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RETHINKING PRIVATE ATTORNEY INVOLVEMENT THROUGH A “LOW BONO” LENS

*Luz E. Herrera**

Millions of Americans are too rich for subsidized legal services but too poor to afford a private attorney. These near poor struggle to navigate the legal system much in the same way as the poor, but they have fewer options. The result is that fewer than one in five legal needs of low-income clients are addressed by a lawyer. The legal profession has an obligation to address this lack of accessibility to the judicial system. Legal services leaders should expand their approach to the delivery of legal services to include affordable models that benefit low- and moderate-income clients who are ineligible for free legal aid. Pro bono models do not sufficiently address the inadequacy of affordable legal services by the private bar. Discussion about legal services must shift from a narrow focus on free legal services to a more inclusive focus on the needs of both the legal consumer and the private legal provider. This shift from a pro bono to a “low bono” legal services model would improve access to the judicial system by low- and moderate-income Americans.

We cannot continue to ignore the millions upon millions of people . . . throughout this nation who are almost poor, who do not qualify for legal aid, and who, in reality, are without sufficient funds to hire an attorney.

—Gary G. Bellow, 1968¹

* Assistant Professor of Law, Thomas Jefferson School of Law. The author would like to acknowledge the help of research assistants Bertha Alicia Hernandez, Erubey Lopez, Diana Lopez, and Marc M. Breverman, who helped gather and organize the materials, and the law students at the *Loyola of Los Angeles Law Review* for their patience and editing. The author is also grateful to her colleagues, Steve Berenson, Laura Gomez, Ernesto Hernandez, Rebecca Lee, Leticia Saucedo, and Steve Semerano for their comments on early drafts of this Article. The author is especially grateful to Jeanne Charn, Robert Cohen, Jose Padilla, Fred Rooney, Sue Talia, and Richard Zorza, for helping fill in gaps, for their encouragement, and most importantly, for daring to challenge conventional wisdom.

1. Gary G. Bellow, *The Extension of Legal Services to the Poor: New Approaches to the Bar’s Responsibility*, in *THE PATH OF THE LAW FROM 1967* at 115, 116 (Arthur E. Sutherland ed., 1968). Gary G. Bellow (1935–2000) was a pioneering public service lawyer and leader in legal

I. INTRODUCTION

In 1968, Gary G. Bellow warned that the newly created legal services program would inevitably create new problems because it was based on several erroneous assumptions, including the assumption that “the provision of legal aid service to the poor is separate from the general problem of the unavailability of legal service to others in our low-income areas and to much of the rest of the nation.”² Bellow cautioned that the failure of the legal services agenda to include a component of legal services delivery to the non-poor would prove to be shortsighted.³ He believed that the country would continue to have an access to justice problem until it recognized that most of the legal problems of the marginalized in society are symptoms of political and economic inequalities.⁴ Bellow’s caution was not heeded forty years ago, but perhaps now it is time to reconsider our approach to legal services delivery.

Millions of people in our country who do not qualify for subsidized civil legal services, but who do not make enough money to hire an attorney at market rates of \$200 to \$350 an hour, have few means of obtaining adequate representation for the myriad of unavoidable legal problems they routinely encounter.⁵ While we continue to have a large (and growing) population of poor, there exists a larger population of near poor who struggle to navigate the legal system in much the same way as the poor.⁶ The recent financial

clinical education. See EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 28–31 (1974). During his time in Washington, D.C., as a public defender and the deputy director of the United Planning Organization, Bellow advocated to create a federally funded legal services program for the poor as part of Lyndon Johnson’s War on Poverty. *Id.*

2. Bellow, *supra* note 1, at 115–16.

3. *Id.* at 116. *Non-poor* is used in this Article to describe individuals who are not poor and is more inclusive than the term *near poor*, which describes individuals who are in precarious economic situations that place them at the brink of poverty.

4. See *id.* at 121 (“We talk of the need for changes in attitudes of the poor, and the potential for such changes through contact with lawyers and through exposure to fairer treatment. This may be true. But the changes will not be very lasting, if they are not accompanied by some real changes in the political and economic position of the poor as well.”).

5. Attorney hourly fees vary according to the market in the particular geographic region. The range of market rates referenced in this Article is supported by research conducted by students in the author’s Access to Justice seminars at Thomas Jefferson School of Law in Fall 2008 and at Chapman University School of Law in Spring 2008. The supporting documentation is on file with the author.

6. A 2005 report by the Legal Services Corporation (LSC) concluded that only one-fifth of those who require civil legal services in this country receive them. LEGAL SERVS. CORP.,

crisis on Wall Street caused by troubles in the housing market has increased the pool of low- and moderate-income individuals who require legal assistance on civil matters.⁷

On January 23, 2009, the Associated Press featured Timothy Cook, an individual who fell behind on his mortgage payments as a result of a prolonged illness.⁸ Cook, along with six of his relatives and friends who shared the house, found himself on the verge of losing his home in the midst of a cold Minnesota winter.⁹ After being turned away by local legal aid lawyers who were unable to assist him, Cook proceeded to the self-help center at the Hennepin County Courthouse in Minneapolis.¹⁰ Courthouse personnel provided limited assistance and suggested that he find an attorney who might be able

DOCUMENTING THE JUSTICE GAP IN AMERICA 18 (2005), <http://www.lsc.gov/justicegap.pdf> [hereinafter LEGAL SERVS. CORP., JUSTICE GAP I]. A follow-up report issued by LSC in 2009 confirms and strengthens that finding. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 27 (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf [hereinafter LEGAL SERVS. CORP., JUSTICE GAP II] ("There is now a substantial body of knowledge demonstrating that only a fraction of the legal problems experienced by low-income individuals is addressed with the help of an attorney."). Both reports confirm that due to lack of resources, LSC grantees turn away approximately 50 percent of those who seek and qualify for their services. LEGAL SERVS. CORP., JUSTICE GAP II at 27; LEGAL SERVS. CORP., JUSTICE GAP I at 18. For more information about LSC, see *infra* Part II.B. For a detailed discussion of restrictions on federally funded programs, see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187, 2189–90 (1999).

7. This Article focuses exclusively on access to civil legal services. For a discussion about the availability of counsel for low-income parties, see generally the ABA's report on the status of legal aid in the United States. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 38 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> ("Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.").

8. Steve Karnowski, *Poor Economy Hits Courts, Hurts Programs for the Poor*, ASSOCIATED PRESS, Jan. 23, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/01/23/national/a113216S56.DTL>.

9. *Id.* The housing crisis has greatly harmed moderate-income individuals and low-income families who pooled their money to buy a piece of the American dream. Although the number of foreclosure filings only rose 42 percent from 2005 to 2006, the number of homes that were actually foreclosed on increased dramatically. Center for American Progress, *Subprime Mortgage Foreclosures by the Numbers*, March 26, 2007, http://www.americanprogress.org/issues/2007/03/foreclosures_numbers.html. See also Stephanie Armour, *Foreclosures Jump in December After Months of Declines*, USA TODAY (Jan. 14, 2010), available at http://www.usatoday.com/money/economy/housing/2010-01-13-foreclosures-rise-in-december_N.htm?obref=obinsite (reporting that foreclosure filings hit their peak in July 2009 and that approximately 2.4 million homes are expected to be lost through foreclosure, auction, and other means in 2010).

10. Karnowski, *supra* note 8.

to help him.¹¹ Still hopeful that he would obtain the necessary help, Cook stated, “Hopefully, maybe, God willing, I’ll find an attorney who will do this pro bono for me.”¹² After exploring all of his options for legal representation, Cook could not obtain a lawyer in time to save his home.¹³ “If I could have gotten an attorney, they would have known what to do,” he said.¹⁴

Timothy Cook typifies many individuals around the country who cannot find the proper assistance to deal with their civil legal issues.¹⁵ While the difficulties low-income individuals have in obtaining assistance on civil legal matters are well documented, it took the crash of the subprime lending market and its repercussions on all sectors of the economy to highlight the vulnerability of middle-class¹⁶ families and the limits of our existing civil legal services model.¹⁷

11. *Id.*

12. *Id. Pro bono publico* (commonly shortened to *pro bono*) is derived from the Latin phrase meaning “for the public good.” In the United States, *pro bono* has become associated with the provision of free legal services. For a discussion of the development of public interest and pro bono work in a historical context, see generally Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97 (2002) and Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281 (2001).

13. Kamowski, *supra* note 8.

14. *Id.* Despite the public’s antipathy for lawyers and the availability of self-help remedies, many individuals like Mr. Cook prefer to involve an attorney in order to find solutions to their legal problems. There are several studies that show that clients fare better when represented by attorneys. See Clare Pastore, *A Right to Civil Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1072–1074 (2009) (advocating for greater use of research about the impact of attorney representation as a vehicle for expanding the right to counsel to civil cases); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveals About When Counsel Is Most Needed*, FORDHAM URB. L.J. (forthcoming 2010) (compiling studies showing less favorable outcomes for self-represented parties).

15. For a longer discussion of legal consumers’ needs, see *infra* Part IV.

16. The Census Bureau does not have an official definition of the “middle class”; it looks at several measures of distribution of income to divide the country into quintiles of income distribution. The 2007 U.S. Census figures report that the second quintile started at an annual household income of \$20,300, the third quintile started at an annual household income of \$39,100, and the fourth quintile began at an annual household income of \$62,000. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, PERCENT DISTRIBUTION OF HOUSEHOLDS, BY SELECTED CHARACTERISTICS WITHIN INCOME QUINTILE AND TOP 5 PERCENT IN 2007, http://www.census.gov/hhes/www/macro/032008/hhinc/new05_000.htm (last visited Aug. 8, 2009). For purposes of this Article, “moderate-income” and “middle-class” refer to individuals who belong to the three middle quintiles of our country’s economic distribution, which ranged from approximately \$20,300 to \$100,000 per year.

17. The “paycheck-to-paycheck” reality for these millions of Americans has been documented by academics and, most recently, by opponents of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). For an overview of the economic plight of

Those who frequent our courthouses and who work with low- and moderate-income individuals have no illusion about the large gap between the rhetoric of justice and the present reality of our legal system. All over the country, courts are plagued by long dockets, slashed personnel, scarce resources, and self-represented individuals who are not literate in the law and represent themselves in complex legal proceedings or transactions out of necessity.

The last national study commissioned by the American Bar Association (ABA) in 1994 (the "1994 Legal Needs Study") indicated that moderate-income individuals in this country have a number of unmet legal needs similar to those of the poor.¹⁸ Recent reports issued by state commissions and committees on access to justice confirm the plight of low- and moderate-income individuals.¹⁹ In fact, several of the reports suggest that the national study understates the problem. California's Access to Justice Commission reports that in the year 2000, approximately 7.5 million Californians earned below the state's median income but did not qualify for federally funded civil legal services.²⁰ The seven most recent state reports confirm that fewer than one in five legal needs of low-income

middle-class Americans, see generally Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401 (2004), and Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349 (2008). See also Michael J. Heyman & Theodor C. Albert, *Bankruptcy Law's Major Changes*, ORANGE COUNTY LAW., July 2005, at 36 (reviewing the new bankruptcy filing requirements of BAPCPA).

18. See ABA, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 9–11 (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>. The 1994 Legal Needs Study defined moderate-income households as those with incomes greater than 125 percent of the poverty threshold but less than \$60,000. *Id.* at 7. It found that in 1992, about half of such moderate-income households faced one or more situations that could be addressed by the civil justice system. *Id.* at 9. Of those instances, approximately 61 percent never made it to the justice system. *Id.* at 27. The most common legal needs of those surveyed related to personal finances, consumer issues, housing, and real property. *Id.* Poverty guidelines are determined each year by the U.S. Department of Health and Human Services. The guidelines are income thresholds updated annually by a cost of living index. For 2009 poverty guidelines, see Dep't of Health & Human Servs., Annual Update of the HHS Guidelines, 74 Fed. Reg. 4199 (Jan. 23, 2009).

19. State studies that have been undertaken include California (2007), Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Massachusetts (2003), Washington (2003), Tennessee (2004), Illinois (2005), Montana (2005), Virginia (2007), Utah (2007), Wisconsin (2007), Nevada (2008), Alabama (2009), Georgia (2009), and New Jersey (2009). LEGAL SERVS. CORP., JUSTICE GAP II, *supra* note 6, at 13, 17; Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 44 (2007); and CAL. COMM'N ON ACCESS TO JUSTICE, ACTION PLAN FOR JUSTICE 2 (April 2007), available at http://www.calbar.ca.gov/calbar/pdfs/reports/2007_Summary_Action-Plan-Justice.pdf.

20. CAL. COMM'N ON ACCESS TO JUSTICE, ACTION PLAN FOR JUSTICE, *supra* note 19, at 2.

clients are addressed by a lawyer.²¹ With unemployment figures rising and wages dropping, the number of individuals who meet the poverty guidelines and make less than the median income has increased.²²

If the accessibility of the legal system remains the top priority for ensuring justice, then perhaps we must consider forging new alliances, healing the political wounds of previous generations, and expanding the discourse of access to justice to include the provision of affordable legal services by the private bar that would benefit a larger client community. If teachers, firemen, social workers, and government employees cannot afford to hire an attorney to protect their parental, economic, or civil rights, the legal profession has a problem that it is obligated to address under the profession's norms of conduct.²³ This Article urges legal services leaders to expand their approach to legal services delivery to include affordable legal services models that benefit low- and moderate-income clients ineligible for free legal aid. The paradigm shift to an affordable civil legal services model must be accompanied by deliberate efforts to integrate the Main Street lawyers who have historically made up the largest sector of the private bar.²⁴ A more expansive legal services

21. LEGAL SERVS. CORP., JUSTICE GAP II, *supra* note 6, at 13.

22. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LOCAL AREA UNEMPLOYMENT STATISTICS, <http://data.bls.gov/PDQ/outside.jsp?survey=la> (toggle "View State(s) by area type"; select "A Statewide" in box 1; select "06 California" in box 2; and click "Get Data") (last visited Sept. 7, 2009) (showing an increase in unemployment rate from 5.3 percent in June 2007 to 12.2 percent in August 2009).

23. The ABA Model Rules of Professional Conduct state in part: "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." MODEL RULES OF PROF'L CONDUCT pmbl. para. 6 (2002).

24. This Article uses the phrase "Main Street lawyers" to describe solo and small-firm practitioners for whom low- and moderate-income clients represent a sizeable part of their practices. There are no current figures that indicate how many solo and small-firm practitioners represent such populations; however, previous studies indicate that a large sector of these lawyers have such client bases. See generally JEROME E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO 17-18 (1962) (reporting that "the practice of most metropolitan individual practitioners" is composed of "the undesirable cases, the dirty work, those areas of practice that have associated with them an aura of influencing and fixing and that involve arrangements with clients"); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-33 (1982) (positing that the legal profession is separated into two hemispheres, one consisting of lawyers who serve large, corporate clients, and the other composed of individual lawyers serving individual clients, and that these two hemispheres are defined somewhat by the wealth of the client); CARROLL SERON, THE BUSINESS OF PRACTICING LAW 129-36 (1996) (providing an overview of New York

platform that includes a discussion about the affordability of legal services is long overdue and immediately needed to develop public awareness and political support for accessible legal services.²⁵ This Article attempts to shift the lens of the legal services discussion from a narrow focus on free legal services to one that is more inclusive and responsive to the needs of both the legal consumer and the major private providers of legal services in this country—the Main Street lawyers.

Part II of this Article examines the role of the private bar in the development of the national civil legal services program for the indigent in the United States. This section is divided into three subsections, each of which sets forth assumptions about who is “deserving” of legal services and who is “competent” to provide them. Part II.A focuses on the historical role and limitations of the Main Street lawyers’ charitable efforts in delivering legal services to the indigent through early models of legal aid societies. This period of history, where there was no federal hub for legal services to the poor, is referred to herein as the “Charitable Era.” Part II.B takes us from the Charitable Era to the debate surrounding the inclusion of a Judicare component in our present federal legal services program.²⁶ It explains the fears and biases against the Main Street lawyers’ role in providing legal services to the indigent that informed the development of today’s legal services program in the United States.

attorneys’ thoughts on voluntary pro bono work versus paid work that turns into pro bono cases because clients fail to pay for legal services).

25. See generally JEANNE CHARN & RICHARD ZORZA, THE BELLOW-SACKS ACCESS TO CIVIL LEGAL SERVICES PROJECT, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS (2005), <http://www.garybellow.org/Text.pdf> (advocating for full access to a legal services system that includes the middle class, offers a continuum of services from brief advice to full representation, and provides a measure of quality and accountability); William C. Vickrey, Joseph L. Dunn & J. Clark Kelso, *Access to Justice: A Broader Perspective*, 42 LOY. L.A. L. REV. 1147 (2009).

26. The model of government subsidies to pay the private bar to serve low-income individuals is commonly known as “Judicare.” Judicare is similar to Medicare—a model wherein the government compensates private practitioners to provide services—and is a system adopted by a majority of developed countries around the world. See Robert J. Rhudy, *Comparing Legal Services to the Poor in the United States with Other Western Countries: Some Preliminary Lessons*, 5 MD. J. CONTEMP. LEGAL ISSUES 223, 241 (1994) (“The primary delivery system in other countries or provinces reviewed is a Judicare system of private attorneys compensated at a reduced fee by a public agency or bar association administering public funds. Between 25 to 50 percent of the private bar is involved in providing such services in these countries.”). See generally Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83 (2001) (comparing the U.S. approach to and level of funding for civil legal aid services to those of other democratic nations with similar constitutional equal justice mandates).

Part II.C explores the establishment of pro bono programs as the primary form of private attorney involvement that arose from the Judicare debate and a federal government requirement that recipients of federal grants use a portion of their federal grants to develop private bar participation.²⁷ This section argues that while a federal government role is pivotal in coordinating access to legal services across state lines, the current framework is handicapped not only by its restrictions and funding levels, but also by the implementation of pro bono as the primary private attorney involvement program. Part III sets forth the argument for why emphasis on pro bono models alone represents an obstacle to increasing the availability of affordable legal services by the private bar. It argues for the inclusion of the Main Street lawyers as the principle private attorney providers in a re-envisioned national legal services framework. Finally, Part IV offers a “low bono” agenda for alternative private attorney involvement that takes into account client preferences, the financial needs of the private bar, and existing civil legal services delivery models. The Article concludes by setting forth suggestions for additional research necessary to move such an agenda forward.

II. A SUMMARY OF THE HISTORY OF PRIVATE ATTORNEY INVOLVEMENT IN DELIVERING LEGAL ASSISTANCE TO THE INDIGENT

Educating ourselves about the history of private attorney involvement in delivering legal assistance to the less fortunate is critical to forming a new legal services model. There are a handful of legal aid leaders and scholars who have spent their lives advocating for legal services to the poor, but the larger community of current and future attorneys, policymakers, and bar leaders have little or no understanding of the making of our civil legal services delivery system.²⁸ Also, much of the existing literature disregards the contributions of local bar associations and Main Street lawyers in providing affordable legal services. Creating a stronger model for

27. 45 C.F.R. § 1614 (2008).

28. Given the lack of discourse of legal services in state and national elections, this lack of understanding is reflected in the general public, particularly that segment which is under the age of forty and was not privy to political debates over legal aid between 1964 and 1994. Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 Loy. L.A. L. Rev. 869, 869 (2009) (“A striking aspect of recent American political campaigns is the almost complete silence surrounding access to justice.”).

tomorrow requires us to understand the motivations and prejudices that influenced where we are today.

A. *The Charitable Era: 1919–1965*

Neither the problem of access to civil legal services in the United States nor the role of the Main Street lawyers in providing those legal services is new. As early as the 1880s, attorneys pooled their skills and resources to create legal aid societies, which provided legal assistance to those in need.²⁹ Until New Deal legislation introduced federal subsidy programs, such as unemployment benefits and aid to dependent children, it was incumbent on private attorneys to respond to legal crises in communities.³⁰

While the origin of legal services for the poor is often traced back to the German Society of the City of New York in 1876,³¹ most legal aid advocates trace the origins of their movement to Reginald Heber Smith.³² In 1919, with funding from the Carnegie Foundation, he published *Justice and the Poor*, which documented the problems the poor confronted when attempting to navigate the legal system.³³ At the time, poor people "relied largely upon the charitable impulses of [members of the bar] to supply service to those who could not pay the going rate."³⁴ Smith documented that, in 1917, there were only 41 legal aid organizations in 41 cities, which employed a total of 62 full-time and 113 part-time attorneys and handled a total of 117,201 cases.³⁵ The critique of the legal profession contained in Smith's book caused an uproar in the legal profession; however, Smith's

29. See JOHNSON, *supra* note 1, at 4–5; JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876–1926*, at 16–18 (1928).

30. See JOHNSON, *supra* note 1, at 5–9; see also MARJORIE GIRTH, *POOR PEOPLE'S LAWYERS* 3 (1976) ("Until the mid-1960s the legal profession relied largely upon the charitable impulses of its members to supply service to those who could not pay the going rate.").

31. JOHNSON, *supra* note 1, at 4.

32. For a comprehensive history of the legal aid movement in the United States, see generally JOHN S. BRADWAY & REGINALD HEBER SMITH, *GROWTH OF LEGAL AID WORK IN THE UNITED STATES* (1936); EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951); GIRTH, *supra* note 30; JOHNSON, *supra* note 1; and REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919).

33. JOHNSON, *supra* note 1, at 5. When Reginald Heber Smith graduated from Harvard Law School at age twenty-five, his first job was to lead the newly created Boston Legal Aid Society (BLAS). He was one of two attorneys at BLAS. *Id.*

34. GIRTH, *supra* note 30, at 3.

35. JOHNSON, *supra* note 1, at 6 (citing SMITH, *supra* note 32, at 147, 152, 192).

passion for making legal services for the indigent accessible had enough support that, in 1921, the ABA formed the Standing Committee on Legal Aid and named Smith its chairman.³⁶ Although Smith's leadership brought about additional efforts to address the legal problems of the poor, the Great Depression considerably slowed down the efforts of charitable attorneys who volunteered time and donated money to establish legal aid societies for the poor.³⁷ Having suffered their own economic difficulties, lawyers became less interested in establishing private projects to aid the indigent.

Ultimately, it was McCarthyist rhetoric and the enactment of the Legal Aid and Advice Act of 1949³⁸ in England that provided the U.S. legal profession the necessary fuel to expand legal aid societies.³⁹ The British enactment of a government-funded legal system, which subsidized legal services for those who could not afford them, threatened socialization of the legal profession.⁴⁰ In 1950, the General Assembly of the ABA reacted to this threat by passing a resolution condemning federal government intervention in legal services delivery and emphasizing the importance of keeping legal aid private.⁴¹ In order to curtail the need for government intervention, the private bar mobilized to operate private legal aid offices. By the time the federal government revisited the idea of a government-subsidized legal services program in the early 1960s, there were over 150 organizations in every major city in the United States with an aggregate budget of \$4.5 million and staff of 400 full-time lawyers.⁴² These organizations were generally established by Main Street lawyers, and they generally lacked the capacity and the network to coordinate legal strategies that would help advance the

36. *Id.* at 7. The Standing Committee on Legal Aid and Indigent Defendants (SCLAID) continues its work today. See American Bar Association Standing Committee on Legal Aid and Indigent Defendants Home Page, <http://www.abanet.org/legalservices/sclaid/> (last visited Aug. 24, 2009).

37. JOHNSON, *supra* note 1, at 8.

38. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51 (Eng.).

39. JOHNSON, *supra* note 1, at 17–18.

40. See *id.*

41. *Id.* at 19.

42. Houseman, *supra* note 19, at 36.

legal positions of the poor on a grand scale. The organizations were diverse in their structures and largely underfunded.⁴³

When President Lyndon B. Johnson's War on Poverty plan provided an opportunity to create a federally funded system for civil legal services, there was widespread support among the lawyers working at the legal aid societies to increase and strengthen their existing structures.⁴⁴ The Office of Economic Opportunity's (OEO)⁴⁵ vision of the legal services program was not informed by Main Street and private legal aid lawyers. Instead, it was largely modeled after pilot projects funded by the Ford Foundation in the early 1960s, which were components of multi-service social agencies that worked with the poor in the cities of New Haven, New York, Boston, and Washington, D.C.⁴⁶ Academics, foundation executives, and young attorneys developed the blueprint for a social reform component to the first federal legal aid program.⁴⁷ With few exceptions, most of the social reformers who were instrumental in developing a national legal services program were disconnected from the existing legal aid movement supported by the private bar.⁴⁸

The key to enacting federal legislation was to merge the two movements—the one supported by the private bar and the one envisioned by social reformers—into a consolidated proposal for a national legal services program. The effort to reconcile the two strategies was a difficult political battle which the leadership of the ABA and government officials ultimately settled without input from the existing legal aid lawyers or Main Street lawyers.⁴⁹

43. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW AND SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 3 (2007), <http://www.clasp.org/admin/site/publications/files/0158.pdf>.

44. *See id.* at 7.

45. The OEO was established by the Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964) (repealed in part 1981).

46. The projects funded were Mobilization for Youth in New York; Action for Boston Community Development; the Legal Assistance Association in New Haven, Connecticut; and the United Planning Organization in Washington D.C. HOUSEMAN & PERLE, *supra* note 43, at 4–5. *See generally* JOHNSON, *supra* note 1, at 21–32 (providing an overview of the creation of "neighborhood lawyer programs" such as those mentioned above).

47. *See* JOHNSON, *supra* note 1, at 21–35 (describing the neighborhood lawyer experiments funded by Ford Foundation executives and implemented by university professors and young lawyers).

48. *Id.* at 35.

49. The idea for the national program is traced to Jean and Edgar Cahn, who, in 1964, published a piece in the *Yale Law Journal* advocating for neighborhood law offices that could

In 1964, the ABA leadership learned of the social reformers' ambitions and reminded the group that the ABA could be either friend or foe in the OEO's legal services effort.⁵⁰ ABA support for the OEO program was forged by individuals who had little or no experience working directly with existing legal aid programs.⁵¹ They understood, however, that the ABA needed to control negotiations surrounding the OEO program lest the program permit the possibility of non-lawyers practicing law.⁵² In 1965, the ABA House of Delegates unanimously sanctioned the idea of creating the OEO's Legal Services Program (LSP). The ABA endorsement came after the ABA obtained assurances that it would participate on a permanent advisory committee to guide OEO policy.⁵³ ABA support was orchestrated by then ABA president Lewis Powell, who had made access to counsel one of his priorities for the ABA during his term.⁵⁴ Powell and his advisors lobbied a broad base of ABA leaders to support the OEO initiative and used the 1965 ABA annual

provide a voice for the poor. See Edgar S. & Jean Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964). While still working on the piece, Jean Cahn worked at the U.S. Department of State, and Edgar Cahn worked at the U.S. Department of Justice in Washington, D.C. JOHNSON, *supra* note 1, at 40–43 (describing the fears of social reformers that local bar organizations would “water[] down the legal services organizations with conservative lawyers” who would be unwilling to undertake legal action to ensure legal rights for the poor).

50. JOHNSON, *supra* note 1, at 44, 50–52.

51. For example, William McCalpin, one of the chief protagonists of the ABA's involvement with the OEO from 1964 to 1967 and chairman of the ABA Standing Committee on Lawyer Referral, had little exposure to legal aid. *Id.* at 45, 49.

52. The concern about non-lawyers providing legal services arose from Sargent Shriver's speech in 1964 of the “supermarkets of social service” that would include “legal advocates for the poor.” *Id.* at 50. The “supermarkets” concept was based on the premise that local planning bodies called community action agencies (CAAs) would decide how to address the problems of the poor in their particular communities with government-provided money. HOUSEMAN & PERLE, *supra* note 43, at 7. CAAs could choose to include legal services programs as part of their efforts; however, in practice, most CAAs deferred to existing legal aid organizations and used the money to address other social issues. *Id.* at 7, 10. The Cahns believed that a separate legal services arm with local bar involvement was necessary to supplement local CAA plans. JOHNSON, *supra* note 1, at 54. The ABA's position was that local legal services programs should not be controlled by non-lawyers, whether on the local, statewide, or national level. HOUSEMAN & PERLE, *supra* note 43, at 7. CAAs were part of the Community Action Program, one of the groups within the OEO. JOHNSON, *supra* note 1, at 65.

53. JOHNSON, *supra* note 1, at 58.

54. *Id.* at 55. Two years prior, the U.S. Supreme Court held that states were responsible to provide counsel in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Shortly after the *Gideon* decision, statewide public defender systems began to appear. GIRTH, *supra* note 30, at 3. In 1964, Congress passed the Criminal Justice Act, which provided federal payments to defense counsel in federal cases, and the Economic Opportunity Act, which included the first attempt to secure lawyers in civil cases for the poor. *Id.*

conference to quiet any lingering opposition to the resolution by Main Street lawyers and their colleagues involved with the legal aid societies.⁵⁵

However, Main Street lawyers were not the only group of attorneys with concerns. The National Legal Aid and Defender Association (NLADA) represented legal aid providers whose input was not significantly included in the development of a national legal services program.⁵⁶ NLADA's objection arose from a gathering of legal aid providers with architects of the OEO program who condemned existing legal aid organizations as ineffective.⁵⁷ Such statements completely alienated NLADA members from further conversations with the OEO about a national program;⁵⁸ however, the ABA's lobby of NLADA was so strong that at the 1965 ABA Conference, NLADA's president was prepared to defend the federal proposal.⁵⁹

In September 1965, E. Clinton Bamberger, Jr., accepted the role as the first director of OEO's LSP, tasked with determining the specifics of a federal legal services program.⁶⁰ Bamberger worked

55. JOHNSON, *supra* note 1, at 59–64.

56. Some of the discord between traditional legal aid providers and those involved in developing the federal model is traced to a November 1964 legal services conference sponsored by the Department of Health, Education and Welfare in Washington, D.C. The conference brought together individuals from three experimental legal services programs financed by the Ford Foundation and the Office of Juvenile Delinquency and Youth Development (OJD). *Id.* at 44–45. The speakers at this conference were social reformists who advocated a different legal aid model from the one in existence. Their comments attacked the established legal aid movement, and the legal aid advocates in attendance were insulted. *Id.* at 47–49.

57. NLADA's Executive Committee did not support the creation of separate programs under the OEO; however, it issued a statement in December 1964 that stated its position that

[w]ith ample funds, traditional legal aid and defender organizations can be broadened to meet the full legal needs of indigent people in metropolitan centers. The creation of separate, duplicating agencies to offer legal services under Economic Opportunity programs will be more costly and less effective than will the proper use of existing facilities, and serious ethical questions will be raised where nonlawyers attempt to practice law.

Id. at 48–49.

58. *Id.* at 49.

59. *Id.* at 63 (stating that NLADA President Ted Voorhees was prepared "to answer every conceivable objection any delegate could possibly raise").

60. *Id.* at 69. One of the principal architects of the OEO's legal services program, Jean Cahn, resigned from the OEO on April 1, 1965, because, in stark disagreement with the OEO's Community Action Program (CAP) director, she believed the legal services program should not be subordinated to non-lawyer control. *Id.* at 64–65. Bamberger, a partner in one of Baltimore's largest law firms who had no previous legal aid experience and only peripheral involvement in local bar activities, was recommended by the ABA to fill the vacancy. *Id.* at 67–70.

with the National Advisory Committee to produce the OEO's Legal Services Guidelines (the "OEO Guidelines").⁶¹ Among other requirements, the OEO Guidelines mandated that the poor be represented on the boards of local programs and prohibited local programs from taking fee-generating cases, and prohibited advocating for legislative reform.⁶² The OEO Guidelines also insisted on convenient office hours in neighborhood-accessible offices that offered preventive law and client education programs.⁶³ The OEO's legal services program was based on a staff attorney model whereby full-time attorneys working for legal aid organizations would provide legal services to the poor.⁶⁴ These and similar organizations would be supported by a network of national and state support centers that would provide staff attorneys with the training and information necessary to advance a legal strategy for the poor.⁶⁵ The vision for a national legal services program was now in place, but what was still lacking was support from legal aid advocates and those members of the private bar not represented by the ABA leadership.

In November 1965, Bamberger and other supporters of the OEO plan attended the NLADA annual conference to obtain support from legal aid practitioners.⁶⁶ The reception from legal aid advocates was not welcoming.⁶⁷ Despite the antagonism, LSP supporters engaged the legal aid group in a day-long conversation that helped to open the door to legal aid programs across the country.⁶⁸ At the end of the day, the parties agreed that more needed to be done to provide legal

61. HOUSEMAN & PERLE, *supra* note 43, at 8.

62. *Id.* at 9.

63. *Id.* The members of the committee included ABA President Lewis Powell, NLADA President Theodore Voorhees, Jean Cahn, and Gary G. Bellow. JOHNSON, *supra* note 1, at 107.

64. *Id.* at 9.

65. *Id.*

66. *Id.* at 74–76.

67. *Id.* at 74–75. The chairman of the board of a local legal aid program expressed the programs' shared reluctance to the proposed LSP when he responded to Bamberger's speech at the 1965 NLADA conference:

Other authorities, grown old in the service of Legal Aid, still are skeptical about the takeover by public and political authorities of the civil Legal Aid institution. Many of you are genuinely concerned about the implications of support by public funds of an enterprise essentially the responsibility of the community and specifically of its members of the bar.

Id. at 76.

68. *See id.* at 78–79.

assistance to the poor.⁶⁹ Although the ABA was successful in containing the dissidence of the private bar at its 1965 meeting, the private bar's objections continued—and were perhaps heightened—as the OEO's plan for civil legal services developed.

*B. The Staff Model versus Judicare:
Policy and Political Rationales (1966–1980)*

The national legal services program began to develop without the input of the majority of practicing attorneys in the United States, including those who engaged in legal aid as part of their practice. This exclusion aggravated the private bar's distrust of the federal government and its expanding role in the provision of legal services.⁷⁰ Despite these voiced concerns, the OEO and the ABA moved forward with their LSP plan without properly addressing the concerns and needs of private lawyers who had been integral to the provision of legal aid for the previous ninety years.

Private attorneys began to support the concept of federal legal aid as a result of a national speech circuit organized by ABA and OEO leaders.⁷¹ The principal selling point for private attorneys was that any group could obtain federal funding by submitting an application; however, the application process itself reinforced the skepticism held by the private bar.⁷² Because the OEO required funding applications to include community input,⁷³ rifts arose among community action agencies (CAAs);⁷⁴ lawyers, local bar associations, and their members; and community interest groups.⁷⁵ Although most of these conflicts were eventually set aside for the

69. *See id.* at 79.

70. The OEO program was also constructed without the full participation of existing legal aid lawyers and private attorneys who contributed their skills to individual clients and delivered legal services to the poor. *See supra* Part II; *see also* JOHNSON, *supra* note 1, at 17–19 (discussing McCarthy-era fears of "socialization of the legal profession" in America and their effect on the development of federal legal aid).

71. JOHNSON, *supra* note 1, at 80–82.

72. *See id.* at 82–84.

73. *Id.* at 83.

74. *See generally supra* note 52 (discussing the role of CAAs in the development of the legal aid apparatus).

75. *See generally* JOHNSON, *supra* note 1, at 84–86 (describing the structure and goals of the parties in conflict).

sake of funding,⁷⁶ the issue of program design—the greatest conflict of all—continued to shape the debate over the next fifteen years.

Several local bar associations and lawyer groups composed of Main Street lawyers submitted proposals premised on private lawyers receiving federal funds to take on cases for low-income clients.⁷⁷ The government subsidy of private attorney work for low-income clients, referred to as “Judicare,” was already a popular practice in a few European countries.⁷⁸ Several Judicare proposals were submitted to the OEO for consideration; however, OEO leadership was already predisposed to using a staff attorney model because they did not trust the private bar to advocate zealously for poor clients.⁷⁹

In considering the Judicare model, the OEO foresaw potential conflicts of interest between private attorneys and their existing clients—particularly in smaller communities where the handful of practicing attorneys represented landlords, local businesses, and other fee-paying clients.⁸⁰ In addition, the OEO was concerned that Main Street lawyers did not have the expertise necessary to represent the poor and that public money may encourage the most marginal attorneys to participate in the program.⁸¹ From a regulation standpoint, the OEO also predicted that private attorneys would resist the federal program because of its threat to the self-regulatory nature of the legal profession.⁸² In fact, a significant segment of the private bar feared that the intervention of the federal government would force the profession to relinquish control over how legal services

76. See generally *id.* at 87–94 (describing the administrative and political pressure that lawyer groups applied to the OEO and the resolution of the above-mentioned conflicts).

77. One early proposal, which resulted in a stand-off, came from San Bernardino County in California, where the local bar association and the local CAA agreed that the Judicare model would best suit the needs of the community. *Id.* at 85. The OEO rejected this proposal on the ground that it did not reflect the staff attorney model. See *id.* at 85–86. The local bar association refused to amend its proposal because its members did not agree with such a model. *Id.* at 86.

78. See Richard L. Abel, *Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 475 (1985) (“Britain was the first nation to accept [civil legal aid] as a governmental responsibility in 1949, followed by the Netherlands in 1957 . . .”).

79. HOUSEMAN & PERLE, *supra* note 43, at 10.

80. See generally JOHNSON, *supra* note 1, at 117–21 (discussing the inception of Judicare and the alleged negative aspects of allowing private attorneys to participate in the program).

81. *Id.* at 118–19.

82. See *id.* at 117–21.

were delivered, thereby opening the door to regulation of the profession at large.⁸³

Many Judicare advocates did not believe that the legal services delivery program should utilize federal funds for social reform purposes for fear that it would encourage the socialization of the legal profession.⁸⁴ Advocates also emphasized the importance of allowing clients, including the poor, to have the freedom to choose their attorney, as opposed to having an assigned staff attorney imposed upon them.⁸⁵

Judicare opponents⁸⁶ countered that because most of the clients whom the new program targeted did not live in metropolitan areas where the majority of attorneys practiced, they were already constrained in their choices.⁸⁷ More importantly, because the Judicare model was an individual rather than a collective model, opponents argued that it was not an ideal vehicle for promoting the

83. HOUSEMAN & PERLE, *supra* note 43, at 10. The private bar continues to balk at the thought of regulating the legal profession, pointing to the importance of lawyer autonomy in preserving democratic principles and to the financial and ethical difficulties experienced by doctors with the advent of HMOs. *See generally* George C. Harris & Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 *FORDHAM L. REV.* 775, 809–18 (2001) (describing the history of restrictions on the medical profession). A 2009 survey about the unauthorized practice of law (UPL) found that at least twenty-nine states enforce regulations against UPL. ABA STANDING COMM. ON CLIENT PROTECTION, 2009 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES 1 (2009), *available at* <http://www.abanet.org/cpr/clientpro/09-upl-survey.pdf> ("Twenty-nine jurisdictions actively enforce UPL regulations, although some jurisdictions indicate that insufficient funding makes enforcement difficult.").

84. *See generally* Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 *CHICANO L. REV.* 1 (1972) (describing the creation of, political resistance to, and survival of the California Rural Legal Assistance project, which aimed to assist migrant workers in California in accessing the justice system).

85. *See* JOHNSON, *supra* note 1, at 238. The medical profession experienced a similar transformation, which resulted in the creation of Medicare in 1965. *See* Gail B. Agrawal & Howard R. Veit, *Back to the Future: The Managed Care Revolution*, 65 *LAW & CONTEMP. PROBS.* 11, 12–16 (2002) (outlining the history of Medicare). Medicare allowed the federal government to exercise control over the practice of medicine, which led to the enactment of the Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e (2006), and the introduction of the HMO. *See* Agrawal & Veit, *supra*, at 16–20. Even though the legal and medical professions were going through parallel changes, attorneys were better positioned to defend their profession because many members of Congress were also members of the bar. *See* Congress Merge, Power Search, <http://www.congressmerge.com/onlinedb/powersearch.htm> (select "Profession" and then search using "attorney," "lawyer," "physician," and "doctor" as keywords) (showing that there are currently 187 members of Congress who are lawyers and only 13 who are doctors).

86. The opposition to Judicare came primarily from leaders of NLADA, the OEO, and the ABA. *See generally* JOHNSON, *supra* note 1, at 117–21 (discussing the nature of Judicare opposition).

87. *Id.* at 238.

social change agenda that the national civil legal services program was designed to advance.⁸⁸ Additionally, opponents worried that private lawyers lacked sufficient poverty law experience, that only the lowest-quality lawyers would participate,⁸⁹ and that the program would be too costly.⁹⁰

In an effort to quiet the demands of Judicare advocates,⁹¹ the OEO made some concessions and funded a handful of pilot programs in Wisconsin, Connecticut, and California.⁹² These Judicare programs were mainly implemented in rural areas where populations were diffuse and a staff attorney program was less feasible.⁹³

The considerable tension between LSP and Main Street lawyers was not solely based on support—or there lack of—for the provision of legal services to the poor. Many of the attorneys who objected to the staff attorney model already served low- and moderate-income clients and viewed the OEO-funded attorneys as outsiders, with imperialist views and without connections to local bar organizations.⁹⁴ Attorneys also questioned whether group representation and impact litigation were prompted by the needs of

88. *Id.* at 120.

89. See Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 *FORDHAM L. REV.* 719, 729–40 (2001) (discussing the existing hierarchy within the legal profession); see also Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 201, 202–03 (Austin Sarat & Stuart Scheingold eds., 1998) (discussing the historical division between public interest and private bar public service practice).

90. JOHNSON, *supra* note 1, at 120.

91. Perhaps one of the best-coordinated national efforts to replace the OEO's preferred staff model with a Judicare model was led by Al Cohn, president-elect of the American Trial Lawyers Association, a competitor of the ABA. See JOHNSON, *supra* note 1, at 95–98.

92. *Id.* at 120–21.

93. See *id.* at 326 n.29. Although other entities submitted Judicare proposals to the OEO, the Wisconsin State Bar Association, which coordinated political support for the Judicare model, forced the question of whether Judicare models should receive federal funding. See *id.* at 117–18.

94. GIRTH, *supra* note 30, at 79–86 (describing the private bar's view of OEO attorneys in three New Jersey cities). The view that OEO lawyers were “hippie imperialists” was further exacerbated by the funding of the Reginald Heber Smith Fellowship, which attracted both recent graduates from elite law schools and young lawyers from prestigious law firms to work on law reform issues in low-income communities for a term of one to two years. See Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 *FORDHAM L. REV.* 883, 899–901 (2004) (“Under the program, called the Reginald Heber Smith Community Lawyer Fellowship Program, the fellows quickly became known as ‘Reggies’ and were placed throughout the country to help legal aid offices become part of the new national network of poverty advocates.” (citation omitted)). See generally JOHNSON, *supra* note 1, at 178–80 (describing the Reginald Heber Smith Fellowship Program).

the clients or by the desires of LSP attorneys.⁹⁵ Local bar members accused LSP attorneys of creating greater conflict in their cases because there was no economic incentive for resolution.⁹⁶ There were also members of the private bar who believed that even the poor could pay something for legal services if they were gainfully employed.⁹⁷ Minority lawyers, many of whom represented poor clients, also raised concerns because they distrusted the established bar to guard their economic interests.⁹⁸ The numerous concerns of the private bar were exacerbated by LSP's unwillingness to engage with the Main Street lawyers.⁹⁹

Ultimately, a system of salaried attorneys triumphed over a Judicare model. LSP architects believed a staff attorney model, supported by a system of nationally controlled local centers providing lawyers with training and leadership development was a more effective route to combat the ills of poverty and transform the entrenched local entities protecting the status quo.¹⁰⁰ By the time Richard Nixon took office in 1969, there were at least 260 LSP-funded programs, operating in every state except North Dakota.¹⁰¹

95. In 1967, the OEO made law reform for the poor a principal priority of the funding of legal services programs. HOUSEMAN & PERLE, *supra* note 43, at 11.

96. GIRTH, *supra* note 30, at 84. One attorney was quoted saying, "There is no question in my mind that the program stirs up litigation and matrimonial discord. They give bad advice when they tell people to get a divorce." *Id.*

97. Originally some of the OEO's members proposed that eligibility for its legal services program be aligned with the poverty standards in the United States. *Id.* at 112. This proposal met fierce opposition from NAC, NLADA, and other proponents of legal aid. *Id.* at 112-13. These groups favored the higher eligibility standards that were based on more factors than simple income. *Id.* The final OEO Legal Services Guidelines provided that a flexible standard should apply and free services should not be provided to an organization or a group of individuals if it could afford legal care by pooling resources. *Id.* at 115-16. Factors in evaluating the ability to pay included "the size of the organization, the relative poverty of the members of the organization, and the cost of the legal assistance [desired]." *Id.*

98. *Id.* at 85.

99. *See id.* at 122.

100. *Id.* at 119 (describing the "low regard for the calibre and motives of the practitioners most likely to represent the poor under [a Judicare] system").

101. HOUSEMAN & PERLE, *supra* note 43, at 11. The governor of North Dakota, a Democrat, exercised his right to veto the OEO program due to private lawyers' opposition to the program. OEO Director Shriver could have overridden such a veto, but he refused to override his colleague. JOHNSON, *supra* note 1, at 91. The issue of governor vetoes was taken up by California Senator George Murphy in 1969 when he attempted to pass an amendment giving governors absolute veto rights. HOUSEMAN & PERLE, *supra* note 43, at 14-15. Although the absolute veto right failed to garner sufficient support from members of the House of Representatives, the veto remained a strong weapon in an acting governor's effort to stop or postpone funding to OEO programs. For an overview, see *id.* at 15-16.

The OEO legal aid organizations were guided by the principles that (1) the client community consisted of only poor people; (2) clients were to control the decisions about how to address their problems; (3) law reform was crucial to address the historical exclusion of poor people from institutions of power; (4) advocacy of the collective need was superior to advocacy of the individual need;¹⁰² and (5) a complete range of legal services should be available to the poor.¹⁰³ By all accounts, LSP envisioned by the OEO led to great protections and increased rights for the poor.¹⁰⁴ To the extent they were successful, the programs met with resistance from those individuals and institutions whose power was now threatened by formidable opponents representing the poor against government entities, private corporations, and other elites.¹⁰⁵

The growing resistance to the OEO's efforts eventually became a topic of debate within the Nixon administration.¹⁰⁶ Although the debate over LSP was portrayed by conservatives as an opportunity to revisit the *Judicare* discussion, the impetus was actually a series of adverse court decisions against industries and governmental agencies that had been unaccustomed to opposition from the poor.¹⁰⁷ The largest battle over the role of the private bar was played out in California and led by its then state governor Ronald Reagan.

After a number of successful lawsuits against government entities and agribusiness interests, the California Rural Legal Assistance (CRLA) program, the first OEO LSP to serve rural areas statewide,¹⁰⁸ came under attack.¹⁰⁹ The attacks resulted in a

102. *Cf.* MODEL RULES OF PROF'L CONDUCT pmb. para. 6 (2002) (emphasizing the obligation of the legal profession to provide legal services to individual clients).

103. HOUSEMAN & PERLE, *supra* note 43, at 12–13.

104. Among the most notable accomplishments of the early legal aid program were the implementations of social security income, the WIC program, Medicaid, the Food Stamp Program, and protections for tenants and consumers. *Id.* at 13–14. Additionally, LSP had significant judicial victories in *King v. Smith*, 392 U.S. 309 (1968) (providing for court remedies against administrators of benefit programs), *Shapiro v. Thompson*, 394 U.S. 638 (1969) (holding that welfare recipients cannot be denied benefits arbitrarily), and *Goldberg v. Kelley*, 397 U.S. 254 (1970) (establishing procedural due process rights in terminations of certain social services).

105. *See* HOUSEMAN & PERLE, *supra* note 43, at 14–17 (outlining the significant controversies that arose as a result of political efforts to restrain OEO activities).

106. Nixon took office in January 1969 and delayed appointing a new national legal services director until his administration assessed the OEO generally. GIRTH, *supra* note 30, at 95.

107. HOUSEMAN & PERLE, *supra* note 43, at 14–15.

108. Bennett & Reynoso, *supra* note 84, at 2. The initial allocation of federal funds for CRLA was \$1.27 million in 1966. *Id.* at 2 n.2.

gubernatorial veto of a \$1.8 million grant of funds to the organization.¹¹⁰ Governor Ronald Reagan justified his veto by citing to multiple allegations of misconduct by CRLA, which were later detailed in a report by the director of the California OEO.¹¹¹

In 1971, an appointed commission cleared CRLA of any misconduct, and the OEO agreed to award California a \$2.5 million grant for pilot Judicare programs in exchange for Reagan's agreement to withdraw his veto.¹¹² However, the \$2.5 million allocation never materialized because of a decade-long dispute over which evaluation criteria should be used¹¹³ and which delivery system best addressed the needs of the poor.¹¹⁴ The debate over national legal services was so great that in 1971, ABA leaders, a bipartisan group in Congress, and the President's Advisory Council on Executive Reorganization agreed to transfer the functions of the OEO's LSP to a new, private nonprofit corporation.¹¹⁵ The new organization would receive and distribute federal funds to legal services programs and would be "immune to political pressures."¹¹⁶

C. Private Attorney Involvement in the LSC Era: 1972–Present

The debate about Judicare and the role of government subsidies for private attorneys continued to shape the national discourse about legal services for the poor. The arguments became more sophisticated as purely ideological arguments yielded to qualitative and quantitative studies that assessed the effectiveness of various

109. See HOUSEMAN & PERLE, *supra* note 43, at 15–16.

110. See *id.* The Economic Opportunity Act, 42 U.S.C. § 2834, gave state governors the right to veto antipoverly grants. JOHNSON, *supra* note 1, at 91

111. *Id.* The OEO appointed a commission of three Republican judges from Colorado, Maine, and Oregon to address the many charges of misconduct alleged in the Uhler report. See Bennett & Reynoso, *supra* note 84, at 55–56; see also HOUSEMAN & PERLE, *supra* note 43, at 15.

112. Bennett & Reynoso, *supra* note 84, at 69–70.

113. HOUSEMAN & PERLE, *supra* note 43, at 15–16.

114. See Bennett & Reynoso, *supra* note 84, at 70–79.

115. See HOUSEMAN & PERLE, *supra* note 43, at 19. The other option the parties considered was eliminating the legal services program altogether. See *id.* at 16–17 (detailing the efforts of OEO Director Howard Phillips to dismantle the legal services program).

116. *Id.* at 19 (quoting President Nixon). At the same time, President Nixon proposed that the OEO impose restrictions on lobbying, organizing, and other political activities of its staff attorneys. *Id.*

delivery systems.¹¹⁷ Such studies were critical to the successful advocacy for the continuation of a national legal services program under the Nixon administration. One of these reports, published in January 1972 by the Bureau of Social Science Research, focused on the evaluation of four Judicare programs in rural areas: Wisconsin Judicare, Pine Tree Legal Assistance of Maine, Michigan's Upper Peninsula Legal Services, and Colorado Rural Legal Services.¹¹⁸ The report criticized the OEO for not conducting a serious study of these pilot Judicare projects; it also noted that the lack of comparable programs in urban areas prevented it from making a determination about whether a Judicare model would work in cities.¹¹⁹

The American Bar Foundation also sponsored a study on the Wisconsin Judicare program. Its author, Samuel J. Brakel, issued a preliminary report on Judicare in November 1972¹²⁰ to respond to the "considerable attention in academic and political circles" about "the merits of the Judicare model for delivering legal services to [the] poor."¹²¹ Characterizing the debate as "taking place with little or no reference to the facts,"¹²² he wrote that the "substantive weaknesses" of previous studies "derive[d] from the fact that too little time and money [were] made available for them."¹²³ Because the Wisconsin Judicare program was the principal Judicare model in the country, he reasoned that a thorough understanding of the program was pivotal to

117. Under the Nixon administration, the OEO commissioned delivery system studies to evaluate over two hundred legal services field offices by interviewing project stakeholders, including directors, attorneys, community and social service representatives, and local bar members. See *infra* note 130.

118. LEONARD H. GOODMAN & JACQUES FEUILLAN, ALTERNATIVE APPROACHES TO THE PROVISION OF LEGAL SERVICES FOR THE RURAL POOR: JUDICARE AND THE DECENTRALIZED STAFF PROGRAM 8 (1972).

119. The report states in its introduction:

For some unknown reason, there has never been a serious, systematic, much less scientific, published study of any single OLS-funded program. The OLS probably should have sponsored a small-scale controlled experiment with Judicare, such as the [Department of Health, Education and Welfare] is now conducting in Meriden, Connecticut, or, at least, a rigorously scientific comparative study of one Judicare and one staff program in similar settings. Either would have yielded more definitive answers to the question of their relative efficacy than the present report can supply.

Id. at 9 n.4.

120. SAMUEL J. BRAKEL, WISCONSIN JUDICARE: A PRELIMINARY APPRAISAL 1 (1972).

121. *Id.*

122. *Id.*

123. *Id.* at 114.

the debate, particularly because the program worked.¹²⁴ Brakel's report included an appendix laying out the different arguments for and against Judicare, arguments that Brakel referred to as "absurd propaganda."¹²⁵

In 1974, Brakel issued a final report, which included a study of Judicare programs in Wisconsin, Michigan, and Montana.¹²⁶ The report found that, on virtually every measurement, Judicare compared favorably with the staff attorney model.¹²⁷ Brakel blamed the reluctance of OEO leadership to give Judicare projects a fair shot for the "drastic curtailment—an emasculation—of efforts to provide legal services to the poor."¹²⁸ The report urged that Judicare be adopted nationwide as the primary delivery model with staffed offices as a supplement to it,¹²⁹ and offered evaluation methods and cost estimates for testing these proposed delivery models.¹³⁰ Thus, on the brink of the creation of the Legal Services Corporation (LSC), Brakel had effectively called for a reversal of federal policy.

Brakel wrote at a time when the Nixon administration and Congress were debating the continuation of a federal legal services program. His study referenced the Legal Services Corporation Act, which had passed one arm of Congress in June 1973, and included restrictions on the use of federal funds in lawsuits concerning abortion, school desegregation, selective service, and juvenile issues.¹³¹ These restrictions were later included in the new legal services program created by the Legal Services Corporation Act of

124. *See id.* at 1–3, 109–10. At the time of the report, the Wisconsin Judicare experiment, first funded in 1966, served twenty-eight counties and an estimated total population of 600,000 people. *Id.* at 3.

125. *Id.* at 115–16. He also admonished "[t]hose who . . . characterize Wisconsin Judicare as a failure or dismiss the Judicare approach as misguided" for being ignorant of the program's accomplishments and "adversely influenced by the personalities or politics of 'friends' of Judicare." *Id.* at 110.

126. SAMUEL J. BRAKEL, *JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE* 12 (1974).

127. *Id.* at 123–29.

128. *Id.* at 2–3 & n.6.

129. *Id.* at 2–3.

130. *Id.* at 17–23, 113–15. The OEO commissioned the Urban Institute to develop evaluation designs beginning in March 1974, and the report was published in January 1975. LEONA M. VOGT ET AL., *EXPERIMENTAL DESIGN OPTIONS TO TEST VARIOUS APPROACHES TO DELIVERING LEGAL SERVICES TO THE POOR* (1975).

131. BRAKEL, *supra* note 126, at 2 n.4.

1974 (the “LSC Act of 1974”).¹³² The new legislation continued the tradition of a staff attorney system; however, it established LSC as an independent, bipartisan, and nonprofit organization with an eleven-member board of directors.¹³³ The transformation of the OEO’s LSP into LSC in October 1975 stripped the OEO of its local support centers; it restricted lobbying and rulemaking abilities; and it limited the types of cases attorneys were allowed to take.¹³⁴ Although the newly created LSC was more bureaucratic and restricted, it remained similar in structure to its predecessor, LSP.¹³⁵

Judicare proponents continued to advocate for a private attorney model that delivered legal services to the poor.¹³⁶ Conservatives opposed to social advocacy strategies successfully lobbied for a mandated study of Judicare and other private attorney models in the LSC Act of 1974.¹³⁷ The LSC study—the 1980 Delivery Systems Study (DSS)—looked at thirty-eight demonstration projects, including fourteen Judicare projects, one private attorney voucher program, six pre-paid insurance programs, nine contracts with private law firms, two legal clinics, and six organized pro bono projects.¹³⁸ The DSS compared these demonstration projects with sixty randomly selected staff attorney programs. It concluded that overall, none of the alternative models performed better than the staff attorney model;¹³⁹ however, it found that the three most viable of

132. Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified at 42 U.S.C. § 2996 (2006)); see also HOUSEMAN & PERLE, *supra* note 43, at 21–22.

133. HOUSEMAN & PERLE, *supra* note 43, at 22. The board is appointed by the U.S. president and confirmed by the Senate, and no more than six of the eleven members may belong to the same political party. *Id.*

134. *Id.* at 30. Because President Nixon resigned only weeks after signing the LSC Act of 1974, the initial board was not sworn in until a year after its creation. *Id.* at 22.

135. *Id.* at 23.

136. Prompted by efforts of the private bar, OEO and LSC grantees began to experiment with private attorney models in the 1970s. KEN SMITH, PRIVATE ATTORNEY INVOLVEMENT: AN ASSESSMENT OF THE 1982–83 TEN PERCENT REQUIREMENT 6 (1984).

137. See 42 U.S.C. § 2996f(g). Congress allocated approximately \$13 million over a four-year period to examine all of the systems for delivery of publicly funded civil legal assistance to the poor. See LEGAL SERVS. CORP., DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES I (1980). The LSC Act of 1974 required an independent study of various alternatives to the existing, staff attorney delivery system, including “judicare, vouchers, prepaid legal insurance, and contracts with law firms”; however, it made no mention of pro bono programs. 42 U.S.C. § 2996f(g); see also LEGAL SERVS. CORP., DELIVERY SYSTEMS STUDY: A POLICY REPORT TO THE CONGRESS AND THE PRESIDENT OF THE UNITED STATES 3–6 (1980).

138. See LEGAL SERVS. CORP., *supra* note 137, at 37 tbl.1.

139. *Id.* at 8.

those alternatives were Judicare, contracts with law firms, and organized pro bono.¹⁴⁰ The DSS concluded that, although "pure Judicare" programs did not seem viable,¹⁴¹ private attorneys were able to provide high-quality, cost-effective civil legal services.¹⁴²

As a result of the DSS and President Reagan's threat to eliminate LSC altogether, Congress mandated that LSC-funded programs devote a portion of their grants to private bar involvement.¹⁴³ Although the DSS did not yield scientific evidence concluding that a private attorney model was better than a staff attorney model, it created an opportunity for local bar organizations and private attorneys to experiment with private attorney models.¹⁴⁴ Given President Reagan's history of antagonism toward the OEO and CRLA during his tenure as governor of California,¹⁴⁵ it was clear that a national legal services program would not survive unless there was a meaningful partnership with the private bar.¹⁴⁶

In 1981, the same year that Congress reduced LSC's funding by 25 percent,¹⁴⁷ LSC's Board of Directors passed a resolution requiring grantees to use 10 percent of their LSC funds for private attorney

140. *Id.* at 88 tbl.17.

141. *Id.*

142. *Id.*; see also Alan W. Houseman, *Legal Services to the Poor and Disadvantaged in the 1980's: The Issues for Research*, in RESEARCH ON LEGAL SERVICES FOR THE POOR AND DISADVANTAGED: LESSONS FROM THE PAST AND ISSUES FOR THE FUTURE 21 (Bryant G. Garth ed., 1983). The DSS and Section 1007(h) of the Legal Services Corporation Act Amendments of 1977 both provided guidelines under which private attorney models could work. Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, §§ 9-10, 91 Stat. 1619, (codified as amended at 42 U.S.C. § 2996f). Section 1007(h) also called for a study of special groups, including veterans, migrant farm workers, Native Americans, people with limited English ability, rural residents, the elderly, the handicapped, and the institutionalized. *Id.* § 13. The DSS supported a decentralized structure, which would allow local priority setting that would better account for the needs of special groups. LEGAL SERVS. CORP., *supra* note 137, at 6-11.

143. HOUSEMAN & PERLE, *supra* note 43, at 25.

144. SMITH, *supra* note 136, at 5; see also Andrea J. Saltzman, *Private Bar Delivery of Civil Legal Services to the Poor: A Design for a Combined Private Attorney and Staffed Office Delivery System*, 34 HASTINGS L.J. 1165 (1983) (describing the disagreement between proponents of a staffed office legal services program and of a Judicare model, and proposing a mixed model).

145. HOUSEMAN & PERLE, *supra* note 43, at 14-16.

146. SMITH, *supra* note 136, at 4 ("When the Legal Services Corporation bill was making its way through Congress in the mid-'70s, the debate over judicare became a major issue. A potential hurdle to passage was avoided when language was inserted in the bill calling for a comprehensive study of judicare and other delivery models that utilized the private bar as alternatives to the staff attorney model.")

147. *Id.* at 16.

involvement (PAI) programs.¹⁴⁸ The 10 percent instruction resulted from the partnership between LSC programs and a private bar that feared being overwhelmed by requests for free services if LSC were eliminated.¹⁴⁹ The 10 percent instruction was flexible, and it was introduced as a special condition to funding for which a waiver was available if sufficient effort was made to meet the target.¹⁵⁰ By contrast, the 12.5 percent instruction was a minimum threshold mandate with accompanying reporting and auditing requirements as conditions to the receipt of annual funding for legal services programs.¹⁵¹

Legal aid advocates who regarded the private bar as “a predominantly conservative force hostile to legal services work [were] proven wrong in 1981 when the organized bar rose in opposition to President Reagan’s attempts to abolish legal services.”¹⁵² This experience and Reagan’s hostility to legal services forced many legal services advocates to look toward the private bar for ideas and resources that might fill any gaps resulting from LSC cuts.¹⁵³

The PAI component did not specify how private attorneys could be involved, but possible models included Judicare, private attorney contracts, and pro bono. The 10 percent instruction provided additional opportunities to bring legal services advocates and the private bar together for training programs that demonstrated or reinforced the importance of collaboration.¹⁵⁴ Within months, LSC reported that 88 percent of its programs had implemented a PAI component; however, a significant majority of those programs were primarily pro bono models.¹⁵⁵ Between 1980 and 1982, the number

148. HOUSEMAN & PERLE, *supra* note 43, at 25.

149. *Id.* at 24–25; Abel, *supra* note 78, at 508.

150. GERRY SINGSEN, ACCOUNTING UNDER THE NEW 12.5% PRIVATE ATTORNEY INVOLVEMENT REGULATION 13 (1984).

151. *Id.*; *see also* SMITH, *supra* note 136, at 43.

152. SMITH, *supra* note 136, at 6.

153. *Id.*

154. The 10 percent instruction was challenged at different levels by legal services programs. For example, in a suit by the National Senior Citizens Law Center, the U.S. District Court for the District of Columbia held that the 10 percent instruction was invalid because it did not go through a rule-making process that included a note-and-comment period before its promulgation. Nat’l Senior Citizens Law Ctr., Inc. v. Legal Servs. Corp., 581 F. Supp. 1362, 1368–69 (D.D.C. 1984), *aff’d on other grounds*, 751 F.2d 1391 (D.C. Cir. 1985).

155. SMITH, *supra* note 136, at 7.

of private attorneys involved in federally funded legal services programs quadrupled;¹⁵⁶ however, Judicare programs remained marginal.¹⁵⁷

By 1985, organizations receiving LSC funding were instructed to devote 12.5 percent of their budget to private attorney involvement.¹⁵⁸ The 12.5 percent PAI mandate has remained a staple of LSC-funded programs and has served as the impetus for hundreds of programs across the country involving the private bar.¹⁵⁹

While the proponents of the PAI provision intended it to support a fee-for-service component, currently, LSC grantees primarily allocate PAI funds to coordinate the private bar in pro bono efforts.¹⁶⁰ A review of LSC's PAI Action Plan, which provides direction to LSC-funded programs through 2010, does not once mention any Judicare-type model, although it cites pro bono efforts at least a dozen times.¹⁶¹ Although none of the approximately 138 legal aid programs that receive funding from LSC¹⁶² have their PAI programs posted on LSC's website, it seems likely that only a handful of these organizations are utilizing the 12.5 percent PAI allocation to pay the private bar for providing civil legal services to the poor. The Wisconsin program is the only OEO-era Judicare experiment that has survived and is still operational today.¹⁶³ The

156. *Id.*

157. A study of the implementation of programs during the first two years of the 10 percent instruction revealed that while 35 percent of programs operated a Judicare component along with pro bono, only 15 percent were strictly Judicare programs. *Id.*

158. 45 C.F.R. § 1614.1 (2008) ("Except as provided hereafter, a recipient of Legal Services Corporation funding shall devote an amount equal to at least twelve and one-half percent (12.5%) of the recipient's LSC annualized basic field award to the involvement of private attorneys in such delivery of legal services . . .").

159. The 12.5 percent instruction was a minimum threshold mandate with accompanying reporting and auditing requirements as conditions to the receipt of annual funding for legal services programs. *Id.*; see also Smith, *supra* note 136, at 43.

160. For information on LSC-funded PAI programs, see LSC Resource Information, PAI Written Plans, http://www.lri.lsc.gov/probono/pai_written_plan.asp (last visited Sept. 14, 2009).

161. See LEGAL SERVS. CORP., LSC 2007 ACTION PLAN FOR PRIVATE ATTORNEY INVOLVEMENT, http://www.lri.lsc.gov/LRI/LSC_2007_Action_Plan_for_PAi.pdf (last visited Sept. 14, 2009). The mantra of the report is "Help Close the Justice Gap, Unleash the Power of Pro Bono." *Id.*

162. Houseman, *supra* note 19, at 40. Houseman estimates that there were approximately 864 legal aid programs throughout the country. *Id.* at 40 n.21. This figure includes law school clinical programs. *Id.*

163. In May 2007, University of Maryland School of Law Professor Michael Millemann provided a brief overview of Judicare programs in the United States in a report to the Maryland State Bar Association in support of the state's efforts to launch a Judicare program. See MICHAEL

only other LSC-funded program that uses Judicare as its primary form of delivering legal services to the poor is located in rural Minnesota.¹⁶⁴

A portion of the legal aid community survived deep cuts in federal funding in the early 1980s and mid-1990s in large part due to the promulgation of pro bono programs,¹⁶⁵ creative funding schemes generated by interest rates on lawyer escrow accounts,¹⁶⁶ and the efforts of state justice committees.¹⁶⁷ However, the federal legal aid that exists today is not structured as originally envisioned by the architects of the OEO. Opponents of LSC have limited its capacity for social reform by restricting the ability of legal aid organizations that receive federal funds to file class actions, recover attorneys' fees, represent undocumented people, and sue governmental

MILLEMANN, FINAL REPORT AND RECOMMENDATIONS ON THE POTENTIAL USE OF PRIVATE LAWYERS, WHO ARE PAID REDUCED FEES BY A LEGAL SERVICES FUNDER, TO REPRESENT LOW-INCOME PERSONS IN MARYLAND WHO CAN NOT OBTAIN LEGAL ASSISTANCE IN CIVIL CASES 71 (2007), http://www.msba.org/sec_comm/sections/dlserv/minutes/RFLSPFinalReportFINAL.pdf. Millemann reports that the Wisconsin Judicare program is the primary provider of free legal services in northern Wisconsin and that the program includes approximately two hundred participating private attorneys, as well as eight staff attorneys who provide back-up assistance. *Id.* at 71–72.

164. *See id.* at 78–79. For more information on Minnesota's Judicare program, see Legal Services of Northwest Minnesota, www.lsnmlaw.org (last visited Sept. 14, 2009). Georgia and Virginia are the only other LSC-funded legal services programs with a Judicare component. MILLEMANN, *supra* note 163, at 80–81. The Judicare program in Georgia serves primarily rural areas with high poverty and is part of a larger legal aid program called the Pro Bono Project that is co-sponsored by the Georgia State Bar. *Id.* at 80; *see also* State Bar of Ga., Pro Bono Project, http://www.gabar.org/related_organizations/pro_bono_project/ (last visited Sept. 14, 2009). The Southwest Virginia Legal Aid Society works with a centralized staff that conducts intake, assesses cases, determines eligibility, and refers clients to private attorneys. *See* MILLEMANN, *supra* note 163, at 80–81; *see also* Southwest Virginia Legal Aid Society, Inc., SVLAS Mission Statement, <http://www.svlas.org/index.htm> (last visited Sept. 14, 2009).

165. *See* HOUSEMAN & PERLE, *supra* note 43, at 33. The ABA Standing Committee on Pro Bono and Public Service has been the key to establishing the ABA's position on pro bono activities. *See generally* ABA Standing Comm. on Pro Bono & Public Serv., <http://www.abanet.org/legalservices/probono/home.html> (last visited Sept. 14, 2009). The Standing Committee on Pro Bono sponsors annual Equal Justice Conferences, ABA, Equal Justice Conference, <http://www.abanet.org/legalservices/ejc/home.html> (last visited Sept. 14, 2009), annual Pro Bono Publico Awards, ABA, Pro Bono Awards, http://www.abanet.org/legalservices/probono/nav_awards.shtml (last visited Sept. 14, 2009), a National Pro Bono Celebration, National Pro Bono Celebration, <http://www.probono.net/celebrateprobono/> (last visited Sept. 14, 2009), and a Center for Pro Bono that coordinates five pro bono projects, ABA, Center for Pro Bono Projects, http://www.abanet.org/legalservices/probono/nav_projects.shtml (last visited Sept. 14, 2009).

166. *See* HOUSEMAN & PERLE, *supra* note 43, at 34.

167. *See id.* at 42–43.

agencies.¹⁶⁸ Consequently, the political lobbying and social change components that were part of the early vision of a salaried-attorney legal aid program are not possible under existing federal regulations.

Instead of merely acquiescing to this limited framework, legal services advocates must be creative and entrepreneurial in their efforts, especially as state and local governments are cutting support for legal aid programs.¹⁶⁹ Law firms that have traditionally helped subsidize pro bono projects are either disappearing or laying off attorneys in droves.¹⁷⁰ Moreover, funds earned through the Interest on Lawyers Trust Accounts (IOLTA) program have reached dismal lows with the lowering of interest rates.¹⁷¹ While traditional sources for legal services funding decrease, demand for legal assistance in the areas of consumer protection, family conflicts, and government benefits continue to increase.¹⁷² With few exceptions, state and federal governments do not appear to treat legal services as a priority in this time of fiscal constraint that encourages any long-term expectation of increased funding.¹⁷³

168. *See id.* at 29–33 (providing a full discussion of LSC restrictions).

169. *See id.* at 6–9; *see also* Vickrey, Dunn & Kelso, *supra* note 25, at 1154–57 (describing how the state budget crisis led to major cuts for the courts and the administration of justice); Press Release, Legal Aid Ass'n of Cal., Significant Changes to Governor's Legal Representation Pilot Projects in Assembly Budget Process (May 31, 2007), http://www.calegaladvocates.org/news/article.146248-Significant_Changes_to_Governors_Legal_Representation_Pilot_Projects_in_Ass (summarizing a reduction in state funding for California's legal representation pilot projects from \$5 million to \$2.5 million).

170. *See generally* Debra Cassens Weiss, *2009's Toll: More Than 10,000 Law Firm Layoffs and Lower Pay Trend*, A.B.A. J., May 28, 2009.

171. Julie Kay, *Deep Cuts Slam Legal Aid: State Budget Cuts, Lower Interest Rates Have Dire Impact*, NAT'L L.J., Oct. 27, 2008. IOLTA programs collect interest from client trust accounts maintained by attorneys to deposit client money allotted for court fees, attorney retainer fees, or settlement payments. When interest rates drop, the available money pooled from the interest earned on these attorney accounts decreases. For a detailed description of the IOLTA funding problem, *see* BRENNAN CTR. FOR JUSTICE, *THE ECONOMY AND CIVIL LEGAL SERVICES* (2009), http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/#IOLTA (last visited Sept. 7, 2009).

172. *See* JOY MOSES, CTR. FOR AM. PROGRESS, AND JUSTICE FOR ALL: *PRIORITIZING FREE LEGAL ASSISTANCE DURING THE GREAT RECESSION* 3–4 (2009), http://www.americanprogress.org/issues/2009/07/pdf/legal_services.pdf.

173. *See* sources cited *supra* note 171. Nonetheless, there may be reasons to remain optimistic. On October 16, 2009, California passed Assembly Bill 590, which authorizes a pilot right to counsel program for individuals at or below 200 percent of the federal government poverty threshold for cases involving "housing-related matters, domestic violence and civil harassment restraining orders, probate conservatorships, guardianships of the person, elder abuse, or actions by a parent to obtain sole legal or physical custody of a child." Cal. Assembly 590, 2009–2010 Reg. Sess. (2009). For information regarding the impact and community reaction to the passing of Assembly Bill 590, *see* Carol J. Williams, *California Gives the Poor a New Legal*

The legal aid community's hope that allocation of federal dollars would significantly increase under President Barack Obama and a Democratic Congress was recently tempered by a smaller than expected funding allocation and no overhaul of the restrictions imposed by the previous Republican administration.¹⁷⁴ Since the general public has not expressed any concern about legal services, and a substantial increase in funding for the current legal services model is unlikely, legal aid advocates must expand their view of legal services to provide assistance to the segment of the low-income population whom pro bono and legal aid organizations are currently unable to help.

III. THE CHALLENGES OF PRO BONO

Despite the great need for legal services in our country, the legal aid community remains reluctant to experiment with private attorney models outside the pro bono context. The insistence upon pro bono as the primary source of PAI is a barrier to providing legal services to a larger segment of the population because it requires largely superficial involvement by private attorneys.

The organized bar has largely been remiss in addressing the accessibility of legal services to all Americans by only encouraging its members to contribute a small token of money or time.¹⁷⁵ With the adoption of the ABA Model Code of Professional Responsibility (the "Model Code") in 1969, the legal profession began to codify the belief that it has a duty to make legal counsel available to members of the public. Ethical Consideration (EC) 2-1 stated that "important functions of the legal profession are to educate laymen to recognize

Right, L.A. TIMES, Oct. 17, 2009, <http://articles.latimes.com/2009/oct/17/local/me-civil-gideon> 17.

174. See, e.g., Editorial, *Sins of Omission: The Forgotten Poor*, N.Y. TIMES, Feb. 2, 2009, at A20 (advocating for increased funding for LSC). For fiscal year 2010, LSC requested that Congress allocate \$485.1 million. LEGAL SERVS. CORP., BUDGET REQUEST: FISCAL YEAR 2010 at 1 (2009), <http://www.lsc.gov/pdfs/br2010.pdf>. President Obama requested \$435 million, the House of Representatives approved \$440 million, and the Senate approved \$374.6 million. Press Release, Legal Servs. Corp. Senate Bill Would Provide \$400 Million in Funding to LSC (June 26, 2009), http://www.lsc.gov/press/pressrelease_detail_2009_T248_R17.php. LSC estimates that an allocation of \$440 million would result in an expenditure of \$7.09 per low-income person. MOSES, *supra* note 172, at 7.

175. See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 2-25 (1969); MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."¹⁷⁶

These early ethical standards explained that it was the lawyer's role to educate laypeople about their legal problems.¹⁷⁷ However, the standards also warned that if a lawyer voluntarily provided legal advice to the public and that advice was "likely to produce legal controversy," then that lawyer should not "accept employment, compensation, or other benefit in connection with that matter."¹⁷⁸ The standards were concerned with client solicitation but recognized that the profession could not "remain a viable force in fulfilling its role in . . . society unless its members receive[d] adequate compensation for services rendered."¹⁷⁹ The rules provided that attorneys should charge reasonable fees in cases where clients were able to pay for those services.¹⁸⁰ The Model Code clearly stated that "lawyers should support and participate in ethical activities" and that "persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services."¹⁸¹ It emphasized the need for reasonable fees by warning that the "excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights."¹⁸² Although EC 2-25 states that "[t]he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer," it stops short of requiring attorneys to commit to providing free services.¹⁸³

The 1983 Model Rules of Professional Conduct (the "Model Rules") continued the tradition of providing suggested contributions to public service, but also established minimum guidelines of "render[ing] at least (50) hours of pro bono publico legal services per

176. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-1.

177. *Id.* EC 2-2.

178. *Id.* EC 2-4 (setting forth the foregoing rule, but exempting former clients, relatives, and close friends from its application).

179. *Id.* EC 2-16.

180. *Id.*

181. *Id.*

182. *Id.* EC 2-17.

183. *Id.* EC 2-25 ("Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. . . . Every lawyer should support all proper efforts to meet this need for legal services.").

year.”¹⁸⁴ In addition, they encouraged lawyers to “voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”¹⁸⁵ Although the 2002 amendments to the Model Rules of Professional Conduct keep the fifty pro bono hours and voluntary financial support as suggestions, they also re-emphasize the earlier, broader understanding that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.”¹⁸⁶

Efforts to make pro bono services mandatory for all lawyers have been vehemently opposed by the same bar members who have gained economic benefits from promoting voluntary pro bono efforts.¹⁸⁷ In order to avoid mandatory pro bono, the leadership of the private bar decided to encourage previously reluctant members to participate in pro bono activities by marketing pro bono participation to the largest law firms in the country as a good business decision.¹⁸⁸ As a result of this deliberate sales pitch, the private attorney attitude toward pro bono commitments is more motivated by career advancement than by professional responsibility.¹⁸⁹ The Pro Bono Institute’s publication *Making the Business Case for Pro Bono*¹⁹⁰ states:

184. MODEL RULES OF PROF’L CONDUCT R. 6.1 (1983).

185. *Id.* For an overview of the evolution of Rule 6.1, see Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 29–33 (2004).

186. The language quoted is the amended language added to MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002).

187. See Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to the Right Question*, 49 MD. L. REV. 78, 86 (1990); see also Cummings, *supra* note 185, at 11–12 & n.23 (discussing different views on mandatory pro bono). The Pro Bono Institute exists, in part, to support and promote pro bono efforts of large law firms. Pro Bono Inst., About the Pro Bono Institute, <http://www.probonoinst.org/about.php> (last visited Aug. 18, 2009). It developed the Pro Bono Challenge to encourage law firms of fifty or more attorneys to pledge to devote either (1) sixty or one hundred hours per attorney annually; or (2) 3 percent or 5 percent of their annual billable hours to individuals and organizations in need. Pro Bono Inst., Law Firm Pro Bono Challenge, <http://www.probonoinst.org/challenge.php> (last visited Aug. 18, 2009); see also Pro Bono Inst., The Pro Bono Challenge, <http://www.probonoinst.org/challenge.text.php> (last visited Aug. 18, 2009) (setting forth the text of the Pro Bono Challenge).

188. See, e.g., ESTHER F. LARDENT, PRO BONO INST., MAKING THE BUSINESS CASE FOR PRO BONO 10–12 (2000), <http://www.probonoinst.org/pdfs/businesscase.pdf> (explaining how law firm investment in pro bono can strengthen large firms’ ability to attract and serve commercial clients).

189. See Philip R. Lochner, Jr., *The No-Fee and Low-Fee Legal Practice of Private Attorneys*, in LAWYERS: A CRITICAL READER 241, 243–46 (Richard L. Abel ed., 1997).

190. LARDENT, *supra* note 188.

[W]ithout abandoning the moral and ethical principles at the heart of *pro bono* service, [supporters] can confidently identify those elements of *pro bono* practice that, when appropriately structured and integrated into the fabric of the firm, result in positive benefits for the law firm and its attorneys, as well as for the clients and communities served.¹⁹¹

The benefits of institutionalizing *pro bono* to an individual firm include marketing to and the recruitment of new hires, and the retention and training of its current attorneys.¹⁹²

On account of its economic justification, *pro bono* is conditioned on the willingness of attorneys and law firms to subsidize it as a business expense. The extent of the subsidy, therefore, is dependent upon the existence of fee-paying clients and is subject to market forces.¹⁹³ The danger inherent in this model is that the same market forces that reduce the ability of a law firm to subsidize *pro bono* work also increase the need for *pro bono* services and make legal services for the poor increasingly vulnerable.¹⁹⁴ It remains unclear how the downsizing of—and in some cases disappearance of—large law firms will influence the provision of *pro bono* services.¹⁹⁵ It is not out of the realm of possibility that large-firm *pro bono* efforts will diminish alongside the diminishing business that currently subsidizes the provision of these *pro bono* efforts.

Today, LSC-funded legal services staff programs are supplemented by hundreds of *pro bono* programs, including bar association projects, independent nonprofit entities with staff who

191. *Id.* at 1; *see also* Cummings, *supra* note 185, at 107–08 (“The Pro Bono Institute has also moved vigorously to make the ‘business case’ for *pro bono*. The notion that professionalism constitutes a normative check on the lawyer’s basest motives to act as mere profit-maximizer has therefore given way to the view that one need not sacrifice profit for professional principles—indeed, the two go hand-in-hand.”).

192. LARDENT, *supra* note 188, at 4–12.

193. Rebecca L. Sandefur, *Lawyers’ Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC’Y REV. 79, 79 (2007) (arguing that “growing reliance on *pro bono* leaves . . . civil legal assistance increasingly vulnerable to market forces”).

194. *See id.* at 87–88.

195. For example, Heller Ehrman, one of California’s largest multi-national law firms and a national *pro bono* leader that received multiple awards for its *pro bono* contributions, *see* Heller Ehrman, *Pro Bono Newsletter*, Spring 2008, http://www.hewm.com/docs/en/ProBonoNewsletter_Spring08.pdf (last visited Aug. 25, 2009) (listing some of the firm’s *pro bono* commitments), announced its closing in September 2008, Tom Abate & Andrew S. Ross, *Heller Ehrman Law Firm to Dissolve Friday*, S.F. CHRON., Sept. 25, 2009, at C-1.

refer pro bono cases to attorney panels, law school clinical programs, and units within legal services programs.¹⁹⁶ The 2009 ABA Pro Bono Report indicates that 73 percent of the attorneys interviewed reported providing an average of 41 hours of pro bono work per year to individuals of limited means or organizations that serve them.¹⁹⁷ These numbers reflect an increase from 2005 when 66 percent of those surveyed reported that they averaged only 39 hours of pro bono work.¹⁹⁸

While it is heartwarming that almost three-quarters of all attorneys who participated in the study reported doing a week's worth of pro bono per year, those efforts alone cannot close the gap of access to civil legal services. Low-income clients have legal problems that require much more time than attorneys are willing to devote on a pro bono basis. Moreover, some of these cases are not the type of cases to which attorneys are interested in devoting their free time.¹⁹⁹ While attorneys state that they are willing to take on unfamiliar clients from unfamiliar sources, in practice, less than 20 percent of attorneys take on cases of individuals who are neither part of the attorney's familiar, professional, or social networks nor are referred to the attorney by legal aid programs.²⁰⁰ When one considers

196. ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 6-7 (2005), <http://www.abanet.org/legalservices/probono/report.pdf> (discussing the national pro bono efforts of law schools, legal services organizations, and law firms). For a directory of pro bono programs, see Standing Comm. on Pro Bono and Pub. Serv. and the Ctr. for Pro Bono, ABA Directory of Pro Bono Programs (Jan. 21, 2007), <http://www.abanet.org/legalservices/probono/directory.html>.

197. ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 1 (2009), <http://www.abanet.org/legalservices/probono/report2.pdf>. The study is based on interviews of 1,100 attorneys nationwide who were chosen as a representative sample of attorneys from all fifty states, their distribution reflecting the national attorney population. *Id.* at vi. *Cf.* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSION 18-20, 125-53 (2005) (compiling data based on a survey of 3,000 law school graduates from Yale, the University of Pennsylvania, Fordham, Tulane, Northwestern, and the University of Chicago; attorneys who were recipients of the ABA's annual Pro Bono Publico Award; and firms that had available pro bono data).

198. *See* ABA STANDING COMM. ON PRO BONO AND PUB. SERV., *supra* note 197, at 1.

199. *See* RHODE, *supra* note 197, at 134.

200. *See id.* at 14-16; *see also* ABA STANDING COMM. ON PRO BONO AND PUB. SERV., *supra* note 196, at 13-14 (describing that, among attorneys who reported providing free legal services to persons of limited means or to organizations serving the poor, 43 percent indicated that their cases were referred to them by a family member or friend, "while 40 percent stated that their cases were referred through an organized pro bono program"); DEBORAH L. RHODE, ACCESS TO JUSTICE 154-56 (2004) (stating in part that many "attorneys also count services for friends,

that lawyers compose less than 1 percent of the U.S. population²⁰¹ and that most legal aid programs do not serve clients with incomes above 200 percent of the poverty line, only a small segment of the American public has access to pro bono services despite the multi-million dollar infrastructure that supports them.²⁰² Among those who were surveyed for the 2009 ABA Pro Bono Report was a sample of 439 attorneys in solo practice.²⁰³ Eighty-four percent of solo attorneys and attorneys working in law firms of ten or fewer attorneys reported providing pro bono services to individuals of limited means or the organizations that help them.²⁰⁴ On average, solo and small-firm practitioners report performing 43 and 37 hours of pro bono services per year, respectively.²⁰⁵ The engagement of solo and small-firm practitioners in pro bono work is not surprising since small-firm practitioners have historically provided free services for low- and moderate-income individuals.²⁰⁶

Similar to their large-firm counterparts, solo practitioners use pro bono to obtain expertise, create client loyalty, and build reputation.²⁰⁷ However, many solo and small-firm practitioners object to the language of ABA Model Rule 6.1, which states that pro

family members, bar associations and organizations that could afford to pay for assistance"); Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 425 (2003) (noting that "[m]ost uncompensated assistance went to friends, relatives and employees of lawyers and their clients, or to bar associations and middle- and upper-middle-class organizations such as Jaycees, Little League, and symphonies").

201. The ABA reports that there were 1,180,386 licensed attorneys in the United States in May 2009. ABA MKT. RESEARCH DEP'T, LAWYER DEMOGRAPHICS (2008), http://www.abanet.org/marketresearch/Lawyer_Demographics.pdf. The U.S. Census Bureau estimates that 305,859,863 people were living in the country as of August 15, 2009. U.S. Census Bureau, U.S. POPClock Projection, <http://www.census.gov/population/www/popclockus.html> (last visited Aug. 15, 2009). For a discussion of the institutionalization of pro bono, see Cummings, *supra* note 185, at 6–41.

202. Pro bono services are delivered at no financial cost to the client; however, there is a cost associated with such services, which someone must pay. To effectively assess the value of pro bono services, we need to understand exactly how much pro bono programs cost and their effectiveness in assisting the client community.

203. ABA STANDING COMM. ON PRO BONO AND PUB. SERV., *supra* note 197, at 6.

204. *Id.* at 12.

205. *Id.* at 13.

206. See generally Lochner, *supra* note 189 (detailing how solo practitioners and small-firm lawyers obtain no-fee clients).

207. See *id.* at 243–46 (describing the conditions under which solo practitioners provide pro bono services).

bono work must be provided “without fee or expectation of fee.”²⁰⁸ Many attorneys whose client base is largely composed of low- and moderate-income clients believe that pro bono should include the legal work an attorney provides to a client after the client is unable to continue paying the attorney’s bill.²⁰⁹ Comment 4 to Rule 6.1 affirms that the “intent of the lawyer to render free legal services is essential for the work performed to . . . be considered pro bono.”²¹⁰ It further explains that “services rendered cannot be considered pro bono if an anticipated fee is uncollected,” whereas the award of statutory attorneys’ fees in cases taken on a pro bono basis do not prevent cases from still being considered as “pro bono.”²¹¹ Therefore, the work an attorney performs for a client of limited means after it has become clear that the client will no longer pay for the services rendered is not considered pro bono. Rule 6.1 places a premium not on the actual work performed for clients of limited means, but on the ability of the lawyer to finance the representation.²¹²

Since solo practitioners must personally subsidize any free legal work, they are more likely to count reduced-fee arrangements as pro bono. It is not surprising that the 2009 ABA Pro Bono Report found that “solo practitioners (36%) were significantly more likely than the attorneys working in the largest firms (26%) to feel that a reduced-fee arrangement could still qualify as pro bono service.”²¹³ Scholars who study solo practitioners explain that solo and small-firm

208. MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002) (“In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means . . .”).

209. See SERON, *supra* note 24, at 132 (quoting attorneys who had a different definition of pro bono). “Our firm does a fair amount of pro bono work—not by choice sometimes [but] because people don’t pay us!”; “I wouldn’t say I took [cases] on a pro bono basis, but they ended up on a pro bono basis . . . You have to work with the client, and there have been times where, really, I have stopped the meter because I knew the client couldn’t afford it, and so in that way I make my contribution.”). *Id.* See also JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 104–10 (1978) (providing an overview of how members of the private bar handle pro bono and professional work); Lochner, *supra* note 189, at 244 (listing various factors that motivate attorneys to take on or to avoid pro bono services).

210. MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. 4 (2002).

211. *Id.*

212. MODEL RULES OF PROF’L CONDUCT R. 6.1(b)(2) (2002) (“[T]he lawyer should . . . provide any additional services through . . . delivery of legal services at a substantially reduced fee to persons of limited means.”).

213. ABA STANDING COMM. ON PRO BONO AND PUB. SERV., *supra* note 197, at 8 n.14.

attorneys consistently express the belief that pro bono is “an elitist claim to good works.”²¹⁴ The pro bono discourse and infrastructure have been principally defined by ABA leadership. In this author’s experience, Main Street lawyers—primarily solo or small-firm practitioners—do not perceive the ABA as representing their interests.²¹⁵

In her study of New York solo and small-firm practitioners, *The Business of Law*, Carroll Seron quoted one attorney: “Nobody is baby-sitting for me for free; the phone is not coming for free”²¹⁶ Seron explained that some small-firm practitioners regard ABA mandates about pro bono to be just another mandate from elite Wall Street attorneys who “feel they can tell *all* practitioners what to do.”²¹⁷ Many solo and small-firm practitioners object to mandatory pro bono requirements because they cannot afford to offer free work.²¹⁸ However, this same group of attorneys reports providing free and reduced-fee legal services to low-income clients.²¹⁹ Both the 2009 ABA Pro Bono Report and the 1994 ABA Legal Needs Study indicate that solo and small-firm practitioners may already play a large role in providing legal services to the poor. The last national survey found that, of those low-income individuals who were assisted by an attorney, 75 percent of them used a private lawyer and only 25 percent used a legal services attorney to handle their legal issue.²²⁰ The data further demonstrate that 68 percent of low-income

214. See, e.g., SERON, *supra* note 24, at 129; see also Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 89, at 10 (noting that critics argue professionalism is a way to protect those in privileged positions).

215. At its midyear meeting in February 2010, the ABA House of Delegates approved a 50 percent dues reduction for solo practitioners effective May 2010 in an effort to attract more members and recognize “the varying economic circumstances lawyers working in these fields or situations may face.” *ABA to Cut Dues for Solo Lawyers and Public Service*, Feb. 10, 2010, available at <http://www.jdjournal.com/2010/02/10/aba-to-cut-dues-for-solo-lawyers-and-public-service-2/>.

216. SERON, *supra* note 24, at 129.

217. *Id.*

218. See Sandefur, *supra* note 193, at 87–88, 93–94 (proposing that pro bono services are offered by those who can afford it).

219. SERON, *supra* note 24, at 129–33 (summarizing interviews with solo and small-firm lawyers who engage in free or reduced-fee work).

220. ALGODONES ASSOCIATES, THE AMERICAN BAR ASSOCIATION LEGAL NEEDS STUDY 7 (1998), http://www.algodonesassociates.com/legal_services/assessing_needs/ABA%20Legal%20Needs.pdf.

individuals paid an attorney to resolve their legal needs.²²¹ When asked about the fee arrangement with those private lawyers, 39 percent of low-income households said they paid the usual fee, and 8 percent reported a reduced-fee arrangement.²²² While the low-income clients surveyed did not indicate the practice setting of the attorney who collected the fee, 63 percent of private lawyers practice in offices of five or fewer attorneys, and 48 percent of all private lawyers are solo practitioners.²²³ If low-income clients who are not served by legal aid organizations are already paying lawyers to handle their legal matters, then our efforts should focus on developing an agenda that promotes affordable fees that make legal services more accessible not only to the poor but also to the millions of near poor who need legal services. Law firms and lawyers who understand the market benefit of engaging in pro bono and who are already vested in the national pro bono networks should be encouraged to continue their investment. However, legal aid programs should revisit their PAI budgets to develop programs that engage the Main Street lawyers who are already providing legal services to low- and moderate-income clients.²²⁴

The emphasis on charitable commitments from attorneys at primarily medium and large firms ignores the demographics of the legal profession and limits the availability of legal services. The ABA estimates there were 1,180,386 licensed lawyers practicing in the United States in 2008.²²⁵ Private practice attorneys represent the largest segment of that population, comprising 74 percent of all lawyers.²²⁶ A February 2006 survey by the State Bar of California, which represents the state with the second largest population of

221. *Id.* at 7–8.

222. *Id.* at 8. Another 8 percent indicated they were not sure if they paid the reduced or non-reduced rate for the attorney's services. *Id.* These findings may not be a true reflection of how many low-income individuals pay private attorneys for legal services because they may not account for contingency fee arrangements. This question deserves further research.

223. ABA MKT. RESEARCH DEP'T, *supra* note 201.

224. *See* Rhudy, *supra* note 26, at 244–45 (“[W]e can develop a stronger political base for substantial expansions of public funding for legal services by seeking to expand services to persons at higher income levels than are currently eligible (with a sliding fee co-payment for some services, as with health care, counseling, and other publicly subsidized services in the United States currently); and by committing to expand the development of judicare delivery systems as new funding becomes available.”).

225. ABA MKT. RESEARCH DEP'T, *supra* note 201.

226. *Id.*

attorneys,²²⁷ reveals that 62 percent of California attorneys in private practice work in law firms of five or fewer attorneys.²²⁸ If solo and small-firm practitioners make up such a large segment of the legal profession, we should create opportunities for them to become a part of the institutionalized fabric that provides legal services to the poor. In conceiving a new legal services delivery model, we must focus on the economic needs and professional goals of the private bar, with particular focus on those members who are already facilitating access to the legal system for a majority of legal consumers.

IV. THE CASE FOR A “LOW BONO” CIVIL LEGAL SERVICES AGENDA

In order to garner more support for accessible legal services, reduced-fee arrangements by the private bar need to be considered. To arrive at a more inclusive legal services agenda, we should acknowledge (1) the importance of reduced-fee service arrangements; (2) the needs and preferences of the potential client community; (3) the goals and needs of private attorneys; and (4) the available resources that can help shepherd a model that strengthens and supplements legal aid.

A. “Low Bono”—Providing Reduced-Fee Services

Charging legal fees is central to the establishment of the attorney-client relationship for private attorneys.²²⁹ “Low bono” takes into account that clients should have lawyer alternatives other than market rates and free. “Low bono” is the most popular term used to describe discounted-rate arrangements between attorneys and clients, particularly those clients who are underrepresented.²³⁰ “Low bono” arrangements consider the financial constraints of those who seek representation and the attorneys who must charge fees to sustain

227. California reported the second highest concentration of attorneys (148,399), while New York reported the highest concentration (150,542). ABA Mkt. Research Dep’t, National Lawyer Population by State (2009), http://www.abanet.org/marketresearch/2009_NATL_LAWYER_by_State.pdf.

228. THE STATE BAR OF CALIFORNIA, MEMBER SERVICES SURVEY 1, 13 tbl.I (2006), http://www.calbar.ca.gov/calbar/pdfs/reports/2006_State-Bar-Survey.pdf.

229. See MODEL RULES OF PROF’L CONDUCT R. 1.5 (2002) (setting forth guidelines for attorneys’ fee arrangements with clients).

230. For more information on “low bono” work, see generally [lowbono.org](http://www.lowbono.org) Home Page, <http://www.lowbono.org> (last visited Oct. 26, 2009).

their own livelihood. Individuals who are unable to obtain free legal services but who cannot pay market rates, and attorneys who depend on paying clients for their livelihood both benefit from such arrangements.²³¹ Although “low bono” work is not new, it has gained more recognition in the last ten to fifteen years due in large part to law school initiatives primarily led by the City University of New York (CUNY) School of Law and the University of Maryland School of Law.²³²

CUNY School of Law and the University of Maryland School of Law, along with two other schools, were funded by the Open Society Institute in 1997 to provide training, mentoring, and support to solo and small-firm lawyers to develop economically viable law practices while serving low- and moderate-income communities.²³³ The group of law schools formed the Law School Consortium Project (LSCP) in 1997 to expand law schools’ professionalism missions beyond graduation to train, mentor, and provide other support to community solo and small-firm lawyers.²³⁴ By supporting small-firm lawyers that provided “low bono” work, LSCP sought to increase the availability of quality legal services to low- and moderate-income individuals and communities.²³⁵ Low- and moderate-income individuals like Timothy Cook benefitted from the “low bono” provided by LSCP-supported attorneys. “Low bono” advocates approach the problem of access to legal services with reduced-fee programs that provide alternatives for the poor and the non-poor.

B. Understanding Client Preferences

The current legal aid program does not provide alternatives to legal services recipients who are able to transcend poverty. To have a

231. *See id.*

232. Deborah Howard, *The Law School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for Low and Moderate-Income Individuals and Communities*, 29 FORDHAM URB. L.J. 1245, 1245 n.1 (2002).

233. *Id.* at 1245. The other two law schools were Northeastern University School of Law and St. Mary’s University School of Law. *Id.* at 1245 n.1.

234. *See* Maryland Law, *The Law School Consortium Project, Mission*, <http://www.law.umaryland.edu/programs/clinic/initiatives/lscp/mission.html> (last visited Oct. 25, 2009).

235. As of 2009, LSCP is not active; however, a handful of law schools have continued to support their alumni networks through Listservs, referrals, training, and incubator programs. Interviews with Fred Rooney, Dir. CUNY School of Law Cmty. Res. Network, and Phillip Robinson, Exec. Dir. Civil Justice, Inc., in L.A., Cal. (Oct. 16, 2009).

legal aid program that reflects the American ideology and spirit, we must leave behind the idea that all poor individuals are unable to contribute to resolving their legal problems.

As a solo practitioner in Compton, California, for over seven years,²³⁶ the author repeatedly received calls from low-income and near-poor individuals who preferred to pay a \$75 consultation fee than to spend a day navigating a self-help clinic or to wait two weeks for an appointment at a legal aid organization. Poor clients who were turned away from legal aid organizations or who could not get into a court-based self-help center during court hours were relieved to find an attorney who would charge them less than \$200 an hour to help them navigate a complex legal system. When solutions to procedural issues, language barriers, and attention to the specifics of their particular cases were not easily addressed by alternative resources such as online forms, self-help literature, or paralegals, the legal services consumers sought another option. Reduced-fee services and limited-scope representation provide that option, particularly in the areas of family, consumer, and real estate law.²³⁷

Some examples of the clients that needed to find an alternative fee arrangement to fit their needs include individuals like Wendy Smith, Peter Lee, and Margarita Inzunza. Mrs. Smith, a teacher and mother of two, left an abusive marriage but could not find an affordable attorney to help her assert her interests in the family home and her husband's pension. She earned just enough money to exclude her from no-cost legal services; however, after groceries, child care, rent, utilities, and transportation costs, her credit card balance increased every month. Peter Lee, owner of a catering business, had an annual gross income in 2008 of \$65,000. Lee's client base shrank approximately 60 percent in the last eighteen months as companies in his community eliminated special events and downsized staff lunches. His business is his only source of income, but it was no

236. For a fuller discussion of the author's law practice in Compton, California, see Luz E. Herrera, *Reflections of a Community Lawyer*, in *THE MODERN AMERICAN* 39 (2007), available at <http://www.wcl.american.edu/modernamerican/documents/Herrera.pdf>.

237. Herbert M. Kritzer, *To Lawyer or Not to Lawyer, Is That the Question?*, 5 *J. EMPIRICAL LEGAL STUD.* 875, 887-89 (2008) (reviewing studies that show the nature of the clients' problems are the dominant factor in their choice to seek legal assistance, even for low- or no-fee clients). For more on limited-scope representation, see generally FORREST S. MOSTEN, *UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE* 28-34 (2000) (providing a sample of a limited-scope agreement) and M. SUE TALIA, *A CLIENT'S GUIDE TO LIMITED LEGAL SERVICES* (1997).

longer sufficient to pay his household expenses and his spouse's medical bills. He was recently served with two lawsuits from creditors, and he could not find affordable legal assistance. There were also clients like Margarita Inzunza is an undocumented immigrant whose livelihood was based on selling homemade food in her neighborhood, babysitting for family members, and renting the cottage she inherited from her husband.²³⁸ She was forced to evict her tenant, who had not paid rent in three months, because the cottage did not comply with local government building codes.²³⁹

While the already large poor population continues to grow, the increasing near-poor population also struggles to navigate the legal system. The legal services delivery system in the United States must account not only for the poor but also for those individuals who are a paycheck, an emergency-room stay, or a divorce away from being part of the bottom economic quintile in this country.²⁴⁰ These people now make up the largest number of legal services consumers who have been deemed unworthy of subsidized legal services. It is this client community that is driving change in the landscape of attorney services in our country. So long as the needs of these individuals remain ignored, they will continue to define access to justice not by the dominant attorney paradigm but by the paradigm established by the competitors of the legal profession who have taken an interest in their needs. The ability and willingness of low-income clients to pay attorneys for legal services should be considered when developing private attorney models that supplement subsidized legal services. Models of private attorney involvement that focus on providing

238. The Pew Hispanic Center estimates that, as of March 2006, 11.5 to 12 million unauthorized immigrants lived in the United States. JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY*, at i (2006), <http://pewhispanic.org/files/reports/61.pdf>.

239. Municipal codes throughout the country require homeowners to obtain permits before undertaking construction projects in their homes. Terri Cullen, *Without the Right Permit, Renovating Gets Costly*, WALL ST. J. ONLINE, Nov. 8, 2004, <http://www.realestatejournal.com/buildimprove/20041108-cullen.html> (outlining how municipalities employ renovation codes). Individuals who are unfamiliar with such laws and ordinances—particularly immigrants who come from municipalities where no such codes exist—may proceed to build out the homes in which they live, often without knowledge that they are violating the law.

240. See Warren, *supra* note 17, at 411 (finding that more than eight out of ten families with children cite job loss, family breakup, and medical problems as the leading causes of bankruptcy, and concluding that the risk of such financial collapse is now being felt strongly by a growing proportion of middle-class families and is no longer confined to the poorest families).

affordable legal services allow those low- and moderate-income clients who are currently unable to obtain free services to have a choice when free services are not an option.

The existing legal services program is a casualty of the preferences of elite political players on both sides of the aisle who have repeatedly failed to include the needs of the client community in their decision making about legal services.²⁴¹ The preferences of the legal consumer are now being reflected in the rise of the self-help movement and the proliferation of online resources to help consumers navigate legal problems. Unless the legal profession is willing to consider consumer preferences in its future plans, its lobby may not be powerful enough to combat these trends. State and ABA legal-needs studies have contributed to our understanding of clients' substantive legal problems; however, there is little quantitative research to help us understand client preferences in light of innovations such as technology,²⁴² court-based self-help centers,²⁴³ and non-attorney legal services providers.²⁴⁴

Bar organizations, policymakers, and court administrators are in a good position to determine what types of services are needed by low- and moderate-income individuals in their communities. Because of the sheer volume of their interactions with clients, courts and legal aid organizations have the greatest opportunity to collect information about consumer preferences for legal services. These organizations

241. Although LSC regulations require that the governing or advisory boards of legal services providers include members of the client community, many of these boards instead include representatives of the community organizations that represent the members of the client community. See JOHNSON, *supra* note 1, at 111–12.

242. See OFFICE OF INSPECTOR GEN., LEGAL SERVS. CORP., INCREASING LEGAL SERVICES DELIVERY CAPACITY THROUGH INFORMATION TECHNOLOGY 1 (1996), <https://www.oig.lsc.gov/tech/Tecpaper.pdf>. The Legal Services Corporation identified that

order-of-magnitude increases in delivery system capacity could be achieved by: increasing client self-help through the new delivery medium of public access kiosks; providing information and legal assistance via the Internet; using computer-assisted client intake and legal assistance telephone helplines; and integrating these and other technology applications to help reshape the delivery of legal services.

Id.

243. For example, see the online self-help center sponsored by the California Judicial Branch, <http://www.courtinfo.ca.gov/> (last visited Aug. 25, 2009), or the national Self-Represented Litigation Network, <http://www.srln.org/> (last visited Aug. 25, 2009).

244. See, e.g., Legal Zoom, <http://www.legalzoom.com> (last visited Aug. 25, 2009); Pre-Paid Legal Services, <http://www.prepaidlegal.com> (last visited Aug. 25, 2009); We the People USA Home Page, <http://www.wethepeopleusa.com> (last visited Aug. 25, 2009).

should increase collaboration with scholars to develop a better understanding about what clients want from a legal services model.

C. Why Attorneys Prefer “Low Bono”

It behooves us to understand reduced-fee models that may be more appealing to a larger group of attorneys and that could serve the needs of a larger portion of the poor and near-poor client community. Prescribing a role for “low bono” in a more comprehensive legal services delivery program requires that we confront the false dichotomy between satisfying the legal needs of low- and moderate-income clients and the needs of the private bar.

By engaging the private bar in a dialogue about how it can modify its fee structures to accommodate more affordable legal services and still be economically viable, we will all be forced to consider the factors that are driving the costs of legal services. A “low bono” agenda should take into account all of the factors that drive costs in the legal services marketplace, including education, training and continuing education, support staff, law office management tools, marketing, and technology. Once we understand the basic costs of running a law office, we can begin to discuss the amount attorneys must charge in order to maintain a reasonable standard of living. It will also be critical to revisit earlier studies of various legal services delivery systems to understand whether previous models can be improved. We should encourage strategic thinking about how to modify and improve staples of legal practice—such as the billable hour, client collections, vendor pricing, staff and attorney retention, ethical rules, and the cost of legal education—which might serve as impediments to the provision of legal services to a wider subset of our population.

The promulgation of a new legal services delivery agenda requires that law students and lawyers, regardless of their client base, have a better understanding of the business of law. Currently, only certain law firm partners, solo and small-firm lawyers, and executive directors of nonprofit legal services providers have an adequate understanding. By embracing the existence of cost as a principal factor in the provision of legal services, perhaps we can reexamine our preconception that providing quality legal services means either not charging a fee or charging a fee that is beyond the reach of most legal consumers.

It is this "low bono" agenda that will begin to differentiate the profit motives of lawyers. Individuals who are comfortable maintaining a lower standard of living in order to serve low- and moderate-income clients and who already provide legal services to these constituencies are the ones who can benefit most from a new model of private attorney involvement. As long as the dominant paradigm of legal services delivery is to provide free legal services to the poor, the profession will never be forced to address its role in driving the costs of legal services out of reach for the average American.²⁴⁵ A more inclusive platform of affordable legal services is superior to one of solely free legal services because it allows us to engage a larger group of people who care about accessibility and sustainability.

D. Integration of "Low Bono" with Existing Models

Before constructing a new civil legal services delivery system that can provide affordable legal services to both low- and moderate-income individuals, we must maximize the effectiveness of existing models. A paradigm shift that increases access to justice can only occur if individuals are willing to re-imagine the functions and partnerships of courts, law schools, and legal aid organizations. Such a new vision must include the collaboration of the private bar and "low bono" models.

In response to the great need for more assistance to unrepresented litigants, entities focused on prescribing solutions to the unavailability of affordable legal services have formed at the state level.²⁴⁶ State supreme court judges and court personnel around the country are key players in developing programs that facilitate legal services delivery for self-represented litigants inside courthouses.²⁴⁷ Courts must now look at the role "low bono" can

245. Cummings, *supra* note 185, at 13 ("In its attempt to provide the poor with equal access to lawyers, legal aid sought to vindicate the fairness of the legal system. In doing so, legal aid compartmentalized the bar's public service obligation, assigning it to a cadre of full-time staff attorneys housed in separate offices. This lifted the direct onus of service from private lawyers, allowing them to take credit for advancing the public good, while continuing to devote themselves to the claims of their paying clients." (citations omitted)).

246. See generally Karla M. Gray & Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions*, 47 JUDGES' J. 33 (Summer 2008) (describing state access to justice efforts across the nation).

247. As of 2005, Alabama, Arkansas, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, Ohio, Oklahoma, Texas, Utah, Vermont, and the District of Columbia

play in their existing programs and begin to relax archaic rules that hinder greater access to justice. Along with a court's willingness to collaborate with the private bar, technology will be instrumental to a broader agenda to increase the delivery of legal services. Courts have greatly benefited from the availability of personal computers, the Internet, and other technological advances that increase access to justice. Several of the most innovative and effective programs that have emerged to address the need for more access to our legal system—such as self-help centers, mobile legal centers, document-preparation enterprises, limited-scope representation, and attorney networks—integrate the use of technology.²⁴⁸

However, since a significant portion of the consumer base cannot afford legal services and does not have access to technology, neighborhood-based self-help centers staffed by private attorneys can increase the availability of legal services to that population and should be one of the components of a new PAI model. Such a model may include a mix of pro bono and fee-generating activities for

have access to justice commissions formed in whole or in part by their supreme courts. ACCESS TO JUSTICE SUPPORT PROJECT, ACCESS TO JUSTICE PARTNERSHIPS STATE BY STATE 4–18 (2005), <http://www.nlada.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf>. There were fifty-four access to justice commissions and related initiatives. *Id.* at 19–20. See generally ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES, <http://www.abanet.org/legalservices/sclaid/atresourcecenter/resourcematerials.html> (last visited Sept. 7, 2009) (providing information on access to justice initiatives). For more information on courts' efforts to assist self-represented litigants, see the Self-Represented Litigation Network at <http://www.srln.org/> (last visited Oct. 26, 2009).

248. For examples of such online resources, see I-Can! Legal Home Page, <http://www.icandocs.org> (last visited Aug. 13, 2009); Legalmessenger.net Home Page, <http://www.legalmessenger.net> (last visited Aug. 13, 2009); LegalZoom Home Page, <http://www.legalzoom.com> (last visited Aug. 13, 2009); Rocket Lawyer Home Page, <http://www.rocketlawyer.com> (last visited Aug. 13, 2009); Self-Help, <http://www.self-help.org> (last visited Aug. 13, 2009); We the People USA Home Page, <http://www.wethepeopleusa.com> (last visited Aug. 13, 2009). For an overview of how technology is impacting legal services delivery, see Darryl R. Mountain, *Disrupting Conventional Law Firm Business Models Using Document Assembly*, 15 INT'L J.L. & INFO. TECH. 170 (2007); Ronald W. Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117 (2009); eLawyering Blog, *Automated Document Assembly as a Disruptive Legal Technology*, <http://www.elawyeringredux.com/2008/12/articles/change/automated-document-assembly-as-a-disruptive-legal-technology> (Dec. 30, 2008); and WILLIAM HORNSBY, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *IMPROVING THE DELIVERY OF AFFORDABLE LEGAL SERVICES THROUGH THE INTERNET: A BLUEPRINT FOR THE SHIFT TO A DIGITAL PARADIGM*, <http://www.abanet.org/legalservices/delivery/deltech.html> (last visited Sept. 7, 2009).

private attorneys utilizing tools like limited-scope representation and clinical consultation.²⁴⁹

Law schools will also be important players in advancing a new legal services model by engaging their students in practical learning experiences and strengthening their alumni networks. While law school clinical programs have grown considerably, most are still peripheral to law school instruction. Law students can gain a better understanding of the law when they see it applied. Law schools can also help by providing professional practice programs that ease the transition between law student and lawyer, and by connecting their students with their alumni in order to provide further education. Training programs and alumni networks like those at CUNY should be replicated across the country.²⁵⁰

Finally, legal aid organizations and bar associations are perhaps in the best position to integrate private attorneys into a new model of legal services delivery by experimenting with private attorney collaboration beyond the pro bono models. Encouraging the establishment of modest-means panels through lawyer referral programs, offering training opportunities to attorneys who charge below-market rates, and engaging the solo and small-firm bar will help create greater accountability for neighborhood-based lawyers and legal aid organizations. LSC restrictions on private attorneys that exist under PAI regulations should also be removed to encourage the development of greater legal aid collaboration with the private bar.²⁵¹ Advocates for a statutory right to counsel based on due process grounds in cases involving basic human needs, such as shelter, safety, health, sustenance, and parental rights, should incorporate private attorneys in their models.²⁵²

249. Luz E. Herrera, *Community Lawyers: Training and Business Models for the Neighborhood Lawyer* (Feb. 15, 2010) (describing pilot projects integrating the "low bono" services providers into existing structures).

250. Law schools are not limited to connecting the burgeoning population of solo and small-firm practitioners with alumni and helping them develop practical skills; they can also contribute to the redefinition of the meaning of public interest work.

251. The restriction barring former legal aid attorneys from receiving PAI funds within two years of leaving legal aid employment is particularly overdue for revision. See 45 C.F.R. § 1614.1(e) (2008) ("[N]o PAI funds shall be committed for direct payment to any attorney who for any portion of the previous two years has been a staff attorney . . .").

252. See generally Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009) (arguing that legislative bodies are more likely to expand the right to counsel in civil cases as part of a broader strategy that addresses a social problem); Laura K. Abel & Max Rettig, *State Statutes*

These existing resources are crucial points of entry for legal services consumers; however, the supply of affordable legal services continues to be outweighed by demand for them by the low- and moderate-income sectors of the market.²⁵³ So long as the legal profession maintains its monopoly on the provision of legal services, a large portion of the country's civil legal needs will go unmet.²⁵⁴ In the end, more effective solutions and responses to the legal needs of the majority will not occur unless legal aid organizations, pro bono programs, law schools, and other institutional players are deliberate about including solo and small-firm neighborhood lawyers in the discussion. The author hopes this piece will help influence legal aid advocates to rethink their perspective of what future private attorney involvement could look like under a more comprehensive civil legal services delivery plan.²⁵⁵

Providing for a Right to Counsel in Civil Cases, 40 CLEARINGHOUSE REV. 245 (2006) (noting that counsel may be guaranteed by court rules and statutes in matters involving family law, medical rights, medical involuntary commitment, and various other legal rights); Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196 (2006) (arguing that (1) judges, mediators, and clerks should ensure that individual rights are not forfeited because of a lack of counsel; (2) programs should supplement the court's role in assisting parties without counsel; and (3) if these measures do not sufficiently protect an unrepresented party from forfeiting rights, a civil right to counsel should attach); Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 733 (2006) (analyzing the use of state constitution procedural due process rights as a vehicle for expanding the right to counsel in civil cases); Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006) (documenting efforts to advocate for an extension of the civil right to counsel, first established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to state court matters).

253. The author does not believe that every problem has a solution in the law; however, the author assumes that a significant portion of the nation's low- and moderate-income population will continue to require the assistance of lawyers because of the complexity of their problems, an imbalance of power with respect to the other parties, or an inability to navigate the legal system. See generally Kritzer, *supra* note 237; Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 LOY. L.A. L. REV. 949 (2009) (encouraging a greater understanding of nonlegal solutions to promote equal access to justice because the public's first resort is to nonlegal institutions).

254. See generally Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039 (2006) (arguing that the structure of the legal profession limits the availability of legal services to low-income individuals).

255. Cf. Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021 (2009) (encouraging greater accountability and inclusiveness in a mixed-model legal services delivery system); Charn & Zorza, *supra* note 25 ("We must also challenge the longstanding assumptions about universal access [to legal aid] that have created obstacles to innovation and reform.").

V. CONCLUSION

Addressing the justice gap problem requires us to be critical of existing structures, processes, and players and to be willing to consider that perhaps our current paradigm can benefit from agitation. The paradigm shift advocated in this Article does not intend to discredit the importance of federal government subsidies for legal aid to the poor, as such subsidies are critical to preserving justice for a segment of that population. However, it does seek to push the legal services community into a more diverse and inclusive discussion that incorporates the moderate-income clients who need affordable legal services and the attorneys who serve them. Both constituencies are critical political players in a national discourse on the delivery of legal services. A mixed-model legal services delivery program must give these groups a stake in order to successfully advance an agenda that also benefits the poor. The development of such an agenda requires more quantitative data on the Main Street lawyers, reduced-fee models, client preferences, and the factors that drive the cost of legal services.

