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# Juking Access to Justice to Deregulate the Legal Market

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# Juking Access to Justice to Deregulate the Legal Market

MILAN MARKOVIC\*

## ABSTRACT

*Study after study has concluded that the United States suffers from a lack of access to justice because most legal issues are addressed without attorney involvement. To better serve Americans who cannot currently afford legal assistance, scholars have argued that corporations should be permitted to offer legal services. England and Australia already allow corporations to own law firms and deliver legal services.*

*Whatever the merits of corporate delivery of legal services, its impact on access to justice has been overstated. The cost of legal services plays a minor role in decisions to not obtain legal assistance. Moreover, many legal services are relatively affordable, and those that are currently cost-prohibitive such as complex litigation cannot be delivered ethically at significantly lower prices. Whereas the legal profession has largely assumed that legal services are very valuable and highly sought after, low- and middle-income people also appear to not prioritize legal assistance and may not benefit from assistance in some situations.*

*To expand access to justice, the legal profession should educate the public about common legal problems and reconsider ethical rules that hinder attorneys from soliciting business and marketing their services. Legal aid and pro bono resources should be targeted to significant legal problems that cannot be addressed without attorney involvement. Increasing the supply of low-cost legal services providers would merely exacerbate existing inequalities in the legal system while failing to address the need for high quality legal representation with respect to complex matters.*

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## INTRODUCTION

Expanding access to justice has long been one of the legal profession's foremost priorities. In 1938, Charles Clark, the Dean of Yale Law School, bemoaned the failure of lawyers to "meet the social needs which justify the existence of his profession" and urged the organized bar to "meet the issue of maldistribution of legal service."<sup>1</sup> The Supreme Court claimed in its 1977

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1. Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1275 (1938).

decision in *Bates v. State Bar of Arizona* that “[t]he middle 70% of our population is not being reached or served adequately by the legal profession” and that attorney advertising would allow the public to more easily locate qualified attorneys.<sup>2</sup> The *Model Rules of Professional Conduct* (“*Model Rules*”) currently exhort lawyers to “seek improvement . . . of access to the legal system”<sup>3</sup> and “provide legal services to those unable to pay.”<sup>4</sup>

Despite the enormous amount of attention devoted to access to justice, study after study has concluded that the vast majority of Americans’ civil legal needs are addressed without attorneys.<sup>5</sup> This problem has ostensibly worsened since the recent economic recession.<sup>6</sup> When a large percentage of the population is effectively foreclosed from obtaining legal representation, the promise of “Equal Justice Under Law” would seem to ring hollow.<sup>7</sup>

Of course, Americans—especially those of limited means—lack access to a wide variety of goods and services, not just legal services.<sup>8</sup> What differentiates the legal market from most other markets, however, is that lawyers possess a virtual monopoly over the provision of legal services.<sup>9</sup> Lack of access to

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2. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977) (citations omitted).

3. MODEL RULES OF PROF’L CONDUCT pmbl. (2013) [hereinafter MODEL RULES].

4. MODEL RULES R. 6.1.

5. See, e.g., THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS., N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1–2 (2013), [http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport\\_2013.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf) [<http://perma.cc/PUA3-4FKE>] (last visited Oct. 5, 2015); LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf) [<http://perma.cc/K2F7-YQTQ>] [hereinafter LSC REPORT]; DISTRICT OF COLUMBIA ACCESS TO JUSTICE COMM’N, JUSTICE FOR ALL?: AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY V (2008), <http://www.dccaccessjustice.org/files/CivilLegalNeedsReport.pdf> [<http://perma.cc/JJE5-FWHR>] [hereinafter DC REPORT]; AM. BAR ASS’N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 8 (1994), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf> [<http://perma.cc/WWL3-B2N9>] [hereinafter ABA SURVEY].

6. See LSC REPORT, *supra* note 5, at 28.

7. See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 212 (2003).

8. See Charles Silver & Frank B. Cross, *What’s Not to Like About Being a Lawyer*, 109 YALE L.J. 1443, 1482 (2000) (arguing that the poor would benefit far more from cash transfers than legal services); see also J.J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, 37 FORDHAM URB. L.J. 303, 321 (2010) (suggesting that legal aid resources could be used to “supply low-income individuals with other benefits, perhaps health care, education, job training, or just cash”). But see DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 94 (2007) (“[L]egal problems often concern rights, and treating people as rights-bearers by offering legal help dignifies them in a way that treating them as needs-bearers, by offering them cash does not.”).

9. See, e.g., Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 703 (1996); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 571 (1994). Whether the legal profession actually holds a monopoly is much disputed. Compare Jack P. Sahl, *Cracks in the Profession’s Monopoly Armor*, 82 FORDHAM L. REV. 2635, 2635 (2014) (“The legal profession in the United States continues to enjoy its long-held monopoly in the nation’s legal services market. Historically, American courts are largely responsible for this monopoly and have relied on their ‘[a]ffirmative [i]nherent [p]ower . . . to regulate . . . every aspect of the practice of law.’”),

justice—the inability of individuals of modest means to obtain legal assistance—is allegedly a direct result of this monopoly.<sup>10</sup> As Professor Hadfield has argued:

The problem of access is primarily a problem of cost—meaning the total cost of identifying, securing and implementing legal help . . . Under the existing business model—in which legal services for ordinary individuals are provided by solo and small firm practitioners in traditional law-office settings—these costs are simply too high. To reduce the cost of law and increase access to legal assistance, the form in which legal services are produced and delivered has to change.<sup>11</sup>

To expand access to justice, Hadfield and other scholars have urged that the legal profession should allow large corporations such as Walmart and Google to enter the legal market.<sup>12</sup> These corporations, with their economies of scale and superior resources, will allegedly be able to provide basic legal services to currently underserved populations.<sup>13</sup> In 2007, the United Kingdom removed restrictions on non-lawyer ownership of law firms through its so-called Tesco law in the hope that corporations will succeed where lawyers have failed in expanding access to justice.<sup>14</sup>

The American legal profession has historically opposed such proposals on ethical grounds.<sup>15</sup> While some critics view such concerns as a pretext for economic protectionism,<sup>16</sup> others argue that greater non-lawyer involvement in

with Silver & Cross, *supra* note 8, at 1491 (suggesting that lawyers must compete with other professionals and do not possess a market monopoly). See also Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2611 (2014) (suggesting that the legal profession's monopoly on the practice of law is “under siege”).

10. See, e.g., Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 Int'l Rev. L. & Econ., June 2014, at 43 [hereinafter Hadfield, *Cost of Law*]; Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, 143 Daedalus, no. 3, 2014, at 84-87 [hereinafter Hadfield, *Innovating*]; Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing to Protect Consumers*, 82 FORDHAM L. REV. 2683, 2683 (2014); Ray Worthy Campbell, *Rethinking Regulation and Innovation in the U.S. Legal Services Market*, 9 N.Y.U. J. L. & BUS. 1, 3 (2012).

11. Hadfield, *Cost of Law*, *supra* note 10, at 1, 3.

12. See, e.g., *id.* at 2; Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 6 (2012).

13. Knake, *supra* note 12, at 45.

14. See John Flood, *Will There Be Fallout from Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537, 548-49. Tesco is a large grocery chain that some speculated would dominate the consumer end of the legal market. See *id.* at 549. However, Tesco does not currently sell legal services. See Marion Dakers, *Tesco Law Rules Relaxed to Encourage More One-Stop Law Shops*, THE TELEGRAPH (Oct. 26, 2014), <http://www.telegraph.co.uk/finance/newsbysector/supportservices/11187121/Tesco-Law-rules-relaxed-to-encourage-more-one-stop-law-shops.html> [http://perma.cc/VKG5-UDPE].

15. See generally Ted Schneyer, *Professionalism as Pathology*, 40 FORDHAM URB. L.J. 75, 84-85 (2012) (tracing the legal profession's use of the “idiom of professionalism” to preserve its monopoly from 1920 to the present day).

16. See, e.g., Knake, *supra* note 12, at 14 (“That our industry is the only one which attempts—with a transparent lack of success—to cloak anticompetitive injunctions with the cloth of ‘ethics’ is as humiliating as it

the legal market could diminish the quality of legal services<sup>17</sup> and threaten attorney independence.<sup>18</sup> Moreover, obvious conflicts of interest arise when, as in the United Kingdom, insurance companies own and operate personal injury firms or “Walmart lawyers” are able to advise clients on employment law.<sup>19</sup> Lawyers also have a duty to mediate between the interests of their clients and the public, which may be jeopardized in a liberalized market.<sup>20</sup>

This Article will contend that, in addition to the ethical issues raised by the corporate delivery of legal services, its likely impact on access to justice has been overstated. Although it is undeniable that most people currently do not turn to lawyers for assistance with the vast majority of their legal problems, this does not signify that there is a massive unmet demand for legal services that corporations can fill. Even if corporations could deliver legal services at significantly lower prices, factors other than cost (such as the public’s lack of understanding of its legal needs and skepticism about the value of legal assistance) are the main drivers of lack of access to justice.<sup>21</sup> Most legal services are also not prohibitively expensive,<sup>22</sup> and those services that are prohibitively expensive, such as complex litigation, will likely remain so if corporations were to deliver them.

The legal profession should seek to overcome informational deficiencies that prevent low- and middle-income Americans from seeking legal assistance. This

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is depressing.”) (quoting Bruce MacEwen, et. al., *Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61, 86–87 (2008); George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Justice and What We Can Learn from the Medical Profession’s Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 775 (2001) (“All professions are conspiracies against the laity.”) (quoting GEORGE BERNARD SHAW, *THE DOCTOR’S DILEMMA* 10 (1963)).

17. See, e.g., Dana Remus, *Hemispheres Apart, A Profession Connected*, 82 FORDHAM L. REV. 2665, 2675 (2014); Lisa H. Nicholson, *Access to Justice Requires Access to Attorneys: Restrictions on the Practice of Law Serve a Societal Purpose*, 82 FORDHAM L. REV. 2761, 2768, 2772 (2014).

18. The prohibition against fee-splitting with non-lawyers, for example, is designed to safeguard the professional independence of the lawyer. See MODEL RULES R. 5.4, cmt. 1; see also Remus, *supra* note 17, at 2666 (“Without the protections of professional regulation in the corporate hemisphere, the dangers of insufficient professional independence . . . would be fully realized. There would be little to stop sophisticated corporate actors from co-opting lawyers into facilitating excessively aggressive or unethical business schemes.”).

19. See Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access and Professionalism*, 29 GEO. J. OF LEGAL ETHICS 1 (2016).

20. See generally W. Bradley Wendel, *In Search of Core Values*, 16 LEGAL ETHICS 350, 365 (2014) (“The lawyer’s role is best understood as mediating between the interests of clients and the public interest. Professionalism . . . refers not to a closed cartel or to the abnegation of the desire to earn a living, but to a commitment to maintaining the law and related institutions in good working order instead of attempting to game or subvert it.”). Lawyers, of course, do not always abide by their obligation to exercise independence from their clients and effectuate compliance with the law as I have noted in two very different contexts. See Milan Markovic, *Subprime Scriveners*, 103 KY L.J. 1, 5 (2014); Milan Markovic, *Advising Clients After Critical Legal Studies & the Torture Memos*, 114 W.VA. L. REV. 109, 114 (2011).

21. See *infra* Section II.A.

22. Catherine R. Albiston & Rebecca Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101, 117 (2013); see also Campbell, *supra* note 10, at 4 (describing “academic consensus” that regulation prevents cheaper legal services from being offered in the market).

could be done by educating the public about its legal needs and loosening ethical restrictions that inhibit lawyers from soliciting clients and marketing their services. Nevertheless, low- and middle-income Americans have many types of needs and merely allowing corporations to enter the legal market will not cause low- and middle-income people to spend their limited resources on legal assistance. The focus on satisfying most legal needs with *some* legal assistance is not only unrealistic but also counter-productive because it assumes that legal assistance is valuable in all cases and fails to address the need for high quality legal services with respect to complex and significant matters.

Part I of this Article briefly reviews the empirical research on unmet legal needs. Although most of the legal needs of low- and middle-income Americans are resolved without formal legal assistance, this does not signify that Americans overwhelmingly desire legal assistance and cannot obtain it. Every legal issue does not merit the involvement of an attorney.

Part II contests that lack of access to justice is caused by the high cost of legal services and that legal services are cost-prohibitive. Empirical researchers have found that individuals do not seek legal assistance because they do not understand their needs as legal and do not believe that consulting an attorney will help. Cost is a relatively minor factor. Moreover, although the empirical data on cost is limited, the cost of basic services such as obtaining a will or uncontested divorce appears to be quite low. Other legal services, especially those involving substantial litigation, are quite expensive, but the cost of such services likely cannot be lowered to the point that they will be affordable for the majority of low- and middle-income individuals and still be delivered ethically, even assuming that corporations would focus on serving these populations.

Part III suggests that lack of access to justice is likely to persist even if corporations were permitted to deliver legal services because individuals with limited discretionary income do not appear to place a high value on legal services and sometimes act reasonably in handling their legal problems without attorneys. There is little data to substantiate that legal assistance positively impacts outcomes, especially with respect to less complex proceedings. In focusing so heavily on expanding access to justice by providing individuals with some form of low-cost lawyer or non-lawyer representation, the legal profession may be confusing its interests with those of low- and middle-income people, who may not benefit from representation in some situations and are unlikely to receive high quality representation in situations where legal assistance is critical.

Part IV proposes reforms that can mitigate the lack of access to justice without removing restrictions on the corporate delivery of legal services. The legal profession should seek to educate the public about the law and make information about legal services more readily available, including cost information. Anti-solicitation rules and onerous advertising regulations should be reconsidered to allow attorneys to properly market their services.



Nevertheless, even with greater awareness of the law, lack of access to justice will persist because some Americans will be unwilling or unable to pay for legal services, and there is little apparent support for increased legal aid funding. The legal profession should consequently target legal aid and pro bono resources toward complex and significant legal matters that low- and middle-income people cannot address on their own.

### I. UNMET LEGAL NEEDS AND THE DEMAND FOR LEGAL SERVICES

A substantial body of empirical literature examines low- and middle-income Americans' legal needs. Although this literature is often used to illustrate that the legal profession is failing to meet the public's demand for legal services, its actual implications are far less clear.

To examine legal needs, researchers generally survey subjects about pre-selected problems that have a civil law dimension and record whether they sought or obtained legal assistance in each instance.<sup>23</sup> The most recent nationwide survey was conducted by the American Bar Association ("ABA") in 1994, entitled *Legal Needs and Civil Justice: A Survey of Americans* ("ABA Survey").<sup>24</sup> The ABA Survey found that "nearly three fourths of the legal needs of low-income households and nearly two thirds of legal needs of moderate-income households were not taken to the civil justice system."<sup>25</sup> A more recent report by the Legal Services Corporation concluded that nationwide less than one in five legal problems are addressed with the assistance of a lawyer.<sup>26</sup>

Among most scholars and policymakers, it is axiomatic that such statistics indicate a massive unmet demand for legal services in the United States.<sup>27</sup> Such an analysis fails to appreciate how empirical researchers examine and determine "legal needs."

The ABA Survey defines "legal needs" as "specific situations members of households were dealing with that raised legal issues—whether or not they were recognized as 'legal' or taken to some part of the civil justice system."<sup>28</sup> Most empirical surveys conceptualize legal needs in the same manner, that is to say,

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23. Rebecca L. Sandefur, *Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE 224 (Trebilock et al. eds, 2012).

24. See ABA SURVEY, *supra* note 5, at 1.

25. *Id.* at 24.

26. LSC REPORT, *supra* note 5, at 2.

27. See Herbert M. Kritzer, *Examining the Real Demand for Legal Services*, 37 FORDHAM URB. L.J. 255, 256 (2010) (noting consensus among leading lawyers, scholars, and policymakers on the unmet demand for affordable legal services).

28. ABA SURVEY, *supra* note 5, at 2; see also HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 12 (1999) (defining "legal need" as "[a] matter experienced by a respondent which raised legal issues, whether or not it was recognized by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the [matter] involved the use of any part of the civil justice system").



from the perspective of researchers.<sup>29</sup> The justification for adopting a lawyer-centric view of “legal needs” is that laymen only have a limited understanding of when their problems involve a legal component.<sup>30</sup>

Although this approach allows for a better assessment of the extent to which the lives of Americans are impacted by legal problems, presumably any qualified professional or tradesman will detect and identify issues that laymen cannot.<sup>31</sup> Not every legal need would benefit from the involvement of a lawyer, and in some instances, the benefit of legal assistance is extremely low.<sup>32</sup> As Professor Kritzer has explained:

[Figures regarding unmet legal needs] are impressive because of what amounts to an implicit base of comparison: everyone should always get legal assistance when a legal problem arises. We would never say that everyone should always get medical attention when a medical problem arises. We do not go to see a doctor (or nurse practitioner or physician’s assistant) every time we have a cold or we stub—and possibly break—a toe . . . We need to put the number of “unmet legal needs” of any particular group into perspective.<sup>33</sup>

Expanding access to justice should not require that every dispute with a legal component—whether it is a dispute between neighbors or a customer and business—be taken to a lawyer.<sup>34</sup>

The United States is not unique in having a high incidence of unmet legal needs.<sup>35</sup> Across the developed world people often manage their legal problems

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29. See Sandefur, *supra* note 23, at 224.

30. As Charles Clark and Emma Corstvet observed many years ago, “the usual notion of lawyer is still of a surgeon, called in for serious operations, or of a witch doctor, to harass the enemy.” Clark & Corstvet, *supra* note 1, at 1277.

31. See also Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 58 (2014) (“Such studies are undertaken for the admirable purpose of highlighting the justice gap—the difference between the legal needs of the poor and our ability to meet them. But as a programmatic matter, they tell us almost nothing about the range of client needs nor how to allocate existing resources among legal assistance, nonlegal assistance, and other forms of advice and dispute resolution.”).

32. Measuring demand for legal services via the strain on legal aid offices is similarly problematic because the demand is skewed by the availability of free assistance. See Kritzer, *supra* note 27, at 270; see also J. J. Prescott, *The Challenges of Calculating the Benefits of Providing Access to Legal Services*, 37 FORDHAM URB. L.J. 303, 304 (2010) (“Public resources are limited, and so the fact that people are ‘in need’ or ‘would benefit from’ additional [legal aid] funding is not sufficient to justify a shift in the allocation of public monies towards legal aid.”).

33. Kritzer, *supra* note 27, at 257.

34. See Luban, *supra* note 7, at 212 (describing this notion as “nightmarish”).

35. See Laurel S. Terry, *Putting the Legal Profession’s Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2937 (2014) (“It does not appear to be accurate to assert . . . that in ‘most jurisdictions lawyers only enjoy a monopoly over representing clients in courts’ and that ‘[t]he market for legal services remains largely open.’ . . . In a number of jurisdictions transactional work or ‘advice’ is also a ‘reserved’ legal activity.”) (internal citations omitted).

without attorneys.<sup>36</sup> For example, a 2013 United Kingdom survey of a broadly representative sample of British and Welsh households found that in only thirty percent of cases did households seek formal legal advice from any source.<sup>37</sup> A 2006 New Zealand survey found that ten percent of households obtained assistance from someone other than a family member or mediator in addressing their legal problems.<sup>38</sup> In Canada, just over eleven percent of “justiciable legal problems” were taken to attorneys according to a 2007 survey.<sup>39</sup>

Nor does the high incidence of unmet legal needs reflect that Americans fail to address their legal problems. The American Bar Foundation’s 2014 Community Needs and Services Study (“CNSS”) indicates that in only sixteen percent of situations do people take no action with respect to their civil justice problems.<sup>40</sup> In forty-six percent of situations they use self-help, and in twenty-three percent of situations they obtain assistance from friends and family members.<sup>41</sup> The effectiveness of these strategies or whether they even resolved the needs at issue can be contested. Yet, contrary to the claims of some commentators, it is impossible to know whether all of these situations merited attorney involvement or that respondents were harmed by addressing their needs without attorneys.<sup>42</sup>

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36. Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949, 950 (2009). Of course, it is conceivable that access to justice—and particularly access to lawyers—is more vital in the United States. See Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 374 (2004) (“Our poor performance [in access to justice] is of special concern given the centrality of law and lawyers in American life.”) [hereinafter Rhode, *Connecting Principles to Practice*].

37. Nigel Balmer, *English and Welsh Civil and Social Justice Panel Survey: Wave 2*, iii (2013), [http://doc.ukdataservice.ac.uk/doc/7643/mrdoc/pdf/7643\\_csjps\\_wave\\_two\\_summary\\_findings.pdf](http://doc.ukdataservice.ac.uk/doc/7643/mrdoc/pdf/7643_csjps_wave_two_summary_findings.pdf) [http://doc.ukdataservice.ac.uk/doc/7643/mrdoc/pdf/7643\\_csjps\\_wave\\_two\\_summary\\_findings.pdf](http://doc.ukdataservice.ac.uk/doc/7643/mrdoc/pdf/7643_csjps_wave_two_summary_findings.pdf) [perma.cc/B8LU-5W35]. Respondents reported seeking formal legal advice from government-funded citizen advice bureaus and police and not just solicitors. See *id.* at iii.

38. LEGAL SERVICES AGENCY, NEW ZEALAND’S 2006 NATIONAL SURVEY OF UNMET LEGAL NEEDS AND ACCESS TO SERVICES 1, 10 (2007), [http://www.legalaidreform.org/news/item/download/361\\_6529f984e75060429755631013f26b81](http://www.legalaidreform.org/news/item/download/361_6529f984e75060429755631013f26b81) [<http://perma.cc/7A76-Z4GW>].

39. ABE CURRIE, THE LEGAL PROBLEMS OF EVERYDAY LIFE: THE NATURE, EXTENT AND CONSEQUENCES OF JUSTICIABLE PROBLEMS EXPERIENCED BY CANADIANS 56 (2007), [http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07\\_la1-rr07\\_aj1/rr07\\_la1.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf) [<http://perma.cc/6AEW-NTNW>] (last visited December 21, 2015).

40. See REBECCA SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY 12 (Aug. 8, 2014), <http://richardzorza.files.wordpress.com/2014/08/sandefur-accessing-justice-in-the-contemporary-usa-final.pdf> [<http://perma.cc/93H9-ZE39>] [hereinafter CNSS Study]. Unlike the ABA Survey, the Community Needs and Services Study did not confine its research to low- and middle-income households. *Id.* at 5.

41. *Id.*

42. The LSC Report states, for example, “the long-term goal must be to develop resources sufficient to meet the civil legal needs of all eligible low-income persons.” LSC REPORT, *supra* note 5, at 28; see also Hadfield, *Cost of Law*, *supra* note 10, at 5 (noting that it is problematic that households receive less than two hours of help per surveyed legal need). As Kritzer notes, these assumptions are flawed because unmet legal needs are calculated against the unrealistic benchmark that all legal needs, no matter how serious, should be resolved through legal representation. Kritzer, *supra* note 27, at 257.

*Some* of these situations may have benefited from the intervention of an attorney or a skilled non-attorney.<sup>43</sup> But, as set out below, Americans do not seek legal assistance for a number of different reasons with the cost of assistance playing a relatively minor role.<sup>44</sup>

## II. HIGH COSTS AND ACCESS TO JUSTICE

The connection between the high cost of legal services and lack of access to justice is often regarded as self-evident.<sup>45</sup> However, empirical research does not substantiate that lack of access to justice is the product of the high cost of legal services or that most legal services are especially expensive. Moreover, services that are truly cost-prohibitive may not be capable of being delivered at significantly lower prices without adverse consequences to clients and the legal system.

### A. THE ROLE OF COST

Researchers have sought to determine why Americans do not obtain legal assistance. According to the nationwide ABA Survey completed in 1994 moderate income people fail to take formal legal action in addressing their legal needs because i) they do not really believe their legal problems are in fact problems; ii) they prefer to handle their problems on their own; and iii) they believe that recourse to the legal system would not help.<sup>46</sup> The results for low-income Americans are similar.<sup>47</sup> The 2014 CNSS Survey found that forty-six percent of respondents did not consult lawyers because they did not see the need and twenty-four percent did not believe that it would help.<sup>48</sup> Overall only eight percent of moderate-income and sixteen percent of low-income respondents cited cost concerns in explaining their decisions to not seek legal assistance in the ABA Survey<sup>49</sup> whereas cost was a factor in only seventeen percent of instances in which individuals did not seek legal assistance in the CNSS Survey.<sup>50</sup>

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43. British citizens, for example, are able to consult Citizen Advice Bureaus that are staffed with volunteers. See Balmer, *supra* note 37; see also Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 *FORDHAM. URB. L.J.* 129, 136 (2009).

44. See *infra* Part II.

45. See Albiston & Sandefur, *supra* note 22, at 117 (noting ubiquitous nature of this perception); see also Gillian Hadfield, *Lawyers, Make Room for Non-Lawyers*, CNN, (Sept. 25, 2012), <http://www.cnn.com/2012/11/23/opinion/hadfield-legal-profession> [<http://perma.cc/TF52-R7SK>] (claiming that legal help is “enormously expensive and out of reach for the vast majority of Americans”).

46. ABA SURVEY, *supra* note 5, at 22.

47. Low income respondents did identify cost as opposed to desire to handle the problems on their own as a reason to not seek out formal assistance, however. *Id.* at 21.

48. See CNSS Study, *supra* note 40, at 12–13.

49. ABA SURVEY, *supra* note 5, at 21.

50. See CNSS Study, *supra* note 40, at 3.

Recent state surveys are consistent with these findings. For example, in the legal needs surveys conducted in Virginia and Georgia, cost was not among the top five reasons that respondents gave for not obtaining legal assistance.<sup>51</sup> In Virginia, 20.5 percent of respondents stated that they did not regard their legal problems as problems, 17.9 percent did not know why they took no action, 16.8 percent believed that nothing could be done, and 15.1 percent did not want the hassle.<sup>52</sup> In Georgia's survey, eighteen percent of respondents indicated that they did not seek help because they did not consider their problems to be legal problems, 16.7 percent believed that nothing could be done, and 7.5 percent did not want the hassle.<sup>53</sup>

These surveys reveal that factors other than cost, such as a lack of understanding of legal needs and skepticism about the value of legal services, are the main impediments to expanding access. Americans may be misguided to not seek legal assistance when they could potentially benefit from it.<sup>54</sup> However, the complex educational, cultural, and psychological barriers that prevent individuals from accessing legal services cannot be overcome merely by increasing the number of low-cost providers.<sup>55</sup>

Of course, making legal services more affordable would likely help the subset of the public that is aware of its legal needs and simply cannot afford to obtain assistance. The following sections examine the affordability of legal services and whether corporate delivery of legal services can be expected to lower the price of legal services that are currently cost-prohibitive.

## B. THE AFFORDABILITY OF LEGAL SERVICES

Information about the cost of legal services in the United States is scarce.<sup>56</sup> No comprehensive study has been undertaken to examine what people pay for legal

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51. LSC REPORT, *supra* note 5, at C-1.

52. *Id.*

53. *Id.*

54. See Robinson, *supra* note 19, at 46 (“[S]ome persons who could potentially benefit from legal services may be resistant to purchasing them . . . either because they do not believe they need a legal service or there are cultural or psychological barriers to accessing the service.”); see also Albiston & Sandefur, *supra* note 22, at 117 (“Well-meaning observers often speak and write as though access to justice is only an issue for the poor, and assume that poor people desire lawyers’ services but cannot obtain them because those services are so very expensive. In fact, the picture is much more complex.”).

55. Some advocates of corporate delivery of legal services acknowledge this point while contending that corporate delivery will reduce costs broadly, not merely the price at which services are offered. See Hadfield, *Cost of Law*, *supra* note 10, at 16 (defining cost as “the all-in cost: the final cost of getting the benefit of legal services . . . . This includes not only the time, research, and educational costs incurred by an attorney . . . . It includes the cost to the consumer of recognizing the need for and then finding, evaluating, understanding, and implementing the analysis and recommendation”). For a discussion of how these costs can be addressed without embracing the corporate delivery of legal services, see *infra* Part IV.

56. Sandefur, *supra* note 23, at 227; see also Robinson, *supra* note 19 (noting absence of reliable cost data in the United Kingdom, Australia, and United States). *But see* Hadfield, *Cost of Law*, *supra* note 10, at 7 (suggesting on the basis of surveys of the salaries of solo and small firm practitioners that “[c]onventional legal

services or what attorneys or firms charge for specific services, and more empirical research is certainly needed in this regard.<sup>57</sup> What data there is suggests that most legal services, outside of litigation, are modestly priced.<sup>58</sup>

Professor Sandefur calculated the cost of several common legal services based on a late 1980s survey of lawyers' charges and adjusted the figures to today's dollars.<sup>59</sup> For a will, assuming no discounting, Sandefur estimates the average cost to be from \$139 to \$201.<sup>60</sup> Sandefur estimates the cost for a real estate closing to be \$731–\$1,056.<sup>61</sup> The same methodology indicates that the cost of an uncontested divorce is \$848–\$1,225.<sup>62</sup> While these sums may seem high, by way of comparison, the average American family spends significantly more on eating out at restaurants (\$2,600) and entertainment (\$2,700).<sup>63</sup>

Sandefur's fee estimates are not definitive.<sup>64</sup> Nevertheless, they are consistent with surveys undertaken in similar legal jurisdictions such as Canada.<sup>65</sup> That most basic legal services are relatively affordable stands to reason because solo practitioners and small firms must compete intensely over price.<sup>66</sup> Additional downward pressure on prices in the United States has also come in recent years from the oversupply of new attorneys.<sup>67</sup>

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services are simply beyond the means of most Americans"). While various publications do release data on hourly billing rates, not all services are billed by the hour and lawyers routinely discount their hourly rates. See generally Robert E. Hirshon, *The Billable Hour is Dead: Long Live?*, 30 GP SOLO MAG., Jan./Feb. 2013, at 22, 25 ("[T]he billable hour no longer rules the kingdom alone.").

57. Sandefur, *supra* note 23, at 227.

58. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 92 (1983) (suggesting that legal fees are modest for justice problems that do not involve filing a lawsuit); Sandefur, *supra* note 23, at 229.

59. See Sandefur, *supra* note 23, at 228–29. Professor Sandefur also compared these figures against those provided by CostHelper, a website that receives cost data from both consumers and providers who visit the website. See *id.* at 229.

60. *Id.*

61. *Id.*

62. See *id.*

63. Sandefur, *supra* note 23, at 229 (internal citation omitted).

64. Sandefur acknowledges, "we know little about how much individuals who buy lawyers' services today typically pay for them." *Id.* at 231.

65. Canadian Lawyer Magazine's survey of legal fees suggests that the average cost in Canada for a real estate sale is \$696, \$853 for a real estate purchase, \$370 for a basic will, \$1169 for an uncontested divorce. See Michael McKiernan, *The Going Rate*, CAN. LAWYER MAG., June 2014, at 35, <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2014/cljune14legalfees.pdf> [<http://perma.cc/FJ5V-LVT3>].

66. See, e.g., Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Firm Practitioners*, 70 FORDHAM L. REV. 847, 848 (2001); Richard L. Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC'Y REV. 7, 13 (1986); see also Silver & Cross, *supra* note 8, at 1490 ("Both within the bar and between the bar and parallel professions, competition for business is fierce."). Hadfield acknowledges this competition and yet postulates that prices can nevertheless be substantially reduced. See Hadfield, *Cost of Law*, *supra* note 10, at 16–17.

67. American law schools have been graduating approximately two students for every available legal job for the last several years. See Katherine Mangan, *Law Deans Confront a 'New Normal' as Schools Adjust to Job-Market Changes*, CHRON. HIGHER EDUC., Jan. 18, 2013, at A3. Some have speculated that there is not an oversupply of new lawyers because the needs of low- and middle-income individuals continue to go unmet. See,

Of course, as indicated by legal needs studies, a substantial number of Americans doubt that they can afford legal assistance.<sup>68</sup> However, these studies do not provide respondents with information about fees charged by attorneys in their jurisdictions or ascertain whether the respondents had previously retained lawyers.<sup>69</sup> Clients are often satisfied with the fees they have paid to attorneys despite the public's general perception that lawyers charge too much.<sup>70</sup>

This is not to deny that some legal services are prohibitively expensive. Litigation can cost tens of thousands of dollars in the United States,<sup>71</sup> and many lawyers do not take cases on a contingent fee basis.<sup>72</sup> Nevertheless, as set out below, these legal services likely cannot be provided at significantly lower prices even assuming that corporations would seek to offer them.

### C. LOWERING COSTS THROUGH NON-LAWYER DELIVERY OF LEGAL SERVICES?

Scholars critical of the legal profession's monopoly over the legal services market have acknowledged the existence of substantial competition in the legal market while claiming that non-lawyer-owned firms would be able to make legal services more affordable through greater economies of scale and better use of technology.<sup>73</sup> Under this view, while legal services have traditionally been

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*e.g.*, ILL. STATE BAR ASS'N, FINAL REPORT, FINDINGS AND RECOMMENDATIONS THE IMPACT OF LAW SCHOOL DEBT ON THE DELIVERY OF LEGAL SERVICES (2013), <http://www.isba.org/sites/default/files/committees/ISBA%20Law%20School%20Debt%20Report.pdf> [<http://perma.cc/ARU9-5RKN>]. However, this presupposes that low- and middle-income individuals are willing and able to pay for legal services. *See* Bernie Burke, *Still More on What Matters Most*, THE FACULTY LOUNGE (Jan. 13, 2013), <http://www.thefacultylounge.org/2013/01/still-more-on-what-matters-most-or-a-guided-tour-of-pandaemonium.html> [<http://perma.cc/UY4J-Y7UB>] (“If you think that every underemployed law graduate in America is just too lazy, too stupid or too greedy to take one of the countless paying jobs just waiting out there to meet the legal needs of the poor (who have no money to pay you, despite their substantial and serious needs), you live in a fantasy world.”).

68. *See* ABA SURVEY, *supra* note 5.

69. *See* Sandefur, *supra* note 23, at 227 (“No major contemporary survey asks Americans how much they paid for lawyers’ services to handle a specific justice problem . . .”). Some respondents who are concerned about cost may in fact qualify for legal aid because most Americans who qualify for legal aid do not recognize it. *See* LSC REPORT, *supra* note 5, at D-1 (summarizing knowledge of legal aid from state surveys).

70. Sandefur, *supra* note 23, at 232 (citations omitted). In one survey conducted in Chicago, sixty-two percent of respondents claimed to be “very satisfied” with the cost of their legal services. *Id.* (citation omitted); *see also* Law Society of Alberta, *Most Albertans Satisfied with their Lawyers: Ipsos Reid Poll Shows*, May 19, 2010, [http://www.lawsociety.ab.ca/files/bulletins/Bulletin\\_2010\\_05May\\_19.htm](http://www.lawsociety.ab.ca/files/bulletins/Bulletin_2010_05May_19.htm) [<http://perma.cc/CMW5-2Q42>] (noting that seventy-one percent of surveyed respondents claimed to receive either very good value or good value from their lawyers).

71. *See* Sandefur, *supra* note 23, at 230 (“Especially when substantial litigation is involved, as in the case of contested divorces, legal services can be quite costly, running into the tens of thousands of dollars.”). *But see id.* (noting that over half of litigants appear to be charged less than \$5000). The average cost for a lawyer to handle a two-day trial in Canada is estimated to be \$21,953. McKiernan, *supra* note 65.

72. Contingent fees are not permitted in criminal and matrimonial matters. *See* MODEL RULES R. 1.5(d) (1)–(2).

73. *See* Hadfield, *supra* note 10, at 18; RICHARD SUSSKIND, TOMORROW’S LAWYERS 57 (2013) [hereinafter SUSSKIND, TOMORROW’S LAWYERS]; Campbell, *supra* note 10, at 3; *see also* Alexander Schwab, Note, *In*



delivered in a “bespoke manner,”<sup>74</sup> as with other industries, more and more work that was once bespoke can be “commoditized, masse produced, and sold at a much, much lower cost.”<sup>75</sup> Whatever the future of the legal market, this belief that corporations will succeed where lawyers have failed in delivering legal services to low-and-middle income people rests on a number of unexamined assumptions. Corporations may not necessarily be more innovative than lawyer-owned firms, they may choose to focus on areas that are already highly profitable, and cannot easily commoditize litigation and other services that are currently cost-prohibitive.

As a preliminary matter, it is unclear why lawyer-owned firms cannot deliver commoditized services. It is true that corporations—particularly public corporations—can fund their activities more easily than lawyer-owned firms.<sup>76</sup> But there is no a priori reason to believe that corporations are more efficient and innovative than other business entities or that they can make formerly unprofitable legal practice areas profitable.<sup>77</sup>

According to research conducted by Harvard Law School’s Program on the Legal Profession in 2014, jurisdictions that have liberalized their legal markets have been unable to find a discernable impact on access to justice.<sup>78</sup> This reflects not only the difficulty in delivering legal services to low- and middle-income clients profitably but also that non-lawyer-owned firms are more likely to

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*Defense of Ambulance Chasing: A Critique of Model Rules of Professional Conduct 7.3*, 29 YALE L. & POL’Y REV. 603, 624 (2011) (“A smaller practice cannot expect the constant stream of clients a high-volume firm enjoys.”).

74. See RICHARD SUSSKIND, *THE END OF LAWYERS?* (2010) (describing bespoke legal services as “one-to-one consultative professional service, highly tailored for the specific needs of particular clients”).

75. Benjamin Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3070 (2014).

76. See EDWARD IAUBUCCI & MICHAEL TREBILCOCK, AN ECONOMIC ANALYSIS OF ALTERNATIVE BUSINESS STRUCTURES FOR THE PRACTICE OF LAW 53 (Sept. 20, 2013), <http://www.lsuc.on.ca/uploadedFiles/ABS-report-Iacobucci-Trebilcock-september-2014.pdf> [<http://perma.cc/8G9E-5LG7>]. (“Outside shareholders may provide capital to the firm that would be very difficult to raise from capital-constrained professionals within the firm, or from banks.”). It bears noting, however, that the vast majority of corporations are not public corporations and cannot readily access the capital markets. See generally Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations & Agency Costs*, 38 STAN. L. REV. 271, 271 (1986) (“[I]nvestors in closely held corporations have large percentages of their wealth tied up in one firm and lack access to capital markets. Thus they are less efficient risk bearers than investors in publicly held corporations.”).

77. See, e.g., CHRISTOPHER DECKER & GEORGE YARROW, UNDERSTANDING THE ECONOMIC RATIONALE FOR LEGAL SERVICES REGULATION 55 (Oct. 31, 2010), [http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/economic\\_rationale\\_for\\_Legal\\_Services\\_Regulation\\_Final.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/economic_rationale_for_Legal_Services_Regulation_Final.pdf) [<http://perma.cc/AJW3-RLYG>] (“Economic analysis does not provide any clear-cut, a priori, answers to the question of what is the most efficient way to bundle economic activities.”); Joseph Schumpeter, *Capitalism and Process of Creative Destruction*, in MONOPOLY POWER AND ECONOMIC PERFORMANCE 19, 31–35 (Edwin Mansfield ed., 1974) (claiming that market control facilitates innovation by freeing business decision-making from a focus on the short term); cf. Mark Zachary Taylor, *Empirical Evidence Against Varieties of Capitalism’s Theory of Technological Innovation*, 58 INT’L ORG. 601, 628 (2004) (suggesting that countries with more regulated economies are no less innovative than freer economies).

78. See Robinson, *supra* note 19 at 6.



gravitate to high margin contingency work rather than seeking to innovate in areas that are currently unprofitable.<sup>79</sup>

Indeed, rather than expanding access to legal services, corporations may simply compete for existing legal work.<sup>80</sup> The United States does not permit non-lawyer-owned firms to provide legal services, but LegalZoom, an online provider of customizable legal documents such as wills, has grown rapidly and developed a large customer base.<sup>81</sup> LegalZoom's success has apparently not, however, led individuals to acquire wills in greater numbers.<sup>82</sup> Clients may benefit from increased competition in the legal market,<sup>83</sup> but access to justice is hardly advanced by the migration of work from lawyer-owned firms to other entities.

Even accepting that non-lawyer-owned firms can deliver legal services more efficiently and that these firms will focus on providing services to those who are underserved in the current market, much legal work requires individual attention and cannot be commoditized.<sup>84</sup> Litigation is the quintessential bespoke service,<sup>85</sup>

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79. *Id.* at [INSERTPAGE] (“Non-lawyer ownership is likely to be attracted to sectors where expected returns to profit are high . . . like personal injury . . . other sectors of legal services have not witnessed as largest investment by non-lawyers.”). For example, Slater & Gordon (“S&G”), Australia’s first publicly traded law firm, predominately focuses on highly lucrative personal injury work and has grown by acquiring established personal injury firms. See Thomas Markle, Note, *A Call to Partner with Outside Capital: The Non-Lawyer Investment Approach Must Be Updated*, 45 ARIZ. ST. L.J. 1251, 1267-68 (2013). S&G has a natural advantage over its lawyer-owned competitors because its principals are not required to fund cases themselves. See also Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 34–45 (1998) (“Because [a] plaintiffs’ firm lacks access to outside capital, it can only fund a limited number of cases on a contingency fee basis at any one time . . . Allowing nonlawyer investment in law firms would permit greater risk sharing in contingency fee cases.”).

80. The potential macroeconomic effects of non-lawyer ownership of personal injury firms should not be overlooked. Such ownership could lead to an increase in frivolous or speculative lawsuits because lawyers no longer bear the entire risk of failure. Cf. Stuart L. Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U.C. DAVIS BUS. L.J. 65, 82 (noting these concerns with respect to litigation financing). Of course, unlike litigation financing, where investors fund a discrete case and obtain access to case materials, see *id.* at 72, investors in law firms will presumably not have access to all of a firm’s case records and therefore less ability to determine investment risk.

81. See Carolyn Elephant, *The LegalZoom IPO: Proving that Volume Practice Doesn’t Work, Even 21st Century Style*, MYSHINGLE.COM (July 30, 2012), <http://myshingle.com/2012/07/articles/trends/the-legalzoom-ipo-proving-that-volume-practice-doesnt-work-even-21st-century-style/> [<http://perma.cc/YK3U-3BNS>] (describing LegalZoom’s business model).

82. See Robinson, *supra* note 19, at 38-39 (summarizing research in Massachusetts).

83. Although beyond the scope of this Article, some commentators maintain that there are benefits to lowering the cost of legal services aside from expanding access to justice. See generally Benjamin H. Barton, *A Glass Half-Full Look at the Changes in the Legal Market*, 38 INT’L REV. L. & ECON. 29, 36 (2014) (“The argument that we will be better off with cheaper access to legal work is thus a simple Coasian syllogism: (1) markets work better and we are all better off when transaction costs are lower; (2) legal fees are transaction costs; (3) we are all better off when legal fees are cheaper.”).

84. Legal futurists have acknowledged that technology will be unable to replace oral advocates for the foreseeable future. See SUSSKIND, TOMORROW’S LAWYERS, *supra* note 74, at 58; Robinson, *supra* note 19, at 45 (“Much legal work . . . requires the individualized attention of an experienced practitioner who often charges high rates.”).

85. SUSSKIND, TOMORROW’S LAWYERS, *supra* note 74, at 58.

and to make litigation affordable for low- and middle-class individuals while still remaining profitable, non-lawyer-owned firms would likely have to handle a greater number of cases. However, it is difficult to conduct a high volume litigation practice in accordance with ethical rules.<sup>86</sup> The recent American experience with foreclosure firms is especially concerning.<sup>87</sup> Under pressure to minimize litigation costs and handle a surge in foreclosure cases, partners devoted little time to individual cases and largely abdicated their pre-trial responsibilities to support staffs.<sup>88</sup> Principals in some of the most profitable foreclosure firms were ultimately sanctioned for filing documents that they knew or should have known were false as well as for outright fraud.<sup>89</sup>

One possible means to make litigation less expensive while avoiding such excesses is to permit lay advocates in a greater range of proceedings.<sup>90</sup> A few jurisdictions are already experimenting with licensed, non-lawyer representatives.<sup>91</sup> These initiatives may well be worth pursuing, especially with respect to proceedings where litigants overwhelmingly appear unrepresented.<sup>92</sup> However, it

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86. For a powerful account of high volume legal practice in the immigration law context, see RICHARD ABEL, *LAWYERS IN THE DOCK* 105–108 (2008) (describing a disciplinary case involving an attorney in New York’s Chinatown with over 500 cases pending before the immigration courts). Nora Engstrom has written of high volume settlement mills: “[Clients] who have meritorious claims and have been seriously injured are least apt to benefit from this unique brand of legal service, raising profound ethical and public policy issues.” Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO. J. LEGAL ETHICS* 1485, 1547 (2009); see also Schwab, *supra* note 73, at 625 (“The high-volume model is not best equipped to handle complex cases requiring individualized attention or serious matters where minor errors could have major repercussions.”); cf. Carolyn Elefant, *The LegalZoom IPO: Proving that Volume Practice Doesn’t Work, Even 21st Century Style*, MYSHINGLE.COM (July 30, 2012), <http://myshingle.com/2012/07/articles/trends/the-legalzoom-ipo-proving-that-volume-practice-doesnt-work-even-21st-century-style/#sthash.jzjWjNmP.dpuf> [<http://perma.cc/YK3U-3BNS>] (“Even with all of the technology in the world, with a volume practice, you’re always on the prowl to drum up more clients to feed the beast. That’s partly because volume practice requires bodies to serve, but also because volume work consists largely of ‘one-off’s’ . . . so you can’t leverage your existing marketing efforts.”).

87. The recent economic recession saw the rise of massive foreclosure firms that would handle hundreds of cases simultaneously on behalf of their financial institution clients. See, e.g., James Geoffrey Durham, *Avoiding a Lawyers’ Race to the Foreclosure Bottom: Some Advice for Lenders and Borrowers on their Role in Foreclosure Litigation*, 32 *N. ILL. U. L. REV.* 419, 420 (2012); Dustin A. Zacks, *Robo-Litigation*, 60 *CLEV. ST. L. REV.* 867, 868 (2013). See *id.* at 901–04; see also *id.* at 884–90 (examining cases from Florida and other states).

88. *Id.* at 898.

89. See *id.* at 884–90 (examining cases from Florida and other states).

90. See, e.g., Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 *FORDHAM URB. L.J.* 1259, 1274 (2014); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 *GEO. J. LEGAL ETHICS* 209, 230 (1990).

91. Washington State licenses “legal technicians,” although they currently do not have the ability to represent litigants in court. See Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 *MISS. L.J.* 75, 95 (2013). Research also indicates that lay advocates may perform as well as lawyers in certain types of proceedings. See HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 77, 118–19, 171 (1998) (examining performance in unemployment compensation appeals, state labor board appeals and social security disability appeals); see also Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 *SEATTLE J. SOC. JUST.* 51, 74 (2010) (suggesting that the importance of attorneys increases as procedural complexity increases).

92. Ontario allows licensed paralegals to appear in court with respect to small claims and administrative matters. See Law Society of Upper Canada, *By-Law 4 §6(2)(2)*.

is unclear that non-lawyers, whether they work on their own or for corporations, will be able to afford to substantially undercut their lawyer competitors on price and still maintain profitable practices.<sup>93</sup>

Litigation is labor-intensive and presumably non-lawyers will need to prepare cases in much the same way that lawyers do. Even a relatively simple matter such as the defense of a tenant in a summary eviction proceeding requires a representative to i) obtain and review all of the documents relevant to the tenancy and visit the property in question; ii) determine whether the landlord has used the correct procedure for eviction under state and local laws; and iii) investigate potential defenses such as that the landlord failed to maintain the premises or had a retaliatory or discriminatory motive for bringing the eviction.<sup>94</sup> Non-lawyers will also have many of the same costs as lawyers, ranging from office expenses to educational costs and professional dues.<sup>95</sup>

The United States already allows non-lawyers to represent individuals before certain administrative agencies.<sup>96</sup> For example, non-lawyers routinely represent claimants in social security disability appeals.<sup>97</sup> The involvement of non-lawyers has not led to lower fees in social security cases, and firms that employ non-lawyers to handle appeals have been roundly criticized for ethical lapses.<sup>98</sup>

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93. This point seems to be conceded by some advocates of lay practice, see Zorza & Udell, *supra* note 90, at 1307, although they claim that costs can eventually be lowered. *Id.* at 1308.

94. Lawrence Wood, *Keeping Tenants Out of the Cold, Local State and Federal Laws Offer Defenses Against Eviction Actions*, 84 ABA J. 68 (1998).

95. A study comparing rates of lawyers and non-lawyers who contracted with the British government to provide legal aid found that solicitors charged hourly rates that were only \$7.50 higher than those of non-lawyers. See Richard Moorehead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 L. & Soc'y REV. 765, 783 (2003). Interestingly, the study found that lawyers ultimately charged less than non-lawyers because they devoted fewer hours to their matters. See *id.* As the authors acknowledge, however, because of the design of the legal aid scheme, lawyers had incentives to devote less time to their legal aid cases whereas non-lawyers had incentives to devote more time per case. See *id.* at 783–4.

96. See generally Zachary Zurek, Comment, *The Limited Power of the Bar to Protect Its Monopoly*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 242, 261 n.98 (2013) (noting that non-lawyers are authorized to represent individuals before the Social Security Administration, Department of Labor, Patent and Trademark Office, and other administrative agencies).

97. See 20 C.F.R. §§ 404.1705 (recognizing that claimants may retain non-attorney representatives). The social security system is allegedly the largest adjudicatory system in the world. See Robert E. Rains, *Professional Responsibility and Social Security Representation: The Myth of the State-Bar Compliance with Federal Rules on Production on Adverse Evidence*, 92 CORNELL L. REV. 363, 364 (citing Heckler v. Campbell, 461 U.S. 458, 461 n.2 (1983)).

98. Binder & Binder, a firm partly owned by non-lawyers, has been employing lay advocates to handle social security claims since 2004 when the Social Security Administration amended its representation rules. See Damian Paletta & Dionne Searcey, *Two Lawyers Strike Gold in U.S. Disability System*, WALL ST. J. (Dec. 22, 2011), <http://online.wsj.com/articles/SB10001424052970203518404577096632862007046> [<http://perma.cc/3K3G-NU93>]. Binder & Binder is highly profitable because it charges fees that are the same as its lawyer-owned competitors while functioning largely as a “warehouse” for claims. See *id.* It is generally viewed as responsible for diminishing the ethics of the social security bar generally. See Robinson, *supra* note 19, at 50. Non-lawyer representatives are also sanctioned at a higher rate than lawyer representatives. See Drew A. Swank, *Money for Nothing: Five Small Steps to Begin the Journey of Restoring Integrity to the Social Security Administration's Disability Programs*, 41 HOFSTRA L. REV. 155, 173 (2012).

Foreclosure and social security firms may be anomalies. But these examples illustrate that the commodification of litigation and other complex services is difficult to achieve without compromising ethics, no matter the capitalization of the entity that delivers them. Rather than transforming how legal services are delivered, corporations may simply bring ethically problematic high-volume legal practice to more sectors of the legal market.<sup>99</sup> Regulating these entities, as has been done in the United Kingdom, could help to prevent an ethical race-to-the-bottom, but the end result may simply be that legal work moves from lawyers to non-lawyers without expanding access to justice.

Although more empirical research must be undertaken, there is little evidence to support the view that the high cost of legal services is responsible for the high incidence of unmet legal needs. Nor will the corporate delivery of legal services, either through lawyers or non-lawyers, be able to render cost-prohibitive services such as litigation affordable without significantly diminishing the quality of representation provided.

### III. THE PRIORITIZATION OF LEGAL ASSISTANCE

The notion that corporations will expand access to justice by lowering the cost of legal services also presupposes that people prioritize legal services and would purchase them if they were significantly less expensive. However, low- and middle-income people have limited resources. Satisfying legal needs often means forsaking other needs. Depending on the nature of the legal problem, low- and middle-income people may reasonably choose to handle their legal problems on their own.<sup>100</sup> In assuming that most, if not all, problems with a legal component should be addressed via some type of legal representation, the legal profession potentially overstates the importance and value of legal assistance.

#### A. DO LOW- AND MIDDLE-INCOME AMERICANS PRIORITIZE LEGAL SERVICES?

One of the chief reasons that Americans might reasonably choose to handle their legal problems on their own is that they prefer to spend their limited funds

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99. Cf. ABEL, *supra* note 86, at 107–08 (quoting an attorney who defended himself in disciplinary proceeding by stating, “I’m the only low budget lawyer in Chinatown . . . I’m Filene’s basement . . . This is Lord & Taylor trying to put Filene’s basement out of business” (internal citation omitted)).

100. The prevailing view appears to be that unrepresented individuals are bereft of volition. See, e.g., TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN N.Y., REPORT TO CHIEF JUDGE OF THE STATE OF NEW YORK 1, 12 (2010) [hereinafter 2010 NY REPORT]; LSC REPORT, *supra* note 5, at 24 (suggesting that unrepresented individuals have no choice but to be unrepresented); see also Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 386 (2010) (“A litigant’s appearance without counsel is most often compelled, not voluntary.”). Another common view is that the unrepresented are fools, as reflected by the well-known legal maxim: A man who chooses to represent himself has a fool for a client. See also *Kay v. Ehrler*, 499 U.S. 432, 438 (1991) (“A lawyer who represents himself has a fool for a client.”).

on other goods and services. Attorney use is directly linked with income.<sup>101</sup> The modern single-earner family has experienced a seventy-two percent drop in discretionary income from a generation ago; low- and increasingly middle-income individuals cannot readily satisfy their legal needs without ignoring other needs.<sup>102</sup> That the average poor person spends far more money on food, health care, shelter, clothing, education, entertainment, transportation, and alcohol than he or she does on legal services also evinces that legal services are a low priority.<sup>103</sup>

The spending of low- and middle-income people may fail to reflect their true priorities if, for example, they do not know that their problems are legal in nature or do not believe they can find affordable legal assistance.<sup>104</sup> Moreover, it is difficult to conceive of the decision to represent oneself as a choice when ninety-eight percent of tenants in eviction cases, ninety-nine percent of borrowers in consumer credit cases, and ninety-five percent of parents in child support cases, appear unrepresented in court, as is the case in New York State.<sup>105</sup>

The legal profession should certainly do more to educate the public about the importance and availability of legal services.<sup>106</sup> Nevertheless, even with full information, many individuals may reasonably choose to handle their legal problems on their own. According to the 1994 ABA Survey, forty-eight percent of

101. See Balmer, *supra* note 37, at 49 (summarizing research). The evidence is less clear that this is a result of money or the type of problems that wealthier people experience versus poor ones. Compare *id.* at 48 (suggesting that lawyer use is linked with income even when controlling for problem type), with Kritzer, *supra* note 27, at 259 (“Some of the overall difference in lawyer use as a function of income reflects the different types of problems those with lower incomes frequently experience, as compared to those with higher incomes.”).

102. Elizabeth Warren, *The Middle Class on the Precipice: Rising Financial Risks for American Families*, HARV. MAG., Jan.–Feb. 2006, <http://harvardmagazine.com/2006/01/the-middle-class-on-the.html> [<http://perma.cc/94VJ-3NQ4>]; see also Anna Bernasek, *The Typical Household, Now Worth a Third Less*, N.Y. TIMES (July 26, 2014), [http://www.nytimes.com/2014/07/27/business/the-typical-household-now-worth-a-third-less.html?\\_r=0](http://www.nytimes.com/2014/07/27/business/the-typical-household-now-worth-a-third-less.html?_r=0) [<https://perma.cc/EF5V-2D9F>?type=source] (noting that the inflation-adjusted median net worth of American households fell from \$87,992 in 2003 to \$56,335 in 2013).

103. Silver & Cross, *supra* note 8, at 1487; see also Robert Nelson, *the Future of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 382 (1994) (“[L]egal services may not be as high a priority for the poor as employment, medical care, food, or shelter.”). Although one may question whether money spent on entertainment or alcohol would better go to obtaining legal advice, there is obviously significant risk for lawyers and policymakers to substitute their values for those that they are purportedly trying to help. See Silver & Cross, *supra* note 8, at 1483 (“As a class, poor people are needy, not incompetent. If they value television sets, clothing, legal services or healthcare differently than we do, the appropriate presumption is that they know what is best for them.”).

104. Many people also likely overestimate their ability to handle their legal problems on their own. See Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One’s Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1130 (1999) (“Incompetence . . . not only causes poor performance but also the inability to recognize that one’s performance is poor.”).

105. 2010 NY REPORT, *supra* note 100, at 1; Jonathan Lippman, *New York’s Template to Address the Crisis in Civil Legal Services*, 7 HARV. L & POL’Y REV. 13, 13 (2013); see also DC Report, *supra* note 5, at 132, 133 (noting that 98.65 percent of respondents in paternity and child support cases and 97.75 percent of respondents in housing court were pro se in 2005).

106. See *infra* Part IV.

low-income households and sixty-four percent of moderate-income households are satisfied with the resolution of their legal needs when they retain an attorney.<sup>107</sup> This stands to reason because even the most skilled attorney cannot ensure a positive outcome. Retaining an attorney, as opposed to engaging in self-help or seeking help from a knowledgeable friend or family member, may increase the likelihood of a positive outcome but not to the extent that it justifies the added cost.<sup>108</sup>

Indeed, although commentators often view self-representation rates in eviction, consumer debt, and other proceedings involving unpaid financial obligations as compelling evidence of a lack of access to justice,<sup>109</sup> any funds expended by litigants for legal assistance could instead be used to satisfy a portion of their unpaid obligations.<sup>110</sup> Although retention of counsel may diminish any liabilities, effective representation can be very expensive and not even the best attorney can guarantee the desired result.<sup>111</sup> Representing oneself could even constitute a strategic choice.<sup>112</sup> Judges and court staffs are often forced to assist the unrepresented in navigating the legal process.<sup>113</sup>

Were the unrepresented merely victims of their financial circumstances,<sup>114</sup> representation rates should not differ based on the legal problem at issue. Yet, Americans are far more likely to consult attorneys with respect to divorce and

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107. ABA SURVEY, *supra* note 5, at 29.

108. *See id.* (setting out varying satisfaction rates based on whether respondents took no action, handled the situation themselves, sought assistance from a non-legal third party, or retained counsel). Satisfaction also depended greatly on the nature of the legal problem. *See id.*

109. *See, e.g.,* Hadfield, *Innovating*, *supra* note 10, at 1; Lippman, *supra* note 105, at 13; LSC REPORT, *supra* note 5, at 25.

110. According to a 2005 study, eighty-three percent of unrepresented litigants in New York's housing courts make less than \$30,000 a year. LSC REPORT, *supra* note 5, at 25; *see also* Robinson, *supra* note 19, at 45 ("Non-lawyer ownership provides few new options for a bankrupt tenant facing eviction.").

111. Unfortunately, not all legal representation is effective. For example, a recent report on the New York Immigration Courts found that nearly half of legal representatives provided inadequate representation, with the private bar providing significantly worse representation than legal clinics and pro bono attorneys. *See* STUDY GROUP ON IMMIGRANT REPRESENTATION, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 1, 4, 26 (2011), [http://perma.cc/4UPQ-DBVX](http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

112. *Cf. Engler, supra* note 100, at 396 (noting the perception that some unrepresented litigants are seeking "free lunch" or otherwise seeking to gain an advantage by representing themselves, even where they might have the means to pay for counsel). One study of divorce courts in Maricopa County, Arizona found that seventy-two percent of self-represented litigants would represent themselves in future divorce cases. *See* Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases*, 37 ST. LOUIS U. L.J. 553, 561, 604 (1994).

113. *See* 2010 NY REPORT, *supra* note 100, at 12 ("When parties appear without counsel the important role of the judge as a neutral arbiter is increasingly difficult to maintain."); *see also* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 975-76 (2004) (summarizing research on judges' obligations to assist unrepresented litigants).

114. *See* ABA SURVEY, *supra* note 5.



custody than other civil justice problems.<sup>115</sup> A 2008 District of Columbia report found that thirty-eight percent of respondents in divorce cases and custody cases were pro se compared to ninety-seven percent of respondents in housing court.<sup>116</sup> Individuals make judgments, however imperfectly, about when it is actually necessary and advantageous to hire an attorney.<sup>117</sup>

Despite the attention devoted to expanding access to justice, as set out below, there is surprisingly little empirical research to suggest that the public would benefit from legal assistance in a much larger range of matters.

## B. THE EFFECTIVENESS OF LEGAL ASSISTANCE

Access to justice advocates have long contended that “legal representation makes all the difference.”<sup>118</sup> Yet very little reliable research supports this position.<sup>119</sup> As Professor Levin has noted about existing studies that purport to measure the importance of legal representation:

The problem with [the existing studies] is that a simple comparison of the outcomes in cases where a client is represented by a lawyer and where an individual self-represents cannot account for other factors that may affect outcomes, including factors that affect whether a client will obtain a lawyer. For instance, the ability to obtain legal representation may depend upon the individual’s perseverance or articulateness or other characteristics that may also be relevant to case outcomes. The ability to obtain counsel may also depend upon the strength of the client’s case, which may affect whether a . . . lawyer would take the case . . .<sup>120</sup>

Two recent, more rigorous studies have questioned whether legal assistance even *marginally* increases the likelihood of a positive outcome. Professors Greiner and Pattanayak analyzed the outcomes of claimants in unemployment benefits appeals who were unrepresented versus those who were randomly

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115. See Sandefur, *supra* note 23, at 238–39.

116. DC REPORT, *supra* note 5, at 7, 9.

117. See Sandefur, *supra* note 23, at 237 (noting that Americans are more likely to obtain lawyers when there is no means to readily resolve their problems other than going to court); see also Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer? An Empirical Study of Divorce Cases*, 12 J. L. & FAM. STUD. 57, 59 (2010) (“[Pro se] divorce litigants may have good, common sense notions about when self-representation is feasible and when it is not.”). An ABA survey found that twenty percent of pro se litigants in family courts admitted that they could afford an attorney. *Id.* at 58, n.4.

118. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2181 (2012) [hereinafter Greiner & Pattanayak, *Randomized Evaluation*].

119. See, e.g., *id.* at 2119; Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 991 (2012) (“[T]here seems to be little benefit to providing lawyers across the board, especially in simple cases.”).

120. Levin, *supra* note 9, at 2617–18 (citations omitted).



assigned representation by the Harvard Legal Aid Bureau in 2012.<sup>121</sup> Despite the excellent reputation of the Bureau and the best efforts of its students and staff,<sup>122</sup> claimants who received an offer to be represented by the Bureau did not win at a significantly higher rate than those who did not.<sup>123</sup>

A 2009 study by Erica Hashimoto of federal criminal misdemeanor cases concluded that representation not only provided little benefit but also produced worse outcomes.<sup>124</sup> The study compared the outcomes of pro se defendants with those of defendants who either retained counsel or had counsel appointed.<sup>125</sup> Pro se litigants were acquitted and had their cases dismissed at significantly higher rates than their represented peers.<sup>126</sup> They also received lighter sentences.<sup>127</sup> The study controlled both for the severity of the charges and the type of offenses, although defendants who represented themselves could, conceivably, have had stronger cases than those who retained or were assigned representation.<sup>128</sup>

These results should be taken with caution. Other randomized studies have found that legal representation does positively affect outcomes.<sup>129</sup> Moreover, unemployment benefits cases and misdemeanor criminal cases generally do not allow for a great deal of preparation time, potentially making counsel less useful than in matters where attorneys have additional time.<sup>130</sup> Representation may also benefit clients in ways other than affecting outcomes in individual cases.<sup>131</sup>

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121. See Greiner & Pattanayak, *Randomized Evaluation*, *supra* note 118, at 2140, 2143.

122. *See id.* at 2141.

123. *See id.* at 2149.

124. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489 (2009).

125. *See id.* at 490.

126. *Id.*

127. *Id.*

128. *Id.* at 495.

129. See James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 928 (2013); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 421 (2001).

130. See Greiner & Pattanayak, *Randomized Evaluation*, *supra* note 116, at 2171–72 (suggesting that the quick time frame for employment appeals may explain their findings). A subsequent study by Greiner and Pattanayak in housing court seems to suggest the superiority of traditional legal assistance over limited scope or unbundled legal assistance. See James Greiner et al., *supra* note 129, at 903–04 (noting that represented individuals were more likely to remain in their homes and have their financial obligations reduced). The authors speculate that this may be due to, *inter alia*, the relatively complex nature of housing law, the litigation style of the attorneys, and the relatively limited time of the judges to conduct their own inquiries. *See id.* at 940–44.

131. As Greiner and Pattanayak suggest:

[R]epresentation may assure that each person subject to official decision-making and/or state coercive power is treated with dignity; it may promote a feeling on the part of the litigant that the process was fair and that her story was told, thereby increasing the litigant's willingness to accept the result of the adjudication . . . . It may educate the client as to her best interests or as to what is possible given legal and factual constraints, thereby adjusting the client's goals; and it may better the client's socioeconomic situation . . . perhaps because the legal representative also acts as a coordinator of official and community resources.

Nevertheless, the paucity of evidence regarding the positive effects of representation in general, let alone in any particular unrepresented individual's situation, may suggest that Americans are acting reasonably in seeking to handle many of their legal problems without lawyers while reserving their funds for other uses. Allowing greater non-lawyer involvement in the legal market would only drastically alter the decision-making calculus of low- and middle-income people if legal services were to be provided at little to no cost.<sup>132</sup>

### C. BEYOND ACCESS TO JUSTICE AS ACCESS TO REPRESENTATION

To question the benefits of attorney representation in specific contexts may raise doubts about its value generally.<sup>133</sup> Nevertheless, if the value of attorney representation is not assumed in all cases, access to justice initiatives could be focused on providing individuals with attorneys in situations where attorneys are most useful and effective.

Much of the support for access to justice initiatives comes not from their impact on the lives of low- and middle-income people, but from the perceived benefit to the legal system in increasing representation rates.<sup>134</sup> The unrepresented are widely viewed, fairly or unfairly, as imposing strains on the legal system. As expressed by New York State's Task Force to Expand Access to Civil Legal Services:

[U]nrepresented parties require repeated adjournments and cannot present or resolve their cases that otherwise could be resolved by counsel without the need for protracted litigation . . . . [L]ack of counsel [also] undermines the Judiciary's core function of serving as a neutral arbiter of disputes when Judges struggle to help vulnerable unrepresented litigants.<sup>135</sup>

Eliminating "protracted litigation" and facilitating the role of judges qua "neutral arbiters" may be worthwhile societal goals. However, these goals are not

Greiner & Pattanayak, *Randomized Evaluation*, *supra* note 118, at 2206. *But see* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 428–29 (2007) (suggesting that self-representation may guard against the poor preparation of appointed counsel and also further ideological interests).

132. *Cf.* Kritzer, *supra* note 27, at 269 ("Making judgments about the demand for legal services, and the impact of income on that demand, is difficult if we are looking at services that are provided at no cost.").

133. *See* Mark Osiel, Book Review, *Lawyers as Monopolists, Aristocrats and Entrepreneurs*, 103 HARV. L. REV. 2009, 2031 (1990) (noting the legal profession's emphasis on its esteem).

134. *See* 2010 N.Y. REPORT, *supra* note 100, at 20 ("The provision of civil legal services is the essential ingredient for resolving disputes before they get to court and settling them efficiently and effectively when cases do end up in court."); *see also* Engler, *supra* note 100, at 2053 ("The prevalence of unrepresented litigants creates strains on the system."). *But see* Greiner & Pattanayak, *Randomized Evaluation*, *supra* note 118, at 2124–25 (reporting that representation delayed the resolution of unemployment benefits claims). New York State has calculated that legal aid directed towards preventing homelessness saved the state \$355,000,000 from 2005 to 2009. 2010 N.Y. REPORT, *supra* note 100, at 25.

135. *See, e.g.*, 2010 N.Y. REPORT, *supra* note 100, at 9, 12 (noting effect on businesses, judges, and lawyers).

necessarily compatible with the priorities and interests of low- and middle-income people.

Indeed, as scholars have observed, one means to avoid “protracted litigation” is for lawyers to pressure unsophisticated clients to settle or otherwise waive their right to be heard.<sup>136</sup> Conceiving of access to justice as access to some representation ignores the very real differences in both the quality and type of representation that individuals of limited means are likely to receive.<sup>137</sup> The desire of judges to act as “neutral arbiters” can also be antithetical to the interests of low- and middle-income people insofar as they are opposed by more moneyed adversaries.<sup>138</sup>

To be sure, unrepresented parties are sometimes pressured to take ill-advised settlements. There is also no guarantee that judges will safeguard the rights of unrepresented litigants.<sup>139</sup> But a more feasible and effective alternative than seeking to ensure that every litigant has a representative<sup>140</sup> would be to more closely regulate the dealings between attorneys and unrepresented individuals and impose additional obligations on judges vis-à-vis the unrepresented.<sup>141</sup>

For example, attorneys who negotiate settlements on behalf of their clients with unrepresented parties could be required to specifically advise these parties to review the settlement terms with their own counsel or advisor.<sup>142</sup> Attorneys are currently afforded remarkable latitude in dealing with unrepresented parties.<sup>143</sup> At minimum, this will clarify the attorney’s role and signal to unrepresented

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136. See, e.g., Terrence C. Halliday & Robert L. Nelson, *Lawyers, Structure, and Power*, 36 LAW & SOC. INQUIRY 885, 888 (2011) (“It is personal client lawyers, low in the prestige hierarchy of the bar, who might exert greater influence over their clients.”); Cramton, *supra* note 9, at 555 (warning lawyers of dangers of “abusive paternalism” towards unsophisticated clients); see also Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 129 (2010) (suggesting that attorneys should not reduce their clients’ varied interests into predetermined legal categories).

137. See Pearce, *supra* note 113, at 969 (“The organized bar . . . refuses to acknowledge that our legal system promises equal justice under the law, but allows justice to be bought and sold.”).

138. See generally Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L.A. L. REV. 979, 982 (2009) (“Supporters of the American system continue to point to the need for impartial judges . . . Judges who are willing to help both sides, as needed, do not necessarily have to be perceived as biased. Passivity and impartiality are not the same thing.”).

139. See Engler, *supra* note 100, at 2015–6 (reviewing empirical research on judges’ silencing of unrepresented individuals).

140. As Barton and Bibas observe, “[E]ven though criminal defendants do enjoy the Gideon right to counsel, the quality and availability of indigent criminal defense remain hobbled by inadequate funding. Gideon’s shortcomings in the criminal context should caution us [in the civil context].” See Bibas & Barton, *supra* note 119, at 968.

141. Cf. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 83 (1997) (suggesting that a range of responses are needed to ensure that lawyers do not improperly negotiate with unrepresented parties).

142. See *id.* at 138 (“Ethical rules could . . . impose a duty of fairness on a lawyer negotiating with an unrepresented adversary, prohibit a lawyer from obtaining an unconscionable agreement from an unrepresented party, or impose on the lawyer duties toward the tribunal and/or the unrepresented adversary different from those where the adverse party is represented.”).

143. MODEL RULES R. 4.3, cmt. 2 provides:

individuals that they should carefully review the settlement documents.<sup>144</sup> A few states already require judges to supervise settlements involving unrepresented persons to ensure that they understand the settlement terms.<sup>145</sup>

Conceiving of access to justice solely in terms of representation rates also leads to a misallocation of scarce legal aid and pro bono resources.<sup>146</sup> Legal aid attorneys are guided largely by office custom and their subjective experiences in determining which clients to serve and how to serve them because of an absence of reliable empirical research on attorney effectiveness.<sup>147</sup> The median attorney in the United States currently provides thirty hours of pro bono service,<sup>148</sup> which is not only fewer than the fifty hours exhorted by the *Model Rules*<sup>149</sup> but is plainly insufficient to resolve all but uncomplicated matters. An access to justice agenda devoted to providing high quality legal assistance in a much smaller number of situations may not improve representation rates, but it could allow low- and middle-income people to more effectively vindicate their rights.

#### IV. EXPANDING ACCESS TO JUSTICE WITHOUT CORPORATE DELIVERY OF LEGAL SERVICES

This Article has questioned the assumptions that problems with access to justice are caused by the alleged high cost of legal services and that all legal problems should be addressed by attorneys. Nevertheless, there are undoubtedly a substantial number of Americans who would benefit from legal assistance but

So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

144. The *Model Rules* acknowledge the importance of the unrepresented person understanding the lawyer's role, but there is no affirmative obligation to clarify unless the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter." See MODEL RULES R. 4.3.

145. See Engler, *supra* note 100, at 378–79 (tracing developments in Massachusetts and California). Massachusetts advises that:

Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.

*Id.* at 378 (citation omitted).

146. See Selbin et al., *supra* note 31, at 52; see also Barton & Bibas, *supra* note 119, at 992 ("[T]here seems to be little benefit to providing lawyers across the board, especially in simple cases.").

147. See Laura Abel, *Designing Access: Using Institutional Design to Improve Decision Making about the Distribution of Free Civil Legal Aid*, 7 HARV. L. & POL'Y REV. 61, 75 (2013).

148. See ABA, *Supporting Justice III: A Report on the Pro Bono Work of America's Lawyers*, iv, March 2013, [http://www.americanbar.org/content/dam/aba/administrative/probono\\_public\\_service/lis\\_pb\\_Supporting\\_Justice\\_III\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lis_pb_Supporting_Justice_III_final.authcheckdam.pdf) [<http://perma.cc/26SJ-J3G7>].

149. MODEL RULES R. 6.1(a).

fail to realize it and others who cannot locate qualified attorneys.<sup>150</sup> Low- and middle-income individuals also lack access to information that can aid them in representing themselves. This Part will explore how the legal profession might address these problems without fundamentally altering how legal services are delivered in the United States.

#### A. EDUCATING THE PUBLIC

Law is a social construct, but laymen often do not conceive of their problems in legal terms.<sup>151</sup> For example, people may suspect that they have been taken advantage of or injured without knowing that their legal rights have been violated and that there is a potential remedy.<sup>152</sup>

Empirical research confirms that Americans cannot reliably identify their legal needs.<sup>153</sup> The State of Georgia's legal needs study found that seventy-three percent of interviewees were unaware that they had legal needs.<sup>154</sup> The 2014 CNSS Study, which examined a wider range of legal issues, found that only in nine percent of situations were interviewees aware that their civil justice problems were legal in nature.<sup>155</sup> This inability to identify a problem as legal makes it highly improbable that individuals will seek legal assistance.<sup>156</sup>

Even when Americans conceive of their problems in legal terms, they struggle to find competent attorneys. Although most states have not-for-profit attorney referral services, very few people use them.<sup>157</sup> These services also provide little more than the name of a participating attorney who practices in the area of law and is in good standing with the bar.<sup>158</sup> Instead, people rely on their personal networks to find attorneys. According to the ABA Survey, of the households that consulted with an attorney, thirty-two percent of low-income households and thirty-eight percent of moderate-income households located the attorney through

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150. For a discussion of corporations' ability to lower search costs, see Hadfield, *Cost of Law*, *supra* note 10, at 9–10.

151. Sandefur, *supra* note 23, at 236.

152. *See id.*

153. *See supra* Part II(A); *see also* Sandefur, *supra* note 23, at 232 (“Among the most important reasons that people do not take their problems to lawyers is that they do not think of their problems as legal.”).

154. LSC REPORT, *supra* note 5, at C-1. A study in the United Kingdom found that just over ten percent of legal problems were conceived of as legal in nature. Balmer, *supra* note 37, at iii.

155. CNSS Study, *supra* note 40, at 14.

156. According to a recent study in the United Kingdom, individuals who know that they have a legal problem are six to seven times more likely to seek out legal assistance than those who do not. *See* Sandefur, *supra* note 23, at 236; *see also* CNSS Study, *supra* note 40, at 14 (“[Respondents were] significantly more likely to have used or considered using lawyers for the situations that they believed to be ‘legal’ (39% of instances) than for those they did not (14% of instances).”).

157. *See* Sandefur, *supra* note 23, at 242.

158. *See, e.g.*, Benjamin P. Cooper, *Attorney Self-Disclosure*, 79 U. CIN. L. REV. 697, 707-08 (2011); Linda Morton, *Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It*, 25 U.C. DAVIS L. REV. 283, 301 (1992).

a friend or family member, and approximately the same percentage of respondents sought out attorneys with whom they were already acquainted.<sup>159</sup> Despite the advent of the Internet, most consumers still locate legal services in this manner.<sup>160</sup> Those without extensive networks and preexisting relationships with lawyers will naturally struggle to secure the appropriate representation.<sup>161</sup>

The public also has very little information about the cost of legal services. Although the Supreme Court in *Bates* held that lawyers could not be prohibited from advertising the prices of certain routine legal services,<sup>162</sup> few attorneys advertise their prices.<sup>163</sup> As noted, no comprehensive study has been undertaken to examine what people pay for legal services or what attorneys or firms charge for their services.<sup>164</sup> Moreover, substantial numbers of low-income Americans appear to be unaware of legal aid or mistakenly believe that they do not qualify. The ABA Survey found that only half of low-income households knew of free legal services and only thirty-six percent correctly surmised that they qualified.<sup>165</sup> Knowledge of legal aid has not improved in recent years.<sup>166</sup>

Although informational deficiencies likely cannot be completely overcome, the legal profession could support expanded civics education and make legal information far more available than it does presently.<sup>167</sup> To remedy the public's inability to conceive of their legal problems in legal terms, state bars could launch public education campaigns to raise awareness of how lawyers assist with common problems. The Virginia Bar was awarded a newspaper advertising

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159. ABA SURVEY, *supra* note 5, at 26.

160. A 2011 survey found that 46 percent of those surveyed would rely on friends, family members or colleagues to locate an attorney; 34 percent would contact a lawyer they used in the past; and only 7 percent would use the Internet. *See* Sandefur, *supra* note 23, at 243 (citations omitted). For a critique of Internet ratings systems for lawyers, *see* Cooper, *supra* note 158, at 707–09.

161. *See, e.g.*, Cooper, *supra* note 158, at 706 (“[T]rying to find a lawyer by word of mouth is only effective if consumers know people who know good lawyers. Many individuals simply do not have the kind of connections that are going to help them find a good lawyer.”); Morton, *supra* note 158, at 290 (“[N]onusers of legal services find commercial and organized sources of information more important than users.”) (citation omitted).

162. *See* *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977).

163. *See generally* Linda Sorenson Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 GEO. J. LEGAL ETHICS 429, 476 (1990) (“Most legal advertisements do not include a range of fees or hourly rates. Sophisticated clients most likely realize that such information is relatively meaningless . . . . But such advertisements may mislead unsophisticated clients . . . .”); Richard L. Abel, *How the Plaintiff’s Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 358 (2006). (“[A]dvertising tells clients little about competence, price, speed, or responsiveness . . . [M]any states discourage price advertising.”).

164. Sandefur, *supra* note 23, at 227.

165. ABA SURVEY, *supra* note 5, at 26.

166. *See* LSC REPORT, *supra* note 5, at D-1 (stating that only about twenty-three percent of individuals in Utah and twenty percent of individuals in Alabama were aware that free legal assistance was available).

167. An existing initiative is iCivics, launched by former Supreme Court Justice Sandra Day O’Connor, which provides interactive online learning resources for students. *See Our Story*, ICIVICS, <https://www.icivics.org/our-story> [<https://perma.cc/9S4Q-EEQB>] (last visited Feb. 4, 2015). For a discussion of lawyers as civics teachers, *see generally* Bruce A. Green & Russell G. Pearce, *Public Service Must Begin at Home: The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1214–1219 (2009).



award for such a campaign in 1999.<sup>168</sup> The campaign clearly set out in plain terms the variety of services attorneys provide, which ranged from stopping mistreatment in nursing homes and securing Medicare benefits to helping people start businesses.<sup>169</sup>

Ethical reforms may also be necessary because anti-solicitation and advertising rules contribute to informational deficiencies by impeding attorneys and firms from marketing and publicizing their services.<sup>170</sup> For example, Model Rule 7.3 prohibits lawyers from soliciting professional employment in person, via phone, or other real-time contact when they are motivated partly by pecuniary gain.<sup>171</sup> While the Rule seeks to protect potential clients from being coerced into accepting legal representation against their will, it is overbroad insofar as it bars virtually all solicitations of individuals with whom the lawyer is unacquainted, regardless of whether the lawyer exerts any pressure on the potential client. Model Rule 7.3 could simply prohibit duress and harassment, with special protections in place for individuals who are known to be especially vulnerable.<sup>172</sup>

The *Model Rules* also prohibit lawyers from paying for recommendations from non-lawyers who may regularly interact with populations that are in need of legal assistance.<sup>173</sup> The result of this policy is that lawyers must engage in costly mass advertising rather than marketing their services to individuals who are well-positioned to refer clients who are in most need of legal assistance.<sup>174</sup> While allowing attorneys to pay for referrals may lead potential clients to attorneys who are not necessarily the most qualified to handle their cases, a greater danger is that

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168. See *Public Education Campaign*, ST. BAR OF VA., <http://www.vsb.org/site/publications/public-education-campaign> [<http://perma.cc/YL86-JU25>] (last updated June 2, 2014). *Retirement Ad*, STATE BAR OF VIRGINIA, <http://www.vsb.org/publications/ads/images/retirement.pdf> [<http://perma.cc/Q6EA-BEX3>] (last visited June 2, 2014).

169. *Id.*; see, e.g., *Retirement Ad*, STATE BAR OF VA., <http://www.vsb.org/publications/ads/images/retirement.pdf> [<http://perma.cc/Q6EA-BEX3>] (last updated June 2, 2014).

170. Scholars have long advocated for the abandonment of restrictive anti-solicitation and advertising rules. See, e.g., Judith L. Maute, *Facing 21<sup>st</sup> Century Realities*, 32 MISS. C. L. REV. 345, 346 (2013); Rhode, *Connecting Principles to Practice*, *supra* note 36, at 416-16; Monroe H. Freedman, *Advertising and Solicitation by Lawyers: A Proposed Redraft of Canon 2 of the Code of Professional Responsibility*, 4 HOFSTRA L. REV. 183, 184 (1976).

171. MODEL RULES R. 7.3(a). Some states also prohibit solicitation by mail for a period of time in certain cases. See, e.g., GA. RULES OF PROF'L CONDUCT R. 7.3(a)(3) (2013).

172. Model Rule 7.3(b) already prohibits duress and harassment in solicitation, whether it be in-person or written, as well as contacting individuals who have made it known that they do not wish to be contacted. See MODEL RULES R. 7.3. Some states prohibit any communications for the purpose of soliciting business if "the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer." See, e.g., GA. RULES OF PROF'L CONDUCT R. 7.3(a)(4) (2013).

173. MODEL RULES R. 7.2(b).

174. See Drake D. Hill, *Deconstructing the Prophylactic Ban on Lawyer Solicitation*, 62 TEMP. L. REV. 875, 896 (1989) ("By bringing the legal services consumer in contact with the person providing those services, consumers can judge for themselves . . . Like advertising, solicitation can inspire legal consumers to seek additional information about the lawyer from other sources, which in turn may reduce the likelihood of consumer deception.").



people in need of legal assistance will be unaware of where to obtain such services. Any risk of undue influence in the selection of counsel could be mitigated by requiring attorneys to disclose referral payments to prospective clients.<sup>175</sup>

The *Model Rules* are more lax in their treatment of attorney advertising by prohibiting only false and misleading communications.<sup>176</sup> However, many states extensively regulate attorney advertising, which limits both its use and effectiveness. Some states require advertisements to be pre-approved by the state bar.<sup>177</sup> Others do not permit the use of actors or monikers.<sup>178</sup> New Jersey prohibits “drawings, animations, dramatizations, music, or lyrics in connection with televised advertising” and does not allow counsel to advertise characteristics that are not clearly related to legal competence.<sup>179</sup>

Whatever the merits of such regulations, they prevent lawyers from advertising the way that other businesses, including some alternative providers of legal services, do.<sup>180</sup> As Professor Smolla has observed:

Modern advertising is all about being “catchy” and using the devices of drama, arts, color, sound, fiction, fantasy, or comedy . . . A lawyer who dares to be catchy, however, is in danger of being caught—and disciplined. Lawyers act at their peril if they dare to make their advertising interesting, through the use of logos, symbols, catchy phrases, jingles, music, dance, humor, parody, surprise, sarcasm, drama, puffery, or figurative hyperbole.<sup>181</sup>

Some states also specifically regulate the advertising of prices. In Kentucky, attorneys must file detailed descriptions of the routine services for which they are advertising a fee.<sup>182</sup> In New York, attorneys must honor their advertised rates unless their clients agree in writing that the advertised rates do not apply to the

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175. See MODEL RULES R. 7.2(b)(4) (permitting attorneys to enter into reciprocal referral arrangements with lawyers and non-lawyers as long as these arrangements are nonexclusive and are disclosed to clients).

176. See MODEL RULES R. 7.1.

177. See, e.g., NEV. RULES OF PROF'L CONDUCT R. 7.2A(a) (2013); TEX. RULES OF PROF'L CONDUCT R. 7.07(b) (2013).

178. See, e.g., FLA. RULES OF PROF'L CONDUCT R. 4.7-15 (2013) (prohibiting use of image or voice of celebrities or “an actor portraying an authority figure”); S.C. RULES OF PROF'L CONDUCT R. 7.1(e) (2013) (prohibiting advertisements that contain “a nickname, moniker, or trade name that implies an ability to obtain results in a matter”).

179. N.J. RULES OF PROF'L CONDUCT R. 7.2(a) (2013).

180. For example, LegalZoom regularly features Robert Shapiro, one of its co-founders, who is a well-known Los Angeles attorney who formerly represented O.J. Simpson even though the company does not actually provide legal advice, let alone legal advice from Mr. Shapiro. See generally Brandon Schwarzenraub, *Electronic Wills & the Internet: Is LegalZoom Involved in the Unauthorized Practice of Law or Is Their Success Simply Ruffling the Legal Profession's Feathers?*, 5 EST. PLAN. CMTY. PROP. L.J. 1, 9–10 (2012) (summarizing allegations against LegalZoom in Connecticut and California with respect to deceptive practices).

181. Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437, 460 (2006) (emphasis omitted).

182. See Ky. Sup. Ct. R. 3.130 (7.04).

needed services.<sup>183</sup> Such regulations serve to guard against a “bait and switch,”<sup>184</sup> but the public is deprived of useful information when attorneys do not advertise their prices in order to have greater flexibility in negotiating fees and rates at a later time.<sup>185</sup> Even in states without such regulations, many lawyers are reluctant to advertise their prices for fear that they will be viewed as misleading by disciplinary authorities.<sup>186</sup> In the era of ubiquitous advertising and social media, prospective clients may be far less susceptible to the “bait and switch” than state regulators believe. In any event, state bars could mitigate this problem by publishing the ranges of fees charged by attorneys within their jurisdictions for basic services so that the public will be wary of fees that fall far outside of these ranges.

Anti-solicitation and advertising regulations are designed to not only protect the public but safeguard the image of lawyers.<sup>187</sup> Nevertheless, as important as such considerations may be, access to justice is undermined by the legal profession’s maintenances of ethics rules that keep the public uninformed of the importance and availability of legal services.

## B. EMBRACING THE INTERNET AND NEW TECHNOLOGIES

In addition to maintaining regulatory barriers that hamper the dissemination of information about legal services, the legal profession has been slow to adjust to a world in which more and more people turn to the Internet to inform themselves about their legal problems.<sup>188</sup> Although information found on the Internet can be

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183. See N.Y. RULES OF PROF'L CONDUCT R. 7.1(r) (2013).

184. Ewald, *supra* note 163, at 476–77.

185. As the Supreme Court remarked in *Bates*, “Although . . . the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less.” *Bates*, 433 US at 375. There was at one time much speculation that advertising of legal services would lead to a drop in the price of legal services. See, e.g., *id.* at 380; Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1109 (1983). Empirical research post-*Bates* supported this view. See Nora Freeman Engstrom, *Attorney Advertising & the Contingent Fee Cost Paradox*, 65 STAN. L. REV. 633, 635–36 (2013). However, as Professor Engstrom has explained, the firms that advertised in the aftermath of *Bates* do not resemble the firms that advertise today. *Id.* at 639. Indeed, the vast majority of advertising is now done by personal injury firms and the fees of personal injury firms have not dropped even as tort recoveries have risen. See *id.* at 638–39. Moreover, personal injury firms that advertise appear to charge more than those that do not. See *id.* at 639 (internal citations omitted).

186. See Ewald, *supra* note 163, at 474 (“Any communication that describes the fee for a particular legal service has the potential to mislead or deceive if the service is not clearly defined . . . [T]o the unsophisticated client, even the term ‘routine,’ ‘simple,’ or ‘uncontested’ may be confusing.”).

187. See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 624–25 (1995). But see William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 336 (1996) (“[T]here have been dozens, if not scores, of research efforts gauging attitudes, opinions and images resulting from lawyer advertising. The consensus among this research is that lawyers dislike lawyer advertising, but consumers are moderately positive toward it.”).

188. See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 151 (1999) (“[W]hile the legal profession retains its historical ambivalence toward technological advances, laypeople are gravitating to the Internet to seek help with their daily legal problems . . . .”); see also

misused, the legal profession should embrace this inexorable cultural trend to assist those who seek to address their legal problems on their own.

The chief impediment to increased information-sharing over the Internet is that attorneys risk unintentionally creating attorney—client relationships.<sup>189</sup> Although lawyers can provide general legal information to help educate the public without forming attorney—client relationships, they cannot give legal advice.<sup>190</sup> However, the distinction between general legal information and legal advice is tenuous in the context of the Internet.

For example, persons on the Internet might request “general legal information” that is nevertheless specific to their particular situations and upon which other similarly situated persons might come to rely.<sup>191</sup> Some attorneys answer such questions despite the ethical perils,<sup>192</sup> but the public would receive better information if there were greater attorney participation.

The *Model Rules* already allow lawyers to provide “short-term limited legal services” under the auspices of nonprofit and court-annexed legal services programs without the expectation that the individual seeking advice will obtain continuing representation.<sup>193</sup> This model could be extended to Internet forums as long as the questioners are advised to seek further counsel and are fully informed of the limits of the legal advice they receive from participating attorneys.<sup>194</sup>

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Cassandra Burke Robertson, *Private Ordering in the Market for Professional Services*, 94 B.U. L. REV. 179, 200 (2014) (suggesting that communication technology and the Internet increasingly act as a substitute for professional advice).

189. See, e.g., ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (discussing lawyer websites); N.M. Bar Op. 2001-1 (2001), <http://www.nmbar.org/NmbarDocs/AboutUs/committees/Ethics/2000-2002/2001-1.pdf> [<http://perma.cc/J3MK-89JT>] (indicating that attorneys may create attorney—client relationships on the internet notwithstanding disclaimers).

190. See, e.g., N.Y. RULES OF PROF'L CONDUCT R. 7.1(q) (r) (2013); D.C. Bar Legal Ethics Comm. Op. 316, Lawyers' Participation in Chatroom with Internet Users Seeking Legal Information, See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) (discussing lawyer websites); N.M. Bar Op. 2001-1 (2001), <http://www.nmbar.org/NmbarDocs/AboutUs/committees/Ethics/2000-2002/2001-1.pdf> [<http://perma.cc/J3MK-89JT>] (indicating that attorneys may create attorney—client relationships on the internet notwithstanding disclaimers).

191. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/ethics\\_opinion\\_10\\_457\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_457_authcheckdam.pdf) [<http://perma.cc/877V-VEBT>] (“[L]awyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner’s individual circumstances.”); N.Y. RULES OF PROF'L CONDUCT R. 7.1, cmt 9 (2013) (“A lawyer . . . should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, because slight changes in fact situations may require a material variance in the applicable advice.”).

192. See *Ask a Lawyer*, AVVO, <http://www.avvo.com/ask-a-lawyer> [<http://perma.cc/3X8S-H2HE>] (last visited Oct. 10, 2015); see also Lanctot, *supra* note 188, at 248 (“Neither courts nor bar counsel is likely to be sympathetic to lawyers who have given negligent advice [in cyberspace] and then try to rely on boilerplate disclaimers to absolve them of responsibility for harm.”).

193. MODEL RULES R. 6.5(a).

194. Compare Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2003-164 (2003) (suggesting that no attorney—client relationship is established when an individual asks a specific question to an attorney on a

Some questioners might eventually seek to obtain full representation whereas those that do not will at least have a more informed understanding of their legal situations.

The legal profession has also historically opposed efforts to assist the unrepresented in fulfilling basic legal tasks.<sup>195</sup> However, companies such as LegalZoom and Rocket Lawyer that provide basic legal documents and forms to consumers over the Internet are now firmly established and growing rapidly.<sup>196</sup> Although there are legitimate concerns about the quality of the services provided by these companies, as well as their business practices,<sup>197</sup> their emergence shows that there is strong demand for do-it-yourself legal documents.

State bars nevertheless continue to cede much of this business to for-profit corporations. A 2011 study found that twenty-four states have extensive plain language court forms for use, fourteen have limited court forms for use, and twelve states do not have any such forms.<sup>198</sup> A few legislatures have also developed standardized non-litigation documents such as wills.<sup>199</sup> If more states were to follow suit, this would reduce the risk of individuals relying on flawed or outdated documents produced by for-profit companies.

The ABA appears to be becoming more accepting of the Internet as a means of educating the public.<sup>200</sup> But, even without formal cooperation from the organized bar, entrepreneurs are developing products that facilitate greater access to legal information. One such product, created by A2J Author, assists self-represented

radio call-in show or similar format), and Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2005-168 (2005) (suggesting that disclaimers can prevent the creation of attorney-client relationship with advice seeker), with MODEL RULES R. 6.5 cmt. 2 (2013) (suggesting that an attorney in a limited representation program should advise client to seek further counsel).

195. See Rhode, *Professionalism in Perspective*, *supra* note 9, at 705 (noting state bars' longstanding hostility to self-help programs).

196. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041, 3058 (2014). Document generation is a \$400 million industry and is expected to grow by ten to twenty percent per year. *Id.* at 3059.

197. LegalZoom's website contains the following as part of its disclaimer: "Although LegalZoom takes every reasonable effort to ensure that the information on our website and documents are up-to-date and legally sufficient, the legal information on this site is not legal advice and is not guaranteed to be correct, complete or up-to-date." *LegalZoom Disclaimer*, LEGALZOOM, <https://www.legalzoom.com/disclaimer.html> [<https://perma.cc/6UUB-2G4A>] (last visited Oct. 10, 2015). Most of the litigation surrounding LegalZoom has involved allegations of unauthorized practice of law. See generally Isaac Figueras, *The LegalZoom Identity Crisis: Legal Form Provider or Lawyer in Sheep's Clothing?*, 63 *CASE W. RES. L. REV.* 1419, 1430-37 (examining cases in North Carolina, Missouri, and Ohio).

198. See Charles R. Dyer et al., *Improving Access to Justice: Plain Language Family Law Court Forms in Washington State*, 11 *SEATTLE J. FOR SOC. JUST.* 1065, 1073-74 (2011) (citation omitted).

199. See, e.g., CAL. PROB. CODE § 6240 (2013); ME. REV. STAT. Title 18A, § 2-514 (2013); MICH. COMP. LAWS § 700.123c (2014).

200. The ABA recently announced a pilot program with Rocket Lawyer to have lawyers provide legal advice and documents over Rocket Lawyer's platform. See Jennifer Smith, *Online Legal Services Company to Team up with American Bar Association*, WALL ST. J. (Aug. 11, 2014), <http://blogs.wsj.com/law/2014/08/11/online-legal-services-company-to-team-up-with-american-bar-association/> [<http://perma.cc/AD6Q-P8L9>].

litigants by providing a graphically illustrated step-by-step process to complete court documents.<sup>201</sup> A Maryland company recently received significant recognition for developing an application that guides individuals through the mechanics of the criminal record expungement process and refers them to lawyers.<sup>202</sup>

These technologies are not substitutes for dedicated attorney assistance.<sup>203</sup> However, as the preceding examples illustrate, significant innovation can occur in the legal market without having corporations directly deliver legal services. Although the Internet and new technologies should not be viewed as a panacea for lack of access to justice,<sup>204</sup> they can help the public better understand its legal needs, navigate basic legal issues, and find attorneys in situations where they seek attorney involvement.

### CONCLUSION

Lack of access to justice is a serious and intractable societal problem.<sup>205</sup> To expand access to justice, the legal profession cannot continue to focus on how legal services are delivered in the hope of lowering costs while ignoring factors that depress the demand for legal services.

The notion that corporate delivery of legal services will expand access to justice is based on several misconceptions. Although most legal problems are addressed without attorneys, this does not signify that there is a massive unmet demand for legal services. Every civil justice problem does not merit attorney involvement, and individuals sometimes act reasonably in seeking to resolve their problems on their own. Nor does the high cost of legal services prevent most people from accessing legal services. The inability of Americans to conceive of their problems as legal and lack of appreciation for the value of legal assistance play a much more critical role.

Even if corporations could, through improved economies of scale, lower the cost of some legal services to the point that more low- and middle-income

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201. The tool is provided under the auspices of the Chicago Kent School of Law. See *A2J Author*, ILL. INST. OF TECH. CHICAGO-KENT C.L., <http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/a2j-author> [<http://perma.cc/XXH9-NVYM>] (last visited Dec. 19, 2015).

202. See Anna Stolley Persky, *New App Helps People Expunge Their Criminal Records*, ABA J. (Nov. 1, 2014), [http://www.abajournal.com/magazine/article/wipe\\_out\\_new\\_app\\_helps\\_people\\_expunge\\_their\\_records](http://www.abajournal.com/magazine/article/wipe_out_new_app_helps_people_expunge_their_records) [<http://perma.cc/M24E-AM5E>].

203. As Harry Surden has suggested, the purpose of advanced computer systems is not to replace human lawyers but rather to “automate[] certain typical ‘easy-cases’ so that the attorney’s cognitive efforts and time can be conserved for those tasks likely to actually require higher-order legal skills.” Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 87, 101 (2014).

204. *Id.* at 88–89.

205. See, e.g., Pearce, *supra* note 113, at 969 (“The organized bar . . . refuses to acknowledge that our legal system promises equal justice under the law, but allows justice to be bought and sold.”); Luban, *supra* note 7, at 245 (“America’s thirty million poor people have long lists of needs, and legal representation may be far down the list. But that misses the point. Even if silencing doctrines are not among life’s gravest injustices, they represent an outrageous violation of what the legal system should be.”).

individuals would purchase them, they are unlikely to be able to make litigation and other cost-prohibitive legal services affordable. Much legal work remains bespoke, and the public is unlikely to benefit from more high volume providers of legal services.<sup>206</sup>

The legal profession bears some responsibility for lack of access to justice by failing to promote greater understanding of the law and maintaining ethical rules that impede lawyers from soliciting business and effectively marketing their services. It has also been slow to utilize the internet to make basic legal forms and documents available. As a result, the public has inadequate access to legal information.

Nevertheless, even with better access to information, many individuals will continue to resolve their legal problems on their own and reserve discretionary income for other uses. There is very little data to substantiate that representation leads to better outcomes, especially with respect to uncomplicated matters. The legal profession's insistence that legal representation is always valuable leads to the misallocation of legal aid and pro bono resources that should be targeted to serious situations where a skilled attorney might actually make a difference.

An access to justice agenda with the limited ambition of creating more low-cost legal services providers, through the corporate delivery of legal services or otherwise, may marginally increase representation rates.<sup>207</sup> But it is a disservice to low- and middle-income people.

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206. Cf. Pearce, *supra* note 113, at 970 (“[B]ar leadership has focused . . . on providing more lawyers to low-income people . . . Given that our society primarily distributes legal services through the market and employs an adversary system of justice, the bar’s proposals . . . would have a very limited impact in advancing equal justice.”).

207. Cf. Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 *LOY. L.A. L. REV.* 913, 914 (2009) (“[I]f we begin with the limited ambition of providing counsel (or purported alternatives) only in individual, well-defined legal disputes, then that is as far as we are likely to get . . .”).