three years of forgone earnings from removing oneself from the workplace, nor the costs of compound interest on the student debt that many law students take on. Considering the cost of living, lost earnings, and interest on student loans, the true cost of law school may be closer to \$350,000 at private law schools.⁶⁰

These costs show no sign of abating. In the forty years from 1974 to 2014, when adjusted for inflation, law school tuition rose by an average of 292 percent at private universities and 626 percent at public universities.⁶¹ Many students have borne the rising costs through increasingly large student debt loads.⁶² By 2014, the average student loan debt taken on by law school graduates was \$122,158 at private law schools and \$84,000 at public law schools.⁶³ At fifteen law schools, the average student debt load at graduation was above \$150,000 – not including the compound interest that graduates would have to pay.⁶⁴ This included not only elite law schools like Harvard and Columbia, but also lower-ranked law schools such as the Thomas Jefferson School of Law, the John Marshall Law School, and Golden Gate University Law School.⁶⁵

The costs of attending law school create an enormous barrier to entry for aspiring lawyers. The prospect of hundreds of thousands of dollars of debt deters many would-be lawyers who might

⁵⁶ Paul Campos, *Has the Increased Cost Of Law School Improved Legal Education?*, Wake Forest L. Rev., 101 (2016) (noting that, “adjusted for inflation, [there has been], in constant dollars, a 626% increase in resident public law school tuition, and a 292% increase in private law school tuition”).

⁵⁷ See Corey Adwar, *How to Become a Lawyer Without a Law Degree*, Slate (Aug. 2, 2014), http://www.slate.com/blogs/business_insider/2014/08/02/states_that_allow_bar_exams_without_law_degrees_require_apprenticeships.html [<https://perma.cc/KTX3-5SLH>] (noting that 43 states require three years of law school to practice law, and that 99.9% of bar examinees attended three years of law school).

⁵⁸ Ilana Kowarski, *See the Price, Payoff of Law School Before Enrolling*, US News (Mar. 21, 2018), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-03-21/understand-the-cost-payoff-of-law-school-before-getting-a-jd> [<https://perma.cc/NXL6-G62K>].

⁵⁹ *Id.*

⁶⁰ Author’s analysis considering average cost of living, forgone wages based on average personal income nationwide, and 7% interest rate for Federal Grad PLUS loans.

⁶¹ Campos, *supra* note 56, at 101.

⁶² *Id.*

⁶³ Robert Farrington, *Law School And Student Loan Debt: Be Careful*, Forbes (Dec. 18, 2014), <https://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/#66cbb81711f9> [<https://perma.cc/X489-4L2D>].

⁶⁴ US News, *Which Law School Graduates Have the Most Debt*, US News and World Report, (2017), <https://www.usnews.com/best-graduate-schools/top-law-schools/grad-debt-rankings> [<https://perma.cc/N3RU-R897>].

⁶⁵ *Id.*

be interested in serving low-income individuals.⁶⁶ Lawyers bemoan the prospect of “#DebtTillDeath,” with some lawyers finding their debt load to be “straight up depressing” and “not even a real number.”⁶⁷ Financially, the six-figure investment required for a juris doctor tends to attract either two kinds of students: those who have the goal of recouping the investment by accumulating wealth through their legal practice,⁶⁸ or those who are daring enough to take a low-paying public interest job without a realistic prospect of being able to pay off their law school loans.⁶⁹ The former group has minimal interest in providing low-cost, affordable legal services, and the latter group has proved too small to provide legal services to the millions of Americans who cannot afford them. Thus, the cost of a legal education acts as a “cost prohibitive” barrier that forces “[p]rices [to] remain bound by a relatively limited pool of expensive [lawyers].”⁷⁰ Additionally, as the costs of law school continue to rise, fewer students are applying to law school,⁷¹ further driving up the costs of hiring an attorney.

II. ADDRESSING THE ACCESS TO JUSTICE GAP

A. Commonly Proposed Solutions

Four solutions have been frequently proposed that could reduce barriers to entry of the legal profession and improve the provision of affordable legal services. These include reduction of the law school curriculum to two years rather than three, strengthening of student loan repayment assistance programs, an increase in Legal Aid funding, and a “Civil Gideon” that would mandate access to a lawyer for litigants who are unable to afford one. Below, I further detail each of the proposed solutions, as well as some of the fundamental challenges that prohibit each of them from being fully realized.

⁶⁶ *Dealing with the Debt Burden as a Public Interest Lawyer*, PSJD Blog, (Jan. 6, 2010, 3:49 p.m.) <http://blog.psjd.org/2010/01/06/dealing-with-the-debt-burden-as-a-public-interest-law-student/> [<https://perma.cc/HB2W-CZGF>] (“combination of a high, anticipated debt load and relatively low salary leaves even those students who are most committed to public service to wonder if the reward is worth the sacrifice”).

⁶⁷ Staci Zaretsky, *Will You Ever Be Able to Pay Off Your Law School Debt?* Above The Law (Sept. 26, 2017), <https://abovethelaw.com/2017/09/will-you-ever-be-able-to-pay-off-your-law-school-debt/> [<https://perma.cc/W9ME-LCRB>].

⁶⁸ Casey Sullivan, *7 Top Tips to Help You Get Rich as a Lawyer*, Find Law (July 11, 2016), https://blogs.findlaw.com/greedy_associates/2016/07/7-top-tips-to-help-you-get-rich-as-a-lawyer.html [<https://perma.cc/KM4L-P4WL>] (“[c]alling someone a greedy associate is redundant . . . most of us enter the law for a very different reason: our desire for cold, hard cash and lots of it”).

⁶⁹ *Dealing with the Debt Burden as a Public Interest Lawyer*, PSJD Blog (Jan. 6, 2010 3:49 p.m.), <http://blog.psjd.org/2010/01/06/dealing-with-the-debt-burden-as-a-public-interest-law-student/> [<https://perma.cc/UDA8-GNT5>] (“the primary tool [public interest lawyers] have to dig out of debt – their salary – seems alarmingly insufficient to the task.”).

⁷⁰ Matt Faustman, *Why Are Lawyers So Expensive, Even For the Small Things?*, Up Counsel Blog (2012), <https://www.upcounsel.com/blog/why-are-lawyers-so-expensive> [<https://perma.cc/X2AB-CEXE>].

⁷¹ See, e.g., Kelly McEvers, *As Law School Applicant Pool Shrinks, Student Bodies Diversify*, NPR (April 26, 2016), <https://www.npr.org/2016/04/26/475773282/nations-top-law-schools-face-near-record-enrollment-decline> [<https://perma.cc/PK6F-UU7R>] (The number people applying to law school is down - way down, about a half of what it was a decade ago”).

1. Improve Law School Affordability by Reducing Curriculum to Two Years

To reduce the cost barrier of law school, diverse commentators, including former President Obama⁷² and Professor Brian Tamanaha,⁷³ have suggested that law school should be reduced from three years to two. This idea is not new; in the 1970s, several prominent legal educators, including the law school deans of Harvard, Stanford, and Penn, advocated for a two-year law degree.⁷⁴ And in the 19th century and early 20th century, many aspiring lawyers forwent law school altogether, instead “reading the law” through apprenticeships with experienced lawyers.⁷⁵ U.S. Supreme Court Justice Robert Jackson, who served into the 1950s, attended only one year of law school before pursuing an apprenticeship to gain admission to the bar.⁷⁶

Those who call today for a reduction of law school to two years highlight that the change would “reduce the cost of legal education” and “enable [law graduates] to pursue lower-paying careers in the public service.”⁷⁷ There would be clear societal benefits from “lightening up a financial burden” from students who plan to “serve the needs of the relatively disadvantaged, lower-income, or even average-income Americans.”⁷⁸ With lower student debt loads, a new generation of lawyers less burdened by debt could afford to charge lower hourly fees and bridge the accessibility gap.⁷⁹

2. Strengthen Student Loan Assistance Programs

A second major focus for those concerned about the accessibility gap is student loan forgiveness for lawyers engaged in public service. These programs are designed to encourage aspiring lawyers to bridge the accessibility gap by alleviating the burden of student loan repayment.⁸⁰ Programs such as income-based repayment (IBR), pay as you earn (PAYE), and public service loan forgiveness (PSLF) allow lawyers with government-funded debt to have their loans forgiven if they meet certain requirements. For PSLF, lawyers’ law school debt is forgiven if they

⁷² Peter Lattman, *Obama Says Law School Should Be Two, Not Three, Years*, NY Times (Aug. 23, 2013), <https://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/> [perma.cc/CHE2-KGJB].

⁷³ Philip G. Schrag, *Failing Law Schools – Brian Tamanaha’s Misguided Missile*, 26 Geo. J. Legal Ethics 387, 410-12 (2013) (summarizing Tamanaha’s proposal to reduce costs by shortening law school to two years).

⁷⁴ Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for BAR Eligibility after Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 599, 603-4 (2012).

⁷⁵ *Id.* at 600.

⁷⁶ *Id.*

⁷⁷ *Id.* at 611.

⁷⁸ *Id.* at 608.

⁷⁹ *Id.*; See generally Brian Tamanaha, *The Problem with IBR*, THE NATIONAL JURIST (Nov. 30, 2012), <http://www.nationaljurist.com/national-jurist-magazine/problem-ibr> [perma.cc/Q6KR-SL49] (describing how law school debt discourages lawyers from public interest careers); Elie Mystal, *Law Deans Blame the Bar Exam, Instead of Themselves*, ABOVE THE LAW (Mar. 20, 2015), <http://abovethelaw.com/2015/03/law-deans-blame-the-bar-exam-instead-of-themselves/> [perma.cc/PJA9-DLY2] (“THREE YEARS OF LAW SCHOOL creates an unnecessary barrier to entry. Taking on six-figures of debt creates an unnecessary barrier to entry.”) (emphasis in original).

⁸⁰ Schrag, *supra* note 73, at 395-98 (describing IBR, PAYE, and public service loan forgiveness).

work in the public service for ten years and make payments proportional to their income.⁸¹ Even if they do not work in public service, lawyers could have their loans forgiven after twenty years (PAYE) or twenty-five years (IBR) if they make consistent loan payments proportional to their income.⁸²

These programs are lifeblood to those who pursue legal careers in the public service. Young lawyers with heavy debt burdens express sentiments like “praying for public service loan forgiveness” and “relying on PSLF.”⁸³ Some advocates laud the “strong incentive” that PSLF provides young lawyers to pursue legal careers in the public service, highlighting that lawyers enrolled in PSLF would pay less than half of what they would under traditional repayment plans.⁸⁴ With PSLF and associated programs, proponents contend that lawyering in the public service “will equal debt forgiveness.”⁸⁵

Proponents argue that such programs could be strengthened by providing for periodic partial forgiveness rather than an all-or-nothing forgiveness after ten plus years. One proposal, by Senators Richard Blumenthal and Elizabeth Warren, calls for partial forgiveness every two years, commencing in the second year after graduation.⁸⁶ This would increase the pace of loan forgiveness and alleviate some of the pressure on recent graduates pursuing public service careers.

3. Increase Legal Aid Funding

A third solution is a sharp increase in funding for Legal Aid attorneys who focus primarily on the provision of legal services to low-income individuals. In today’s legal market, Legal Aid attorneys are a critical part of bridging the access to justice gap.⁸⁷ Their clients include “the most vulnerable [. . .] the working poor, [. . .] people with disabilities, [and] victims of domestic violence.”⁸⁸ With over eight hundred Legal Aid offices across the country, attorneys funded by the Legal Services Corporation close nearly nine hundred thousand civil cases annually, helping to meet the needs of hundreds of thousands of low-income Americans who would otherwise be unable to afford assistance.⁸⁹

In recent years, bipartisan and nonpartisan groups have called for increases in legal aid

⁸¹ See, e.g., Liberty Straney, Lindsey Schromen-Wawrin, & Mariah Thompson, *Confronting Law Student Debt*, NATIONAL LAWYERS GUILD (Mar. 2016), <https://www.nlg.org/wp-content/uploads/2016/03/Confronting-Law-Student-Debt.pdf> [perma.cc/647F-V4EP] (detailing options to reduce loan payments or have debt forgiven).

⁸² Schrag, *supra* note 73, at 395-98 describing IBR, PAYE, and public service loan forgiveness).

⁸³ Zaretsky, *supra* note 67.

⁸⁴ Liz Lyons, *College Cost Reduction and Access Act Brings Relief to Public Interest Lawyers*, THE PUBLIC INTEREST ADVOCATE, DEPAUL UNIVERSITY COLLEGE OF LAW CENTER FOR PUBLIC INTEREST LAW (2010), <http://nlgchicago.org/wp-content/uploads/Winter-2011.pdf> [perma.cc/C37W-NA9L].

⁸⁵ *Id.*

⁸⁶ The Strengthening Forgiveness for Public Servants Act, S. 2826, 113th Cong. (2013-14), *reprinted in* <https://www.blumenthal.senate.gov/imo/media/doc/Strengthening-Forgiveness-For-Public-Service.pdf> [perma.cc/HC2F-NB7F].

⁸⁷ See generally, LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 25 (Sept. 2009).

⁸⁸ *Id.* at 27.

⁸⁹ *Id.* at 2, 12.

funding.⁹⁰ Proponents argue that increased government funding for Legal Aid would fund a wave of new attorneys to provide legal services to the needy.⁹¹ Yet even the increases called for would be insufficient to address the underlying issue; the American Bar Association (ABA), for example, called on Congress to increase funding by an additional eighteen percent, which would merely bring federal funding back to 2010 levels.⁹² Yet the ABA acknowledges that, “[e]ven with the increased funding, one million low-income Americans [would] be turned away from legal aid offices across the country that don’t have the budget for all the lawyers and paralegals needed to handle their cases.”⁹³ The degree of increase in Legal Aid funding called for is still nowhere near sufficient to address the entire accessibility gap.

4. Civil Gideon

A last hope of legal commentators is the “Civil Gideon,” a federal or state judicial decision that would mandate free provision of a lawyer to individuals in civil legal disputes.⁹⁴ Advocates point to the *Gideon* precedent in U.S. criminal law, as well as analogous requirements for civil legal disputes in several European countries.⁹⁵ This idea has gained numerous supporters, including the American Bar Association (ABA) and several state bar associations.⁹⁶ The hope is that a Civil Gideon decision would address the accessibility gap once and for all, forcing the hand of state governments and requiring them to provide funding for state-appointed lawyers to assist civil litigants.

B. Challenges to Implementing Proposed Solutions

Each of the aforementioned solutions, if implemented with the requisite political buy-in, government funding, and a guarantee of long-term sustainability, could make progress toward remedying the lack of affordable legal services. Yet none of these solutions address one of the primary causes of the accessibility gap: the legal profession’s exclusive monopoly on legal services. Each of the proposed solutions suffers from debilitating drawbacks that renders them unlikely to be long-term, sustainable solutions to the accessibility gap.

⁹⁰ Hilarie Bass, *Legal Aid Ensures Equal Justice for All; Congress Must Increase Funding for the Legal Services Corporation*, The Hill (Apr. 27, 2018), <http://thehill.com/blogs/congress-blog/judicial/385227-legal-aid-ensures-equal-justice-for-all-congress-must-increase> [perma.cc/3BAQ-V9M7]; see also James Sandman, *Management’s Recommendation for LSC’s FY 2017 Budget Request*, Legal Services Corporation (July 13, 2015), <https://www.lsc.gov/sites/default/files/LSC/about/budget/LSCFY17MgmtRecom.pdf> [perma.cc/C6YS-V5RG] (including several supporting letters from organizations urging an increase in legal aid funding).

⁹¹ *Id.*

⁹² Bass, *supra* note 90.

⁹³ *Id.*

⁹⁴ Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 Yale L.J. 2206, 2208-13 (2013) (describing the background of the “Civil Gideon” movement).

⁹⁵ *Id.*

⁹⁶ *Id.* at 2212-13.

1. Lack of Support in Legal Community for Two-Year Law School

Despite the best efforts of a small number of proponents, two entrenched interest groups – the ABA and law schools themselves – have effectively neutered the possibility of a two-year law school experience. When President Obama called for law schools to retool their curriculum into two-year programs, the ABA President argued that the proposal was nonsensical and questioned if the President meant what he said.⁹⁷ The ABA continued to maintain rigid rules requiring three full years of credit hours, forcing any two-year JD program to cram three years' worth of classes into two years of school.⁹⁸

Law schools – beset by financial pressures in the midst of declining applications⁹⁹ – have been loath to eliminate their golden goose, the three-year law school tuition.¹⁰⁰ Only a handful of law schools offer a two-year JD program, including none of the law schools ranked in the top thirty by U.S. News.¹⁰¹ Even those law schools that offer two-year JD programs still typically charge students the same tuition and fees as a three-year program.¹⁰² These programs have not resulted in radical changes to the cost of attending law school, and do not seem to have any prospect of gaining traction in the coming years.¹⁰³

Even in the highly unlikely event that a two-year law school curriculum were to be implemented with a reduction in the cost of law school of one-third, that still would not eliminate the access-to-justice gap. With average student debt at \$122,158 at private law schools and \$84,000 at public law schools,¹⁰⁴ a one-third tuition reduction would still leave law school graduates facing

⁹⁷ See Tovia Smith, *Should it Take 2 or 3 Years to Earn a Law Degree?*, NPR (Sept. 28, 2013) <https://www.npr.org/2013/09/18/223610581/should-it-take-3-years-to-earn-a-law-degree> [perma.cc/DM5D-Y728]; Elie Mystal, *Law School Offers Two-Year Program That (Shockingly) Costs Only Two Years Of Tuition*, ABOVE THE LAW, (Sept. 4, 2013) <https://abovethelaw.com/2013/09/law-school-offers-two-year-program-that-shockingly-costs-only-two-years-of-tuition/> [perma.cc/28CB-VTR7].

⁹⁸ *Id.*

⁹⁹ See, e.g., Terry Carter, *Reduction in Law School Applications Result in Favorable Upsides for Some*, ABA Journal (August 10, 2017), http://www.abajournal.com/news/article/reduction_in_law_school_admissions_favor_applicants_in_several_ways [https://perma.cc/Y875-BRGW] (noting that “law school applications have dropped precipitously in the face of a weak job market and questions about the future for legal employment”); See also, Kaitlin Mulhere, *A Troubled Law School*, INSIDE HIGHER ED (Sept. 19, 2014), <https://www.insidehighered.com/news/2014/09/19/significant-financial-pressures-weigh-thomas-jefferson-school-law> [perma.cc/3H7V-75VV] (describing the large debt burden faced by one law school, leading to staff layoffs and a proposed restructuring of debt).

¹⁰⁰ See Elizabeth Olson, *The 2-Year Law Education Fails to Take Off*, N.Y. TIMES, (Dec. 25, 2015), <https://www.nytimes.com/2015/12/26/business/dealbook/the-2-year-law-education-fails-to-take-off.html> [perma.cc/9CJB-EAE7] (“Law schools have been . . . unwilling to disrupt a proven earnings model”).

¹⁰¹ The only two-year JD offered in a top-30 program was at Northwestern University, which canceled its program in 2015. *Id.*; see also U.S. NEWS & WORLD REPORT, *Best Law Schools* (2018) <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings/page+2> [perma.cc/4RB2-TZK8].

¹⁰² Olson, *supra* note 100 (“A handful of other law schools are still successfully offering a two-year degree option . . . Brooklyn Law School, University of Kansas, University of Dayton[. . .]. But such degrees largely do not reflect retooling of the law school curriculum because accreditation rules require the same number of course credits to graduate. The degree in a truncated time frame typically costs the same as the three-year version.”).

¹⁰³ *Id.*

¹⁰⁴ Robert Farrington, *Law School and Student Loan Debt: Be Careful*, FORBES (Dec. 18, 2014), <https://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/#66cbb81711f9>

enormous student debt burdens close to \$100,000. Many law students would also continue to have student debt from their undergraduate studies – debt that, on average, totals \$39,400.¹⁰⁵ The financial pressures on young lawyers would still be a major inhibitor of affordable legal services.

2. Financial Uncertainty of Loan Forgiveness Programs

Loan forgiveness programs, such as PSLF and IBR, face three challenges that make them unlikely to be long-term solutions to the access-to-justice problem: first, they require law students to bear the cost of school up-front and assume hundreds of thousands of dollars in costs; second, inconsistent administration of the programs forces young lawyers to live in a state of uncertainty about their debt; and third, political will to support these programs is fading.

The first problem with these programs is structural; they require law students to take on the cost of law school themselves, without any guarantee that they will be reimbursed.¹⁰⁶ Aspiring lawyers must endure a potentially ballooning debt load for a decade or more. Those participating in PSLF work in public service professions for 10 years while compound interest accrues inexorably on their student loans; those participating in PAYE and IBR must make income-based payments for 20 years.¹⁰⁷ All of them toil away in the fragile hope that their remaining debt will be forgiven once the 10-year or 20-year mark arrives.¹⁰⁸

This debt is a major burden to those who participate in the programs.¹⁰⁹ One such lawyer reports that their debt burden went from “\$180ish [thousand]” to over “\$220[,000] with unpaid interest [. . .] no hope of touching the principal on my [salary].”¹¹⁰ These lawyers are effectively forced to forego any dreams of “paying mortgages [or] saving for retirement and their children’s college tuition,” since they “will not be free of their law school debt until deep into their middle age.”¹¹¹

Second, even if young lawyers make a good-faith effort to participate in these programs, they could incur a real risk that inconsistent administration of the programs will result in their loans never actually being forgiven.¹¹² In 2017, for example, the U.S. Department of Education (DOE)

[perma.cc/DHH3-F9D2].

¹⁰⁵ Student Loan Hero, *A Look at the Shocking Student Loan Debt Statistics for 2018*, (May 1, 2018), <https://studentloanhero.com/student-loan-debt-statistics/> [perma.cc/Y24D-BQZ8] (noting average undergraduate student debt load of \$39,400.).

¹⁰⁶ Brian Tamanaha, *The Problem with IBR*, THE NATIONAL JURIST (Nov. 30, 2012) <http://www.nationaljurist.com/national-jurist-magazine/problem-ibr> [perma.cc/9BMM-B8BW].

¹⁰⁷ *Id.*; See also, Federal Student Aid, *Income-Driven Plans*, U.S. DEPARTMENT OF EDUCATION, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> [https://perma.cc/3AA7-3GRG].

¹⁰⁸ *Id.*; See also, Federal Student Aid, *Income-Driven Plans*, U.S. DEPARTMENT OF EDUCATION, <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven> [https://perma.cc/3AA7-3GRG].

¹⁰⁹ *Id.*

¹¹⁰ Staci Zaretsky, *Will You Ever Be Able to Pay Off Your Law School Debt?* ABOVE THE LAW (Sept. 26, 2017), <https://abovethelaw.com/2017/09/will-you-ever-be-able-to-pay-off-your-law-school-debt/> [https://perma.cc/NRM2-FF92].

¹¹¹ Tamanaha, *supra* note 106.

¹¹² Stacy Cowley, *Student Loan Forgiveness Program Approval Letters May Be Invalid*, Education Dept. Says, N.Y. TIMES (March 30, 2017), <https://www.nytimes.com/2017/03/30/business/student-loan-forgiveness-program-lawsuit.html> [https://perma.cc/ZG98-8AB8] (“[N]ow, some of those workers are left to wonder if the government will . . .

suggested that approval letters previously sent to PSLF participants were invalid, nonbinding, and subject to rescission.¹¹³ This rescission could be retroactive; one lawyer, for example, worked for four years at a nonprofit with annual certification from the PSLF administrator, only to receive a retroactive denial note in 2016 telling him that approval was rescinded for all four years of his participation in PSLF.¹¹⁴ By then stuck with \$135,000 in growing debt, he would have to start again from scratch.¹¹⁵ Moreover, in his case and in those of other PSLF participants, the DOE did not provide any means of appealing its decision.¹¹⁶ These lawyers and others who participate in debt forgiveness programs may eventually be left high and dry.

A final risk of participating in these programs is that they are subject to shifting political winds. Given the long time horizon of these programs – 10 years to 25 years – there is a major risk that one political administration or another may reduce the scope of the loan forgiveness programs or cancel them altogether.¹¹⁷ President Obama, for example, proposed capping PSLF at \$57,500, and President Trump proposed eliminating PSLF altogether.¹¹⁸ Even those who support loan forgiveness programs, like the National Association of Student Financial Aid Administrators (NASFAA), call for PSLF to be financially strengthened by limiting full loan forgiveness to \$57,500.¹¹⁹ Given the fiscal tightening across the country, there is a high likelihood that loan forgiveness programs “might well be cut back or restricted in the budget cutting battles” of the next several years.¹²⁰ For prospective participants in these programs, the possibility of the cancellation of these programs would leave “student debt hanging over them” and would make it “financially [im]possible [. . .] to commit to public service careers.”¹²¹

In sum, loan forgiveness programs are a risky proposition to those who consider participating. The programs require students to assume the cost of law school and leave myriad possibilities that their loans will not be forgiven. The inherent financial risks involved in these programs are major worries to prospective lawyers who hope to pursue public service.

leave them stuck with thousands of dollars in debt that they thought would be eliminated . . . The plaintiffs held jobs that they initially were told qualified them for debt forgiveness, only to later have that decision reversed — with no evident way to appeal, they say.”)

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Katie Lobosco, *400,000 Were Promised Student Loan Forgiveness. Now They Are Panicking*, CNN MONEY (May 18, 2017), <https://money.cnn.com/2017/05/18/pf/college/betsy-devos-public-service-loan-forgiveness/index.html> [<https://perma.cc/D22Y-4PV6>] (“[T]he Department of Education is planning to propose ending the Public Service Loan Forgiveness Program.”).

¹¹⁸ Travis Hornsby, *Just How Good is the PSLF Gamble?*, STUDENT LOAN PLANNER (Jan. 3, 2018), <https://www.studentloanplanner.com/pslf-gamble/> [<https://perma.cc/ZR49-W5QC>]; see also Annie Nova, *Trump’s Budget Would End Student Loan Forgiveness Program*, CNBC (Feb. 12, 2018), <https://www.cnbc.com/2018/02/12/trumps-budget-would-end-student-loan-forgiveness-program.html> [<https://perma.cc/9Z78-FU54>].

¹¹⁹ NASFAA, *Issue Brief: Public Service Loan Forgiveness* (Oct. 2017), https://www.nasfaa.org/issue_brief_pslf [<https://perma.cc/34ES-EGP5>].

¹²⁰ Brian Tamanaha, *The Problem with IBR*, National Jurist (Nov. 30, 2012), <http://www.nationaljurist.com/national-jurist-magazine/problem-ibr> [<https://perma.cc/9BMM-B8BW>].

¹²¹ Lobosco, *supra* note 117 [internal quotations omitted].

3. Unsustainability of Government Funding for Civil Legal Aid

Proposed solutions such as increased Legal Aid funding and the “Civil Gideon” aim to remedy the accessibility gap by ensuring government-funded lawyers for indigent litigants. Yet these proposals face three hurdles: first, the Civil Gideon has limited support in federal judicial precedent and in state legislatures; second, the amount of funding necessary to make either Legal Aid or a Civil Gideon actually effective in meeting the needs of unserved litigants is so great that it could be a political impossibility; and third, such funding would be an unsustainable solution in the long-term, since governments would have the ability to reduce such funding and have historically shown a propensity to do so.

First, there is weak federal judicial support for a Civil Gideon. In cases dating to the 1980s, the Supreme Court has consistently held that individuals in civil disputes are not entitled to counsel.¹²² Furthermore, in 2011, the Court took “an unprecedented step to restrict the right to counsel” by holding that an individual in a civil contempt hearing is not entitled to counsel, even though he might face incarceration.¹²³ Without a judicial mandate, a Civil Gideon would require effectuation by a state court, Congress, or a state legislature. Advocates of a Civil Gideon have garnered the support of powerful lawyers’ groups, including the ABA.¹²⁴ Yet, despite nearly two decades of efforts, even proponents acknowledge that efforts to establish a Civil Gideon “haven’t met with success” in courts or legislatures.¹²⁵

Still, even if a Civil Gideon were to be enacted, it would require adequate funding to provide legal counsel in substance and not merely in name. One need only consider its analogue in criminal law to examine the pitfalls of a *Gideon* in name only.

In criminal law, *Gideon* mandated legal representation for indigent defendants.¹²⁶ However, after decades of inadequate government funding and neglect of the public defender system, the legal “counsel” provided by public defenders is often scarcely better than self-representation.¹²⁷ Public defenders spend on average *six minutes* per case before arraignment¹²⁸ – often with no choice but to “meet ‘em and plead ‘em, [. . .] a brief conversation in the courtroom [. . .] before pleading guilty.”¹²⁹ *Gideon* today “has amounted to little more than an unfunded mandate . . . [public defenders] are so underfunded and overworked that they cannot possibly

¹²² Anne Puluka, *Costs of Law School and Costs of Legal Aid: Expanding Legal Aid and Increasing Access to Justice in Housing Law*, Michigan State University College of Law Digital Commons (2016), <https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1263&context=king> [<https://perma.cc/LG76-ULYH>].

¹²³ *Id.*

¹²⁴ Robert Derocher, *Access to Justice: Is Civil Gideon A Piece of the Puzzle?*, AMERICAN BAR ASSOCIATION BAR LEADER (July 2008), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2007_08/3206/gideon.html [<https://perma.cc/7HX5-HJZS>].

¹²⁵ *Id.*

¹²⁶ Brennan Center for Justice, *The Right to Counsel 50 Years After Gideon: A Resource Page* (Apr. 9, 2013), <http://www.brennancenter.org/analysis/right-counsel-50-years-after-gideon-resource-page> [<https://perma.cc/B2RL-NJGT>].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Alexa Van Brunt, *Poor People Rely On Public Defenders Who Are Too Overworked to Defend Them*, THE GUARDIAN (June 17, 2015), <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked> [<https://perma.cc/VRU5-YXUA>].

provide adequate representation to defendants.”¹³⁰

Legal representation for civil litigants, therefore, would require enough funding to ensure that the legal representation is adequate to meet those clients’ needs. Whether through a Civil Gideon or through increased funding for Legal Aid, the amount of funding required to truly close the access-to-justice gap would be substantial.

Figures from the Legal Services Corporation provide some guidance as to the magnitude of government funding needed to provide legal counsel to indigent litigants. The LSC estimates that the federal government would have to increase funding fivefold simply to keep the LSC from turning clients away.¹³¹ This would require an increase from \$385 million in 2017 federal funding to \$1.9 billion.¹³² Additionally, considering that up to 80% of indigent litigants do not even try to seek legal help,¹³³ that number may have to be increased further to meet the legal needs of all low-income litigants. If one were to include funding to meet the legal needs of middle-income litigants, who are currently ineligible for Legal Aid assistance¹³⁴ – and whose legal needs go unmet up to 60 percent of the time¹³⁵ – the requisite level of funding might be closer to \$10 billion.

Not only is such a level of funding unlikely, the LSC’s experience since its founding shows that government funding is likely to move in the opposite direction. Across both Republican and Democratic administrations, funding for the LSC has decreased precipitously in the past thirty years.¹³⁶ If federal funding for legal aid had simply remained at 1980s levels, adjusted for inflation, it would be 300% higher than it is today.¹³⁷ In recent years, Legal Aid proponents like the LSC and ABA have not even dared to ask for enough funding to return funding to 1980s levels or enough funding to meet all of the legal needs of low-income litigants.¹³⁸ Instead, they have called for

¹³⁰ Brennan Center, *supra* note 126. Brennan Center for Justice, *The Right to Counsel 50 Years After Gideon: A Resource Page* (Apr. 9, 2013), <http://www.brennancenter.org/analysis/right-counsel-50-years-after-gideon-resource-page> [<https://perma.cc/MN5X-WMPW>].

¹³¹ See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 3, 28 (Sept. 2009) (“To fund this need, the federal share must grow to be five times greater than it is now. . . .”).

¹³² James Sandman, *Fiscal Year 2018 Budget Request*, Legal Services Corporation (May 2017), <https://www.lsc.gov/media-center/publications/fiscal-year-2018-budget-request> [<https://perma.cc/SW59-N9ZH>].

¹³³ Legal Services Corporation, *supra* note 131, at 16. See LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 16 (Sept. 2009) (noting that in one study, only 20% of low-income litigants in New Jersey sought a lawyer, and only 31% of those actually obtained one).

¹³⁴ James Sandman, *Fiscal Year 2018 Budget Request*, Legal Services Corporation (May 2017), <https://www.lsc.gov/media-center/publications/fiscal-year-2018-budget-request> [<https://perma.cc/SW59-N9ZH>] (noting that assistance is restricted to those whose incomes fall within 125% of the poverty line).

¹³⁵ James McCauley, *The Future of The Practice of Law: Can Alternative Business Structures For The Legal Profession Improve Access to Legal Services?* 51 UNIVERSITY OF RICHMOND LAW REVIEW 53, 55 (2017) (quoting the Virginia State Bar’s Study Committee on the Future of Law Practice).

¹³⁶ Steven Epler-Epstein, Bob Gillett & Don Saunders, *NLADA Recommendation for FY 2017 LSC Funding Request*, NLADA (June 10, 2015). Accessible on page 28 of the following: <https://www.lsc.gov/sites/default/files/LSC/about/budget/LSCFY17MgmtRecom.pdf> [<https://perma.cc/H7EE-89PX>].

¹³⁷ *Id.*

¹³⁸ Hilarie Bass, *Legal Aid Ensures Equal Justice For All; Congress Must Increase Funding For The Legal Services Corporation*, THE HILL (April 27, 2018, 2:40 PM), <http://thehill.com/blogs/congress-blog/judicial/385227-legal-aid-ensures-equal-justice-for-all-congress-must-increase> [<https://perma.cc/4SKT-WR4R>] (documenting ABA’s call for an

moderate funding increases to return to 2010 levels.¹³⁹ President Trump, who has proposed eliminating funding for Legal Aid entirely, has not reciprocated their moderation.¹⁴⁰

Even if, contrary to political trends, Legal Aid funding were to be increased by several billion dollars, such a solution would still be unsustainable and inefficient. First, with rising inequality, funding would have to be increased annually simply to keep pace with a growing number of Americans eligible for legal assistance.¹⁴¹ Without the political will for continued, perpetual increases in funding, Americans would once again find themselves unable to find affordable legal representation. Second, such a solution assumes that thousands of prospective law students and young lawyers would be willing to enter the workforce as public service lawyers, absorbing hundreds of thousands of dollars of law school tuition costs while sacrificing personal financial stability and risking being left in the lurch if their loans are not forgiven (as detailed in part ii above). Third, even if massive legal assistance funding increases were to be implemented in conjunction with failproof student loan forgiveness, it would essentially result in an inefficient subsidy to law schools. Such an approach would divert funding away from those who need it most – low-income litigants – and instead funnel it toward law schools, since public service lawyers would still have to pay full tuition for their law degree. This would unnecessarily increase the government’s costs by requiring the government to not only subsidize the costs of legal representation for litigants – its primary objective – but also to indirectly foot the bill for the tuition and fees charged with impunity by law schools. Law schools would have no incentive to reduce their exorbitant tuition rates; rather, they could continue to raise tuition with the knowledge that students could pay them and expect loan forgiveness from the government. This would be an inefficient use of the public purse, and it would further exacerbate the cost barrier to entry of the legal profession generally.

III. A SUSTAINABLE SYSTEMIC SOLUTION: LEGAL TECHNICIANS

A long-term solution to the access-to-justice crisis should be robust enough to weather shifting political winds, dynamic enough to endure ebbs and flows in government funding, and sustainable enough to evolve organically to meet the needs of low-income and middle-income litigants. Such a solution can be found with “legal technicians,” a new category of legal professional in between a paralegal and a lawyer.¹⁴² Legal technicians are not lawyers and need not attend law school, but are certified to offer legal advice in limited contexts.¹⁴³ Like Nurse Practitioners in the

increase in Legal Aid funding to match 2010 levels; even if such an increase were granted, it would still fall significantly short of inflation-adjusted 1980s funding levels); *see also* James Sandman, *Management’s Recommendation for LSC’s FY 2017 Budget Request*, Legal Services Corporation, (July 13, 2017).

¹³⁹ Bass, *supra* note 138; Sandman, *supra* note 134.

¹⁴⁰ Brett Samuels, *The 22 Agencies and Programs Trump’s Budget Would Eliminate*, THE HILL (February 12, 2018, 1:28 PM), <http://thehill.com/homenews/administration/373441-the-federal-programs-trump-proposes-cutting-in-2019-budget> [<https://perma.cc/E3Y2-CDW7>].

¹⁴¹ Legal Services Corporation, *supra* note 131, at 2. *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 2 (Sept. 2009)(noting the growing number of people eligible for legal assistance).

¹⁴² *See, e.g.*, Chris Newbold, ALPS In Brief Podcast – Episode 9: The LLLT, Pioneering Efforts in Access to Justice, ALPS (March 7, 2018), <https://blog.alpsnet.com/alps-in-brief-podcast-episode-9-the-lllt-pioneering-efforts-in-access-to-justice> [<https://perma.cc/7P8G-HYU7>] (describing legal technician program in Washington).

¹⁴³ *Id.*

healthcare world, legal technicians can help provide reliable, effective service at a lower cost to litigants who may not be able to afford a lawyer.

A. A Blueprint from the Medical Profession: Nurse Practitioners and Physician Assistants

Analogous challenges faced by the medical industry provide insight into how to provide accessible, affordable services in the face of resistance from an expensive and monopolistic incumbent group. Like law, the healthcare industry has struggled for decades with high consumer costs and inaccessibility of care, stringent licensing requirements, a powerful professional association and expensive graduate schools.¹⁴⁴ The American Medical Association – medicine’s analogue to the ABA – maintained a “de facto monopoly” on the distribution of licenses to practice medicine.¹⁴⁵ Despite a major “shortage of providers” for low-income and middle-income individuals, MDs fought vigorously against any attempt by lower-cost providers to “encroach on turf traditionally reserved for physicians.”¹⁴⁶

In recent years, however, in response to pressure from the Affordable Care Act and consumer watchdog groups to provide lower-cost healthcare, state legislatures have increasingly authorized non-MDs to provide primary care.¹⁴⁷ Lower-cost, trained, and licensed care providers such as Physician’s Assistants (PAs) and Nurse Practitioners (NPs) are now at the forefront of healthcare delivery.¹⁴⁸ Moreover, these professions are more attainable to those who hope to serve low-income individuals, as they require only a Master’s Degree and 500 to 2000 hours of clinical training without any of the student debt burdens of medical school.¹⁴⁹

Today, while MDs “care for the most complex patients,” PAs and NPs “provide the bulk of primary care practice.”¹⁵⁰ This has led to significant cost reductions – NPs charge nearly 30

¹⁴⁴ See, e.g., George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 807-11 (2001) (describing the challenges faced by the medical industry in addressing an access gap in healthcare).

¹⁴⁵ *A Spoonful of Monopoly Helps the Medicine Go Down*, *The Economist* (Sept. 21, 2007), <https://www.economist.com/free-exchange/2007/09/21/a-spoonful-of-monopoly-helps-the-medicine-go-down> [<http://perma.cc/ZX2C-Y83N>].

¹⁴⁶ Ashok Selvam, *Stiff Resistance: Docs Fight Encroachment in Turf War With Nurses*, *Modern Healthcare* (Apr. 19, 2013), <https://www.modernhealthcare.com/article/20130419/MAGAZINE/130419964> [<http://perma.cc/2NE4-4DTZ>].

¹⁴⁷ See, e.g., Carolyn Scheierhorn, *As NPs push for expanded practice rights, physicians push back*, *The DO* (Mar. 19, 2010) <https://thedo.osteopathic.org/2010/03/as-nps-push-for-expanded-practice-rights-physicians-push-back/>. [<http://perma.cc/GBR2-W3EV>]; Leigh Page, *Physicians, NPs, and PAs: Where’s This All Going?*, *Medscape* (Oct. 29, 2014) <https://www.medscape.com/features/content/6006318>.

¹⁴⁸ Sophia Garcia, *The Doctor Is Out, But the Advanced Practice Provider Can See You Now*, *Huffington Post* (last updated September 16, 2014), https://www.huffpost.com/entry/post_b_5592401?ec_carp=4581280447848005804 [<http://perma.cc/XA2U-EYYC>] (describing the shift of primary care to lower-cost providers). Also, based on author’s experience undertaking a Deloitte management consulting project delivered to a European pharmaceutical company on changes within the medical profession.

¹⁴⁹ Stephen Pasquini, *Physician Assistant vs. Nurse Practitioner vs. Medical Doctor*, *The Physical Assistance Life* (last updated Mar. 2017), <https://www.thepalife.com/physician-assistant-vs-nurse-practitioner-vs-medical-doctor/> [<http://perma.cc/7KMD-Z742>].

¹⁵⁰ Susan Schooleman, *Shifting Health Care Paradigm Favors Physician Assistant, Nurse Practitioner Careers*, *Clinical Advisor* (Feb. 28, 2011), <https://www.clinicaladvisor.com/your-career/shifting-health-care-paradigm->

percent less than MDs for outpatient care¹⁵¹ – and an influx of new providers into areas underserved by MDs.¹⁵² Still, restrictions in some states raise costs by requiring NPs to serve “under the supervision” of MDs – meaning, in practice, that NPs have to pay significant consulting fees to MDs for their supervision.¹⁵³ Still, states are doing away with these regulations – NPs are allowed to form fully independent practices in 24 states and semi-independent practices in 16 states.¹⁵⁴ The ability to practice independently of MDs continues to drive down costs to patients.¹⁵⁵

Impressively, despite fears raised by MDs about a potential decline in the quality of care, evidence shows that the more affordable care provided by PAs and NPs is actually as good or better than that provided by MDs.¹⁵⁶ On two dimensions – the objective quality (in terms of healthcare outcomes) and subjective quality (in terms of patient satisfaction) – care by PAs and NPs exceeds that of MDs.¹⁵⁷ Malpractice actions occur at a significantly lower rate for NPs: they occur only in 1 in 173 cases for NPs compared to 1 in 4 for MDs.¹⁵⁸ Civil judgments and criminal actions arise for only 1 in 226 NPs compared to 1 in 23 MDs.¹⁵⁹ Part of this disparity can be traced to the fact that MDs handle more complex, high-risk cases.¹⁶⁰ Still, for the more straightforward care that NPs and PAs are authorized to handle, the evidence points to equal or better quality of care that is more accessible and affordable for a greater number of people.

favors-physician-assistant-nurse-practitioner-careers/article/197201/ [http://perma.cc/XH43-HXZQ].

¹⁵¹ *Nurse Practitioners vs. Primary Care Physicians: Comparing Cost Of Care at 3-4*, Becker’s Hospital Review (Mar. 31, 2016), <https://www.beckershospitalreview.com/finance/nurse-practitioners-vs-primary-care-physicians-comparing-cost-of-care.html> [http://perma.cc/79CZ-JJUM].

¹⁵² *Nurse Practitioner vs. Physician Assistant at 3*, Nurse Journal, <https://nursejournal.org/nurse-practitioner/np-vs-physician-assistants/> [http://perma.cc/TYX3-D8LN] (“Both nurse practitioners and physician assistants routinely serve the primary and preventative care needs of diverse patient populations, and nowhere is this more true than in medically underserved rural and inner-city areas”).

¹⁵³ Keith Carlson, *NP Practice Authority Grows - March 2017 Update at 3*, Nurse.org (Mar. 2, 2017), <https://nurse.org/articles/nurse-practitioner-scope-of-practice-expands-mar17/> [http://perma.cc/7BMU-8ASC].

¹⁵⁴ *Id.* at 5.

¹⁵⁵ Lucia Huang, *Cost Effectiveness of Nurse Practitioners*, Social Impact Research Experience (2015), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1039&context=sire> [https://perma.cc/756E-5DNB] at 30 (reviewing the scientific literature and finding evidence that “nurse practitioners provide equal or more cost-effective care than physicians in addition to increasing the quality and availability of healthcare services”).

¹⁵⁶ *See, e.g.*, Michele Limoges-Gonzalez et al., *Comparisons of Screening Colonoscopy Performed by a Nurse Practitioner and Gastroenterologists: A Single-Center Randomized Controlled Trial*, *Gastroenterology Nursing* (2011) (noting that properly trained nurse practitioners performed colonoscopy screenings “as safely, accurately, and satisfactorily” as gastroenterologist MDs, and had a higher adenoma detection rate of 42% versus 17% for MDs); *See, e.g.*, Catherine Goldie et al., *Nurse Practitioners in Postoperative Cardiac Surgery: Are They Effective?* 22 *Can. J. of Cardiovascular Nursing* 8 (2012) (noting that patients who received care from nurse practitioners had similar outcomes to hospitalist-led care and reported greater satisfaction in some measures of care).

¹⁵⁷ *Id.*

¹⁵⁸ Carolyn Scheierhorn, *As NPs Push For Expanded Practice Rights, Physicians Push Back*, *The DO* (Mar. 19, 2010), <https://thedo.osteopathic.org/2010/03/as-nps-push-for-expanded-practice-rights-physicians-push-back/> [http://perma.cc/6HLN-UAP7].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

B. Early Inroads in Washington and New York: LLLTs and Court Navigators

The legal profession in the U.S. is already seeing its first two examples of non-lawyers providing legal assistance to clients. In New York State, designated Court Navigators – laypeople, often students, with several hours of training – volunteer to help *pro se* litigants fill out forms and navigate the administrative aspects of the legal system and the legal issues they face.¹⁶¹ In Washington State, a full-time professional group of Limited License Legal Technicians (LLLTs) is authorized to provide legal assistance to clients in the area of family law.¹⁶²

The New York approach, although a step in the right direction, is extremely narrow in scope. Launched in 2014, the Court Navigators program focuses on assistance to *pro se* litigants in three areas of law: housing, consumer debt, and benefits advocacy for the elderly.¹⁶³ Court Navigators are typically college or law students and are usually unpaid, although some receive a stipend.¹⁶⁴ In terms of training, they are required only to take a single, two-and-a-half-hour seminar and to commit to volunteering 30 hours with indigent litigants.¹⁶⁵ Their responsibilities include administering legal help desks, filling out forms, assisting with settlements, and accompanying unrepresented litigants to courtrooms.¹⁶⁶ They are not allowed to engage in advocacy on behalf of *pro se* litigants, but they can help litigants answer questions from judges.¹⁶⁷

Given that being a Court Navigator is more of a part-time volunteer position rather than a career path, such a program by itself is unlikely to serve as a long-term solution to the access-to-justice problem. Still, this program is merely the beginning for New York. Chief Judge Jonathan Lippman of the New York Court of Appeals, who spearheaded the Court Navigator program, argues that non-lawyers are the future of legal assistance for the masses: “we need to think out of the box . . . [y]ou can get nonlawyers who are experts in a particular area [and] can be more effective in that area than a generalist lawyer.”¹⁶⁸

In the vein of Chief Judge Lippman’s comments, the LLLT program in Washington State seems far more suited to be a sustainable solution to the access-to-justice issue. Paula Littlewood, the Executive Director of the Washington State Bar Association and a champion of the LLLT program, hails LLLTs as the “Nurse Practitioners” for the legal profession – lower-cost, high-impact professionals who can provide services to those who cannot afford a lawyer.¹⁶⁹ Unlike Court Navigators, LLLTs have three distinct advantages: first, serving as an LLLT is a viable career path; LLLTs are typically full-time paralegals who receive additional training and education to provide

¹⁶¹ Lori Nelson, LLLT-Limited License Legal Technician: What It Is, What It Isn’t, and the Grey Area in Between, 50 Fam. L. Q. 447, 459 (2016).

¹⁶² *Id.* at 453-454.

¹⁶³ *Id.* at 459; *See also*, Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA Journal, Jan. 2015.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 459.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Robert Ambrogi, *Washington State Moves Around UPL, Using Legal Technicians to Help Close the Justice Gap*, ABA Journal (2015).

¹⁶⁹ Newbold, *supra* note 142 (describing the legal technician program in Washington).

the kinds of legal assistance typically reserved for lawyers.¹⁷⁰ LLLTs are also allowed to set up their own independent practices, just like NPs in the medical field.¹⁷¹ Many LLLTs are either “paralegals who’re looking for a way to become independent of an attorney, or are people who desired to attend law school but can’t afford the high cost.”¹⁷²

Second, LLLTs are highly trained and vetted by the state’s bar association. The entry requirements are stringent but less expensive than law school: LLLTs must have at least 45 credit hours of coursework (similar to an Associate’s Degree), 15 credit hours of specialized legal education, pass three standardized exams and then complete 3,000 hours of legal work (approximately 18 months) under the supervision of a lawyer.¹⁷³

Third, LLLTs can actually provide legal advice to clients, can perform legal research and draft documents to be filed – all at rates cheaper than lawyers would charge for the same tasks.¹⁷⁴ The nascent program is still limited in its scope: LLLTs are only allowed to practice family law and are not allowed to represent clients in court or negotiate on their behalf.¹⁷⁵ But the LLLT Board – comprised of attorneys and created by the state Supreme Court – plans to allow LLLTs to practice in other areas where low-income and middle-income people find lawyers unaffordable.¹⁷⁶ The Board is exploring plans to allow LLLTs to serve clients in housing law, immigration law, estate, and health care law.¹⁷⁷ The Board is also working to lessen the restrictions on the scope of legal service that LLLTs can provide, so that LLLTs can start appearing in court to support their clients.¹⁷⁸

The scale of the LLLT program is still limited: as of 2017, there were only 20 licensed graduates, with 21 further students enrolled in classes and another 18 who had completed coursework and needed only to pass the final exam before obtaining their license.¹⁷⁹ Their limited scale is not yet enough to meet client demand in a state where 88% of low-income clients face legal problems without an attorney.¹⁸⁰ Still, like the Court Navigator program, LLLTs are a step in the right direction, toward a future where “non-JD legal providers . . . can perform simpler legal work at much lower cost and thereby fill an enormous part of the gaping legal need.”¹⁸¹

C. Optimal Program Design: Legal Technicians with a Broad Remit to Provide Legal Services

As more states consider the implementation of LLLT programs based on the Washington

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ LeAnn Bjerken, *Program Creates New Type of Legal Professional*, THE SPOKANE J. (March 30, 2017), <https://www.spokanejournal.com/local-news/program-creates-new-type-of-law-professional/> [https://perma.cc/X7JD-EJTU].

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Ambrogi, *supra* note 168.

¹⁸¹ *Id.*

model,¹⁸² I would like to delineate four guiding principles that would be necessary for any legal technician program to be successful in addressing the accessibility gap. These four characteristics take into account the success of NPs and PAs in the medical industry, as well as the groundwork laid by Washington's LLLTs and New York's Court Navigators. The four guiding principles include: educational accessibility into the profession; accreditation and supervision by a professional association; viability as a career, including the ability to operate independent practices; and finally, the ability to provide a wide range of straightforward legal services to meet the needs of low-income and middle-income clients.

First, aspiring legal technicians must be able to attain their educational and professional qualifications affordably. The position must have a low financial barrier to entry. The Washington program is a good example of this: the LLLT position requires only an Associate's Degree combined with an 18-month quasi-apprenticeship and three exams.¹⁸³ People should not have to take on tens of thousands of dollars in debt to become legal technicians. This serves two purposes in addressing the accessibility gap: it would allow the profession to scale up quickly with a larger influx of new entrants to meet client needs, and it would enable legal technicians to charge lower hourly fees since they would not have to pay off large student debts.¹⁸⁴

Second, legal technicians – just like lawyers, doctors, and NPs – should be regulated and accredited by a professional association. This would ensure a high quality of legal services and would provide a mechanism for disciplinary action in the case of malfeasance. With a strong supervisory body, legal technicians would gain the trust of their clients and the legal profession generally. Such a body should be comprised of lawyers, judges, and legal technicians together – preferably appointed by state Supreme Courts, which supervise the legal profession in each state.¹⁸⁵ Legal technicians should also be required to spend the first part of their career under the supervision of a guiding attorney – potentially 18 months, as in Washington, or a similar amount of time designated by each state.¹⁸⁶ Such training periods have precedent and are effective – lawyers themselves once entered the legal profession primarily through apprenticeship, and still do today in countries like the U.K.¹⁸⁷

¹⁸² Bjerken, *supra* note 173.

¹⁸³ *Id.*

¹⁸⁴ Ambrogio, *supra* note 168 (“[T]he basic economics of practicing law . . . “Many clients can’t afford what lawyers need to recoup to service their debt load,” says Elie Mystal, an editor of the legal news Web site Above the Law Since an LLLT license is so much more affordable than a bar accreditation, candidates say they’ll charge considerably less than lawyers do”).

¹⁸⁵ Laurel Rigertas, *The Legal Profession’s Monopoly: Failing to Protect Consumers*, 82 FORDHAM LAW REVIEW 2683, 2683 (2014) at 2684.

¹⁸⁶ LeAnn Bjerken, *Program Creates New Type of Legal Professional*, The Spokane J. (March 30, 2017), <https://www.spokanejournal.com/local-news/program-creates-new-type-of-law-professional/> [<https://perma.cc/X7JD-EJTU>].

¹⁸⁷ See Zachary Crockett, *How to Be a Lawyer Without Going to Law School*, PRICEONOMICS(November 15, 2015), <https://priceonomics.com/how-to-be-a-lawyer-without-going-to-law-school/> [<https://perma.cc/WWZ7-GQWC>] (noting that lawyers were traditionally trained in apprenticeships until the late 1800s); see also Chambers Student, *What is a Training Contract?*, CHAMBERS(2019), <https://www.chambersstudent.co.uk/where-to-start/what-is-a-training-contract> [<https://perma.cc/6DKY-H96A>] (noting that aspiring solicitors in the UK typically spend two years as a “trainee” apprentice with a law firm).

Third, the legal technician position should be a viable career model. Like NPs and LLLTs, legal technicians should be allowed to maintain their own client relationships and establish their own practices. In order to address the legal needs of millions of low-income and middle-income Americans, the legal technician position must be compelling enough to attract tens of thousands of new entrants across the country. This requires financial independence and a living wage for legal technicians. Furthermore, if legal technician is a viable career, it would have a positive externality for society generally: it would make the legal technician role, like the NP position, a job that can provide upward mobility to people who lack a graduate degree – helping to reduce income inequality in our society.

Finally, Legal Technicians – like NPs – must be permitted to actually provide the legal services that clients are unable to afford from lawyers. This should not be limited to just legal research, legal advice, and drafting documents, as in Washington. Legal technicians should also be permitted to represent clients in a limited number of judicial proceedings – specifically, in areas of the law where the access-to-justice gap is most pronounced. These include, but are not limited to: family law, where up to 97 percent of domestic abuse cases in New Hampshire district court involve a party proceeding without representation;¹⁸⁸ housing law, where 90 to 95 percent of tenants are unrepresented in cases brought before the Landlord and Tenant Branch of the D.C. Superior Court;¹⁸⁹ and immigration law, where 63 percent of immigrants facing deportation proceed without an attorney, including 90 percent of immigrants detained in smaller cities.¹⁹⁰ Legal technicians would be far better for litigants in these cases than self-representation without any legal advice at all. Additionally, as legal technicians gain years of experience in a particular legal area, they would likely, as Chief Judge Lippman states, be “more effective in [a particular] area than a generalist lawyer.”¹⁹¹

D. Potential Challenges in the Creation of Legal Technician Roles

There are three significant challenges in addressing the accessibility gap through the development of a legal technician profession. First, the legal profession is self-regulated to a degree greater than nearly any other profession; second, the legal profession has two major reasons to oppose the development of a legal technician profession; and third, it will take time to build the requisite scale of legal technicians to fully address the accessibility gap.

The first major hurdle is procedural: developing changes to the regulations governing the legal profession in order to create a new profession of legal technicians who can provide legal services. This presents a unique difficulty in the case of the legal profession, since the profession is

¹⁸⁸ See LEGAL SERVICES CORPORATION, *DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 25, (2009) (detailing several studies that show a high incidence of *pro se* litigants in state courts).

¹⁸⁹ See Rebecca Buckwalter-Poza, *Making Justice Equal*, CENTER FOR AMERICAN PROGRESS (December 8, 2016) <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/> [<https://perma.cc/MB6P-V99Q>] (noting the disparity of legal representation in landlord-tenant disputes).

¹⁹⁰ Ingrid Early and Steven Shafer, *Access to Counsel in Immigration Court*, AMERICAN IMMIGRATION COUNSEL (September 28, 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court> [<https://perma.cc/3B4B-RDNH>].

¹⁹¹ Ambrogi, *supra* note 168.

regulated by state courts and state bar associations rather than by federal or state legislatures. Whereas NPs were able to lobby their state legislatures in order to implement changes to the regulation of the medical profession – often overcoming resistance from medical doctors¹⁹² – those who hope to address the accessibility gap will have to persuade lawyers themselves (state Supreme Courts and bar associations) to make regulatory changes.

This hurdle is magnified by the strong antipathy that lawyers have already shown toward the creation of a legal technician profession.¹⁹³ Part of their resistance is due to legitimate fears about the quality of legal service provided and the integrity of the judicial system.¹⁹⁴ Another motivation is economic self-interest from fear of competition.¹⁹⁵ Many lawyers don't want to give up their golden goose – their monopoly on legal services – without a fight.¹⁹⁶

Careful analysis by a state Supreme Court will show that these fears are unfounded: concerns about poor legal service are addressable, worries about the integrity of the judicial system are misplaced, and motivations of economic self-interest are legally irrelevant and largely untrue.

First, the quality of legal service can be upheld through strict supervision of legal technicians by a professional association or regulatory body – just like bar associations do for lawyers. There is no reason to believe that legal technicians would be more prone to poor representation than lawyers, particularly if they receive the right training through apprenticeship programs and serve under the watchful eye of a regulatory body. It is not like lawyers themselves are infallible – a quick glance through any state bar association journal will show dozens of lawyers facing disciplinary action or disbarment because of unethical behavior. Either way, legal representation from an experienced, knowledgeable legal technician would be far more helpful to clients than *pro se* representation without any guidance from anyone.

Likewise, concerns about legal technicians impairing the public perception and integrity of the judicial system are misplaced. The bigger concern about the integrity of the judicial system is the fact that the vast majority of low-income and middle-income Americans cannot afford any legal counsel at all. Public perception of lawyers' integrity and honesty is lower than nearly every other profession in America – in the same league as car salesmen and lobbyists.¹⁹⁷ When average

¹⁹² See, e.g., Carolyn Scheierhorn, *As NPs push for expanded practice rights, physicians push back*, THE DO (March 19, 2010), <https://thedo.osteopathic.org/2010/03/as-nps-push-for-expanded-practice-rights-physicians-push-back/> [<https://perma.cc/8QT9-D6EK>].

¹⁹³ See, e.g., Ambrogio, *supra* note 181 (“The Washington State Bar Association opposed the LLLT proposal right up until its approval by the Supreme Court.”); Debra Weiss, *Legal Technicians May Partly Own Law Firms In This State: Is Ban To Nonlawyer Ownership Crumbling?*, ABA JOURNAL (April 13, 2015), <http://www.abajournal.com/news/article/legal-technicians-may-partly-own-law-firms-in-this-state-is-bar-to-nonlawyer-ownership-crumbing/> [<https://perma.cc/XNA5-DSXB>] (“Seattle lawyer Sands McKinley, a critic of the legal technician program, says the rule change could be a first step to allowing other nonlawyers [sic] to partly own law firms. ‘If a glorified paralegal can be an owner of a law firm,’ McKinley told Bloomberg BNA, ‘what kind of argument could you make whereby a CPA tax expert from Deloitte & Touche could not?’”).

¹⁹⁴ Laurel Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683, 2690-92 (2014).

¹⁹⁵ *Id.* at 2694.

¹⁹⁶ *Id.*

¹⁹⁷ *Honesty / Ethics in Professions*, GALLUP, <http://news.gallup.com/poll/1654/honesty-ethics-professions.aspx> [<https://perma.cc/YVV9-SS3C>].

Americans view lawyers as merely “hired guns for the wealthy”¹⁹⁸ and cannot get justice in their own courts, the legal system faces an entirely different integrity problem. In fact, the proliferation of lower-cost legal technicians should, if anything, *increase* the public perception of the judicial system by making equal justice more accessible to all.

Finally, lawyers’ self-interested economic concerns about facing new competition are largely unfounded. Legal technicians would exist not to poach clients away from lawyers, but rather to serve the millions of Americans who cannot afford the high fees that lawyers charge. There is an enormous untapped market – up to 90 percent of low-income individuals¹⁹⁹ and 60 percent of middle-income individuals²⁰⁰ – that is not being served at all by lawyers today. Legal technicians would primarily be serving underserved populations rather than encroaching on the turf of lawyers.

It is possible that in some instances, legal technicians may compete with lawyers by providing services at a more affordable price point. Yet this is an overall benefit to society. People should have access to more affordable services rather than paying artificially inflated prices propped up by a monopoly. Multiple state Supreme Courts have already found that lawyers’ motivations of economic self-interest are not a legally valid basis for regulating the legal profession.²⁰¹ As recently as 2012, when the Washington State Bar Association objected to the creation of the LLLT program based on fears that it would take away work from lawyers, the state Supreme Court responded that “protecting the monopoly status of attorneys in any practice area is not a legitimate objective.”²⁰² Moreover, political and intellectual leaders from both sides of the political spectrum have decried restrictive occupational licensing requirements – like those that lawyers exploit to stifle competition – since they keep prices high and perpetuate economic inequality.²⁰³ The clarion calls to change such requirements are bipartisan.²⁰⁴

A final barrier to the implementation of legal technicians as a solution to the accessibility gap is the necessary time lag to get hundreds of thousands of legal technicians educated, trained, and out in the marketplace assisting clients. Such a program will necessarily take years to achieve the widespread scale needed to provide legal services to millions of Americans. In the meantime, millions of Americans every year go without any legal counsel at all.

To bridge the accessibility gap until enough legal technicians enter the marketplace,

¹⁹⁸ Rigertas, *supra* note 189, at 2692.

¹⁹⁹ See Ambrogi, *supra* note 181 (noting that “multiple state and federal studies [show] that 80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation.”).

²⁰⁰ James McCauley, *The Future of The Practice of Law: Can Alternative Business Structures For The Legal Profession Improve Access to Legal Services?*, 51 U. Rich. L. Rev. 53, 56 (2017) (quoting the Virginia State Bar’s Study Committee on the Future of Law Practice).

²⁰¹ See, e.g., *State v. Pledger*, 127 S.E.2d 337, 339 (N.C. 1962) (stating that unauthorized practice of law statutes were “not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents; its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare”).

²⁰² *In re Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, No. 25700-A-1005, slip op. at 7 (Wash. June 15, 2012), <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> [<https://perma.cc/4N9G-297D>].

²⁰³ J.D. Tuccille, *Occupational Licensing Reform Becomes a Cause Both Republicans and Democrats Can Love*, REASON (July 12, 2016), <http://reason.com/archives/2016/07/12/occupational-licensing-reform-becomes-a> [<https://perma.cc/FV44-SH3Q>].

²⁰⁴ *Id.*

federal and state governments should continue to invest in Legal Aid programs and loan forgiveness programs like PSLF. These programs provide indispensable legal assistance to those who cannot afford it, at a time when the only alternative to a lawyer is self-representation. In the long run, as more and more legal technicians enter the marketplace, Legal Aid programs should become more effective as they send clients with straightforward legal issues to lower-cost legal technicians, while focusing their efforts on clients with the most complex cases, who need lawyers' help the most.

IV. CONCLUSION

Affordable legal services remain out of reach for millions of Americans every year.²⁰⁵ Legal representation remains inaccessible to low-income and middle-income Americans for two primary reasons: the legal profession's monopoly on providing legal services and its requirement that all lawyers attend three years of expensive law school. To address the accessibility gap, several solutions have been proposed: reducing the length of law school to two years; strengthening student loan forgiveness programs; increasing funding for Legal Aid services; and a "Civil Gideon."

Yet each of these solutions attempts to remedy the lack of affordable legal services without addressing its underlying causes. They treat the symptoms but not the disease. The underlying disease is a broken system that excludes lower-cost alternatives to lawyers and forces aspiring lawyers to mortgage their futures with hundreds of thousands of dollars in student debt – making it financially imprudent for lawyers to serve low-income and middle-income clients. Patch-up treatments like Legal Aid and loan forgiveness can help treat the symptom of this disease: a country where the vast majority of civil litigants lack legal representation. However, to fully eradicate the accessibility gap, the disease itself must be addressed.

The only long-term, self-sustaining solution to the accessibility gap is to follow the lead of the medical community and enable legal services to be provided by non-lawyer professionals. Such professionals – such as legal technicians – could enter into their profession with an undergraduate education followed by extensive clinical training. Without law school debt, legal technicians would have a low financial barrier to entry, enabling them to serve clients at lower rates than those charged by lawyers. A high quality of legal representation could be ensured and maintained by strict supervision from a professional regulatory body – in the same way that lawyers are. Finally, and most importantly, legal technicians – like NPs – can bring affordable client service to millions of unserved and underserved Americans without requiring multibillion-dollar infusions of government funding – an influx of money that is highly unlikely to occur under current political realities. Moreover, the creation of a new profession of legal technicians would have a positive economic externality, catalyzing upward mobility and reducing inequality.

With the vast majority of Americans unable to afford a lawyer and forced to represent themselves in legal proceedings, state courts and bar associations must act immediately. Legal technicians can bridge the accessibility gap by providing high-quality, lower-cost legal service to low-income and middle-income Americans. It is time to give them a chance.

²⁰⁵ See Ambrogio, *supra* note 181 (noting that "multiple state and federal studies [show] that 80 to 90 percent of low- and moderate-income Americans with legal problems are unable to obtain or afford legal representation.").